REVIEW AND DISCHARGE OF SPECIAL PATIENTS

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I Introduction

The term 'special patient' signifies a broad category of persons, offenders suffering from varying degrees of mental disturbance, who have been detained in a psychiatric hospital for treatment or observation. "The designation 'special patient' is...a status conferred by the statutory provision under which the offender has been committed to a psychiatric hospital, and may have little or nothing to do with the nature or extent of their mental disorder, or indeed with their perceived dangerousness...'Special patients' are a legal and not a psychiatric category..."[1]

It is not possible within the scope of this paper to consider in comprehensive detail the legal provisions dealing with psychiatric intervention in the criminal process in New Zealand. It is, however, important to note that the Criminal Justice Act 1985 has introduced some significant changes to the law in this area, which deserve careful study.[2] We shall note some of these changes as we proceed.

Our main purpose will be to examine the existing procedures governing the review and discharge of special patients. This will necessitate first an examination of the classes of special patients created by statute and the broad range of dispositions presently available in relation to each category. However, in order to establish a theoretical framework within which to examine the particular issues raised by the procedures for discharge and review some preliminary observations will be made on the questions of proportionality and indeterminacy in psychiatric dispositions, which lie at the heart of any enquiry concerning special patients. The paper will conclude

with some tentative observations regarding the direction that reform in this area of the law might take.

A. Preliminary Observations

It is the writer's view that indeterminate dispositions in the criminal process are undesirable as a matter of general principle. This principle should also determine the manner in which the law disposes of those who, having committed offences, are found to be in need of psychiatric detention or observation. The expansion of mental disease has long been a basis of avoidance of criminal responsibility. However, there is always a danger that a mentally disordered offender may, in pursuance of a humane regime of treatment, be incarcerated indefinitely in a hospital in such circumstances that the place of sanctuary becomes a place of terror, capable of delivering restrictions more punitive than many prisons.[3] For this reason the maximum time during which a person may legally be held as a special patient should be proportionate to the seriousness of the offence with which he is charged.[4]

Above all psychiatric dispositions in the criminal process should be humane and just. This, it is submitted, must mean that as well as providing essential psychiatric services to mentally disordered offenders who require them, offenders should only be admitted to psychiatric hospitals where there is a clear need for psychiatric treatment that is realizable. Dangerousness, while an inevitable concomitant of some psychiatric admissions, is an insufficient measure of the need for treatment and should be regarded as only one of the factors relevant to decisions regarding committal, review and discharge.

"Admissions to psychiatric hospitals should be based primarily upon the need of the person concerned for psychiatric treatment. Dangerous behaviour is, we believe, primarily the concern of the criminal law. It is not the primary role of psychiatric hospitals to provide custody or preventive detention of dangerous offenders. Psychiatry can neither offer scientific predictions about who is dangerous nor rehabilitate the vast majority of dangerous people."[5]

For these reasons it is argued that special patients should be entitled to have their status regularly reviewed. Whether such review should also be automatic will depend upon the nature of review procedures established by future mental health law reform.

II The Categories of Special Patient

As has already been noted, special patients are a legal, not a psychiatric category. The range of persons who may be designated special patients is defined by s 2 of the Mental Health Act 1969. They include the following:

1 Persons found to be under a disability.[6]

2 Persons found not guilty by reason of insanity.[7]

3 Persons detained in a psychiatric institution for examination for a psychiatric report.[8]

4 Persons who, having been detained pursuant to s 121(2)(b)(ii) are further detained in a psychiatric hospital pending trial.[9]

5 Persons remanded to a psychiatric hospital pursuant to the provisio to s 171 (3) of the Summary Proceedings Act, 1957.

6 Persons subject to a temporary reception order under the Mental Health Act 1969.[10]

7 Persons subject to a reception order made on an application under s 42 of the Mental Health Act 1969.

8 A person detained 'in need of care or treatment' pursuant to s 43 of the Mental Health Act 1969.

I will now comment on each of these categories with particular reference to the dispositions available and the opportunities for review.

