JURISDICTION	:	EQUAL OPPORTUNITY TRIBUNAL OF WESTERN AUSTRALIA
LOCATION	:	PERTH
CORAM	:	PRESIDENT: MS P GILES DEPUTY MEMBER: MS M FADJIAR DEPUTY MEMBER: MR J MCKIERNAN
HEARD	:	13 – 15 DECEMBER 2004
DELIVERED	:	24 DECEMBER 2004
FILE NO/S	:	ET/2003-000066
BETWEEN	:	PETER DE GROOT Complainant and THE MINISTER FOR HEALTH Respondent

Catchwords:

Equal opportunity – discrimination on the ground of impairment in provision of services - health services - whether personality disorder is an impairment - mental health services

Legislation:

Equal Opportunity Act 1984 (WA)
Disability Discrimination Act 1992 (Clth)
Mental Health Act 1996 (WA)

Result:

Complaint dismissed

Representation:

Counsel:

Applicant	:	MR A MACDONALD, Equal Opportunity Commission
Respondent	:	MR A SEFTON, State Solicitor's Office

Case(s) referred to in judgment(s):

Purvis (on behalf of Hoggan) v New South Wales (Department of Education and Training) and Another 202 ALR 133

H v S decision (1997) HREOCA 41 (23 July 1997)
R v Nunawading Tennis Club (1997) HREOCA 60 (23 October 1997)

Cases(s) also cited:

IW v City of Perth (1996) 191 CLR 1

REASONS FOR DECISION

1 Mr De Groot has brought a complaint of discrimination on the ground of impairment against the Minister for Health alleging discrimination in the provision of goods and services.

The Allegations

2 The first allegation relates to an incident at Royal Perth Hospital ("RPH"). The specific allegations are:-

(i) on 20 June 2002 the Complainant was feeling unwell and presented at RPH seeking assistance from a psychiatrist;

(ii) he met with the psychiatric registrar Dr Sharon Notley and requested that he be admitted to a closed ward, as he was concerned about his mental state and what he might do;

(iii) during the consultation Dr Notley informed him that he did not need to be locked up and that the Hospital was unable to provide the services he requested.

3 The second allegation is that the Complainant was denied services at the Community Forensic Mental Health Service ("CFMHS") as follows:-

(i) in July 2002, the Complainant was refused services by CFMHS and was informed that his condition was *"untreatable"* and that he *"did not qualify for services"* or words to that effect;

(ii) in late July 2002 after considerable intervention by Ms Drake, the Complainant was accepted as a client of the CFMHS;

(iii) the Complainant and officers of CFMHS subsequently had a disagreement about the treatment that the Complainant should be receiving;

(iv) by letter dated 7 October 2002, Ms Rachel Shynn, CFMHS nurse informed the complainant that he had been discharged from the service, on the ground that it did not offer crisis intervention;

(v) in a subsequent telephone discussion with the Complainant, Ms Shynn also mentioned that the Complainant had *"a long criminal record."*[1]

4 Mr De Groot has had an extremely sad life. He is the brother of convicted murderer, David Birnie. He has a criminal record in his own right. He has a severe anti-social personality disorder with borderline characteristics, one characteristic being that he has difficulty in controlling his temper. For the seven years prior to the events leading to this complaint, he was serving a sentence at Casuarina Prison.

5 While in Casuarina, he was treated by Clinical Psychologist, Ms Sonia Gianatti.

6 In a report to the Parole Board dated 6 March 2000 she said of Mr De Groot;-

> *"Community files and the extensive reports indicate that Mr DeGroot was exposed to sadistic physical, sexual and emotional abuse. Because sadistic abusers use the child's emotional reactions to increase their pleasure, adult survivors resist intimacy and feeling vulnerable because they fear their vulnerability will be used to hurt them....What also evolves is an extreme form of negative self image. Mr DeGroot views himself as a "negative and bad human being" and projects this image onto others."*

7 Her view was that Mr De Groot presents classic symptoms of severe borderline personality disorder with antisocial traits. This refers to an enduring pattern of behaviour, disposition, and temperament characterized by:-

(i) Impulsivity and emotional instability;

[1] Complainant's Points of Claim dated 2 March 2003 paragraph 5

(ii) A dramatic interpersonal style that tends to shift between idealization and devaluation;

(iii) Cognitive difficulties that manifest under stress as mild disorganizations (confusion) and transient altered states of consciousness;

(iv) An inclination to think of oneself as a victim and to gravitate towards situations that either directly or symbolically reinforce a victim status.[2]

8 The Complainant spent most of his sentence in the special unit for vulnerable prisoners and those at risk from other prisoners. From the description provided by Ms Gianatti, it is a very secure unit, with a high level of monitoring of prisoners. She saw Mr De Groot in her office alone, and never felt threatened by him, even though he had verbally abused her and threatened her countless times. There were always prison officers within ear shot, and if they heard shouting, they would come and check on her.

9 Mr De Groot said that Ms Gianatti had understood his need not to be *"put in a box"*. This meant she did not impose restrictions on him, such as prohibiting him from swearing and making threats. She was flexible and understood his need to *"vent"*. For the first 20 minutes of every session with her, she simply allowed him to *"vent"*. He feels that this *"clears the mind"*. He feels he needs this outlet. He obviously gained a great deal from her assistance.

10 On 10 May 2002, Mr De Groot was released from Casuarina Prison. Accommodation had been organised for him in Fremantle but he found it *"like a jail"* and he did not like the attitude of the proprietor. He tried finding a place to stay in a hostel, but he lacked means of identification, and was unsuccessful. He ended up approaching two police officers and telling them that he *"felt unhinged"* and could not cope. They took him to Royal Perth Hospital ("RPH") Emergency Department.

11 The Complainant's account of what happened next was somewhat confused. He said that he received a *"hostile reception"* at RPH and that the doctors there had refused to treat him. He had been spoken to for

[2] S Gianatti, Report to Parole Board, 6 March 2000, citing Yalom, I.D. (1997) Treating Difficult Personality Disorders, San Francisco: Jossey-Bass

about 3 minutes in the waiting room. He had been confronted by a *"nasty security guard"*. He said that he had been *"knocked out twice by security guards."* Calling the security guards was a *"bad mistake"* because he had only just been released from prison. He told them,*"I didn't know if I was going to kill myself or someone else"*. He agreed that he had seen a doctor before the security guards arrived, but the attitude of the doctor was *"abhorrent"*. The doctor had come out into the waiting room and *"treated me like shit"*. The doctor had been *"very nasty"* and the Complainant *"had to become threatening"*.

12 Dr Fenner who assessed the Complainant on that occasion gave evidence. His account of the episode differed markedly from that of the Complainant. He was working at the time as a Senior Medical Officer, Consultation/ Liaison Psychiatrist, in the Emergency Department. He has completed his exams for his Fellowship for the Royal College of Psychiatrists but has yet to be admitted to that body. He has many years of experience in psychiatry and worked for 12 months in 1997 in a unit for persons with personality disorders.

