TAKING A REFLEXIVE TURN: NON-ADVERSARIAL JUSTICE AND MENTAL HEALTH REVIEW TRIBUNALS†

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Mental health law and practice has been instrumental in the development of non-adversarial justice, particularly through the development of therapeutic jurisprudence which emerged from insights gathered in the mental health context. The expanding articulation of non-adversarial perspectives beyond mental health is, in turn, reshaping critical debate about current mental health tribunal practice. Tribunals are also being encouraged to consider human rights perspectives. Human rights concerns and non-adversarial perspectives intersect with the long-standing debates in mental health tribunal practice about participation, representation and the role of the tribunal in the management of a dispute. They also raise new questions about the scope of the tribunal powers with respect to the oversight of medical treatment decisions and the provision of medical services. This article considers the intersection of human rights and non-adversarial justice perspectives in mental health review tribunals. It examines the common conceptual ground occupied by human rights and non-adversarial justice and considers four 'psycho-legal soft spots' in tribunal practice. These are the timing of tribunal review, the participation of the person in tribunal hearings, legal representation before tribunals and the scope of tribunal powers. This article argues for an integration of non-adversarial justice and human rights perspectives.

I INTRODUCTION

Non-adversarial justice refers to an extended repertoire of theoretical and practical approaches that incorporate subjective perspectives into the practice of law.[1] Non-adversarial justice includes 'therapeutic jurisprudence', 'restorative justice', 'preventative law', 'creative problem-solving', 'holistic law' and 'appropriate dispute resolution'. It encompasses the practical application of non-adversarial approaches in new judicial forums, such as problem-solving courts, drug courts, mental health courts, diversion schemes, indigenous courts, coroners' courts

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1 In this article, 'subjective' refers to the perspectives, feelings or beliefs of the individual.

and specialist tribunals,[2] and extends to forums such as neighbourhood justice centres, commissioners and ombudsmen that were established by the earlier 'alternative dispute resolution' movement.[3] Non-adversarial justice approaches the task of dispute resolution by taking into account the social context in which legal problems arise and in which they are adjudicated.[4] Understanding the full context of a dispute or problem enables the creation of innovative solutions to difficult human interactions.[5]

Mental health law and practice has made important contributions to the development of non-adversarial justice. In developing the influential concept of 'therapeutic jurisprudence', Bruce Winick and David Wexler relied on analyses of practices in the mental health field.[6] Furthermore, the mental health tribunals and boards that were established by rights-based mental health legislation in the 1970s and 1980s represent a subset of the 'specialist tribunals' that were created by the alternative dispute resolution movement.[7] Mental health review tribunals have therefore dealt with questions of adversarialism, formality, participation and legal representation as a matter of day-to-day practice for over three decades. Despite this legacy, the development of non-adversarial justice beyond mental health provides new points of reflection for established tribunal practice. For example, non-adversarial justice emphasises the emotional or psychological impact of all judicial processes and highlights the importance of inclusion and participation. The inclusion of the subjective reality of the person who is the subject of the proceedings as an important element in the justice equation has

2 King et al, *Non-Adversarial Justice* (Federation Press, 2009).

3 Justice Marilyn Warren, 'Should Judges Be Mediators?' (Paper presented at the Supreme and Federal Court Judges' Conference, Canberra, 27 January 2010).

4 Michael King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32 *Melbourne University Law Review* 1096, 1097; Arie Freiberg, 'Non-Adversarial Justice' (Paper presented at the Supreme Court of Victoria Judges' Conference, Melbourne, 5–6 November 2009).

5 King et al, above n 2, 5.

6 Bruce J Winick, 'The Jurisprudence of Therapeutic Jurisprudence' (1997) 3 *Psychology, Public Policy and Law* 184. See also David B Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press, 1990); David B Wexler and Bruce J Winick, *Essays in Therapeutic Jurisprudence* (Carolina Academic Press, 1991); David B Wexler and Bruce J Winick, 'Introduction' in David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996) 323; Dennis P Stolle, David B Wexler and Bruce J Winick (eds), *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (Carolina Academic Press, 2000); Christopher Slobogin, 'Therapeutic Jurisprudence: Five Dilemmas to Ponder' (1995) 1 *Psychology, Public Policy and Law* 193; Michael L Perlin, *The Jurisprudence of the Insanity Defense* (Carolina Academic Press, 1994); Bruce J Winick, *The Right to Refuse Mental Health Treatment* (American Psychological Association, 1997); Bruce D Sales and Daniel W Shuman (eds), *Law, Mental Health, and Mental Disorder* (Wadsworth, 1996).

7 Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, 2nd ed, 2002).

particular bearing on mental health tribunal work and the debates that surrounded the development of mental health tribunal practice.[8]

Recognition of the subjective experience of the person at the centre of the judicial process connects non-adversarial justice with contemporary human rights perspectives. It is with reference to the experience of people with disability that the most recent expression of international human rights law, the *Convention on the Rights of Persons with Disabilities* ('CRPD'),[9] has raised fundamental questions about equality and non-discrimination, the meaning of equal recognition before the law, the legitimacy of involuntary psychiatric treatment and the right to health and mental health services, including housing, social support and services that are necessary for habilitation, rehabilitation, education and participation in society.[10] These themes point to common ground between non-adversarial justice and human rights.

This article considers the intersection of human rights and non-adversarial justice perspectives in mental health review tribunals. Part I examines the common themes in non-adversarial justice and contemporary human rights. Part II explores the contribution of these perspectives to tribunal practice, focusing on four 'psycho-legal soft spots'. The term 'psycho-legal soft spot' borrows from David Wexler.[11] It is used in this article to refer to moments in the legal processes that offer an opportunity for creative intervention. The four 'soft spots' are the timing of tribunal review, participation of the person in tribunal hearings, legal representation before tribunals and the scope of tribunal powers. This article argues that an integrated account of non-adversarial justice and human rights enables mental health review tribunals to be reconceptualised as problem-solving forums.

8 Neil Rees, 'International Human Rights Obligations and Mental Health Review Tribunals' (2003) 10 *Psychiatry, Psychology and Law* 33; Amar Shah, 'Is the Mental Health Review Tribunal Inherently Unfair to Patients? (2010) 17(1) *Psychiatry, Psychology and Law* 25; Valerie Williams, 'The Challenge for Australian Jurisdictions to Guarantee Free Qualified Representation before Mental Health Tribunals and Boards of Review: Learning from the Tasmanian Experience' (2009) 16 *Psychiatry, Psychology and Law* 108.

9 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008) ('*Convention on the Rights of Persons with Disabilities*'). For an extended discussion of the Convention, see Bernadette McSherry, 'International Trends in Mental Health Laws' (2008) 26(2) *Law in Context* 1.