A Persons Found 'Under Disability'

A person charged with an offence punishable by death or imprisonment may be found to be 'under disability' if, "because of the extent to which that person is mentally disordered", that person is unable -

(a) To plead; or
(b) To understand the nature or purpose of the proceedings; or
(c) To communicate adequately with counsel for the purpose of conducting a defence."[11] The 'under disability' provisions embrace the common law doctrine of Fitness to Plead, and are designed to ensure that persons are not tried in absentia.[12] If a person is found to be "under disability" their trial does not proceed to a finding of guilty or not guilty. The question then arises as to how they should be disposed of. Prior to the passing of the Criminal Justice Act 1985 the Judge had no choice in these circumstances. The only possible order was that a person be detained as a special patient.[13] However, under the new legislation the Judge has two further options in deciding upon the person's disposition: he may order that he or she be detained in a hospital as a committed patient or that he or she be immediately released.[14]

Before making either of these alternative orders the judge must consider all the circumstances of the case, hear medical evidence and be satisfied 'that it would be safe in the interest of the public'. S 115(4) also provides that, before deciding which of the 3 options to exercise, the judge may remand the person to a hospital for up to 7 days to enable enquiries to be made to assist him in the decision.

The expansion of the range of options under the new Criminal Justice legislation is consistent with the views expressed by a mumber of professional organisations[15] and is consistent with the notion that a range of options should be available which is properly related to the range of offences with which persons under disability may be charged.

In addition, it should be noted that the legislation, for the first time, defines the "maximum period of detention as a special patient" where a defendant is under disability.[16] This far-sighted reform should obviate the possibility of persons, who, would otherwise be subject to indeterminate dispositions, becoming lost within the system[17] and represents an important step towards the systematic review of under disability patients' cases.

(i) Change of Status

As well as the options for disposition stated above, persons detained as special patients by reason of unfitness may also be subject to statutory provisions relating to change of status. There are four such options available:

(1) If the person is adjudged to be no longer under disability, the Attorney-General acting on certificates of two medical practitioners or the Superintendent of the psychiatric hospital may direct that the person be:

(a) returned to Court, or;
(b) be detained as a committed patient.

Similarly, the Minister of Health, acting with the Attorney-General's concurrence, may direct that a person, though still under a disability, be held as a committed patient, where his/her continued detention as a special patient is "no longer necessary".[19]

(2) If the maximum period of detention has expired[20] and the person is still detained as a special patient the Attorney-General shall, acting on certificates of two medical practitioners or the Superintendent of a psychiatric hospital, direct that the person be;

(a) returned to Court, or;
(b) be held as a committed patient, or;

if no certificate is given;

(c) direct that the person be held as a committed patient.

(3) An inquiry can be initiated by a High Court Judge who can conduct an examination to decide:

(a) whether the person should be brought back to trial;
(b) whether the charge or indictment should be dismissed and the person discharged from detention; or
(c) if necessary, order further detention which has the effect of changing the person's status to that of a committed patient subject,to review, release and discharge under the Mental Health Act. The nature and extent of the supervision provided by s 74 has recently been addressed, apparently for the first time in New Zealand, in two unreported decisions of the High Court.[21] The judgments were delivered almost

contemporaneously. In the later judgment Greig J said:

> "The purpose of s 74 is to provide additional protection and an additional safeguard to those who may be detained or kept in a mental hospital. It is an important supervisory function of the Court and is a statutory expression of the inherent jurisdiction of the High Court to maintain a protective and supervisory function over those who are under a disability."[22]

In the earlier decision Ellis J criticised the procedure, already noted, in s 116(4) whereby a person should become a committed patient after two doctors have certified that he is no longer under mental disability, which had been used in its previous legislative form,[23] to ensure the applicants continued detention for a period of eight years. His Honour said;

> "I am of the view that detention over a period of eight years is quite disproportionate to the criminality involved...and while it could be said that his detention was in the public interest...in terms of s 74(3) I am unable to countenance his continued detention."[24]

(4) A person detained as a special patient because of disability can be removed from New Zealand to the care and charge of a friend and relative.[25]

Where the status is changed to that of a committed patient under any of these procedures, the original proceedings are stayed[26] and the ultimate release from the psychiatric hospital is governed by the relevant provisions of the Mental Health Act.