13 He told the Tribunal that all persons attending at the Emergency Department are first assessed by a triage nurse who assigns a priority to the patient. The patient is then assessed by a doctor, who will determine if a specialist psychiatry staff member, such as Dr Fenner, needs to get involved.

14 It was a busy night. Mr De Groot waited to be seen by Dr Fenner for about three and a half hours. Dr Fenner observed him in the waiting room for about 20 minutes prior to assessing him. Observing patients who are not aware they are being assessed is a common technique in psychiatry.

15 He was dozing in the waiting room when he was called in by Dr Fenner into a small interview room where the assessment was to be carried out. Dr Fenner said the Complainant's opening words were *"I'm looking for a warm place to curl up. If you mess me around any more I'm going to paste someone to the wall."* Dr Fenner attempted to assess the Complainant to determine if he required urgent psychiatric treatment. He found the Complainant uncooperative in this process, with a surly and slightly menacing demeanour.

16 The Complainant denied all the key symptoms of mental illness and substance abuse. Dr Fenner was interrupted in his interview and the Complainant waited a further period in the waiting room. During this period, he watched the Complainant and observed him to be smiling and

interacting with others in the waiting room. On resuming the interview, the Complainant resumed his surly demeanour. He told Dr Fenner he had been diagnosed with an agitation and anxiety disorder, that he had been in prison and was not on parole. He declined to tell Dr Fenner about any psychiatric follow up organised on his release. The Complainant informed Dr Fenner that he did not like the accommodation that had been organised for him and had tried other places, but that he had no means of identification and had been unsuccessful.

17 Dr Fenner suspected the Complainant had an anti-social personality disorder, but needed collateral information. He rang Casuarina Prison and spoke to a nurse who recalled Mr De Groot. She told Dr Fenner that the Complainant had been in prison for a violent offence, and had been violent in prison. She did not believe he had a major psychiatric disorder, and had never evinced an intention to harm himself. She also informed Dr Fenner of the Complainant's *"family associations"* meaning the identity of his brother, and that there was a rumour that he was implicated in his brother's crimes.

18 The Tribunal pauses to note that after this conversation, the rumour that the Complainant was somehow implicated in his brother's crimes was repeated on several occasions, with no regard being given for the fact that it was unproven and highly damaging.

19 Repetition of this sensational and totally unsubstantiated rumour appeared unnecessary in the circumstances and could only exacerbate the Complainant's sense of having been unfairly dealt with.

20 To return to the narrative, Dr Fenner concluded that the Complainant did not have a treatable psychiatric disorder. He thought the Complainant's main problem was a practical one of not having accommodation to his liking, and not having any alternative.

21 Dr Fenner recommended to the Complainant that he return to the house in Fremantle. He checked that the Complainant had enough money to return to Fremantle. He also offered assistance for the Complainant in finding alternative accommodation.

22 The Complainant *"flared up quickly"* in Dr Fenner's words. He quickly became belligerent. Security guards had to be called and the Complainant was ejected from the Emergency Department.

23 In cross examination, the Complainant denied that he had gone to RPH that night in order to get a bed for the night. He said that *"I have a*

problem and one day I'll prove it" and that he had *"wanted to talk to someone"*.

24 The RPH notes show that on 10 May 2002, at 8.20 pm, Mr De Groot was seen by a junior doctor, who recorded the Complainant saying that he wanted to *"walk in front of a Mac truck"* and that he was *"ready to snap and do someone some real harm"*. The doctor noted that the Complainant had been *"initially chatty with orderly before becoming sullen when realised who I was."* The Complainant was then referred for review by Dr Fenner.

25 Dr Fenner's notes of his consultation, which started at about midnight, support his oral evidence. His notes detail an intensive examination including findings about the Complainant's demeanour, dress, and speech patterns, that he denied psychotic symptoms, and was reluctant to discuss his suicidal and homicidal plans in any detail. The notes end with the comment:

> *"With security officers present, the Patient was asked to leave the hospital and did so, protesting and making threats of both violence and litigation against staff."*

26 There is no specific complaint of discrimination arising from this event, it having been mentioned in order to provide a background for subsequent events. However, the evidence clearly shows that the Complainant was assessed by two doctors, including a Senior Medical Officer, Dr Fenner, specializing in psychiatry.

Royal Perth Hospital Emergency Department 20 June 2002

27 The Complainant attended again at the RPH Emergency Department on 20 June 2002. His recollection of this event was not clear. This was because the events were a long time ago and also that he had been repeating the story for some years. He recalls seeing Dr Notley, and asking for help, including that he be put under lock and key to get time out. He couldn't recall what Dr Notley said in detail, but he could recall that she said that the Hospital *"did not provide that service"*. He said that his behaviour during the interview had been *"like it is now"* (meaning his demeanour while giving evidence). He said Dr Notley had told him that people didn't want to help him because he was related to his brother. The interview had in his words, *"ended badly"*. He was told some things he already knew, like that he was "black listed" by various departments. He maintained that Dr Notley said nothing about treatment, and offered

nothing to him. He felt *"pissed off and agitated"* but couldn't recall if he had *"acted out."* Mr De Groot denied that Dr Notley had offered him a referral to a psychologist.

28 Dr Sharon Notley qualified as a medical practitioner in New Zealand. She is not a psychiatrist, but has worked in the field of mental health for about 10 years. At the time of these events, she was working as a Medical Officer at Royal Perth Hospital. Part of her duties involved being on the roster for the Emergency Department, which required her attendance up to 3 days per week, depending on staffing arrangements. Her role was a tertiary one, to assess patients seeking psychiatric help after they had been seen by an Emergency Department doctor. She makes psychiatric diagnoses on a daily basis. Her job includes admitting patients in need of acute psychiatric care, referring patients for assessment under the ***Mental Health Act 1966 (WA),*** and making referrals to other services, either within the Hospital, or elsewhere.

29 She recalled assessing Mr De Groot on 20 June 2002. She had obtained a considerable amount of information about him prior to seeing him. She had Dr Fenner's notes of the consultation of the previous month. She was given the notes of the doctor who initially assessed him on that day, although these notes have subsequently been lost. She was told that the doctor who conducted the initial review thought that the Complainant did not have a mental illness, but a second opinion was needed.

30 She spoke to Dr Fenner about the Complainant. He told her that Mr De Groot was potentially very dangerous and not to see him without a security guard present. He may also have told her that it was believed by prison staff that Mr De Groot was implicated in his brother's crimes. Dr Fenner told her that if thwarted, the Complainant could be violent.