10 Alfred Allan, 'The Past, Present and Future of Mental Health Law: A Therapeutic Jurisprudence Analysis' (2002) 20(2) *Law in Context* 24; Tom D Campbell, 'Mental Health Law: Institutionalised Discrimination' (1994) 28(4) *Australian and New Zealand Journal of Psychiatry* 554; Stephen Rosenman, 'Mental Health Law: An Idea Whose Time Has Passed' (1994) 28(4) *Australian and New Zealand Journal of Psychiatry* 560; Tina Minkowitz, 'Abolishing Mental Health Laws to Comply with the Convention on the Rights of Persons with Disabilities' in Bernadette McSherry and Penelope Weller (eds), *Rethinking Rights-Based Mental Health Laws* (Hart, 2010) 151; Neil Rees, 'The Fusion Proposal: A Next Step?' in Bernadette McSherry and Penelope Weller (eds), *Rethinking Rights-Based Mental Health Laws* (Hart, 2010) 73.

11 David B Wexler, 'Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies' (1998) 67 *Revista Juridica Universidad de Puerto Rico* 317. See also Kirk Bailey's use of the term 'hotspots' to refer to communities, neighbourhoods or schools that need additional prevention and intervention efforts: Kirk A Bailey, 'Legal Implications of Profiling Students for Violence' (2001) 38(2) *Psychology in the Schools* 141, 146.

II PART I: COMMON THEMES

A *Non-Adversarial Justice and Comprehensive Law*

From a practical perspective, non-adversarial justice extends the problem-solving capacity of legal systems by creating legal forms and approaches that enable the human dimension in legal problems to be included in the justice process.[12] At the same time, non-adversarial justice affirms the principles and values of justice by recognising the separation of powers, the rule of law and the need for public courts to provide a check on public and private power.[13] It uses the subjective perspective to modify traditional approaches and structures within the justice system and to create mechanisms that enable the justice system to achieve the goals and values of justice and the rule of law in more effective ways. Bruce Winick's description of therapeutic jurisprudence provides an example of this sensibility. He explains that:

> Therapeutic jurisprudence proposes the exploration of ways in which, consistent with principles of justice and other constitutional values, the knowledge, theories, and insights of the mental health and related disciplines can help shape the development of the law.[14]

Winick sees legal rules and procedures, as well as legal actors (such as lawyers and judges), as constituting social forces that produce either therapeutic or anti-therapeutic consequences.[15] He argues that insights from the social sciences can be utilised to adjust law and legal process so that psychological wellbeing can be enhanced or reduced 'without subordinating due process and other justice values'.[16] In this view, therapeutic jurisprudence enhances the justice effects of the law by ensuring that the legal process takes into account the effect of adjudication on the person who is subject to it.[17] It is an approach that includes human perspectives to enhance the idea of 'due process' and the wider goals of the justice process.

Susan Daicoff explores similar themes in her description of the 'comprehensive law movement'.[18] For Daicoff, the defining feature of the comprehensive law movement is its concern with the achievement of optimal human functioning. She describes comprehensive law practitioners as those who use the law's potential to facilitate positive, interpersonal and individual change and to integrate and value extra legal concerns, such as values, beliefs, relationships and wellbeing.[19] Daicoff attributes the developmental of these holistic perspectives to the influence

12 Warren, above n 3; King et al, above n 2, 9.

13 Freiberg, above n 4.

14 Winick, 'The Jurisprudence of Therapeutic Jurisprudence', above n 6, 185.

15 Ibid.

16 Ibid.

17 Allan, above n 10, 24.

18 Susan Daicoff, 'Law as a Healing Profession: The Comprehensive Law Movement' (2006) 6 *Pepperdine Dispute Resolution Law Journal* 1.

19 Ibid 7.

of feminist jurisprudence. Feminist jurisprudence illustrates the way in which traditional law excludes the interpersonal and de-emphasises emotional and interpersonal concerns.[20] Daicoff argues that law achieves this by focusing on objective criteria of 'rights' and 'justice', rather than the 'ethic of care' described by Carol Gilligan.[21] The ethic of care, which is associated with the decision-making style of women, emphasises interpersonal harmony, the maintenance of relationships, feelings and needs, and the prevention of harm.[22] Daicoff contrasts the inclusion of the human element in comprehensive law practice with approaches to the law that emphasise rules, standards, individuality, justice, fairness, objectivity and independence.[23] For Daicoff, comprehensive law takes seriously the idea that disputes originate in the substantive context of human relations and that conflict resolution must take account of the human elements of the dispute, including the needs, interests, values, beliefs and commitments of the participants.[24] Working in family law, Pauline Tesler describes this as the 'rights plus' approach.[25] Working from a problem-solving court perspective, Michael King describes it as 'collaboration and connection rather than adversarialism and separation'.[26] Susan Daicoff's account of comprehensive law closely parallels Michael King's inclusive description of non-adversarial justice and his account of 'emotionally intelligent justice' as a psychologically attuned approach to judging.[27]

The common elements in comprehensive law and non-adversarial justice described by King and Daicoff highlight the implicit engagement of non-adversarial perspectives with 'post-modern' concepts of power. This engagement goes beyond the acknowledgment in non-adversarial justice literature that the power wielded by stronger parties, or by practitioners, may harm the more vulnerable parties.[28] It implies an appreciation of the idea that power relations impact on the ability of an individual to assert their own interests.

According to Barry Hindess, the dominant model of power in western thought until the mid 20th century was the idea of power as a repressive force.[29] Postmodern perspectives challenge this idea of power. Michel Foucault, for example, describes power as a productive force that may be conceptualised as a matrix

20 Ibid 6; Carol Smart, *Feminism and the Power of the Law* (Routledge, 1989).

21 Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1982).

22 Daicoff, above n 18, 21–2.

23 Judy Gutman, 'The Reality of Non-Adversarial Justice: Principles and Practice' (2009) 14 *Deakin Law Review* 29, 40; ibid, 5.

24 Daicoff, above n 18, 21.

25 Pauline H Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation* (American Bar Association, 2001), cited in Daicoff, above n 18, 4.

26 Michael King, 'What Can Mainstream Courts Learn from Problem-Solving Courts?' (2007) 32 *Alternative Law Journal* 91, 95.

27 Daicoff, above n 18, 21–2; King, above n 4.

28 King et al, above n 2, 96.

29 Barry Hindess, *Discourses of Power: From Hobbes to Foucault* (Blackwell, 1996) 2; see, eg, Michael Mann, *The Sources of Social Power Volume 1: A History of Power from the Beginning to AD 1760* (Cambridge University Press, 1986); Michael Mann, *The Sources of Social Power Volume 2: The Rise of Classes and Nation-States, 1760–1914* (Cambridge University Press, 1993).

of power relations surrounding the modern subject.[30] This idea of power loosely corresponds with the concern in non-adversarial justice and comprehensive law to take into account the kaleidoscope of elements that surround human problems and structure the human, institutional and legal context in which legal problems arise. Coupled with a problem-solving or preventive lens, postmodern notions of power correspond with the 'connected' analyses that are valued in non-adversarial justice and comprehensive law.