B Persons Found Not Guilty by Reasons of Insanity

The initial disposition options for persons acquitted on account of their insanity are now identical to those for persons found under disability - namely:

1) detention as a special patient or;
2) detention as a Committed patient or;
3) discharge[27]

The same factors to be considered in the making of the appropriate order apply.[28] However, where insanity acquittees are concerned the legislation does not nominate any maximum period for detention as a special patient. In practice, such a person may still be subject to indeterminate detention.

(i) Change of Status

If an order making the person a special patient under s 115(1) is made, there are three options available for changing the person's status:

1. The Minister of Health, if satisfied on the recommendation of 2 medical practitioners that the person's mental condition no longer requires his continued detention as a special patient, either for his own sake or for reasons of public safety, may direct:

(a) that the person be held as a committed patient or;

(b) that the person be discharged by the Hospital Superintendent.[28a]

In R v G H[29] where the accused had been acquitted on account of his insanity after the murder of three members of his family the Court held that neither the fact that the accused poses no danger to the public

interest nor what was in the accused's best interests were conclusive in deciding whether the accused should be ordered to be detained as a committed patient under the former s 39 G(2). "All of the circumstances must be considered quite apart from the individual's present mental state, which leads me to the belief that while no element of retribution or deterrence is involved for that would be quite inappropriate in considering insanity in such an application as this, there still remains some wider element of public interest, quite apart from its safety, and quite apart from what might be in the best interests of the individual involved where that interest and the public's coincide".[30]

2. An inquiry may be initiated by a High Court Judge in terms of s 74 of The Mental Health Act 1969.[31]

3. The person may be removed from New Zealand in terms of s 72 Mental Health Act 1969.

(ii) Discharge

If a person becomes a committed patient pursuant to the provision s 115, s 116, or s 117 of the Criminal Justice Act 1985 his detention is indeterminate and he can only be discharged when the hospital superintendent is of the opinion that he is fit to be discharged.[32] If an inspector, official visitor, relative or friend of the patient (but not the patient himself) is dissatisfied with the superintendent's opinion that the patient is not fit to be discharged any such person may report the matter to the Minister of Health who, if he thinks further inquiry is necessary, shall request a District Court Judge to hold an enquiry.[33] A District Court Judge has the power after any such enquiry to order the patient's discharge.[34] It should be noted that these provisions apply only to persons who have

been designated committed patients and have no aplication to special patients who must seek review under s 74 of the Mental Health Act.

No person detained as a special patient under s 115 can be released from an institution without Ministerial approval and as we have already seen in the case of persons held as special patients under disability, the powers exercised in tandem by the Attorney-General and Minister of Health, fall short of the power to direct the patient's immediate discharge or release. In fact there is no provision for special patients under disability to be released directly into the community without first undergoing a change of status from special to committed status. This is anomalous, given the fact that insanity acquittees may be discharged directly by the Superintendent on the Minister's direction.[35] In light of the fact that a special patient under disability may not have committed a serious offence and in some instances may not even be mentally disordered[36] there seems little justification in principle to distinguish them from persons acquitted by reason of insanity, in the matter of dispositions.

C Persons Detained in a Psychiatric Institution for Examination for a Psychiatric Report.

The main provision dealing with this category is s 121 of the Criminal Justice Act 1985.[37] The section replaces the former Sections 39B and 47A of the Criminal Justice Act 1954. The provisions of s 121 can operate only against a person charged or convicted of an offence punishable by death or imprisonment, who is in custody pending trial, sentence or an appeal.[38] The report may be sought by the prosecutor, defendant or the court itself in order to ascertain whether the person is under disability or legally insane or to help determine the type and length of any sentence or the nature of any requirement appurtenant to such

sentence or order. Central to the scheme of s 121 is a discretionary power which enables the court, where a psychiatrist or medical practitioner has certified that the report cannot practicably be prepared unless the defendant is in custody, to order that the defendant be committed either to a penal institution or to a psychiatric hospital for a period not exceeding 14 days, for the purpose of a psychiatric examination. This period may be extended with the defendant's consent to a total aggregate period of 1 month.[39]