31 She checked to determine which local mental health service would be the appropriate one for Mr De Groot, given his address, and discovered this was Bentley Mental Health Service. She was also informed (it is unclear by whom) that Mr De Groot had made threats to staff at the Bentley Mental Health Service. Her note about this was *"....Bentley Mental Health Service ... have directed that patient not to be admitted to them as has made death threats to there (sic) staff..."*

32 Graylands Medical Records Department also provided her with information over the phone about the Complainant's history in that institution.

33 Dr Notley observed the Complainant before they met, noting that he appeared calm and not acutely distressed.

34 She then spoke to the Complainant. He told her he wanted to be locked up. She interviewed him in detail in order that she could assess his mental condition. Her findings were that he was not suffering from an acute mental illness that warranted him being referred to a locked facility, such as that available at Graylands or Bentley, for committal under the Mental Health Act.

35 She explained that *"locking him up"* was not an option that was available. She said she offered to try and organise counselling for him. However, at this point, the interview ended with him *"storming out."*

36 Her view was that he appeared to have a personality disorder with anti-social traits. One of the reasons she reached this opinion was that he demonstrated a disregard for others' feelings. For example, when she mentioned to him that he might have frightened the staff at Bentley Mental Health Service, he smiled and said something to the effect that he thought he might have done this. He appeared gain pleasure from having frightened them.

37 She said that Mr De Groot made no direct threats to her during the consultation. He did make implied threats against others. He became abusive after she told him he would not be admitted.

38 Dr Notley's notes, constituting 9 pages of closely written script were before the Tribunal. She said she always kept extensive notes. Notes recording her pre-interview investigations had been written prior to the interview, the bulk had been written later that day. This was her normal practice.

39 The notes reveal that prior to the Complainant leaving, Dr Notley made a very careful investigation of Mr De Groot's mental status. Significantly for this case, her notes included the following:-

> *"Talked of how in prison if not coping, feeling stress would ask to be locked up and that he would then be locked up and that this helped. Said he would be locked up, put on his "head phones" and it would help."*

40 Under cross examination, Dr Notley said that her job was not to provide treatment or a treatment plan, but simply to assess patients in an acute setting. She said she sees people with personality disorders, and

violent people, every day. There are "pathways" for such people. However, it was not her job to run treatment programs for them.

41 She said that there is a treatment program at RPH for people with personality disorders, known as the "Changes Program". In her view, Mr De Groot would not meet the entrance criteria for the Program because of his tendency to threaten others when he didn't get his own way. The Program treats many vulnerable people and their interests needed to be protected. She also felt he would not be eligible because he did not take responsibility for his own conduct, but tended to blame others. While admission to the Changes Program was not her responsibility, she felt referral to a Psychologist for counselling was indicated first. She had endeavored to do this, but Mr De Groot terminated the interview by storming out. She was definite in her recollection that she had attempted to refer Mr De Groot for counselling, despite the fact that Mr De Groot could not recall this part of the interview.

Contact with the Health Consumers Council

42 On leaving the Emergency Department, Mr De Groot telephoned the Health Consumers Council ("HCC") and spoke to Maxine Drake, an advocate employed by that service. The HCC is a community organisation funded by the Health Department, which provides advocacy services to health consumers. Ms Drake met with Mr De Groot the same day and she agreed to try to help him.

43 Ms Drake has worked for the HCC for 10 years. Prior to that she worked in the prison system, and in an organization active in the HIV/AIDS field. Half of her cases are with mental health consumers. She told the Tribunal in her evidence that the issues which confront mental health consumers were quite different to consumers of general health services. Mental health consumers are often seeking due respect, dignity, and proper consent procedures.

44 Upon meeting Mr De Groot, she decided that he needed a mental health service. Despite the fact that he was a difficult person to assist, she resolved to assist him. He told her that he had been *"black banned"* by RPH and Bentley Mental Health Services. The allegation that Mr De Groot had been banned from receiving services was of great concern to her.

45 While Mr De Groot was still with her, she rang Dr Notley at Royal Perth Hospital to try and find out why it was that Mr De Groot had been

refused service. In particularly she wanted to find out if indeed there was a black ban on Mr De Groot, and hoped that she would find out that this was wrong.

46 Ms Drake said that when she informed Dr Notley that she was ringing on behalf of Peter De Groot, Dr Notley either *"laughed"* or *"snorted"* in a mocking and dismissive way. Dr Notley told her that Mr De Groot would not get an admission with his history and his diagnosis. Dr Notley said that Mr De Groot did not have an illness but was an *"extreme antisocial psychopath"* and was *"not treatable"*. Dr Notley informed Ms Drake of Mr De Groot's family association, that Mr De Groot was suspected of being implicated in the murders committed by his brother, and that he was *"highly dangerous."*

47 Ms Drake felt that the reference to Mr De Groot's family association was made by Dr Notley in order to denigrate Mr De Groot in her eyes. She felt that Mr Notley was *"trying to swing me across"*. She believed in particular that the comments about the Complainant's brother, and the suspicion of implication in his crimes were an unnecessary disclosure.

48 Ms Drake then made a number of other telephone calls to attempt to determine if the Complainant had been banned by the Respondent's mental health services. She also spoke with Ms Gianatti. She rang Dr Notley back, but Dr Notley did not vary her view from before. Ms Drake said she *"put the black ban to her directly, but she didn't answer directly."*

49 Ms Drake made two written records of the telephone calls to Dr Notley. The first is handwritten, and was made at the time of the conversation. It makes no reference to a ban.

50 The second is typewritten and was made on 26 June 2002, in support of a complaint made by Mr De Groot to RPH. It states:-

> *"Peter reported having been told by the Psychiatry Registrar to the Emergency Department that he was 'black banned' from receiving mental health services in Perth."*

51 The note of 26 June 2002 also records again Dr Notley allegedly having said that the Complainant *"Basically won't get an admission with his history and diagnosis."*

52 Dr Notley recalls receiving the two telephone calls from Ms Drake. Before the first call she had been informed that her son was very ill, and

needed to be collected urgently from school. She was still at the Hospital when the call came through, attempting to organise another doctor to provide cover for her, and also dealing with queries about other patients. She was surprised that the call was put through to her, because usually such calls would be dealt with elsewhere in the Hospital.

53 She recalls that Ms Drake said she was ringing about Mr De Groot and has his permission to speak about his case. She wanted to know why Dr Notley had not done what Mr De Groot had asked, that is why he had not been treated or admitted. Dr Notley said she tried to explain her view that Mr De Groot did not have an acute psychiatric illness, but a personality disorder. Because Ms Drake had said that she was with Mr De Groot, Dr Notley was concerned about her safety and asked her whether she was alone with him. In that context, she mentioned her suspicions concerning Mr De Groot possibly being dangerous. She found Ms Drake *"badgering"*.

