R v KMD [No 2] [2017] NTSC 18

PARTIES:	THE QUEEN
	v
	KMD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21319440
DELIVERED:	8 March 2017
HEARING DATES:	21 and 22 February 2017
JUDGMENT OF:	HILEY J

CATCHWORDS:

CRIMINAL LAW – Jurisdiction – mental impairment – Part IIA of the *Criminal Code* - supervision orders – no power to order medical treatment against the will of supervised person – interaction with the *Mental Health and Related Services Act* – sanctions for breach of condition of supervised person

R v Ebatarintja [2010] NTSC 6; 26 NTLR 168; *Channon v The Queen* (1978) 33 FLR 433, applied

Coco v The Queen (1994) 179 CLR 427; *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51; *Momcilovic v The Queen* [2011] HCA 34; 245 CLR 1; *Potter v Minahan* (1908) 7 CLR 277; *Re C (adult: refusal of medical treatment)* [1994] 1 All ER 819; *Re Bolton; ex parte Beane* (1987) 162 CLR 514; *X7 v Australian Crime Commission* [2013] HCA 29; 248 CLR 92, referred to

Correctional Services Act 2014 (NT) s 6, s 8, s 93

Criminal Code (NT) s 43I, s 43X, s 43Z, s 43ZA, s 43ZF, s 43ZH, s 43ZJ, s 43ZK, s 43ZM, s 43ZN

Mental Health and Related Services Act 1998 (NT) s 14, s 39, s 123

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 7

REPRESENTATION:

Counsel:

Crown	P Usher
Defendant:	D Grace QC with G McMaster
Chief Executive of Officer Department of Health:	G Macdonald
Attorney-General of the Northern Territory (intervening):	G Macdonald

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Defendant:	Ward Keller
Chief Executive of Officer Department of Health:	Solicitor for the Northern Territory
Attorney-General of the Northern Territory (intervening):	Solicitor for the Northern Territory

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

R v KMD [No 2] [2017] NTSC 18
No. 21319440

BETWEEN:

THE QUEEN

AND:

KMD

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 8 March 2017)

Introduction

[1] On 12 May 2016 the Court began to conduct a review under s 43ZH of the Criminal Code (NT) to determine whether the defendant (**KMD**) may be released from the Custodial Supervision Order made by the Court on 3 June 2015[1] and varied on 14 December 2015[2] (the **CSO**). That review was adjourned to enable further reports to be obtained

[1] Full details of the eight offences for which KMD had been found not guilty by reason of mental impairment, of her psychiatric condition and of the reasons for imposing the CSO are contained in the Reasons for Judgment of Riley CJ in *R v KMD* [2015] NTSC 31 (**the 2015 Reasons**).
[2] On 14 December 2015 the Court amended the CSO to allow a "step down" to cottages adjacent to, but within the Holtze Correctional Facility, on weekdays and to allow participation in cognitive behaviour treatment.

from relevant medical experts, and for the experts to be questioned by counsel.

[2] KMD is seeking an order under s 43ZH(2)(a) that she be released on a non-custodial supervision order (**NCSO**). Alternatively she is seeking an order under s 43ZH(2)(b)(ii), varying the conditions of the CSO to allow her to reside outside the Holtze Correctional Facility.[3] The Chief Executive Officers of the Department of Health and the Department of the Attorney-General and Justice (the **CEOs**) and the Director of Public Prosecutions (**DPP**) contend that the Court should confirm the CSO, in accordance with s 43ZH(2)(b)(i). That issue will be dealt with in separate reasons, after further medical information is provided and further submissions received.

[3] The CEOs also contend that the Court has jurisdiction under Part IIA of the Criminal Code "to mandate pharmacological treatment to KMD", and to consider amending the CSO "to include a condition that Ms KMD shall be treated, if necessary without her cooperation (so involuntarily in the full sense) with medication to be prescribed by a treating psychiatrist employed by the CEO Department of Health."[4]

[4] These reasons deal with those contentions.

[3] Defendant, Outline of Submissions on behalf of the Defendant, 17 February 2017 [1] – [13].
[4] CEOs, Outline of submissions on behalf of the CEOs, 29 November 2016 [5].

Main contentions

[5] Although counsel for the CEOs referred to powers of a superior court, such as those inherent in its *parens patriae* jurisdiction and in making orders for medical procedures in relation to persons unable to give informed consent,[5] the relevant source of power in a matter such as this must be found in Part IIA of the Criminal Code.[6] Part IIA is the provision which confers jurisdiction on this Court in relation to supervision orders, and which establishes a detailed regime for the exercise of that jurisdiction. Counsel for the CEOs relied on s 43ZA, and in particular s 43ZA(2A), in the context of Part IIA as a whole.