A disquieting feature of this provision is the power given to the superintendent, once an order is made, for detention in a psychiatric hospital to provide such treatment to the person as is immediately necessary "to prevent his or her physical or mental deterioration" or serious suffering. Under s 121 (9) compulsory treatment, at least in the case of a person incapable of giving consent, may be provided without the remandee ever being convicted, certified or committed. This is in contrast to s 120 of the Act which provides for a temporary reception order to be made under s 42 (3) of the Mental Health Act 1969 in respect of a person detained on remand in a penal institution pending a trial. As has been noted, such an application would at least require the normal certification and committal procedures to be complied with.[40]

The Legal Information Service/Mental Health Foundation Task Force Report, has recommended that where a remandee is judged to be incompetent to consent to treatment and forcible treatment is felt to be necessary, an application for a temporary reception order should be applied for. If such an order were granted, the remandee should then be governed by the same consent requirements as all committed and special patients.

Persons detained pursuant to s 121 (2) (b) (ii) as special patients are particularly vulnerable. Unlike other categories of special patients their status cannot be changed without returning to court and because their detention is for a maximum stated term it is not subject to any form of review. Yet there is no limit to the type of treatment which could be provided as long as it is "necessary to prevent the physical or mental deterioration of the defendant." This is an extremely broad criterion and is not limited to preservation of mental health. Any physical or mental deterioration may be sufficient to invoke the compulsory treatment procedures.

D. Persons detained pursuant to s 121 (11)

This provision enables a court, on an application by the prosecutor, defendant or on its own motion, to detain in a psychiatric hospital pending a trial or hearing a person who has been made the subject of a s 121 (2) (b) order. There are no requirements for certification and no medical evidence need be presented.[41] Nor does the action require for such detention to occur, that the person be found to fall within civil committed criteria. It follows that while a person is so detained without change of status they cannot be discharged; nor do they have any right of review. Although an order under s 121 (11) requires the consent of both the Superintendent of the hospital and the defendant, and lapses at the conclusion of the trial,[42] the actual period during which the person is to be detained is not specified in the order and could theoretically exceed the maximum period of 1 month specified for orders under s 121 (2) (b). Again, such remandees may never be convicted of an offence nor be shown to be within the civil committal criteria.

This, it is submitted, is unsatisfactory. If it is deemed necessary to continue detention as a special patient pursuant to s 121 (11) it should be incumbent upon the court as is required when it makes an order under s 121 (2) (b) (ii),[43] to record the reasons why such further detention is necessary and why detention in a penal institution or a remand on bail is inappropriate.

E. Remands Pursuant to the Provisio of s 171 (3) Summary Proceedings Act 1957

This section is apparently never used.[44] It provides for the Court, having committed a person for trial to order that the person be detained in a psychiatric hospital, rather than being remanded to prison or placed on bail. However, the person must be certified by two medical practitioners to be "mentally disordered" and requiring detention in a psychiatric hospital "in his own interest". Detention is, therefore, predicated upon a requirement that the person be civilly committable. However, there is no provision for an alternative disposition if the person ceases to fall within the requirements for civil committal. As in the case of persons detained under s 121 (11) of the Criminal Justice Act 1985, no specific time limit is placed on the detention except that it should continue until the time of trial.

The authors of the Towards Mental Health Law Reform report recommend that persons remanded under this provision should have the same rights of review by a Mental Health Review Tribunal as other committed patients. If discharged, the person should be returned to court.
A person detained under this provision, would have a right to seek an enquiry by a High Court Judge under

s 74 of the Mental Health Act, 1969 by virtue of the fact that he/she is being detained as "mentally disordered".[45]