54 Dr Notley also recalled the second telephone call from Ms Drake. By this time Dr Notley was driving her son home having collected him from school. He was vomiting in the car when Ms Drake rang her on her mobile phone. She found the second conversation *"bizarre"*. Ms Drake disputed her assessment that the Complainant did not have a psychiatric illness, by quoting parts of the DSM IV at her. She found the situation distressing.

55 Dr Notley denies laughing during either telephone call. She said that it was a chaotic evening, and she was extremely stressed trying to organise cover in order to go and collect her sick son. She felt bullied, harassed and hectored by Ms Drake. She said to Ms Drake that Mr De Groot would not be offered treatment at Bentley Mental Health Service. She denied saying that Mr De Groot would never be offered a service at Royal Perth Hospital. She was not in a position to make that decision. She felt she and Ms Drake were at cross- purposes. Given what she had been informed about Mr De Groot's past, she was concerned about Ms Drake's safety.

The Community Forensic Mental Health Service

56 The Community Forensic Mental Health Service ("CFMHS") was established immediately prior to these events, as a need was identified for a community service caring for seriously mentally ill offenders who were released into the community. Dr Adam Brett, the Director, described its three roles as:-

(i) court liaison, including advice to Magistrates as to appropriate forms of release orders;

(ii) a consultation and liaison service involving the one-off assessment of individuals who are referred to other appropriate services; and

(iii) assertive case management, in which individuals with serious mental illnesses who had recently been released are managed and treated.

57 The Service is staffed by Dr Brett and 6 psychiatric nurses, each of whom had a caseload of 8 patients.

58 Dr Brett is a Consultant Psychiatrist with considerable experience in forensic mental health.

59 He told the Tribunal that the "serious mental illness" criteria for the Service is usually fulfilled by the patient having a psychosis or mood disorder with significant risk of self-harm, or of causing harm to others. It also includes offenders found unfit to stand trial because of mental illness and those found not guilty due to insanity. Most of the individuals they see in the program are on release orders, such as parole orders, which also allow supervision of them by Parole Officers. The group also includes a small number of people not subject to court orders, but because of their violent tendencies, are difficult to follow up by Mental Health Services.

60 Dr Brett said most of his patients have personality disorders of one type or another, and many of them are violent. The Service has a strict rule that patients can only use the Service if they agree not to threaten or attack the staff. Most of his patients are able to comply with this requirement.

61 The reason for this strict policy is to ensure the safety of the staff. The research evidence shows, according to Dr Brett, that people who threaten violence are more likely to be violent. The Service should not act in a way that reinforces threatening behaviour. Patients need to take responsibility for their own action. There should be clear consequences that follow threats or violence. This is an important psychiatric management tool.

62 Dr Brett explained the categorization system adopted in psychiatry to classify and describe psychiatric disorders. This is set out in the *"bible"* of psychiatrists, the DSM IV (although other categorisation systems are also used). Personality disorders are not categorized as a mental illness in the DMS IV, but as a series of behaviours or characteristics which tend to occur together in some individuals. Antisocial personality disorder appears in the "Cluster C" group, together with borderline personality disorder and Narcissistic personality disorder. Many personality disorder characteristics overlap, including borderline and anti-social personality disorders. Often persons are described as having, for example, borderline personality disorder with anti-social traits, which illustrates this overlap between the descriptions.

The Complainant's recollection of contact with the CFMHS

63 Mr De Groot's evidence of his contact with the CFMHS was somewhat confused. He had difficulty recalling *"because it was such a long time ago."* He recalled a meeting or meetings with Dr Brett, who in his view had *"an attitude problem"* and *"wanted to put me in a box"* as did Rachel Shynn, his Case Manager. He could not recall the treatment proposed for him, but recalled being told that he could not *"swear, scratch or fart"*. He recalled they had told him that he was 100% in control of his own behaviour, which he disagrees with. He felt that he needed crisis management. He agreed in cross examination that he had not attended at various appointments at the Service, because *"other issues came up at the time."*

64 He maintained that his tendency to make threats and become abusive was *"part and parcel of my disorder."* and that it was *"not a safety issue."* His behaviour was *"all hot air"* and that if Dr Brett *"knew about this disorder he wouldn't be a prick."* He believed the Service was placing *"unreasonable and uncalled for limits on me because I have a disorder...you can't do this to mentally disordered people"*.

65 The only incident he could recall with any particularity was when the police were called. This is dealt with later in these reasons. His recollection was that the person behind the glass screen was refusing to give him an appointment and *"being an arsehole."* When it was put to him that he threatened Mr Tyson, a Psychiatric Nurse employed by the Service, he said that he had *"done seven years in hell. When I lose the plot I do say a lot of stupid comments."* He said he had pleaded guilty to the charge that arose from this incident because he wanted to get rid of it, not because he was guilty. When it was put to him that he was discharged

from the Service, he maintained that *"I'm the one who told them to get fucked."*

The CFMHS - recollections and records of Mr De Groot's contact

66 When Ms Drake decided that the CFMHS may be the best agency to assist Mr De Groot she was told to make a written referral. A staff member of CFMHS, probably a psychiatric nurse, delivered a referral form to Ms Drake. In the process of delivering it, the staff member (whose identity was never established) spoke publicly in front of others about how Mr De Groot was *"irretrievable"*, *"untreatable"* and was unable to be assisted. Ms Drake was *"stunned"* about this level of disclosure.

67 Ms Drake wrote a letter dated 25 June 2002 to accompany her referral. It is a passionate plea for assistance for Mr De Groot. It refers to the social stigma he was experienced as a consequence of the identity of his brother, which among other things, *"...contributes to a declared "black ban" of Peter from mental health services. Surprisingly, services are refused Peter, despite him universally being diagnosed with a severe personality disorder. This is a recognized mental illness, characterized by the behaviours that are then seen as disqualifying Peter from treatment. This is an irony not lost on Peter and understandably contributes to his frustration and the actions that cause him so much distress."*

68 The letter includes the comment that:- *"Peter defined his service need as three per weekly psychological counseling sessions and at times secure detention."*

69 Dr Brett wrote back to Ms Drake on 27 June 2002. In the letter he referred to the lack of resources available to his service. He expressed the view that long term therapy of three times per week would be difficult to find anywhere in the Western World in a public mental health service. He also said that the target population of the CFMHS was *"...mentally ill offenders who have a serious mental illness, (which is usually a psychotic illness) and have offended in a serious manner or who are at risk of offending in a serious manner. We also have a role in assessing patients for risk management and liaising with appropriate services to ensure that mentally ill offenders have appropriate follow up. Mr De Groot will be comprehensively assessed by this service in order to ascertain his diagnosis and management needs."*

70 Dr Brett's oral evidence was that he did not believe that Mr De Groot filled the Service's criteria because he did not have a serious mental illness. However, he was prepared to assess him.