The engagement with the notion of power as a productive force distinguishes non-adversarial justice from the alternative dispute resolution movement which preceded and prefigured it. Alternative dispute resolution was characterised by a concern to counter the (repressive) weight of state authority in the administration of justice by redistributing the locus of power to the individual.[31] The approach was informed by a comprehensive critique of adversarialism and a perception that the court system, and the lawyers who practiced within it, represented the dominant and repressive power and values of the state, expressed and reinforced by the real barriers to justice imposed by the cost of litigation.[32] In accordance with this notion of power, alternative dispute resolution approaches typically worked with the principles of empowerment to encourage and equip people to participate in legal structures in order to resolve disputes on their own terms.[33] Released from the constraints of the formal adversarial system, it was thought that people would be free to create innovative, individually tailored solutions to potential legal problems, thereby avoiding an escalation of the complaint and the costs of litigation. The common sense and cost-saving elements of alternative dispute resolution have propelled the progressive incorporation of these ideas into the fabric of the justice system.[34]

Drawing on postmodern understandings of power, feminist critics have argued that, in practice, institutionalised alternative dispute resolution methods fail to take into account imbalances of power between the parties. By relying on simplistic notions of empowerment and ignoring the complex interplay of power relations highlighted by postmodern perspectives, institutionalised alternative dispute resolution methods repeat the injustices associated with adversarial systems in 'alternative' forums.[35] From this perspective, non-adversarial justice processes may fail to deliver justice if they do not acknowledge and address the substantive inequalities between the parties.

30 Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans, Allen Lane, 1977) 157 [trans of: *Surveiller et Punir* (first published 1975)]; see Michel Foucault in Colin Gordon (ed), *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977* (Colin Gordon trans, Harvester Press, 1980).

31 Freiberg, above n 4.

32 Astor and Chinkin, above n 7, 23.

33 See Donald T Weckstein, 'Alternative Dispute Resolution Symposium Issue: In Praise of Party Empowerment — And of Mediator Activism' (1997) 33 *Willamette Law Review* 501.

34 Arie Freiberg, 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' (2002) 20(2) *Law in Context* 6, 6.

35 King et al, above n 2, 132.

Non-adversarial justice and comprehensive law are concerned with the way in which inequalities structure individual experience and agency. Notwithstanding Susan Daicoff's inclusion of rights discourse as emblematic of the objective stance adopted in traditional adversarial law, this perspective links non-adversarial justice and comprehensive law with new human rights thinking. While domestic law and legal systems may continue to emphasise 'rights' as part of the traditional structures of justice, contemporary international human rights law has demonstrated its deepening appreciation of the connectedness of human experience through its recognition of the interdependence and interconnectedness of human rights and its engagement with the realisation of positive rights.[36] The next section of this article outlines the transformation in human rights thinking that has progressed in parallel with non-adversarial justice and comprehensive law.

B *Human Rights Perspectives and the CRPD*

The recognition and incorporation of human rights into domestic legal systems, either through the common law, or legislative or constitutional methods, confirms that human rights are an integral component of the rule of law. Human rights discourse and human rights law are dynamic, interconnected fields of social and legal discourse that have developed rapidly over the past 50 years. In the same way that non-adversarial justice is influenced by the incorporation and recognition of the subjective reality of the participants in the legal dispute, international human rights law is engaged with its own 'quiet revolution', which is expressed most clearly in the text of the CRPD.[37] The CRPD embraces the notion that human rights are interconnected, socially embedded processes.[38] The United Nations has given substance to this notion by formally involving people with disabilities in the drafting and monitoring process of the CRPD, appreciating that people who are subject to human rights abuse are best placed to understand discrimination, to contribute to the articulation of human right principles and to propose the kinds of systemic changes that are necessary to give effect to human rights.[39] The social orientation of the CRPD means that many of its articles are concerned with the responsibility of society to dismantle the physical and attitudinal barriers that exclude and stigmatise people with disabilities, in order to limit social mechanisms that replicate and reinforce the social exclusion and marginalisation of people with disabilities.[40] At the heart of the CRPD is a conceptualisation of

36 World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993).

37 Penny Weller, 'Human Rights and Social Justice: The Convention on the Rights of Persons with Disabilities and the Quiet Revolution in International Law' (2009) 4 *Public Space* 74.

38 Gerard G Quinn and Theresia Degener, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (United Nations, 2002).

39 Donald MacKay, 'The United Nations Convention on the Rights of Persons with Disabilities' (2007) 34 *Syracuse Journal of International Law & Commerce* 323, 327.

40 Rosemary Kayess and Ben Fogarty, 'The Rights and Dignity of Persons with Disabilities' (2007) 32 *Alternative Law Journal* 22.

people with disability as bearers of human rights who are equally entitled to exercise the right to self-determination and autonomy, to participate in society and to be recognised as equal before the law.[41] The positioning of the subjective reality of people with disabilities as the driving rationale in the articulation of human rights requires human rights perspectives to take into account the power relationships that structure social and legal contexts as well as the experience of them. As non-adversarial justice and comprehensive law identify, acknowledging the power relations that surround the person at the centre of the exercise requires adjustment of the processes and structures that give effect to justice.

III PART II: NON-ADVERSARIAL JUSTICE IN MENTAL HEALTH REVIEW TRIBUNALS

A *Tribunals and Rights-Based Mental Health Laws*

Mental health review tribunals ('MHRTs') were established by the rights-based mental health laws that were adopted across developed western jurisdictions in the 1970s and 1980s.[42] At that time, rights-based mental health laws provided new protections for people with mental illness.[43] They typically adopted a 'gatekeeper' model that restricted entry into the clinical domain by defining who could (and who could not) be legitimately subject to involuntary psychiatric treatment. In addition, rights-based mental health laws introduced a system of judicial oversight of the exercise of statutory powers. In Australia, Canada, New Zealand and the United Kingdom, judicial oversight was provided by new specialist tribunals in the form of mental health review tribunals or boards. These new entities were charged with the task of ensuring the statutory criteria were lawfully applied, either at scheduled points of review or on appeal.

Consistent with the valorisation of civil and political rights that was dominant in the 1970s and 1980s, MHRTs were specifically designed to address the rights issues associated with the provision of compulsory mental health care. In the post-World War II period, mental health laws that invested broad discretionary powers in medicine became associated with the human rights abuses that were occurring in psychiatric institutions. In keeping with the objective to regulate the psychiatric system, MHRTs were established as interdisciplinary panels that were able to conduct an 'inquiry' style hearing with informal proceedings, modified

41 Theresia Degener, 'Disability as a Subject of International Human Rights Law and Comparative Discrimination Law' in Stanley S Herr, Lawrence O Gostin and Harold Hongju Koh (eds), *The Human Rights of Persons with Intellectual Disabilities: Different but Equal* (Oxford University Press, 2003) 151.

42 Penelope Weller, 'Lost in Translation: Human Rights and Mental Health Law' in Bernadette McSherry and Penelope Weller (eds), *Rethinking Rights-Based Mental Health Laws* (Hart Publishing, 2010) 51, 63.