Persons Subject to a Temporary Reception Order under the Mental Health Act 1969

Sections 42 and 43 of the Mental Health Act deal with the transfer to psychiatric hospitals of convicted persons in custody, who have become mentally disordered. The procedure is by way of a reception order under s 21 in the same way as for civil committal. However, where a person is detained in a penal institution pending a hearing or trial and becomes mentally disordered the superintendent or his delegate may apply under s 120 of the Criminal Justice Act 1985 for a temporary reception order.[46] The application must be heard before a District Court Judge and does not prejudice the bringing of the person before the Court for the purposes of hearing or trial. The temporary character of the order resides in the fact that it lapses automatically at the conclusion of the hearing or trial.[47]

A person subject to an order under s 120 has the same rights of review as any committed patient, including the right to have his case reviewed by the hospital superintendent,[48] the right to request an inquiry by a District Court Judge pursuant to s 73 and the right to apply for an inquiry by a High Court Judge under s 74. However, in the event that a person was discharged pursuant to either of these latter provisions he/she would be remanded back to prison to await trial or sentence.

The authors of the Towards Mental Health Law Reform report have recommended that any person transferred under s 42 or s 43 who wishes to be transferred back to

prison should be entitled to make six monthly applications to an appropriately constituted review tribunal. Transfer back should be ordered whenever the person is not found to fall within the civil committal criteria.[49]

G. Persons Subject to a Reception Order Under s 42 Mental Health Act 1969

This category may be differentiated from the previous class of persons discussed in that it presupposes sentence, conviction or orders of committal or detention.[50]

"Section 42 patients have in the past formed a large part of the population of forensic psychiatric units, and the practice of sending disturbed prisoners to psychiatric hospitals has come under review since the Report of the Committee of Inquiry into Procedures at Oakley Hospital, 1983".[51] Reception orders securing the hospitalisation of such patients can be made by a District Court Judge on the advice of two doctors.[52] However, the reverse procedure is more complicated and a prisoner may be transferred back to prison only at the direction of the Director of Mental Health upon the certification of two medical practitioners that hospitalisation is no longer necessary.[53] This procedure has resulted in administrative delays with transfers back to prison; and a suggested solution has been made that the power should be exercised by the Medical Superintendent, rather than the Director (or formerly, the Minister.)[54]

The sentence of a person detained under s 42 continues to run during the period of hospitalisation. However, when the sentence expires, or the person is granted parole, the person's status is automatically changed to that of a committed patient.[55] Release is then a

matter at the discretion of the hospital superintendent.

While the transfer procedures in themselves now appear to work satisfactorily, it is important to ensure that where prisoners are transferred against their will they be shown to fall within normal civil committal criteria.

H. Persons detained 'in need of care or treatment'

Section 43 of the Mental Health Act enables the Secretary for Justice in consultation with the Director of Mental Health to authorise the transfer from prison to hospital of any person who, with his/her consent, "would benefit from psychiatric care and treatment". The person need not be mentally disordered within the meaning of the Act. The provision applies only to persons "detained in a penal institution", and applies to persons detained pursuant to a sentence or conviction.

Once transferred, the individual may be treated without consent,[56] and has no formal means of applying to be transferred back to prison. Transfer back is a matter at the absolute discretion of the Director of Mental Health, even though the person may not meet civil committal criteria.

This is anomalous. There would appear to be no sound reason why the decision to transfer back to prison should not be make by the hospital and prison superintendents.[57]

(i) Review

At present there is no procedure whereby the status s 43 transferees may be regularly reviewed. Such persons, although special patients, need not become committed patients,[58] and are not subject to statutory review prescribed by s 55 of the Mental Health Act. For the same reason, a s 43 transferee may not be discharged directly from hospital or seek an inquiry pursuant to s 73. However, a transferee would be entitled to seek an inquiry by a High Court Judge under s 74 of the Act.

It has been recommended that a former s 43 patient who becomes an informal patient should be governed by the same review procedures as other newly-admitted informal patients. He should also be entitled to make six monthly applications to a review tribunal where he/she wishes to be transferred back to prison.[59]

III Review of Special Patients - Some General Procedures

In the previous section we considered in relation to the different categories of special patients, the existing procedures for review and discharge arising out of the Mental Health and Criminal Justice legislation. However, in addition to the review mechanisms arising within the disposition process, it should be noted that there are a number of general options which, while open to any offender in the criminal jurisdiction, may be applicable in proceedings involving mentally abnormal offenders.