71 Mr De Groot was indeed assessed by Dr Brett, on 8 July 2002. Ms Drake was present at the consultation. Dr Brett's conclusion was that the Complainant's main problems related to his personality structure. He had a significant personality disorder of mainly the antisocial and borderline type, finding it difficult to cope with stress and decompensating easily. While he had been managed well in prison with a number of strategies, these facilities were now not available to him. Dr Brett was of the view that the Complainant needed assistance with simple problem solving skills and stress management. In-depth therapy, in Dr Brett's view, would not assist and was probably contra-indicated. He reached the view that the Complainant did not fulfill the CFMHS criteria in that he did not have a serious mental illness. However, the Service could *"broker"* the provision of a service from another mental health provider.

72 The role of community organizations is to lobby, and this is precisely what HCC did. As a result of several letters and phone calls to various individuals, a letter was sent to Dr Brett on 24 July 2002, by Dr Rowan Davidson, Chief Psychiatrist advising that the CFMHS was the most appropriate agency to manage and/or co-ordinate Mr De Groot's mental health treatment.

73 In the meantime, it appears that Mr De Groot did in fact start regarding the CFMHS as his mental health provider. Some time prior to this, he had been allocated a Homeswest flat. During July, problems arose with Homeswest carrying out maintenance on his flat, which resulted in two phone calls from Mr De Groot to workers at the CFMHS. Notes taken by those workers indicate that Mr De Groot was not regarded as a patient of the Service, but was allowed to *"ventilate"* his concerns and frustrations without the Service taking an active role.

74 Around the end of July 2002, Homeswest took eviction action against Mr De Groot. An officer of Homeswest contacted Dr Brett to ask for his advice concerning Mr De Groot. Dr Brett declined to give the advice, because he had no authority to disclose information concerning Mr De Groot. The officer then asked Dr Brett what he would generally recommend when a tenant made threats of violence. His response was that research showed that people who make threats are more likely to be violent than others, and that all threats of violence should be taken seriously, and the appropriate authorities notified.

75 Ms Drake went with Mr De Groot to Court to support him in the eviction proceedings. During the proceedings, evidence was given by a Homeswest officer that caused both Ms Drake and Mr De Groot to form the view that Dr Brett had informed Homeswest that Mr De Groot was dangerous.

76 This led to a stinging letter from Ms Drake to Dr Brett dated 26 July 2002. The letter advised Dr Brett that:-

> *"I now conclude that it would be reasonable for Peter De Groot to refuse services from your agency, even if these were offered, based upon your involvement in the Homeswest matter, recently before the courts. You gave advice to Homeswest that Peter De Groot is not a client of your service, but then went on to say that he is highly dangerous and likely to carry out his threats and that women and older people are at the greatest risk of harm from him.*
>
> ...
>
> *A responsive and ethical approach to this situation from your service would have been to stand beside your client and speak for his interests to the court and Homeswest. Further to this, offering interpretive advice and strategies to Homeswest would have provided a sensible, systemic approach that would benefit all parties."*

77 The letter went on to allege that Dr Brett had acted as an *"agent of control"* and that Ms Drake was *"disappointed that a fresh new services (sic) such as yours has not been able to respond in a more client focussed and creative manner in its dealing with Mr De Groot."*

78 On 1 August 2002, Mr De Groot rang Dr Brett accusing him of telling Homeswest he was dangerous and thereby facilitating his eviction. A file note records that while Dr Brett denied having done this, Mr De Groot did not believe him.

79 It was then ascertained from a Homeswest officer that that Dr Brett had not in fact been the source of the allegation that Mr De Groot was dangerous. This advice had apparently been given to Homeswest by the police. Ms Drake then withdrew her allegation.

80 An appointment made for Mr De Groot on 2 August 2002 at the CFMHS did not proceed because he did not attend. On the same day an

approach was made by Homeswest officers to Dr Brett for assistance in supporting an emergency housing application, which he said he would do provided he had consent from Mr De Groot.

81 On 20 August 2002, after a further approach from Ms Drake, a further assessment was carried out by Dr Brett of Mr De Groot. The appointment lasted approximately one and a quarter hours. By this time, Dr Brett had spoken to Ms Gianatti, and obtained information concerning her dealings with the Complainant. Two nurses at the CFMHS had also had dealings with the Complainant while they had worked in Casuarina Prison, and had input into Dr Brett's researches into the Complainant's past behaviour.

82 The interview initially proceeded smoothly. The Complainant was informed that a Case Manager from the Service would be appointed, a psychiatric nurse Ms Rachel Shynn, and an appointment with a psychologist organised. During the interview, Mr De Groot informed Dr Brett of his tendency to threaten those who are providing him with services. Dr Brett made it clear that all threats of safety would be taken seriously and that steps would be taken to protect staff, including notifying the police. When informed of this, Mr De Groot became angry, said that he did not wish to have the assistance of the CFMHS and terminated the interview. Dr Brett's handwritten note of the consultation concludes with the remark *"No further appointments at this stage. I am not prepared to offer Mr De Groot false promises eg that I would never call the police if he threatened staff (which he stated he would do)."*

83 In his evidence Dr Brett described his diagnosis as preliminary. Generally the Service assesses patients over six weeks prior to coming to a definitive diagnosis.

84 Despite this apparent decision by both parties to part company, contact between them continued. On 26 August 2002, a letter was sent to Mr De Groot advising him of an appointment for him to attend the clinic on 3 September 2002 with Dr Brett.

85 On the same day, Mr De Groot rang wanting to speak to Dr Brett, who was unavailable. On the same day, the Management Team discussed the case, and determined that in the future, Mr De Groot was to communicate only with his Case Manager, that he was not to abuse staff and if appropriate the police were to be called. On 2 September 2002 he rang and had a lengthy conversation with a staff member at the Service about problems he was having.

86 On 2 September 2002, Dr Brett wrote to Ms Drake about her previous complaint. In his letter he said that Mr De Groot had been assessed by the Service and *"we have offered him a comprehensive management package. We are awaiting a second appointment to finalise the management and for him to agree to the management plan."*

87 On 3 September 2002 Mr De Groot did not attend for an appointment that had been made for him. A letter was sent to him on that day signed by Dr Brett noting his failure to attend the appointment, and his statements to staff that he did not wish to be followed up by the Service. It states *"We are more than happy to assess you and organise a management plan but if you do not wish to attend this Service that is your decision. No further appointment has been made for you but if you would like to access our Service please do not hesitate to contact the clinic."*

88 On 4 September 2002, Mr De Groot rang the Service, and then later arrived unannounced demanding to see a doctor. He was informed of the policy that appointments should be made. He began punching a glass wall in the foyer, and said *"You know me from prison.*[3] *I've taken a security door off its hinges in there you know I have. If you think you're safe behind this glass think again. You have to finish work and I'll be waiting by your fuckin' car. You won't look so smart with my hand around your neck."* He also informed the staff that if they called the police *"it would be the last fucking thing you ever do."* The police were called and Mr De Groot was charged. He pleaded guilty to a charge of using threatening words and was fined by the Court of Petty Sessions a few days afterwards.