43 Larry Gostin, 'Mental Health Review Tribunals' (1980) 281 *British Medical Journal* 1142; Great Britain, *Report of the Committee on Administrative Tribunals and Enquiries*, Cmnd 218 (1957).

rules of evidence and procedure and a flexible approach to legal representation.[44] It was thought that an interdisciplinary panel would facilitate a collaborative exchange between the medical, legal and lay members, creating a balance of power within the tribunal and a flexible, informed approach.[45]

While research into tribunal practice has affirmed the positive potential of this model, tribunals operate in a rapidly changing service, knowledge and legal context. Deinstitutionalisation, improved pharmacology and the provision of community-based care have created unanticipated patterns of service delivery that stretch tribunals' capacity.[46] Psychiatric admissions are now more likely to involve short-term acute admission with ongoing management in the community, on either a voluntary or involuntary basis, in jurisdictions that have adopted community treatment orders.[47] These changes and the extension of compulsory treatment powers outside the institution have altered the orientation and scope of tribunal review.

In addition, the development of risk assessment expertise in psychiatry and psychology increases the pressure upon tribunals to define the different elements of the civil commitment criteria in medical terms and with reference to medical expertise.[48] Some tribunal members with legal or lay backgrounds have reported a lack of confidence in their ability to evaluate or challenge the medical information that is put before them, raising questions about the efficacy of the review as a safeguard of rights.[49] Although some tribunals have strived for informality in order to maximise the participation of people with mental illnesses, the demands of the disability movement for recognition of the inherent abilities of people with disability and for equal recognition before the law has amplified calls for formal legal representation before tribunals. This increases pressure on governments to provide for legal representation before MHRTs on the basis that vulnerable people should always have access to justice, including access to the benefits of independent representation and the intellectual rigour, mediation skills and problem-solving approaches that have come to be regarded as the expected skills of a competent lawyer.[50]

Finally, the greater engagement of people with mental illnesses in tribunal proceedings and new research into the experience of people with mental illnesses

44 Jill Peay, 'Mental Health Review Tribunals and the Mental Health (Amendment) Act' [1982] *Criminal Law Review* 794.

45 Jill Peay, *Tribunals on Trial: A Study of Decision-Making under the Mental Health Act 1983* (Oxford University Press, 1989); Andrew Peter Leggatt, *Tribunals for Users: One System, One Service: Report of the Review of Tribunals* (Stationery Office, 2001).

46 Larry Gostin, 'Human Rights of Persons with Mental Disabilities: The European Convention of Human Rights' (2000) 23(2) *International Journal of Law and Psychiatry* 125, 132.

47 England and Wales introduced community treatment orders following changes brought in by the *Mental Health Act 2007* (UK) c 12, s 32.

48 Shah, above n 8, 28.

49 Peay, above n 45, 806; Terry Carney, 'Anorexia: A Role for Law in Therapy?' (2009) 16 *Psychiatry, Psychology and Law* 41, 53.

50 Daicoff, above n 18, 15.

before the tribunal raises questions about the inclusivity of the tribunal hearing.[51] The remainder of this part of the article examines four areas of current debate concerning tribunal practice. These are: the timing of the review; the question of participation; the question of representation and the potential expansion of the powers of the tribunal raised by an integrated analysis of human rights.

B *Human Rights, Therapeutic Perspectives and the Timing of Judicial Review*

While different jurisdictions adopt a variety of time periods, sequences and triggers for tribunal review, tribunal review of psychiatric detention is usually scheduled some time after the person has been compulsorily detained. In international human rights law, it is well established that the exercise of statutory powers that restrict fundamental freedoms should be subject to prompt judicial review. This principle applies to deprivations of liberty that are for public health purposes, including psychiatric detention that is imposed on the grounds of protecting the health and safety of the person and the safety of others.[52] There are, however, differing interpretations of the meaning of 'prompt' review, particularly in relation to psychiatric detention.

The *International Covenant on Civil and Political Rights* ('ICCPR') sets basic human rights standards.[53] Article 9(1) of the ICCPR requires review of all detentions 'without delay'. In considering the meaning of this phrase, the Human Rights Committee, which monitors the implementation of the ICCPR, states that the delay 'must not exceed a few days'.[54] In relation to psychiatric detention, the *Principles for the Protection of People with Mental Illness and the Improvement of Mental Health Care* ('MI Principles'), which is the only United Nations statement specifically concerned with the treatment and care of people with mental illness, stipulate a 'short' period of detention for observation and preliminary treatment, followed by a review that must take place 'as soon as possible'.[55] Jurisprudence from the European Court of Human Rights considering the meaning of 'speedy review', which is the equivalent phrase in the *European Convention on Human Rights*, refers to a period of 'less than 24 days'.[56] Enigmatically, the CRPD requires that review take place in accordance with international human rights law.[57] Two

51 Vivienne Topp, Martin Thomas and Mim Ingvarson, *Lacking Insight: Involuntary Patient Experience and the Victorian Mental Health Review Board* (Mental Health Legal Centre, 2008) 52.

52 *Winterwerp v The Netherlands* (1979–80) 2 Eur Court HR (ser A) 387; Neil Rees, 'International Human Rights Obligations and Mental Health Review Tribunals' (2003) 10 *Psychiatry, Psychology and Law* 33, 35.

53 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

54 Human Rights Committee, *General Comment No 08: Right to Liberty and Security of Persons* (Art 9), 16th sess, UN Doc HRI/GEN/1/Rev.9 (Vol I) (30 June 1982).

55 *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, 46th sess, 75th mtg, Agenda Item 98, UN Doc A/RES/46/199 (17 December 1991) annex Principles 16, 17.

56 *L R v France* (European Court of Human Rights, Chamber, Application No 33395/96, 27 June 2002).

57 *Convention on the Rights of Persons with Disabilities* art 14(2).

expert reviews of mental health laws in the United Kingdom, the Richardson Review in England and Wales and the Millan Review in Scotland, recommended a maximum period of five to seven days respectively.[58]

The Australian experience of the timing of review provides a context that highlights the issues surrounding appropriate review.[59] Mental health laws in Victoria and Western Australia set the review period within eight weeks of being detained, Queensland and South Australia require review within six weeks, Tasmania sets the limit at 28 days, while the Northern Territory and the Australian Capital Territory review detentions within two weeks. In the Australian Capital Territory, where amendments to the relevant Act were designed to bring the law into alignment with the *Human Rights Acts 2004* (ACT),[60] review may occur within three days in some circumstances. New South Wales requires the psychiatric detention to be confirmed by a magistrate 'as soon as practicable' after the detention, which has been taken to mean approximately two weeks.[61] At the time of writing, anticipated changes to the law in New South Wales may have the effect of deferring review to the third or fourth week of detention.[62] Whether or not the review arrangements are sufficient to satisfy the human rights requirements of prompt review required by the ICCPR is open to question, particularly in the absence of effective advocacy or communication of information to the person who is detained or their representative about their right to appeal.[63]

The shorter times of acute admission in contemporary psychiatric care and the advent of compulsory community treatment have changed the significance of the statutory review times. Acute psychiatric admissions are often short.[64] If a person is discharged without ongoing orders before the time of a scheduled review the decision to detain and treat a person involuntarily may not be reviewed at all. Neil Rees argues that the imposition of involuntary detention and treatment without review is a significant infringement of human rights. According to Rees:

> Any initial and short-term interference with the entitlement of a person with a mental illness to exercise the civil rights of freedom of movement and freedom of bodily integrity, in order to treat that person's mental illness, should occur only following the use of transparent procedures laid down by law and assessment criteria which have been developed and applied in compliance with internationally accepted medical standards.[65]

58 Department of Health (UK), *Review of the Mental Health Act: Report of the Expert Committee* (1999); Scottish Executive, *New Directions: Review of the Mental Health (Scotland) Act 1984* (2001).