[6] Counsel for KMD advanced a number of reasons why this Court does not have the power to impose conditions in KMD's supervision order to compel medical treatment against the will of KMD. Some of the submissions also related to whether or not such a power, if it exists, should be exercised.

[7] The primary contention on behalf of KMD is that no such power is conferred by, or under Part IIA. Three main reasons were advanced by counsel in support of that contention.

[8] First, s 43ZA(2A) does not apply to KMD because that provision only applies where the supervised person is in custody in an "appropriate place", namely a place other than a custodial correctional facility, or

[5] See, for example, *Re C (adult: refusal of medical treatment)* [1994] 1 All ER 819.
[6] See *R v Ebatarintja* [2010] NTSC 6; 26 NTLR 168 at [52] – [53].

under a non-custodial supervision order.[7] Further, there is no justification in this case for imposing a condition of the kind referred to in s 43ZA(2A).[8]

[9] Secondly, a person's right to withhold consent to medical or scientific treatment can only be abrogated by a statute which uses language that manifests a clear intention to do so. An example of such a statutory provision is the *Mental Health and Related Services Act 1998* NT (the **MHRS Act**). Counsel referred to Article 7 of the *International Covenant on Civil and Political Rights*,[9] which provides that no one shall be subjected without his or her free consent to medical or scientific experimentation,[10] and also to the principle of statutory construction known as the principle of legality. Counsel also referred to a number of decisions including Northern Territory decisions of *Ebatarintja*[11] and *Channon*,[12] the first of which directly relates to Part IIA.

[10] The principle of legality was described by Kiefel J in *X7 v Australian Crime Commission*[13] at [158]:

> The requirement of the principle of legality is that a statutory intention to abrogate or restrict a fundamental freedom or principle or to depart from the general system of law must be

[7] Transcript of Proceedings, 21 February 2017 at pp 79-80, 85.
[8] Defendant, Outline of submissions on behalf of the Defendant, 17 February 2017 [16].
[9] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[10] Defendant, Outline of submissions on behalf of the Defendant, 17 February 2017 [17].
[11] *R v Ebatarintja* [2010] NTSC 6; 26 NTLR 168.
[12] *Channon v The Queen* (1978) 33 FLR 433 (**Channon**).
[13] *X7 v Australian Crime Commission* [2013] HCA 29; 248 CLR 92.

> expressed with irresistible clearness.[14] That is not a low standard. It will usually require that it be manifest from the statute in question that the legislature has directed its attention to the question whether to so abrogate or restrict and has determined to do so.[15]
>
> (underlining mine)

[11] The principle was also discussed by French CJ in *Momcilovic v The Queen*[16] at [43] – [45]. At [43] His Honour said:

> The principle of legality has been applied on many occasions by this Court. It is expressed as a presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language for which Parliament may be accountable to the electorate. It requires that statutes be construed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law. … It protects, within constitutional limits, commonly accepted "rights" and "freedoms". … It has also been suggested that it may be linked to a presumption of consistency between statute law and international law and obligations.
>
> (underlining mine)

[12] Thirdly, the MHRS Act provides extensive powers and protections in relation to the involuntary treatment of persons with a mental illness who are likely to cause serious harm to themselves or someone else. It effectively constitutes a code, leaving no scope for the implication of such powers elsewhere, such as Part IIA, in the absence of clear words.

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[14] *Potter v Minahan* (1908) 7 CLR 277 at 304.
[15] *Coco v The Queen* (1994) 179 CLR 427 at 437.
[16] *Momcilovic v The Queen* [2011] HCA 34; 245 CLR 1.

[13] Counsel for KMD also raised two "constitutional issues" that they said would arise if this Court determines that a power exists under Part IIA for the Court to order that involuntary treatment occur. Counsel submitted that "the exercise of such a power would be inconsistent with the exercise of judicial power of the Commonwealth pursuant to Chapter III of the Australian Constitution."[17] There are two aspects to the constitutional issue, the first relating to the application of the *Kable* principle, the second relating to the constitutional constraint on the imposition of punishment except pursuant to sentencing upon conviction.[18]

Brief background

[14] In order to provide some context, there is medical opinion to the effect that KMD's medical condition, namely her delusional disorder and or schizophrenia, might be alleviated, if she was treated with antipsychotic medication.[19]

[15] At [49] of the 2015 Reasons, Riley CJ said:

> Dr Kini and Dr Walton were both of the view that KMD is properly described as being unable to provide meaningful consent to treatment or to refuse treatment. Both also stated