89 Again, a decision appears to have been made that Mr De Groot would no longer be offered any assistance by the CFMHS. Contact was made on several occasions by representatives of other agencies concerning Mr De Groot's housing situation in early September, and were informed that he was no longer a client of the Service. However, it appears that the CFMHS relented again. An appointment was made (it is not clear at whose instigation) for Mr De Groot to see Dr Patchett, Director of the State Forensic Mental Health Service (Dr Brett was on leave) on 13 September 2002. Mr De Groot did not attend the appointment. Another appointment was made for 20 September 2002.

90 On 16 September 2002, Mr De Groot rang the Service and spoke to Rachel Shynn, his Case Manager, seeking assistance in his dealings with the Commonwealth Rehabilitation Service, which was apparently offering

[3] This was a reference to the fact that a staff member at CFMHS had also worked in Casuarina Prison while Mr De Groot was in that institution.

him some assistance. He requested that Peter Tyson, a psychiatric nurse working at the clinic, not be there while he attended. He also stated that he was disappointed that the Service had categorized his disorder as criminal behaviour and that he couldn't help it as it was his disorder. Ms Shynn's note states that she told him that *"If he is accepted into the Clinic and abides by the rules we will assist with CRS Australia."* Again, he became abusive, demanding and threatening.

91 Dr Brett saw Mr De Groot again on 23 September 2002. It followed what was becoming a predictable pattern of Mr De Groot becoming abusive and threatening when any limitations were put upon his behaviour. Mr De Groot said that all he wanted from the Service was crisis intervention. When Dr Brett reiterated the policy of the Service to call the police when threats were made, Mr De Groot said he believed he was being discriminated against.

92 A Case Conference was held at the Service on 24 September 2002. Dr Brett concluded by noting that Mr De Groot wanted a crisis intervention service, which the CFMHS was not equipped to provide. Furthermore he became abusive and threatening to staff members. It concluded with a 'recommendation' (which Dr Brett in his evidence said was really a decision rather than a recommendation) that Mr De Groot be discharged from the Service. Dr Brett appears to have sent this report to Dr Patchett and discussed it with him.

93 Mr De Groot rang the Service several times over the ensuing few days, both to try and determine what decision had been made about his treatment, and to seek advice concerning issues that were concerning him. He made repeated threats of suicide if his demands were not met, at one point telling Rachel Shynn *"don't mess me around girl"*.

94 On 25 September 2002, Ms Shynn advised Mr De Groot by telephone that due to the Clinic not offering crisis intervention, he would not be offered any further service. This led to a threat of suicide, and Mr De Groot hanging up. He rang again on 2 October 2002, seeking advice and someone to talk to. He was informed again that he was not a client of the Service, upon which there were further suicide threats and threats to staff of the Service. On 7 October 2002, a letter was sent to Mr De Groot signed by Rachel Shynn advising Mr De Groot that:-

> *"This letter is to advise that you have been discharged from the Wellington Street Clinic. As was discussed with you at your last appointment with Dr Brett, this service does not offer crisis*

intervention and as you are unwilling to undertake preventative therapy there is little this service can offer.

As discussed in your last appointment if you require crisis intervention then it is suggested you contact your General Mental Health Services, which is the Mills Street Centre or the Psychiatric Emergency Team. If you have any concerns please feel free to contact the clinic and discuss this with either the duty officer or myself."

95 Mr De Groot rang the Service on 8 October. On 15 October 2002 a letter in similar terms to that of 7 October 2002 was sent to him by CFMHS. On 30 October 2002 he rang asking for help and repeating his suicide threats. No contact was made after this.

96 Dr Brett was of the view that the Complainant has a personality disorder, probably of an anti-social type. This is shown by his labile mood, lack of regard for others, impulsivity, inability to sustain relationships, difficulty in gaining access to services, and tendency to become threatening on any perceived threat, however slight.

97 He also considered that the Complainant has a high degree of control over his own behaviour. His view is that persons with personality disorders such as the Complainant have in fact a high degree of control over their behaviour, although they will often deny that they can exercise any control. Impulsivity does not equate to lack of control. In his opinion, the Complainant could control his threatening behaviour to others and uses threats as a tool, in quite a calculating way. These threats are escalated until he gets what he wants.

98 Dr Brett was asked about the distinction between personality disorders and serious mental illnesses. He said that with major mental illnesses such as schizophrenia and psychotic disorders generally, the patient often has a completely different grasp of reality to others.

99 He said that treatment of personality disorders is difficult, and controversial. Medication is not helpful. Psychotherapy, especially psycho-dynamic therapy is contra-indicated. The general philosophy is that people with personality disorders benefit from learning practical problem-solving skills and anger management.

100 His diagnosis differed somewhat from the conclusion reached by Ms Gianatti. She was of the view that the Complainant sufferes from borderline personality disorder, whereas he was of the view that anti-

social personality disorder is the dominant presentation. Dr Brett said that 70% of prisoners have anti-social personality disorders. In that environment, the tendency would be to treat the personality disorder aspects of those disorders.

101 It was put to Dr Brett that the Complainant's threatening behaviour was the main feature of his disorder, and that he should not be discriminated against by the withdrawal of treatment on the grounds of his threatening behaviour. Dr Brett's response was that nearly all the patients in his Service have anti-social personality disorders, but could accept the Service's policy of zero tolerance to threats, abuse and violence. While the Complainant exhibited impulsive behaviour, and could not control the actual feeling of impulse, he could control the behaviour which arose from the impulse.

102 While the prognosis is generally poor for persons with personality disorders, had the Complainant been prepared to comply with the Management Plan, he could have been offered problem-solving techniques and de-escalation techniques in order to better control his impulses. The main aim would have been to achieve a situation in which the Complainant took responsibility for his own actions. That would involve coming to appointments and at least trying to comply with the rules. The Complainant was not prepared to even try to do this. He wanted the Service to be available to him to manage crises in his life, whereas the Service wanted to provide him with means in order to prevent crises arising, and to manage them himself when they did arise.

Factual findings by the Tribunal

103 The attendance at RPH Emergency Department on 10 May 2002 is not the subject of the complaint and the Tribunal is not required to make any factual findings concerning it.

104 To the minor extent that accounts vary, the Tribunal accepts Dr Notley's version of the attendance on 20 June 2002. She had an impressive recollection of the events, supported by several pages of contemporaneous notes. The Complainant on the other hand had a poor memory of the events. The Tribunal finds that the Complainant was comprehensively assessed, and found not in need of urgent psychiatric treatment. The Tribunal accepts Dr Notley's evidence that she suggested a referral for psychological treatment to the Complainant, which caused him to become abusive and threatening and leave.