59 *Mental Health Act 1986* (Vic) s 30(1); *Mental Health Act 2007* (NSW) s 27(d), s 37; *Mental Health Act 2000* (Qld) s 187(1); *Mental Health Act 2009* (SA) s 25, s 79(c); *Mental Health Act 1996* (Tas) s 52; *Mental Health Act 1996* (WA) s 138; *Mental Health and Related Services Act* 2004 (NT) s 123; *Mental Health (Treatment and Care) Act 1994* (ACT) s 21.

60 The Tasmanian, Victorian, ACT and WA Acts are currently under review.

61 Christopher James Ryan, Sascha Callaghan and Matthew Large, 'Long Time, No See: Australians with Mental Illnesses Wait Too Long before Independent Review of Detention' (2010) 35(3) *Alternative Law Journal* 147,148.

62 Ibid 147.

63 Cf *Kracke v Mental Health Review Board* [2009] VCAT 646 (23 April 2009) 420 (Bell J).

64 Rees, above n 8, 35.

65 Ibid.

He also warns that we 'pay lip service to the notion that wherever possible people with a mental illness should enjoy the same rights as other members of the community, if most people who become involuntary patients are not reviewed'.[66]

Furthermore, if the person has been discharged from inpatient care but remains subject to a compulsory treatment order in the community, the scheduled tribunal review addresses the person's circumstances at the time of review thereby compounding the omission of a review of the initial detention. Review at the later time occurs when the treatment regime is well established. In this circumstance the review may be coloured by the person's progress and the practical questions about the person's prospective management and care in the community. Commentators who prefer the later review time argue that review at this time increases the opportunity for the person whose treatment is the subject of review to be involved in the hearing and is the most appropriate and productive use of the tribunal forum. Supporters of a delayed time for review see a conflict between early review, as required by ICCPR standards, and non-adversarial justice principles of inclusion, participation and wellbeing. They argue that the inclusion of the person in the hearing at a time when their condition has not stabilised may have damaging consequences, particularly if the tribunal is not adept at responding appropriately to the person.[67]

From a non-adversarial justice perspective, it is possible to retain an emphasis on participation by allowing that it may be achieved in a variety of ways. First, consideration should be given to whether tribunal practices may be modified in order to maximise the ability of people to participate in the process with minimum distress, for example, by limiting the use of CCTV screens if they are disturbing to a particular individual. Participation may also be achieved by the presence and participation of support persons or representatives, who may appear with or instead of the person, or by the tabling of documents, such as psychiatric advance directives or statements.

Delaying review may have anti-therapeutic consequences. For many people the experience of involuntary psychiatric detention is frightening and profoundly confronting. Uncertainty may heighten fear and anxiety. If the prompt review of detention is framed as a non-adversarial process, it has the potential to reduce stress, to ensure that the person and their supporters and carers know the detention has taken place, understand the reason for the detention and know about the processes that will follow. It provides an opportunity to ensure that all parties know about their rights and obligations, to ensure the proper arrangements are in place for the care of the person's dependents and that other personal arrangements and responsibilities are attended to. Understood as a non-adversarial process, the principle of prompt or early review of the detention is justified on human rights and therapeutic grounds.[68] This suggests that tribunal review should be structured

66 Ibid 38.

67 Ian Freckelton, 'Mental Health Review Tribunal Decision-Making: A Therapeutic Jurisprudence Lens' [2003] 10 *Psychiatry, Psychology and Law* 44, 50.

68 Rees, above n 8; Terry Carney, 'The Mental Health Service Crisis of Neo-Liberalism — An Antipodean Perspective' (2008) 31(2) *International Journal of Law and Psychiatry* 101, 111.

in two stages with each review addressing the different therapeutic opportunities and utilising different processes in accordance with their different purposes.

C *Holistic or Comprehensive Law and Participation in the Legal Process*

Both non-adversarial justice and contemporary human rights perspectives emphasise the importance of autonomy, self-determination and the active participation of people in the resolution of their legal problems. From a human rights perspective, participation of people in all matters and decisions concerning them flows from the recognition that the principles of equality and non-discrimination are fundamental and universally applicable. People with mental illnesses or other mental disabilities are entitled to recognition before the law and are entitled to the support and assistance that may be necessary to enable them to participate equally.

The non-adversarial justice literature emphasises the importance of participation as a matter of fairness and legitimacy. Tom Tyler reports that people are more likely to accept and follow the directions of legal authorities where they feel that the authorities' processes are fair and their motives legitimate.[69] When people are enabled to present their case, and the case is taken into account by a respectful legal authority, people are more likely to follow the decision based on an internal commitment to it.[70] In the mental health context, Winick attests to the critical importance of promoting respect for autonomy and the understanding that coercion and paternalism in legal processes are likely to promote non-compliance and resistance to change.[71] The subtleties of individual experience, and hence the importance of understanding subjective perspectives, are illustrated by research showing that patients are consistently less likely to agree that the MHRT was independent or fair compared to MHRT members.[72] This observation points to the importance of considering the responses of all parties to the tribunal process and of communicating to all participants the basis of the decision and the process of reasoning that underpins it.

How does the principle of participation have an impact on tribunal practice? As noted above, at its most basic, the principle of participation requires that people should be present at all tribunal hearings. Typically, there is a low attendance by those with a mental illness at tribunal hearings. Although there may be legitimate

69 See generally Tom R Tyler, 'The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings' in David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996) 3; Tom R Tyler, *Why People Obey the Law* (Princeton University Press, 2nd ed, 2006); Tom R Tyler and Yuen J Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (Russell Sage Foundation, 2002).

70 Raymond Paternoster et al, 'Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault' (1997) 31 *Law & Society Review* 163.

71 Bruce J Winick, 'On Autonomy: Legal and Psychological Perspectives' (1992) 37 *Villanova Law Review* 1705, 1715–21.

72 Nicole Ferencz and Jeremy McGuire, 'Mental Health Review Tribunals in the UK: Applying a Therapeutic Jurisprudence Perspective' (2000) 37 *Court Review* 48, 51.

reasons for non-attendance, a recent study conducted by the Mental Health Legal Centre ('MHLC') in Victoria noted that clinical routines sometimes hampered participation in the hearing.[73] Some participants in the study reported that when they tried to exercise their statutory right to review their clinical file, it was provided without sufficient time to read it, without sufficient explanation and without adequate support.[74] The MHLC report indicates that there may be a poor understanding of the importance and potential benefits of participation.

The principle of participation requires that the person who is to appear before the tribunal be provided with information about the process, the role of the parties, the powers of the tribunal and the person's rights and entitlements. Research in England and Wales has indicated that there is a low level of awareness of rights among compulsorily detained patients,[75] that more than half of a group of detained patients who were provided with a booklet explaining their rights could not understand it,[76] that there was a serious lack of knowledge and understanding of tribunal processes and powers among patients,[77] that higher levels of awareness of tribunal processes are identified amongst those who had been detained before[78] and that people with higher education qualifications or previous experience of compulsory hospital admission were more likely to appeal against their detention.[79] Miranda Shah and Femi Oyebode found that 35 per cent of people appealed, but young people and older people, especially those with dementia, were least likely to appeal, suggesting profound inequalities amongst detained patients. [80] These studies indicate that review frameworks based on rights models must develop effective methods of communication and support that give effect to the rights and entitlements of psychiatric patients.