[17] Defendant, Outline of submissions on behalf of the Defendant, 17 February 2017 [23].
[18] Ibid [24].
[19] See; Kane J et al 'Guidelines for Depot Antipsychotic Treatment in Schizophrenia' (1008), 8 *European Neuropsychopharmacology* 55, 55-77; Leucht S et al, 'Relapse Prevention in Schitzophrenia with New Generation Antipsychotics: A Systemic Review and Exploratory Meta-Analysis of Randomised Controlled Trials' (2003) 160 *American Journal of Psychiatry* 1209-1222; S Catts and B O'Toole, 'The treatment of schizophrenia: Can we raise the standard of care?' 50(12) *Australian and New Zealand Journal of Psychiatry,*1128-1138; cited in Report of Dr Robert Parker, 6 January 2017.

> that if KMD agreed to take oral medication, and her compliance with the treatment could be assured, that would be an appropriate way to proceed. Both thought her agreement to such treatment would not be forthcoming. Opposition to treatment was most recently confirmed in the course of the hearing in March 2015.

[16] KMD continues to refuse to undergo such medical treatment. This is partly because of some unfortunate experiences that followed the administration of a single dose of antipsychotic medication in September 2014, when she was admitted to the Joan Ridley Unit at Royal Darwin Hospital under the MHRS Act.

Mental Health Review Tribunal application

[17] At the hearing on 12 May 2016, counsel for the CEOs indicated that an application would be made under the MHRS Act in the near future. Counsel noted then that it was the CEOs' position that if there is to be medical treatment given to a supervised person, to any extent practicable, the MHRS Act should apply because it contains protections and the like for all concerned.[20]

[18] KMD was involuntarily admitted under s 39 of the MHRS Act on 20 June 2016, and again on 4 July 2016. This was apparently because the review of the initial involuntary admission by the Mental Health Review Tribunal (**MHRT**) had not been completed within 14 days of the original admission – cf s 123(1). Following the review, the MHRT (per President Bruxner and community member Ms S Kapetas,

[20] Transcript of Proceedings, 12 May 2016 at 37.

psychiatrist member Dr Donsworth disagreeing) revoked the admission of KMD as an involuntary patient and ordered that she be discharged once arrangements had been made for her care upon discharge. The dissenting member, Dr Donsworth, favoured the making of an order under s 123(5)(a) of the MHRT Act for KMD to be treated according to a treatment plan advocated by Dr Anthony Miach, a consultant psychiatrist employed by Top End Mental Health Services (**TEMHS**).

[19] The MHRT was required to be satisfied of the criteria set out in s 14 of the MHRS Act which provides:

> **Involuntary admission on grounds of mental illness**
>
> The criteria for the involuntary admission of a person on the grounds of mental illness are that:
>
> (a) the person has a mental illness; and
>
> (b) as a result of the mental illness:
>
> (i) the person requires treatment that is available at an approved treatment facility; and
>
> (ii) without the treatment, the person is likely to:
>
> (A) cause serious harm to himself or herself or to someone else; or
>
> (B) suffer serious mental or physical deterioration; and

(iii) the person is not capable of giving informed consent to the treatment or has unreasonably refused to consent to the treatment; and

(c) there is no less restrictive means of ensuring that the person receives the treatment.

[20] The majority were satisfied that all of the criteria apart from those in s 14(b)(ii) were met. In relation to s 14(b)(i) the President (Ms Kapetas agreeing) said, inter alia:

> 50 I am also satisfied, having regard to the weight of the medical evidence, that there is a reasonable prospect KMD will benefit from antipsychotic medication.
>
> 51 I note that that would be my view irrespective of whether the correct diagnosis for KMD is a delusional disorder or schizophrenia; however, I note the opinion of Dr Parker referred to at [45] above the efficacy of antipsychotic medication may be diminished in KMD's case by the significant emotional attribution underlying her current mental state.
>
> 52 I should pause here to emphasise that I have no doubt whatsoever that it would be in KMD's best interests to undergo treatment such as proposed for her by TEMHS. There is a realistic likelihood that her mental state would improve as a result of such treatment and that such an improvement would greatly enhance her future prospects for re-entry into the broader community. The unfortunate corollary for KMD is that without treatment (and assuming her mental illness therefore persists) those prospects are bleak.
>
> 53 The question for the MHRT, in performing its review function under section 123 of the MHRS Act, is not, however, answered by reference to an assessment of the patient's best interests. It is answered by application of the criteria in section 14.