A Appeal

There is no general right of appeal against the designation of special patient. However, in the course

of a general appeal pursuant to Part IV of the Summary Proceedings Act 1957, matters of substantive law involving psychiatric factors may provide the basis for the appeal itself. Similarly, an appeal against sentence may be based on the ground that the court failed to deal adequately with psychiatric factors in determining the appropriate sentence.

Where a special patient undergoes a change of status to that of a committed patient it may be possible to appeal against a reception order which is invalid, incorrect or deficient.[60]

The Criminal Justice Act 1985 also provides rights of appeal against a finding of disability and acquittal on account of insanity.[61]

Although not in the nature of an appeal right s 74 of the Mental Health Act "provides an overriding supervisory jurisdiction to the High Court to review a patients' condition and status at any given time."[62]

B Habeas Corpus

This remedy has limited scope and, as has already been noted, has been largely eclipsed in Mental Health legislation by the terms of s 74.[63] However, where it is available an application to the High Court for a writ of Habeas Corpus enpowers the Court to consider whether a detainee is held in custody by an order to a competent authority pursuant to existing statutory provisions. The procedure ensures that the applicant is bought before the Court to be examined covering the circumstances of custody and detention.[64]

C Judicial Review

This procedure, which is governed by the provisions of the Judicature Amendment Acts 1972, and 1977 could be

used where an official has failed to perform a duty imposed by statute or has abused statutory power or has otherwise acted unlawfully. For example, where a Superintendent has failed, in terms of the duty imposed by s 55(2) to conduct a review of a committed patient within 4 months of a reception order being made, the High Court could direct him to perform the duty. Although likely to be seldom used, because of the cost and the novelty of Judicial Review procedures in this area, this remedy stands as an important protection against the arbitrary exercise of administrative powers.

D Ombudsman

Psychiatric hospitals fall within the Ombudsman's jurisdiction. Although his jurisdiction is limited to matters of an administrative nature "most decisions taken by hospital staff may be regarded as administrative matters"[65] However, he is precluded from reviewing the discretionary decisions of a professional nature made on clinical grounds including such matters as the continued detention of lawfully committed patients. But while the Ombudsman may make recommendations as to the payment of compensation in appropriate cases, he does not have powers of enforcement and ultimately his powers are persuasive only.

Nevertheless, given the high esteem in which the Ombudsman's office is generally held his recommendations are frequently accepted and acted upon, although it must be conceded in the context of Mental Health legislation that the powers of his office fall far short of providing for the regular review of committed patients.

IV Reform

It is generally conceded that there exists a need for regular and independent review of all involuntarily detained psychiatric patients. While at the present time there is a wide variety of both formal and informal review procedures available to psychiatric patients, these generally do not apply to special patients. However, even where review is available it tends for the most part to operate on an ad hoc basis and apart from the administrative review provided by mental health authorities is generally 'triggered' only at the active instigation of the patient, his/her relatives and advisers. The authors of the Towards Mental Health Law Reform report[66] consider that the present procedures together with review by the courts in exceptional cases, do not provide adequate protection for patients, and recommend that periodic review should be mandatory, automatic and conducted in accordance with basic principles of natural justice.[67]

With regard to special patients the Report recommends the establishment of a National Forensic Committee, a multi-disciplinary tribunal operating under statutory authority, which would provide review, on a six-monthly basis of all special patients. Such a tribunal, being multi-disciplinary, would have special expertise necessary to evaluate forensic issues appurtenant to special patients and would have directory and not merely advisory powers. The National Forensic Committee would provide parallel review procedures in respect of special patients to those provided by the proposed Mental Health Review Tribunal in respect of other patients hospitalized under the Mental Health Act.[68]

The Mental Health Act Review working party has also recommended[69] in reformed Mental Health legislation, the establishment of review tribunals established on a regional basis which would undertake regular six-monthly reviews of all hospital patients. These provisions would apply to special patients[70] who would be able to apply for a review of their continued detention in hospital by tribunals that would be independent of hospital authorities. However, the working party recommends that in the case of Special Patients the review tribunal will only have recommendatory powers, and would not have the authority to discharge, transfer or reclassify.