The principle of participation, as it is discussed in the non-adversarial justice literature, suggests that it is possible to develop innovative approaches to tribunal practice. In restorative justice, for example, all people who are affected by the person's behaviour are brought together in an effort to repair or restore the harm done. Similarly, people affected by a person's mental illness, such as the family, supporters and carers, claim their right to actively participate in tribunal hearings. Notwithstanding the range of difficult issues raised by the participation of different groups of people at tribunal hearings, participation is a fundamental principle that

73 Topp, Thomas and Ingvarson, above n 51, 42.

74 Ibid 47.

75 Rainer Goldbeck, Donald MacKenzie and Peter Bennie, 'Detained Patients' Knowledge of Their Legal Status and Rights' (1997) 8 *Journal of Forensic Psychiatry & Psychology* 573, 578.

76 Caroline Bradley, Max Marshall and Dennis Gath, 'Why Do So Few Patients Appeal against Detention under Section 2 of the *Mental Health Act*?' (1995) 310 *British Medical Journal* 364.

77 Mairead Dolan, Robert Gibb and Placid Coorey, 'Mental Heath [sic] Review Tribunals: A Survey of Special Hospital Patients' Opinions' (1990) 10 *Journal of Forensic Psychiatry & Psychology* 264.

78 Ibid.

79 Bradley, Marshall and Gath, above n 76, 366.

80 Miranda Shah and Femi Oyebode, 'The Use of Mental Health Review Tribunals' (1996) 20 *Psychiatric Bulletin* 653, 654. See also Sandra Dwyer, 'The Use of Mental Health Review Tribunals by Older People' (2003) 15 *Practice: Social Work in Action* 51; Amar Shah and Suzanne Joels, 'Appeals by the Elderly against Compulsory Detention under the *Mental Health Act 1983*' (2006) 21 *International Journal of Geriatric Psychiatry* 1213, 1214.

can extend to the participation of all persons affected by a decision. To borrow from Pauline Tesler, tribunal decision-making may require a 'participation plus' approach based on the recognition that the most viable 'solution' is one that takes into account the person's perspective in the context of broader decision-making support and the implications for others who are affected by a decision of the tribunal.[81]

Developing the idea of participation in this way extends it beyond a vehicle that might enable a decision-making process to recognise and support an individual's effort to engage in a process of change.[82] A 'participation plus' approach envisages that participants may work together to define the 'problem' that is at the heart of the deliberations and to creatively structure appropriate and effective responses.

D *Non-Adversarial Advocacy and Representation*

Debate about the proper role and function of legal representatives in MHRT hearings raises further questions about adversarialism and its relationship to justice.[83] Neil Rees has criticised Australian MHRTs for relying on procedural rules that tend to stifle innovation.[84] On the other hand, the development of informal practices in tribunals may offend the principles of fairness or natural justice if they stray too far into informality.[85] Engaging with the notion of informality at a different level, Ian Freckelton cautions against an uncritical acceptance of the material that is presented to tribunals, calling for a good measure of evidentiary rigour.[86] Reporting on MHRT practice in England and Wales, Sameer Sarkar and Gwen Adshead similarly caution against informality in the tribunal setting.[87] They report that tribunal members studied were reluctant to challenge medical opinions, observing that opinion evidence was introduced to tribunals disguised as medical facts.[88] This leads to the acceptance of hearsay and unsubstantiated evidence in support of continuing detention based on grounds of risk.[89] The

81 Tesler, above n 25, 4.

82 Carney et al, 'Advocacy and Participation in Mental Health Cases: Realisable Rights or Pipe-Dreams?' (2008) (26) 2 *Law in Context* 125, 125.

83 Maria Bisogni, 'What Is the Role of a Legal Representative before the Mental Health Review Tribunal?' (2002) 40 *Law Society Journal* 72, 74; Michael L Perlin, 'Fatal Assumption — A Critical Evaluation of the Role of Counsel in Mental Disability Cases' (1992) 16 *Law and Human Behavior* 39; Michael L Perlin, 'And My Best Friend, My Doctor, Won't Even Say What It Is I've Got: The Role and Significance of Counsel in Right to Refuse Treatment Cases' (2005) 42 *San Diego Law Review* 735; Janet B Abisch, 'Mediational Lawyering in the Civil Commitment Context: A Therapeutic Jurisprudence Solution to the Counsel Role Dilemma' (1995) 1 *Psychology, Public Policy and Law* 120.

84 Neil Rees, 'Learning from the Past, Looking to the Future: Is Victorian Mental Health Law Ripe for Reform?' (2009) 16 *Psychiatry, Psychology and Law* 69, 83.

85 Ibid 83.

86 Freckelton, above n 67, 50. See also Ian Freckelton, 'Extra-Legislative Factors in Involuntary Status Decision-Making' in Bernadette McSherry and Penelope Weller (eds), *Rethinking Rights-Based Mental Health Laws* (Hart, 2010) 203, 225.

87 Sameer P Sarkar and Gwen Adshead, 'Black Robes and White Coats: Who Will Win the New Mental Health Tribunals?' (2005) 186 *British Journal of Psychiatry* 96, 97.

88 Ibid.

89 Ibid.

caution contained in these comments draws attention to the importance of distinguishing between formality of manner and form and the intellectual rigour that must be brought to the tribunal inquiry.

In relation to legal representation, MHRTs generally allow, but do not require, legal representation.[90] The legal structure appears to assume that the multi-disciplinary tribunal, with informal support, obviates the need for formal legal representation and is consistent with the alternative dispute resolution principles of individual empowerment and the concern to ensure that cost burdens do not limit access to justice.[91] Nevertheless, the absence of independent legal representation before MHRTs draws critical comment.[92] In practice, representation before MHRTs is largely dependent upon the usually limited public provision of legal services, which results in low levels of representation.[93] For example, in Australia, although there is a statutory right to be represented in nearly all jurisdictions, few people are legally represented before MHRTs. Valerie Williams reports that in 2002 only 9.2 per cent of hearings in Victoria, 10 per cent in Western Australia and 18.3 per cent in New South Wales involved people who were legally represented.[94] In the same year, in the Northern Territory, mandated representation resulted in a representation rate of 90.7 per cent of hearings in 2002,[95] while in Tasmania, the Tasmanian Mental Health Tribunal Representation Scheme provided representation by law students in 65 per cent of tribunal matters.[96] Fleur Beaupert reports that by 2006 the rates had dropped to 5.6 per cent of hearings in Victoria and 16.2 per cent in New South Wales.[97] The low figures in the larger jurisdictions reflect the limited arrangements that are in place for publicly funded legal representation for mental health patients. They may also reflect the general lack of knowledge about rights and entitlements in Australia, even amongst those mental health patients who have been informed of their rights.[98]

Research in England and Wales indicates that in the early years of tribunal practice, lawyers were perceived as bringing inappropriate adversarialism to tribunal hearings.[99] Some tribunal members saw adversarialism as distressing to all parties and counterproductive and damaging to the doctor–patient relationship.[100] Those observations are consistent with Bruce Winick's concern that lawyers who act paternalistically and perfunctorily may be a direct cause of psychological

90 Sophie Delaney, 'An Optimally Rights Recognising Mental Health Tribunal — What Can Be Learned from Australian Jurisdictions' (2003) 10 *Psychiatry, Psychology and Law* 71, 76.