[21] In relation to s 14(b)(ii) the President (Ms Kapetas agreeing) considered that "the degree of likelihood of a consequence identified in either of s 14(b)(ii)(A) and (B) must be substantial."[21] They considered that "the present likelihood that KMD might harm others must be assessed having regard to current circumstances: namely, a highly constrained and closely supervised custodial environment."[22] In relation to s 14(b)(ii)(b), the majority pointed out that "the fact that KMD remains under custodial supervision means that future behaviour or incidents that may be indicative of a deterioration in her mental state are likely to be observed and documented."[23]

[22] Dr Donsworth, dissenting, said that:

> Without treatment with antipsychotic medication, the risk to others remains. Her current situation of being held in Custody cannot be used as a reason to dismiss this very significant risk.[24]

[23] It is clear that the majority felt constrained to apply the s 14 criteria in the context of KMD's current circumstances, namely her custody at the Darwin Correctional Centre. That context is narrower than that which is relevant to considerations involved in Part IIA, in particular in relation to the kinds of supervision that are appropriate, and the kinds of conditions that should be involved in that process. These

[21] Mental Health Review Tribunal, KMD Reasons for Decision (29 July, 2016) (**MHRT Reasons)** at [59] (Richard Bruxner).
[22] MHRT Reasons at [75] (Richard Bruxner).
[23] MHRT Reasons at [102] (Richard Bruxner).
[24] MHRT Reasons at [26] (June Donsworth).

considerations are all aimed at rehabilitating the supervised person and minimising the risk of harm to that person and other persons.

Part IIA

[24] Most supervision orders are made after an accused person has been found not guilty of an offence because of mental impairment. [25] Supervision orders may be custodial or non-custodial and are subject to such conditions as the Court considers appropriate.[26]

[25] Section 43ZA provides as follows:

> **Nature of supervision orders**
>
> (1) A supervision order may, subject to the conditions the court considers appropriate and specifies in the order:
>
> (a) if it is a custodial supervision order – commit the accused person to custody:
>
> (i) subject to subsection (2) – in a custodial correctional facility; or
>
> (ii) subject to subsection (3) – in another place (an appropriate place) the court considers appropriate; or
>
> (b) if it is a non-custodial supervision order – release the accused person.
>
> (2) The court must not make a custodial supervision order committing the accused person to custody in a custodial correctional facility unless it is satisfied that there is no

[25] Criminal Code (NT) ss 43I(2),43X(2), 43Z.
[26] Criminal Code (NT) s 43ZA(1).

practicable alternative given the circumstances of the person.

(2A) Without limiting subsection (1), the court may decide a supervision order is subject to the condition that a person (an authorised person) authorised by the CEO (Health) may use any reasonable force and assistance:

(a) to enforce the order; and

(b) without limiting paragraph (a) – to take the accused person into custody, or to restrain the accused person, in order to prevent the accused person harming himself or herself or someone else.

(2B) The CEO (Health):

(a) must, by *Gazette* notice, make supervision directions about:

(i) the qualifications of an authorised person; and

(ii) the reporting by an authorised person of any use of force or assistance for subsection (2A); and

(b) may, in the supervision directions, provide for any other matters about the use of such force and assistance as decided by the CEO (Health).

(2C) An authorised person may use reasonable force or assistance as provided in subsection (2A) only in accordance with the supervision directions.

(3) Unless the court receives a certificate from the CEO (Health) mentioned in subsection (4), the court must not make a supervision order:

(a) committing the accused person to custody in an appropriate place; or

(b) providing for the accused person to receive treatment or other services in, at or from an appropriate place.

(4) The certificate of the CEO (Health) must state:

(a) facilities or services are available in the appropriate place for the custody, care or treatment of the accused person; and

(b) if the appropriate place is a secure care facility - the accused person fulfils the criteria for involuntary treatment and care under the *Disability Services Act*.

[26] It is common ground that "an appropriate place" does not include a custodial correctional facility.

[27] In determining whether to make, vary or revoke a supervision order the Court "must apply the principle that restrictions on a supervised person's freedom and personal autonomy are to be kept to the minimum that is consistent with maintaining and protecting the safety of the community."[27]

[28] Section 43ZN stipulates a number of matters which are to be taken into account when making, varying or revoking a supervision order:

[27] Criminal Code (NT) s 43ZM.