105 Mr De Groot provided the Tribunal with first-hand evidence of his tendency to dramatically leave, usually with loud protestations of injustice which are peppered with swear words and abuse. He did this on several occasions during the hearing of his complaint. The Tribunal in no doubt that this is one of his main modus operandi, when things happen or are said which he does not approve of, and he did it on 20 June 2002 when Dr Notley raised the issue of counselling with him.

106 Strictly speaking, it is not necessary for the Tribunal to make factual findings about the telephone calls between Ms Drake and Dr Notley. However, the Tribunal agrees with Dr Notley that she and Ms Drake were at cross purposes to some extent during their two telephone conversations. Both of them were quite genuine in their motives. Dr Notley was endeavouring to warn Ms Drake about her safety, and to justify her clinical findings. Ms Drake was trying to persuade Dr Notley that Mr De Groot required treatment, to ascertain whether Mr De Groot had been refused treatment and whether he had been told that he was banned from receiving services in the future. The calls were not conducted in the best of circumstances, because Dr Notley was caught by surprise, and had other pressing matters on her mind.

107 The Complainant's recollection of his contact with the CFMHS was patchy to say the least. Those parts of it that he did recall, were consistent with what appeared on the Service's file, and the evidence given by Dr Brett and Ms Drake. The Tribunal finds that between July and October 2002, the Service treated Mr De Groot as a patient, despite the fact that he did not fulfil their eligibility criteria.

108 The Tribunal also finds that the relationship between the Complainant and the Service was difficult and stormy. The Service placed requirements on Mr De Groot that he attend for appointments, not attend without appointments, and not make threats or abuse staff members. Despite his failure to comply with these requirements, the Service continued to offer him treatment. Finally, it became clear that the only treatment that Mr De Groot would accept was crisis management, whereas the Service had reached the conclusion that the only treatment it could offer, was problem-solving techniques and anger management, in order that crises not arise. This final conflict led to the relationship being terminated by the Service. Mr De Groot was of the view that he had terminated the relationship, an event described in his usual colourful way. However, the relevant and final termination was effected by the Service by way of its letters of 7 and 15 October 2002. They made it clear that the

CFMHS could only provide Mr De Groot with preventative therapy, which he was not interested in undertaking.

The legal issues

109 The legal issues that are raised in this complaint are:-

(i) Does the Complainant have an "impairment" within the meaning of the Act?

(ii) Was he refused a service by the Respondent on the two occasions mentioned above; and

(iii) If yes to (ii) above, was he refused the service on the ground of his impairment?

(iv) If yes to (iii), does he have a compensable loss?

Does the Complainant have an impairment within the meaning of the Act?

110 The ***Equal Opportunity Act, 1984 (WA)*** ("the Act") makes it unlawful to discriminate on the ground of impairment in a number of areas including employment, education and provision of goods and services.

111 "Impairment" is defined by s4 of the Act as follows:

""impairment" in relation to a person, means one or more of the following conditions –

(a) any defect or disturbance in the normal structure or functioning of a person's body;

(b) any defect or disturbance in the normal structure or functioning of a person's brain; or

(c) any illness or condition which impairs a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour,

whether arising from a condition subsisting at birth or from an illness or injury and includes and impairment –

(a) which presently exists or existed in the past but has now ceased to exist; or

(b) which is imputed to the person."

112 This is widely-acknowledged as being a broad definition.

113 The Tribunal notes two decisions of the Human Rights and Equal Opportunity Commission in which it found that certain personality disorders constitute a "disability" within the meaning of the ***Disability Discrimination Act, 1992 (Clth)***.[4] The definition of disability in that Act is not precisely the same as in the ***Equal Opportunity Act, 1984 (WA)*** but there are many features of similarity.

114 Arguably, the personality disorder which Mr De Groot has, is a "condition" which impairs his emotions, his judgment, and results in disturbed behaviour.

115 However, in light of the Tribunal's findings in relation to other areas of this complaint, it is not necessary decide whether Mr De Groot's personality disorder constitutes an impairment within the meaning of the Act.

Was the Complainant refused a service by the Respondent at Royal Perth Hospital on 20 June 2002?

116 Direct disability discrimination is defined in s66A as follows:-

"(1) For the purposes of this Act, a person (in this subsection referred to as the "discriminator") discriminates against another person (in this subsection referred to as the "aggrieved person") on the ground of impairment, if, on the ground of -

(a) the impairment of the aggrieved person;

(b) a characteristic that appertains generally to persons having the same impairment as the aggrieved person;

[4] R v Nunawading Tennis Club (1997) HREOCA 60 (23 October 1997); H v S decision (1997) HREOCA 23 July 1997.

(c) a characteristic that is generally imputed to persons having the same impairment as the aggrieved person;

(d) a requirement that the aggrieved person be accompanied by or in possession of any palliative device in respect of that person's impairment,

the discriminator treats the aggrieved person less favourably than in the same circumstances or in circumstances that are not materially different, the discriminator treats or would treat a person who does not have such an impairment."

117 Section 66K of the Act provides:-

"(1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's impairment –

(a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;

(b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or

(c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

(2) This section does not apply to discrimination against a person on the ground of impairment in relation to the provision of a service or facility where, in consequence of the person's impairment, the person requires the service to be performed or the facility to be made available in a special manner that without unjustifiable hardship –

(a) cannot be provided by the person providing the service or making the facility available; or

(b) cannot be provided by the person providing the service or making the facility available except on more onerous terms."

118 There is no doubt that a health service is a "service" within the meaning of the Act.[5]

119 In order to answer this question, the service being offered by each provider must be defined. On the basis of the evidence of Dr Fenner and Dr Notley, the Tribunal finds that the service provided by the Emergency Department of Royal Perth Hospital to persons presenting with apparent mental health problems, is to assess them, reach a provisional diagnosis, and if they are in need of urgent medical treatment, to refer them for that treatment, either in the Hospital or elsewhere. For those persons assessed to be without an urgent medical need, but who may benefit from long-term assistance, the Hospital will provide a referral to other services, such as a referral to a psychologist.

120 When Mr De Groot arrived at the Emergency Department on 20 June 2002, he received this service. He was assessed, probably first by a triage nurse, and then by an Emergency Department doctor. He does not recall this happening, but there is little doubt that it did. He was then reviewed by Dr Notley. She observed his behaviour for a period without him knowing, which is a standard part of psychiatric diagnosis. She took his history to the extent he would disclose it. She did extensive research to take a collateral history. She reached a provisional diagnosis, and tried to inform him of the options. In the process of doing this, he ended the consultation by leaving.