91 King et al, above n 2, 3.

92 Carney et al, above n 82, 125–6.

93 Williams, above n 8, 109.

94 Ibid 113.

95 Ibid.

96 Ibid.

97 Fleur Beaupert, 'Mental Health Tribunal Processes and Advocacy Arrangements: "Little Wins" Are No Small Feat' (2009) 16 *Psychiatry, Psychology and Law* 90, 102.

98 This is consistently reported in the research literature in the United Kingdom: see John W Coates, 'Mental Health Review Tribunals and Legal Representation — Equality of Arms?' (2004) 28(11) *Psychiatric Bulletin* 426, 426.

99 Elizabeth Perkins, 'A New Tribunal?' (2003) 10 *Psychiatry, Psychology and Law* 113, 113.

100 Beaupert, above n 97, 101.

dysfunction in their clients.[101] The concern expressed in this literature is that the involvement of lawyers inevitably draws MHRTs toward damaging adversarial practices.[102]

In contrast, Elizabeth Perkins argues that there is insufficient adversarialism in the tribunal process. She notes a lack of intellectual rigour, a propensity to engage in circular or backward reasoning and the adoption of suspect collaborative practices that infringe basic principles of fairness.[103] She also observes that where there is an absence of independent or external legal guidance, conflicting interpretations of the legislation are endemic, particularly when tribunals are engaged with the interpretation of legislative references to the 'nature' or 'degree' of a mental disorder, or the risks associated with mental disorder.[104] Noting that fluid interpretations of the relevant legislation have contributed significantly to an extreme variability in tribunal practice, she calls for a re-engagement with formal legal representation before the tribunal.[105]

Sameer Sarakar and Gwen Adshead similarly welcome lawyers for the intellectual rigour they bring to tribunal proceedings, particularly when the relevance and probative value of the material put before the tribunal must be determined.[106] Their research indicates that tribunal members value legal representation because it ensures that the patient's views are put to the tribunal. Some tribunal members reported that legally represented patients were more informed and less intimidated by the proceedings.[107] Tribunal members observed that whilst the involvement of lawyers sometimes brought to the surface inherent disagreements between participants, lawyers who were able to utilise problem-solving, mediation and other non-adversarial skills to good effect were highly valued.[108]

Overall, the different interpretations of the role of the lawyer in the tribunal process present in this literature suggest that legal practitioners who are familiar with non-adversarial forums are able to work effectively within that framework, employing a range of appropriate legal skills for the benefit of their clients. This observation raises questions about the quality of legal practitioner training.

One solution to the cost of legal representation and the perception that lawyers are entrenched in adversarial approaches is to allow expert community, lay or peer advocates to provide representation. Advocacy literature canvasses a range of approaches to the question of non-legal advocacy and posits ways in which advocates may work in tribunal settings. For example, some commentators

101 Bruce J Winick, 'Therapeutic Jurisprudence and the Civil Commitment Hearing' (1999) 10 *Journal of Contemporary Legal Issues* 37.

102 William Obomanu and Harry Kennedy, '"Juridogenic" Harm: Statutory Principles for the New Mental Health Tribunals' (2001) 25 *Psychiatric Bulletin* 331, 332.

103 Perkins, above n 99, 115.

104 Ibid 116.

105 Ibid 119.

106 Sarkar and Adshead, above n 87, 98.

107 Ibid 97.

108 Ibid 98.

support the involvement of legally trained peer advocates in tribunal hearings.[109] The small amount of research that has considered the role of peer-based advocates in the mental health context raises the question of whether or not advocates fulfil distinct and separate functions to lawyers, or distinct and separate functions from the informal advocacy that is provided by supporters, families or carers. This is an area of inquiry that is ripe for further research.

Some researchers report that patients who are represented by lawyers express a high level of dissatisfaction with their legal representatives.[110] It is not clear whether this finding reflects the quality of the legal representation, the level of stress that is associated with MHRT review, the complexity of the cases that come before the tribunal or the outcome of the process.[111] Dissatisfaction may be evidence of frustration with the MHRT process, the limited powers of review and the failure of mental health laws to clearly provide for the discharge of patients from compulsory orders. Carney et al report that there is inconclusive evidence about the benefits or effects of legal representation.[112] Nevertheless, some consumers report that legal representation, along with advocacy and support or informal advocacy, can improve the sense of empowerment in the tribunal process.[113] The underdevelopment in research and practice concerning advocacy, peer support and legal representation before MHRTs should be a matter of concern for law reformers and policy-makers.

E *Positive Rights and the Scope of Tribunals' Powers*

Rights-based mental health laws augmented the discretionary powers contained in the mental health laws that preceded them by imposing threshold limitations and judicial review.[114] Although the civil commitment criteria governing both of these safeguard measures appears to require a hybrid evaluation of social, legal and clinical matters, the dominance of medical expertise in the production of evidence to be considered by the tribunal further impinges on the limited authority of tribunals to review clinical matters.[115] The limited ability of the tribunal to intrude on the clinical domain is criticised by mental health consumers who hope that the tribunal may offer them an opportunity to broaden the focus of inquiry beyond merely clinical considerations.[116] In most jurisdictions, mental health laws

109 Topp, Thomas and Ingvarson, above n 51; Stephen Rosenman, Ailsa Korten and Leigh Newman, 'Efficacy of Continuing Advocacy in Involuntary Treatment' (2000) 51 *Psychiatric Services* 1029.

110 Dolan, Gibb and Coorey, above n 77.

111 Terry Carney et al, 'Mental Health Tribunals: "TJ" Implications of Weighing Fairness, Freedom, Protection and Treatment' (2007) 17 *Journal of Judicial Administration* 46, 53. See also Pamela J Taylor et al, 'Limits to the Value of Mental Health Review Tribunals for Offender Patients: Suggestions for Reform' (1999) 174 *British Journal of Psychiatry* 164.

112 Carney et al, above n 111, 53.

113 Topp, Thomas and Ingvarson, above n 51, 57.

114 Kathleen Jones, *Asylums and After — A Revised History of the Mental Health Services: From the Early 18th Century to the 1990s* (Athlone Press, 1993).

