



Mental Health
Review Tribunal

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Law Reform Commission
Department of Communities & Justice
GPO Box 31
Sydney NSW 2001

17 February 2021

Dear Commissioner

Consultation Paper 22 – Open justice: Court and tribunal information: access, disclosure and publication

Thank you for the opportunity to provide submissions in relation to the Consultation Paper on *Open Justice Court and tribunal information: access, disclosure and publication*.

The Tribunal only wishes to comment on certain aspects of the Consultation Paper.

The Tribunal has previously provided submissions to the Commission on this topic. This submission should be read in conjunction with the Tribunal's previous submissions.

- The Tribunal considers that it is appropriate that information that identifies a person as being involved in MHRT proceedings should be the subject of an automatic prohibition on publication or disclosure for the reasons referred to in para 3.22 of the Consultation Paper.
- The Tribunal agrees with this suggestion made at para 3.25 of the Consultation Paper that s 162 requires amendment to clarify that the prohibition on publication only covers a forensic patient's involvement with the MHRT and does not prohibit victims from discussing their experiences of the index offence itself.

- In response to question 3.6, the Tribunal considers that the identity of people who are the subject of Tribunal orders and who bring an appeal to the Supreme Court from MHRT proceedings should not be identified. Similarly, if there is an application to the Supreme Court for an extension of a persons' forensic patient status. The current regime is inconsistent for the reasons discussed in the Consultation Paper.
- In response to question 3.7, The Tribunal considers that the consent of a person is a relevant consideration to a decision about the publication of their identity under section 162. The Tribunal considers it appropriate that both the person and the Tribunal should agree to the publication.

In practice, the Tribunal already considers the person's views when making a decision under section 162. However, it is appropriate that the importance of the subject person's views should be given statutory recognition. The Tribunal notes that under ss 44 and 162 of *Mental Health Act 1990*, the person's consent was a part of the two different statutory tests for granting permission to publish.

- In relation to question 5.3, the Tribunal confirms that there have been significant practical difficulties of the kind discussed in the Consultation Paper with prosecuting under s 162.
- In relation to question 6.12, the Tribunal endorses the idea that a certain percentage of all Tribunal decisions be published, to enhance transparency of decision-making. In practice, this would have significant resource implications.

When exercising its jurisdiction under the *Mental Health Act 2007*, the Tribunal only provides short reasons which are written immediately after the conclusion of the hearing. To make these comprehensible to a person who did not have access to the file would require considerable work.

In addition, the work of de-identifying Tribunal reasons for decision is very time-consuming. Given the information freely available on the internet, the Tribunal needs to be satisfied that an interested person could not reverse engineer the information contained in a Tribunal decision and identify the person concerned.

- In relation to question 8.4 Howard Brown suggests that registered victims, who make submissions to the MHRT about the release of a forensic patient, need access to court documents concerning the patient's diagnosis.

The Tribunal does not think that victims should have access to court documents concerning the patient's diagnosis. A victim may make submissions to the Tribunal under s 74A of the *Mental Health (Forensic Provisions) Act 1990* and cl 7A of the *Mental Health (Forensic Provisions) Regulation 2017*. Those provisions ask the victim to outline the forensic patient's past or present behaviour, the impact of that behaviour on the victim, the victims' concerns about the risks posed by the forensic patient and suggestions as to conditions that should be imposed. The nub of the provisions turn on the victim's own concerns, rather than issues of diagnosis.

In practice, the evidence in relation to a forensic patient's mental health is often discussed openly in court proceedings or documented in the court's judgement. Once a person becomes a forensic patient, victims are entitled to attend Tribunal hearings and be represented by the Specialist Victims Support Service. Again, the forensic patient's diagnosis, medication and progress are generally discussed openly in these hearings.

- In Chapter 6, there is discussion of whether a consolidated regime for access to information would be appropriate. The Tribunal acknowledges the difficulties faced by members of the public and the media in understanding the different regimes for accessing court and tribunal information. However, the nature of the Tribunal's proceedings is very different to the civil or criminal jurisdiction of the court, or even the jurisdictions exercised by the NSW Civil and Administrative Tribunal. For this reason the Tribunal would prefer that it retains control over providing access to information which it holds. If need be those rights of access could be clarified in the *Mental Health Act 2007*.
- Chapter 11 deals with researchers access to information. Section 189(d1) of the *Mental Health Act 2007*, which otherwise prohibits the disclosure of information held by the Tribunal, provides for an exception for research purposes. The Tribunal regularly engages with researchers and allows access to its files and databases, subject to appropriate ethics approval.
- Chapter 12 documents concerns about the way in which virtual court rooms may allow unknown parties access to hearings, who in turn may record information discussed in these hearings. The Tribunal has been conducting hearings by video link for many years. Since April 2020, all of its hearings have been conducted by video or telephone because of COVID-19. However, a participant in a hearing must be admitted to the hearing by the Tribunal Chair and the practice of the Tribunal is that everyone participating should identify themselves by name. Having said that it is possible that a person might be able

to view the hearing, whilst remaining off-camera. Given the sensitive nature of information discussed on Tribunal hearings, this is concern to the Tribunal. The prohibition on publishing any information under s 162 does offer some protection to Tribunal participants.

If the Tribunal can assist the Law Reform Commission further, please contact us.

Yours sincerely



Judge P I Lakatos SC
President