The only hospital currently providing regular, albeit informal, review of special patients is the Lake Alice Hospital through its Review Panel.[71] Such review is at present limited to patients in the Maximum Security Villa. Patients are seen by the Panel at the first opportunity following admission, and on subsequent occasions as the Panel determines. However, unlike the proposed National Forensic Committee, this hospital review does not provide a right of hearing and there is no requirement that proceedings be conducted according to principles of natural justice. The Panel may make recommendations to the Director of Mental Health, but has no directory functions. One of the purposes of the Panel is to ensure that responsibility for decisions about potentially criminal or dangerous criminals is shared and to provide independent consultation and advice from experienced psychiatric personnel outside of the hospital.

Conclusion

From this discussion it will be evident that in considering special patients we are in an area where

the coercive powers of the state bear heavily upon those who have been affected by mental disorder prior to, or in the course of a criminal trial. Although, numerically, such persons represent only a small proportion of offenders, their mental condition and the vast array of disposition options available to both the courts and psychiatric institutions makes them particularly vulnerable. For this reason a principle of proportionality between seriousness of offending and length of the period of incarceration should guide all dispositions where indeterminate detention is still a real prospect in many cases.

The only adequate protection against the abuses of indeterminacy, which have occurred in the past, is the establishment of a broadly-based system of independent and regular review which will ensure, at least, that all psychiatric patients whether defined as 'special' or 'committed' patients, have the opportunity to challenge to proferred grounds for their continued detention.

FOOTNOTES

1. Report of the Commission of Inquiry into the Circumstances of the Release of Ian David Donaldson from a Psychiatric Hospital and of his Subsequent Arrest and Release on Bail, Government Printer, Wellington, 1983. Appendix 1 96.

2. See Criminal Justice Act, 1985 Part VII. For a wider discussion of the issues affecting mentally abnormal offenders generally see Report of the Committee on Mentally Abnormal Offenders, London, HMSO, 1975, Cmnd 6244 (The Butler Committee); Report on Mental Disorder in the Criminal Process, Canadian Law Reform Commission, Ottowa, 1976; Report of the Working Party on Psychiatrically Disturbed Prisoners and Remandees, 1981, Department of Justice, Wellington; The Donaldson Commission of Inquiry, supra note 1.

3. See Hall, General Principles of Criminal Law (2nd ed), New York, 1960, 453.

4. This is the view expressed by the authors of the Report of the Legal Information Service/Mental Health Foundation Task Force on Revision of Mental Health legislation, Towards Mental Health Law Reform, 1983, 143. It is a principle now reflected in the legislation at least as regards persons "under disability". See Criminal Justice Act, 1985, s 116.

5. Towards Mental Health Law Reform op cit. n 4, 141.

6. S 115(1)(a) Criminal Justice Act, 1985

7. S 115(1)(b)

8. S 121(2)(b)(ii)

9. S 121(II)

10. S 120

11. Criminal Justice Act 1985, s 108(1)

12. For a full discussion of the history and development of the 'under disability' provisions in this jurisdiction see Brookbanks, A Contemporary Analysis of the Doctrine of Fitness to Plead [1982] NZ Recent Law 84.

13. The duration of the order was a matter for the discretion of the Minister of Justice, who could also direct that the person be held as a committed patient. (See Criminal Justice Act 1954 s 39H).

14. Criminal Justice Act 1985 s 115(2)(a) and (b). Such orders will automatically result in a stay of proceedings in respect of any offence charged in those proceedings. (s 115(5)).

15. See the submissions on the Criminal Justice Bill 1983 by the Department of Health and the Royal Australian and New Zealand College of Psychiatrists and the Report of the Legal Information Service/Mental Health Foundation Task Force, op cit, note 4, 155.

16. Criminal Justice Act 1985, s 116.

17. In Victoria one person found unfit to plead spent 15 years in detention while one in South Australia spent 20 years. S J O'Sullivan, Mental Health and the Law, Sydney, 1981, 128 n 19.