115 Weller, above n 42.

116 Topp, Thomas and Ingvarson, above n 51.

give overriding decision-making power to the treating psychiatrist.[117] Although the exercise of that power may be qualified by the statutory requirement to consider or to take into account the views and wishes of the person, analysis of the decisions of MHRTs show that these statutory factors are commonly subsumed by a range of 'extra-legislative factors'.[118] Mental health care and treatment is perennially contested. Deciding whether or not a given treatment is the most appropriate, or is in accordance with international standards, appears to fall beyond the traditional review powers of MHRTs. Nevertheless, MHRT research shows that tribunal members are concerned to reach the most therapeutically appropriate outcome, notwithstanding the limitations of their statutory powers.[119] It is perhaps unsurprising, given the obvious tensions around treatment decisions and the greater emphasis upon care and treatment in the community, that tribunal members have reported being dissatisfied with the scope of their powers.[120]

These tensions become manifest when MHRTs apply the statutory requirement that treatment be provided in the least restrictive manner. The 'least restrictive' requirement appears consistently in the civil commitment criteria in rights-based mental health laws and was generally intended to facilitate the trend toward de-institutionalisation.[121] However, the exercise of this power by tribunals illustrates the tension that surrounds tribunal powers, clinical authority, human rights and the allocation of resources by governments. Two examples are provided by applications to the European Court of Human Rights ('ECrtHR') from tribunal decisions in England and Wales. In *Johnson v United Kingdom*,[122] the ECrtHR found that the United Kingdom had breached Mr Johnson's right to liberty under Article 5(1) of the *European Convention on Human Rights* because a MHRT had failed to discharge a compulsory order. The order was unlawful because Mr Johnson no longer suffered from a mental illness. The delay in his discharge related to the inability of the health service to find Mr Johnson suitable, supportive accommodation that would prevent his relapse into mental illness. The finding of a breach of Article 5(1) in this case underscores the ECrtHR's position that there is a broad obligation to provide appropriate accommodation to people who have suffered from mental illness.

The case of *Kolanis v United Kingdom*[123] also involved the question of appropriate accommodation. In that instance the ECrtHR determined that the United Kingdom had infringed Article 5(4) of the *European Convention on Human Rights*, which concerns detention on the grounds of mental illness. In *Kolanis* the MHRT ordered that the person be discharged to family care with psychiatric

117 Christopher Ryan, 'Capacity as a Determinant of Non-Consensual Treatment of the Mentally Ill in Australia' (2011) 18(2) *Psychiatry, Psychology and Law* 248.

118 Ian Freckelton, 'Extra-Legislative Factors in Involuntary Status Decision Making' in Bernadette McSherry and Penelope Weller (eds), *Rethinking Rights-Based Mental Health Laws* (Hart, 2010) 203.

119 Carney et al, above n 111, 53.

120 Stephen Blumenthal and Simon Wessely, 'The Patterns of Delays in Mental Health Review Tribunals' (1994) 18 *Psychiatric Bulletin* 398.

121 Gostin, above n 46, 132.

122 (1997) 27 EHRR 296.

123 (2006) 42 EHRR 12.

supervision, which was the person's preference, against the recommendation of the treating clinicians for supervised hostel care. No psychiatrist could be found who was willing to supervise the person if she remained in family care. Although suitable accommodation and supervision were eventually arranged, the United Kingdom was held to be in breach of Article 5(4) because of the prolonged delay in finding a solution.[124]

As these cases illustrate, tribunals that are prepared to make determinations that address the transition from institution to community care in accordance with the least restrictive alternative may find themselves inhibited by the scope and enforceability of their own powers, the lack of suitable accommodation in the community and the different perspectives offered by the treating clinicians. In both *Johnson* and *Kolanis*, the ECrtHR considered the positive entitlements of people with mental illness to appropriate and acceptable medical and social services, including the accommodation and social supports that are necessary to achieve optimal health and wellbeing. In non-adversarial justice terms, MHRTs that adopt this approach are engaging with a problem-solving approach that is concerned with maximisation of the person's future potential.

IV CONCLUSION: TRIBUNALS AS PROBLEM-SOLVING FORUMS

The problem-solving orientation in MHRT work is expressed in the desire of tribunal members to achieve the best outcome.[125] However, tribunals that engage in a problem-solving approach, implicit or otherwise, are confronted by the dominance of medical perspectives, changes in mental health service delivery, deficits in service provision, the demands of services users, the demands of families and carers, the need for effective representation and the obligation to recognise the entitlements expressed in international human rights law.[126] The changing context in which tribunals work challenges them to stretch beyond established approaches into new terrain.[127]

The direction of change that is encouraged by human rights and non-adversarial justice is towards a closer engagement with the needs and aspirations of the people who are subject to tribunal review and, by extension, the perspectives of the families, carers, supporters and services who will be providing support and care to the person. Non-adversarial justice provides a set of practical tools that enable tribunals to respond to the competing pressures by positioning themselves as problem-solving forums that attend to human rights by orchestrating transitions

124 See Peter Bartlett, Oliver Lewis and Oliver Thorold, *Mental Disability and the European Convention on Human Rights* (Martinus Nijhoff Publishers, 2007) 45–46, 257.

125 Carney et al, above n 111, 53. Jill Peay, *Tribunals on Trial: A Study of Decision-Making under the Mental Health Act 1983* (Clarendon Press, 1989).

126 Terry Carney and Fleur Beaupert, 'Mental Health Tribunals: Rights Drowning in Un-'Chartered' Health Waters?' (2008) 13 *Australian Journal of Human Rights* 181.

127 Jill Peay, *Decisions and Dilemmas: Working with Mental Health Law* (Hart, 2003).

between community, acute care and independence. The problem-solving tribunal could be complemented by a process that reviews the initial circumstances of the psychiatric detention in order to ensure that relatives and support persons are contacted, psychiatric advance directives are found and honoured and planning for an effective transition hearing is commenced. The additional expenses incurred in restructuring the tribunal review system would be offset by savings resulting from shorter and fewer acute admissions.

Non-adversarial justice provides an approach that enables MHRTs to respond to the issues and problems that are raised by participants in the legal process.[128] The proposition that the needs of consumers and carers should define the set of problems that are to be addressed by the MHRT is consistent with non-adversarial justice and human rights perspectives. It also provides impetus for a wider debate about the role and purpose of MHRTs in mental health systems. A reformed and empowered tribunal could begin to restructure the mental health system by ordering the conduct of distribution of a range of services in accordance with the needs of consumers.

Extending this argument further, it is possible to see both non-adversarial justice and human rights as expressions of a deeper structural transformation in law and society which demands the equal participation of marginalised or vulnerable people and their inclusion in the governance of institutions and systems that are intended for their benefit.[129] The slogan that has been coined by the disability movement to promote engagement with the CRPD, 'nothing about us without us', reiterates the principle that people with disabilities must always be involved in decisions that affect them.[130] MHRTs are well positioned to respond to the deep social change expressed in non-adversarial justice and contemporary human rights. By engaging with the premise of participation they can begin to give effect to their full problem-solving potential.

128 Freckelton, above n 67.

129 Weller, above n 37, 86.

130 Navanethem Pillay, 'High Commissioner's Statement' (Speech delivered at the First Annual Interactive Debate of the Human Rights Council on Key Legal Measures for Ratification and Implementation of the CRPD, Human Rights Council, 6 March 2009); See also James Charlton, *Nothing about Us without Us: Disability Oppression and Empowerment* (University of California Press, 2000).