Matters court must take into account when making order

(1) In determining whether to make an order under this Part, the court must have regard to the following matters:

(a) whether the accused person or supervised person concerned is likely to, or would if released be likely to, endanger himself or herself or another person because of his or her mental impairment, condition or disability;

(b) the need to protect people from danger;

(c) the nature of the mental impairment, condition or disability;

(d) the relationship between the mental impairment, condition or disability and the offending conduct;

(e) whether there are adequate resources available for the treatment and support of the supervised person in the community;

(f) whether the accused person or supervised person is complying or is likely to comply with the conditions of the supervision order;

(g) any other matters the court considers relevant.

(2) The court must not make an order under this Part releasing a supervised person from custody (whether conditionally or otherwise) or significantly reducing the supervision to which a supervised person is subject unless:

(a) the court has:

(i) obtained and considered 2 reports, each report being prepared by a person who is a

psychiatrist or other expert (but the same person must not prepare both reports); and

(ii) considered the reports submitted to the court under sections 43ZJ and 43ZK and received by the court under section 43ZL, if any; and

(b) subject to subsections (3) and (4), the court is satisfied that each of the following persons was given reasonable notice of the proceedings concerned:

(i) the victim of the offence concerned;

(ii) if the victim concerned is deceased – the victim's next of kin;

(iia) the next of kin of the supervised person concerned;

(iii) if the supervised person concerned is a member of an Aboriginal community – the Aboriginal community.

(3) Notice is not required to be given to a person referred to in subsection (2)(b) if the person cannot be found after reasonable inquiry.

(4) Notice is not to be given to a person referred to in subsection (2)(b)(i) or (ii) who has given notice to the court that he or she does not wish to be notified of any hearings in relation to the supervised person concerned and has not withdrawn that notice.

[29] Before making a supervision order under s 43ZA the Court will be provided with a report on the mental impairment, condition or disability of the accused person under s 43ZJ. Such a report is to contain the information identified in s 43ZJ(2), namely:

(a) a diagnosis and prognosis of the accused person's mental impairment, condition or disability;

(b) details of the accused person's response to any treatment, therapy or counselling he or she is receiving or has received and any services that are being or have been provided to him or her; and

(c) a suggested treatment plan for managing the accused person's mental impairment, condition or disability.

[30] Section 43ZH contemplates the Court conducting reviews from time to time for the purposes of determining whether the supervised person may be released from the supervision order.

[31] Section 43ZK requires a further report at least every 12 months to assist the Court when considering whether or not to conduct a review of the supervision order, under s 43ZH. Such a report is also to contain considerable detail concerning the supervised person, including "details of any changes to the prognosis … and to the plan for managing the mental impairment, condition or disability."[28]

[32] Section 43ZH provides as follows:

Periodic review of supervision orders

(1) After considering a report submitted by an appropriate person under section 43ZK, if the court considers it is appropriate, the court may conduct a review to determine whether the supervised person the subject of the report may be released from the supervision order.

[28] Criminal Code (NT) s 43ZK(2)(b).

(2) On completing the review of a custodial supervision order, the court must:

(a) vary the supervision order to a non-custodial supervision order unless satisfied on the evidence available that the safety of the supervised person or the public will be seriously at risk if the person is released on a non-custodial supervision order; or

(b) if the court is satisfied on the evidence available that the safety of the supervised person or the public will be seriously at risk if the person is released on a non-custodial supervision order:

(i) confirm the order; or

(ii) vary the conditions of the order, including the place of custody where the supervised person is detained.

(3) On completing the review of a non-custodial supervision order, the court may:

(a) confirm the order;

(b) vary the conditions of the order;

(c) vary the supervision order to a custodial supervision order and impose the conditions on the order the court considers appropriate; or

(d) revoke the order and release the supervised person unconditionally.

[33] It is clear from Part IIA and s 43ZH in particular that the major aim of the Part IIA regime is to assist the supervised person to successfully integrate into the community without there being some serious risk to

the safety of the supervised person or any other member of the community. This is to be achieved by deciding on the appropriate form of supervision order, the appropriate place, and appropriate conditions.

Conditions and consequences of non-compliance

[34] Although Part IIA clearly contemplates the imposition of conditions, there is no attempt to circumscribe the nature and content of these conditions, apart from the need to have regard to the principles and matters set out in ss 43ZM and 43ZN. However, the Court would rely heavily upon the reports provided, initially under s 43ZJ and subsequently under s 43ZK.

[35] For the purposes of attempting to achieve the important objective of integrating the supervised person safely into the community, the Court would have regard to the supervised person's response to treatment, therapy, counselling and services that have been and can be provided to her. The Court would also have regard to the treatment plans provided with the reports, initially under s 43ZJ and subsequently under s 43ZK. One would therefore expect that an important condition would be that the supervised person submits to and fully participates in the requirements of the treatment plan.