18. Criminal Justice Act 1985, s 116(4)

19. S 116(5)

20. As defined in s 116(1)

21. In Re M(a) (a Mental Patient), High Court, Auckland, 17/4/86, (M 1419/85) Ellis J; In Re M(b) (a Mental Patient), High Court, Wellington, 21/4/86, (M 710/85) Greig J. See also note, Trial By Diagnosis, Mental Health News, July 1986.

22. Ibid, 15

23 See Criminal Justice Act 1954, s 39 H(2)

24. In Re M(a) (A Mental Patient) op cit, note 21, 13.

25. Mental Health Act, 1909, s 72(1) and (3).

26. Criminal Justice Act, 1985, s 116(7)

27. S 115(1) and (2)

28. Supra p 5

28a. S 117(2)

29. [1977] 1 NZLR 50

30. Ibid, 52 (per Roper J)

31. See discussion at p 6, supra.

32. Mental Health Act. 1969, s 73

33. S 73(2) and (5)

34 S 73(9)

35. Criminal Justice Act 1985 s 117(2)

36. For example, in the case of a deaf-mute for whom there is no other suitable disposition.

37. See also s 42A(3) Children and Young Persons Act 1974, which confers similar powers in relation to children or young persons in need of psychiatric assessments. Such persons, however, are not formally designated special patients.

38. S 121(1)

39. S 121(5)

40 Towards Mental Health Law Reform, supra, n 4, 149.

41. On the making of the order an existing order under s 121(2)(b) automatically lapses which means that there is no continuing requirement to show that a psychiatric report cannot practically be prepared unless the defendant is in custody. In other words his detention may be continued for reasons unspecified and unrelated to the need to obtain a psychiatric assessment.

42. S 121(12)(13)

43. See s 121(4).

44. See Towards Mental Health Law Reform, Report, supra, n 4, 151.

45. See Mental Health Act, 1969, s 74(1).

46. S 120 substantially re-enacts s 42(4) Mental Health Act 1969. The Towards Mental Health Law Reform report

recommended its transfer to the Criminal Justice Act 1954 "where it more properly belongs". op cit, n 4, 150. See also the Report of the Working Party on Psychiatrically Disturbed Prisoners and Remandees, para 29, 30.

47. S 120(b)

48. S 55 Mental Health Act 1969.

49. Op cit, n 4, 154

50. S 42(1)(a) Mental Health Act 1969.

51. Doyle, Criminal Procedure in New Zealand, (2nd ed, W C Hodge). Sydney, 1984. Chapter on Mentally Disordered Offenders by Greg Newbold, 114

52. S 20-27 Mental Health Act 1969.

53. S 44(1) Mental Health Act 1969 as amended by s 2 of the Mental Health Amendment Act 1979.

54. See Working Party Report, Supra, n 2, 41.

55. S 44(5)(a)

56. See Towards Mental Health Law Reform, Supra, n 4, 154.

57. The Working Party on Psychiatrically Disturbed Prisoners and Remandees has recommended that in the case of a disagreement between the Superintendent's the decision could be made by the Director of Mental Health. Supra, n 2, 42.

58. Although he/she will automatically become an informal patient under s 15 of the Mental Health Act when the sentence expires.

59. See Towards Mental Health Law Reform report supra, n 4, 154.

60. See s 34 Mental Health Act, 1969. The section also enables the Director of Mental Health or the Attorney-General to call for a fresh inquiry.

61. Criminal Justice Act 1985, ss 112, 114.

62. In Re M(b) (a Mental Patient) supra, n 21, 11.

63. See Commentary at p.6 supra.

64. For a fuller discussion of the scope of this remedy see Towards Mental Health Law Reform report, supra, n 4, 314. There are no reported cases where the remedy has been used in New Zealand.

65. Ibid, 313

66. Ibid, 315

67. Ibid

68. Ibid, 147

69. Review of the Mental Health Act 1969 discussion papers, 1984, 53.

70. Ibid, 64

71. The panel comprises psychiatric staff from other hospitals, a District Court Judge and the Director of Mental Health and may consider matters relating to the patients treatment as well as matters relating to transfer or discharge.