121 A person presenting to an acute medical facility such as the Emergency Department of a hospital obviously cannot dictate the nature of the treatment they will receive. Part of the contract between them is that the professionals will exercise their skill and judgement to make a recommendation for treatment which is in the patients' best interests, even if the patient disagrees with the recommendation. In this case Mr De Groot requested that he be *"locked up"*. Dr Notley declined this request because she did not believe that such a course would achieve anything. She offered him a referral to counselling, which he declined.

122 The central point is that the service, of diagnosis and referral, that is offered by the Royal Perth Hospital Emergency Department to patients

[5] "Services" include "services of a kind provided by members of any profession ....(and) government...." (s4)

presenting with mental health problems, was given to Mr De Groot. He himself terminated the interview, thereby declining the service.

Was Mr De Groot refused a service by the Community Forensic Mental Health Service?

123 There is no doubt that Mr De Groot was provided with a service by this agency, from July to October 2002.

124 He was the subject of two lengthy assessments, by Dr Brett, supplemented by information obtained from other agencies. In addition, he telephoned the Service on numerous occasions and spoke to nurses and Dr Brett. Some of these telephone calls related to whether the Service was proposing to offer him long-term care. Others however, related to the various crises from which he needed to be extricated. He was given supportive, useful and encouraging advice. He was permitted to "ventilate" his anger at various agencies and organizations and on most occasions appeared to settle down by the end of the conversation. On other occasions, he terminated them angrily because he became agitated and was not getting the answers he wanted. To the extent that his own personality problems allowed, the CFMHS provided him with services. He also nominated the Service to other agencies such as Homeswest, as a source of information about him, when those agencies required medical information in support of various services they were endeavouring to provide him with.

125 The central allegation is that the letters of 7 and 15 October 2002 constituted a discriminatory refusal of service to Mr De Groot, based on his impairment.

126 The Tribunal does not believe that even at this point, the CFMHS was denying Mr De Groot a service. Rather, it was advising him of the service it considered would best suit him, in light its aims, expertise and knowledge of his needs, formed over several months of contact.

127 The CFMHS is not obliged to offer psychiatric care at large to the community, but is obliged to offer a service to persons who fall within its eligibility criteria. As with any professional service, part of the expectation is that the service provider will exercise his or her expertise, knowledge and experience to assess precisely what service is required in each individual case and advise the patient accordingly. Of course, in doing all of these things, the Service is obliged not to discriminate unlawfully in the provision of its services.

128 By October 2002, Mr De Groot was informed that the service which the CFMHS could offer him was behavioral intervention to prevent crises arising, not crisis management. It is not set up for crisis management. It is a 24 hour service. It does not have the staff for crisis management. Furthermore, the staff were of the view that crisis management would not constitute treatment of Mr De Groot's underlying condition. It would simply be a never-ending process of dealing with problems as they arose.

129 By the time the CFMHS terminated the relationship, the main point of contention between it and Mr De Groot was the nature of the service thought appropriate to his needs. The CFMHS was offering Mr De Groot a service that he did not want. He was seeking a service that it did not provide.

130 It was put to Dr Brett that this was a convenient reason why the CFMHS could rid itself of a troublesome patient, the inference being that the real reason was Mr De Groot's behaviour. This is not borne out by the evidence. The evidence shows that Mr De Groot was continually offered a service by the CFMHS between July and October 2002, despite being told on numerous occasions that he would be refused a service because of his behaviour. This could perhaps give rise to criticism that the CFMHS was overly tolerant of Mr De Groot's outbursts and failed to strictly enforce its zero tolerance towards violent behaviour. This does not, however, amount to unlawful discrimination.

Comments about other aspects of the evidence

131 There was no complaint made by the Complainant about his dealings with the Bentley Mental Health Service, which is also an agency conducted by the Respondent. Some hearsay material arose in the evidence of Dr Notley that suggested that the Complainant had been *"black banned"* by that Service, due to his outbursts of anger and threats of violence. Due to an entirely proper objection to this evidence by the Respondent's counsel, the evidence was only received to determine Dr Notley's state of mind, rather than as to the truth of the allegation of a ban.

132 In appropriate circumstances, the Tribunal will adopt an investigatory approach to determine if unlawful discrimination has occurred, even if it has not been raised by the complaint before it. On this occasion, the Complainant was represented by counsel, who chose not to press this issue even after it was squarely raised by counsel for the

Respondent in his closing address. Accordingly the Tribunal did not pursue the matter further.

133 This aspect of the case does however, raise the issue of whether a refusal to treat someone like Mr De Groot, because of an aspect of that person's behaviour, could amount to unlawful discrimination on the ground of impairment. This issue was raised by Mr De Groot's complaint against RPH, because he believed (wrongly in the view of the Tribunal) that he had also been banned by that hospital. It is also raised in the complaint against the CFMHS because of the Complainant's view (wrongly held in the view of the Tribunal) that he was discharged because of his violent outbursts.

134 The decision of the High Court in the case of ***Purvis (on behalf of Hoggan) v New South Wales (Department of Education and Training) and Another 202 ALR 133*** has dealt with the question of a person's behaviour arising from a disability. Of course, in that case, the disability involved was brain damage, not a personality disorder. One similarity to this case arises in the sense that the behaviour of the brain damaged-complainant in that case led to violent outbursts. The violent outbursts led to the complainant being expelled from school. In the context of that case, the Court held that to refuse to offer the complainant educational services did not amount to unlawful discrimination on the ground of disability under the ***Disability Discrimination Act, 1992 (Clth)***. The Court made this finding because it held that in determining whether the respondent was permitted to treat the complainant differently to others, it should compare the complainant (with brain damage) with a person without brain damage who was also prone to violent outbursts. If the respondent's attitude would be the same in both cases, then there was no discriminatory conduct.

135 There are a number of points of distinction between the facts in ***Purvis***, and this case. Furthermore, the ***Disability Discrimination Act, 1992 (Clth)*** differs from the ***Equal Opportunity Act, 1984 (WA)*** in a number of ways. However, had the evidence in this case have revealed a refusal to provide services, the Tribunal would have found that the policy of CFMHS was not discriminatory, based on this binding authority. This is not to suggest that in every case of a mentally impaired person prone to violent outbursts, the result would be the same. Each case must be considered on its merits.

136 Finally, there was a significant amount of evidence of disclosure of sensitive medical and other information about the Complainant, (including

the sensational rumour mentioned above) between government agencies, and from government agencies to the HCC. Some of these disclosures may have authorised, or reasonably judged to be necessary to ensure persons safety. However, in the case of the comments to Ms Drake by an employee of the CFMHS on 25 June 2002, this was palpably not the case.

137 Health professionals should ensure that persons with mental health problems are accorded the same high standards of patient confidentiality as the rest of the community.

Outcome

138 The complaint is dismissed.