[36] Whilst one would normally expect the Court to defer to the views and recommendations of the experts who prepared the treatment plan, the Court would not be bound by the whole of the treatment plan if it

thought there was good reason to depart from it. The supervised person has a right to appear before the Court to argue against the imposition of a particular condition, including the whole or part of a treatment plan.[29]

[37] It is common for treatment plans to involve the supervised person submitting to a detailed regime of a personal and therapeutic kind. This might include routines regarding hygiene, exercise, counselling and taking medication for the purpose of treating or ameliorating current conditions, physical and mental. It is not uncommon for a treatment plan to include the administration of antipsychotic medication. The supervised person would be expected to comply with the requirements in a treatment plan, even if she was not willing to do so.

[38] A consequence of the supervised person's non-compliance with a condition, such as a part of the treatment plan that might have assisted the person's mental condition and removed or relevantly reduced her risk to the safety of herself or others, may be her remaining in the same custodial situation or having more restrictive conditions placed upon her.[30]

[39] The real issue in the present matter concerns the enforcement of such a condition, in circumstances where the supervised person is not willing

[29] Criminal Code (NT) s 43ZI.
[30] See for example, Criminal Code (NT) s 43ZN(1)(f).

to comply with the particular condition. Does the Court have the power to order compliance, relevantly to authorise the particular treatment and to force the supervised person to undergo it?

Power to make enforceable orders

[40] The power to make enforceable orders in relation to supervised persons was considered by this Court in *R v Ebatarintja*. In short the Court decided two points:

(a) If the Court committed a supervised person to custody in premises other than a prison, namely in an "appropriate place" of the kind referred to in s 43ZA(1)(a)(ii), the Court did not possess the power to authorise persons other than Correctional Services officers or police officers to enforce the custody.[31]

(b) The Court did have the power to make a non-custodial supervision order under s 43ZA(1)(b), which directs that the supervised person reside in premises other than a prison and not leave without permission, notwithstanding that those supervising the supervised person do not possess any authority or power to enforce that restraint on the person's liberty.[32] However a serious question would remain as to whether it would be appropriate for a court to make such an order if it cannot be enforced, particularly having

[31] *Ebatarintja* [3].
[32] *Ebatarintja* at [4] and [42] – [51].

regard to the risk of the supervised person harming himself or someone else if he did not comply with the order.[33]

[41] On various occasions Mr Ebatarintja was the subject of a non-custodial supervision order which enabled him to reside in supervised accommodation outside the prison. Mr Ebatarintja failed to comply with the supervision order several times, for example, by absconding from his supervised accommodation and, contrary to the terms of the supervision order, consuming alcohol. This resulted in his non-custodial supervision order being varied to a custodial supervision order. The Department of Health and Families undertook to arrange suitable and secure residential accommodation outside the prison. The Department proposed that Mr Ebatarintja be committed to custody in such premises and that enforcement of both custody and a behaviour management plan be carried out by private security personnel retained by the Department for that purpose. The behaviour management plan envisaged forcible placement of Mr Ebatarintja in an isolation room if his conduct should deteriorate to the point where he was a danger to himself or others.

[42] Martin (BR) CJ referred to the submission by the DPP that authorising a person "to forcibly imprison a person is such a significant extraordinarily legal measure that in the absence of a specific head of

[33] *Ebatarintja* at [16].

power, such a power should not be inferred."[34] His Honour referred to the judgment of Brennan J, with whom Deane and Toohey JJ agreed, in *Channon*,, where a sentencing judge had ordered that while in prison the prisoner receive psychiatric treatment. Brennan J said, at 440:

> In such a case, the direction as to psychiatric treatment will be a frequent, if not necessary, part of a sentence. If there were statutory provisions governing the making of hospital orders or the giving of directions as to psychiatric treatment, no doubt the statute would specify both the occasion for, and the conditions of, exercising the particular statutory power. But where there is no statutory power which might authorise the application of force to a prisoner without his consent during his incarceration, I know of no jurisdiction impliedly vested in a court to direct the application of force in order to effect some psychiatric treatment. The compulsory administration of drugs or the compulsory application of electroconvulsive therapy are not treatments which may be ordered by a court in the absence of special statutory powers. Much less may a court devoid of those powers purport to authorise the application of force at the discretion of prison authorities. The literature of criminology abounds with warnings from psychiatrists and others as to dangers of compelling prisoners to submit to therapies designed to reform their patterns of behaviour. Prisoners are not subject to the application of more force than the force necessary to effect their incarceration and the force (if any) otherwise authorised by the prison statute or regulations. The direction which a court sentencing an offender with the object of psychiatric rehabilitation should ordinarily give is that treatment be made available to the prisoner, not that it be administered to him.
>
> (underlining mine)

[43] Martin (BR) CJ then noted the existing schemes under the then *Prisons (Correctional Services) Act*[35] and the MHRS Act for the

[34] *Ebatarintja* at [34].
[35] *Prisons (Correctional Services) Act 1980* (NT).

detention of persons in custody. These include checks and balances to ensure that the person's rights are protected.

[44] I note that s 93 of the *Correctional Services Act*[36] provides and circumscribes certain powers for the General Manager of a custodial correctional facility to arrange for the forced administration of medication to a "prisoner" in certain circumstances. This would include a supervised person who is the subject of a custodial supervision order under s 43ZA(1)(a)(i).[37]

[45] At [38] His Honour said:

> … Even within a custodial regime, it is a serious step to infer a power of restraint of liberty in persons not specifically identified by the legislature as authorised to exercise such a power. The legislature is expected to speak plainly when identifying persons who may restrain liberty and to specify the conditions under which the power to restrain may be exercised. The statutory scheme under consideration does not plainly evince an intention that the court possesses the power to authorise restraint at the hands of the chief executive officer of the Department or persons employed for that purpose at a residential premises separate from both a prison and an approved treatment facility within the meaning of the *Mental Health and Related Services Act*.

[46] His Honour added that it would be remarkable to infer such a power in circumstances where there was no guidance as to how it should be exercised. I agree. His Honour also drew attention to the express powers authorising the restraint of the liberty of a supervised person in s 43ZF and of a person with a mental illness under the MHRS Act.

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[36] *Correctional Services Act 2014* (NT).
[37] *Correctional Services Act 2014* (NT) ss 6(1) and 8(1)(c).

[47] His Honour's reasoning and decision is consistent with well-established principles concerning purported limitations upon personal rights and liberties. See for example, the passage quoted at [31] by Martin (BR) CJ from *Re Bolton; ex parte Beane*[38] at 523:

> The law of this country is very jealous of any infringement of personal liberty… and a statute or statutory instrument which purports to impair a right to personal liberty is interpreted, if possible, so as to respect that right.

[48] See too, the principle of legality, referred to in [10] - [11] above.

Conclusions so far

[49] Putting aside for the moment the force and effect of s 43ZA(2A), which was enacted to overcome the issues identified in *Ebatarintja*, I do not consider that Part IIA would authorise this Court to make orders which have the effect of compelling a supervised person to be administered medical treatment against her will. Not only would such an order be devoid of any express legislative power, there is no mechanism for its administration or enforcement, for example as exists under the MHRS Act and under s 93 of the *Correctional Services Act*.

[50] The MHRS Act establishes a detailed regime designed to provide for the care, treatment and protection of people with mental illness, while at the same time protecting their civil rights. Amongst other things it provides for approved procedures to be used in the administration of

[38] *Re Bolton; ex parte Beane* (1987) 162 CLR 514.

the Act, approved treatment facilities and approved treatment agencies.[39]

[51] I appreciate that the power considered in *Ebatarintja,* the restraint on the supervised person's liberty, is different to that being considered here. However, as the Full Court said in *Channon*, the compulsory administration of medical treatment is a serious step that would need to be clearly authorised by statute.[40] Although *Channon* involved sentencing powers under the *Sentencing Act 1995* (NT), the passage quoted by Martin (BR) CJ in *Ebatarintja* has just as much, if not more, relevance in the present case than it did in *Ebatarintja*. Indeed the 'trespass to person' involved in the non-consensual administration of invasive medical treatment is likely to be a far more serious invasion upon the person's rights than a restriction of a person's liberty.

[52] Counsel for the CEOs submit that s 43ZA(1) provides a broad discretion to the Court to determine the terms of any supervision order.[41] Whilst I accept that the Court is thereby given the power to impose a wide range of conditions, including conditions concerning the administration of medication, this power does not extend to the Court making orders compelling the supervised person to undergo such medical treatment without her consent, or exposing her to some kind of criminal sanction or penalty for breaching a court order. As I have

[39] MHRS Act, Part 4.
[40] *Channon v The Queen* (1978) 33 FLR 433, 440.
[41] CEO, Outline of submissions on behalf of the CEOs, 29 November 2016 at [20] – [21].

said, non-compliance with such a condition, like non-compliance with conditions associated with a suspended sentence, may well have other consequences for the person's appropriate custodial position.

Purpose and effect of s 43ZA(2A)

[53] Section 43ZA(2A) and accompanying provisions such as s 43ZA(2B) & (2C) and the indemnity provisions in s 43ZPA were enacted in response to Martin (BR) CJ's decision in *Ebatarintja*.

[54] I was referred to various parts of the Second Reading Speech and the Explanatory Memorandum. It was acknowledged that (following *Ebatarintja*) where a supervised person was not committed to custody in a custodial correctional facility the supervision order could not be enforced by restraining the supervised person if that became necessary or by physically preventing the supervised person from harming him or herself or another person. This was not a problem within a custodial correctional facility where such powers already existed, for example under the *Correctional Services Act*.

[55] Counsel for the CEOs also emphasised the words underlined (by counsel) in the following:

(a) a sentence in the Second Reading Speech to the effect that persons authorised "will be able to use reasonable force to enforce a court

order, or to prevent a person harming him or herself or anyone else"; and

(b) a sentence in the Explanatory Memorandum to the effect that the Court could authorise persons "to use reasonable force and assistance in order to … enforce a custodial or non-custodial supervision order (for example to ensure the person takes medication) …".

[56] Despite the impression that might be gained from the example given in the second of the extracts quoted above, I do not consider that the legislation was intended to confer on the Court a power to force a person to take medication against his or her will. Rather, the intention was to overcome the kind of problems that had emerged in *Ebatarintja*, by empowering an "authorised person" to take into custody a supervised person who was supposed to be in custody (in "an appropriate place"), and or, to restrain the person in order to prevent her harming herself or someone else. Hopefully, once so restrained, the person would comply with the conditions set by the Court which might, by means of the relevant treatment plan, include her continuing to take her medication.

[57] Consistent with the concerns raised in *Ebatarintja* and reflected in the Second Reading Speech and the Explanatory Memorandum, I consider that "the order" referred to in s 43ZA(2A)(a) is the substantive order

which the Court makes under s 43ZA(1) whereby the accused person is placed under a supervision order designed to achieve the fundamental aim of preventing the supervised person from harming herself or someone else.[42]

[58] In other words the meaning and effect of s 43ZA(2A) is to empower the Court to impose a condition designed to enable the enforcement of the custodial provisions and the protection from harm provisions of the supervision order, as distinct from the enforcement of other conditions. Parliament clearly recognised the need for such a power where the accused person was committed to custody in an "appropriate place" under s 43ZA(1)(a)(ii), or placed under a non-custodial supervision order under s 43ZA(1)(b) with conditions designed to restrict the liberty of the supervised person and to prevent her from harming herself or someone else.

[59] There is nothing in s 43ZA(2A) or elsewhere in Part IIA that suggests, let alone expresses "with irresistible clearness", that the legislature intended to abrogate the common law right of a person, including a supervised person, not to be subjected to medical treatment against her will, or even that the legislature directed its attention to such a question.[43]

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[42] This fundamental aim is reflected in ss 43ZN and 43ZH(2).
[43] See passage from *X7 v Australian Crime Commission* [2013] HCA 29, 248 CLR 92 quoted above at [10].

The "constitutional issues"

[60] In view of my conclusion that the Court does not have power under Part IIA to mandate pharmacological treatment to KMD, it is not necessary for me to consider the other points raised on behalf of KMD, or to consider the appropriateness or otherwise of making orders of the kind contemplated by the CEOs.

[61] Having said that, it is difficult to see how such a power, if it did exist expressly or by implication in Part IIA, would be in breach of the *Kable* principle.[44] I do not consider that the MHRS Act could properly be said to be a "code" that covers the field in respect of supervised persons who are, or may be, at risk of harming themselves or others. Even if it was a "code" it would not necessarily restrict the jurisdiction of this Court under Part IIA. As is apparent from the decision of the MHRT in the present matter, the Tribunal's focus was on whether KMD was at risk of harming herself or others in her present custodial situation, whereas that is only one of the many matters to which the Court must have regard in applying Part IIA. For the Court to have powers similar to those conferred under the MHRS Act would not impair the Court's institutional integrity, or restrict the ability of the Court to act judicially.

[44] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

[62] In my view such a power, if it existed, could not be construed as punitive, assuming that it could be and was exercised in a manner consistent with the Part IIA regime. If the power existed, and the circumstances were such that it was necessary to exercise the power in order to facilitate the successful integration of the supervised person into the community without there being some serious risk to the safety of that person or any other member of the community, its exercise would be consistent with the primary objectives of Part IIA.

Conclusions

[63] I conclude that this Court does not have the power under Part IIA of the *Criminal Code* to make an order mandating pharmacological treatment to KMD.
