Mental Health
Review Tribunal

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28 April 2021

Mr Alan Cameron AO
Chairperson
Law Reform Commission

By email: [redacted]

Dear Commissioner

Thank you for meeting with [redacted] and [redacted] on 31 May 2021. As discussed, we agreed to follow up that meeting with some written comments on the discussion paper.

1. Consolidating closed court, suppression and non-publication orders

The MHRT is a stand-alone body dealing only with persons who have mental health issues. There are a group of people who appear frequently in the Tribunal – consumers, clinicians and Mental Health Advocacy Service lawyers. These regular participants are used to looking in either the *Mental Health Act 2007* (MHA) or the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (MHCIFPA) for the rules that govern the work of the Tribunal. The most practical place for these frequent users to find the law in relation to closing the Tribunal, suppression and non-publication orders would be to include it in the MHA, as is done at present. This is the Tribunal's preference.

The media are infrequently involved in Tribunal proceedings. The Tribunal recognizes that it would be easiest for members of the media if the law in relation to closing the Tribunal, suppression and non-publication orders were found in a stand-alone Act.

In either case, the Tribunal suggests that a Note could be included in whichever piece of legislation does not contain the rules, referring the reader to the Act where the rules can be found.

2. Standard definitions of key terms

The Tribunal agrees that defining standard key terms would be very helpful. The Tribunal has already referred to the difficulties with the wording of s 162 of the MHA and the challenges it presents for a successful prosecution.

The Tribunal agrees that the option of a Court Information Commissioner would be a useful one. To date, the Tribunal has referred any concerns to the Attorney General who has considered any potential prosecution. Again, the difficulties with a successful prosecution to date are largely related to definitional issues.

3. The information covered by s 162 of the *Mental Health Act*

The majority of Tribunal hearings (about 17,000 of the approximately 18,000 per year) involve decisions about "civil patients" under the MHA. These decisions concern compulsory treatment as an inpatient or in the community and are not related to criminal proceedings.

There is clearly still a significant stigma attached to being a person who has a mental illness, particularly if that has required involuntary treatment. There remains a strong interest in protecting the identity of people who come before the Tribunal and their family members or support persons.

Even the names of clinical staff who appear in Tribunal hearings may be sensitive. Many clinical staff would prefer not to publicise their surnames or allow the publication of information that may identify them in case they become the focus of unwanted attention outside of a clinical setting.

We note that in the Tribunal's publicly available decisions (which are de-identified) the Tribunal does not identify the names of clinicians who give evidence. Only legal representatives are identified by their real name.

The Tribunal acknowledges that this creates difficulties for victims and the media who may wish to write about forensic patients. Some information about forensic patients may be well known from past court and media reports and yet their current circumstances, including their treatment, the name of services that support them and their current address are not publicly known. To make this information publicly available could jeopardise those support services (who most likely do not wish to be associated with negative publicity) or their accommodation.

For these reasons the Tribunal considers that option 3.2, which would only prohibit the publication of medical or health information of the subject person is too narrow.

Option 3.1 is preferable. The protection should also be extend to any carers or other people who attend to support the patient.

We suggest that you consult more broadly, perhaps with NSW Health, to see if clinical witnesses may be concerned about the publication of their identity as participants in Tribunal hearings.

4. Consent to publication of the person's identity

The Tribunal prefers option 4.1A i.e. that the consent of both the Tribunal and the person are appropriate before publication. You raise the question of what might happen if a person does not have capacity to consent, but disclosure of information is in the public interest.

It is difficult to imagine circumstances when the public interest would be served by identifying someone by name, even though the person does not have capacity to consent. If publicity about a person's circumstances is in the public interest, that public interest can still be achieved using a pseudonym. This occurred in the recent Disability Royal Commission hearings.

Another option would be to return to the position under *Mental Health Act 1990*, which provided:

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(1) The name of a person who is the subject of a matter heard before or being reviewed by the Tribunal may not, except with the approval of the Tribunal and the consent of the person *or any representative of the person*, be published or broadcast.

Options 4.2A and B both try to formulate a test to be applied when deciding whether to permit a person's identification. Both ask the Tribunal to consider the risk to the person concerned. This would certainly be a relevant consideration.

Option 4.2B suggests that a risk to the community could also be relevant. The non-publication provisions should only relate to matters considered in a Tribunal hearing. It does not prevent the Police using the media to draw attention to risk issues about a mental health or a forensic patient who is absent or needs to be located.

The Tribunal has concerns about the formulation of options 4.2A and 4.2B. The Tribunal would prefer that the discretion to consent to publication is left open, to allow for the maximum flexibility to react to individual circumstances.

5. Extend the prohibition in MHRT proceedings to related proceedings

As noted in our discussions, the MHCIFPA allows for an extension of some forensic patient's status as forensic patients. These orders can only be made by the Supreme Court. These

judgments in these Supreme Court proceedings tend to identify for the forensic patient by name. Often it identifies the location where the person is currently living and the kinds of activities they undertake. When a person is living in a small community this allows the person to be identified and connected with their index offence. This can jeopardise the person's current living arrangements, particularly if service providers do not wish to be publicly identified with a forensic patient or a person who has committed that kind of offence.

There is also a right of appeal from Tribunal proceedings in either its civil or forensic jurisdictions to the Supreme Court. Under s 166 of the MHA, the Supreme Court has the jurisdiction to discharge a person detained by the Tribunal. It seems odd that the identity of people who are before the Tribunal is protected in the initial proceedings, but could be made publicly available when the matter comes before the Court. Any public interest in the public administration of justice would be achieved through the use of a pseudonym.

The Tribunal considers that judgments made under Part 6 of the MHCIFPA and any appeal from a Tribunal decision should be de-identified.

6. Streamlining information access regimes

For the reasons set out in relation to question 1, the Tribunal would prefer to incorporate model provisions into the MHA.

The Tribunal's jurisdiction and decision making model is very different to that of the courts, so that a standard legislative approach to accessing information is unlikely to fit well.

7. Specific rules for researcher access to information in MHRT proceedings

The Tribunal already regularly collaborates on research projects, which are sanctioned under s 189(1)(d1) of the MHA. These collaborations usually involve researchers based at Universities and the Tribunal provides access to files or data subject to appropriate ethics approval from the University or another health body (e.g. Justice Health and the Forensic Mental Health Service). The Tribunal's full-time presidential members have been co-authors in a number of published papers coming out of these research projects.

The Tribunal usually takes an informal approach to the initial approaches of researchers. The Registrar and/or a full-time Presidential member will talk to the researcher about what they want to do and why they wish to access the Tribunal's files. This is helpful in clarifying the kinds of data that the Tribunal does/does not hold and the form in which it is held. If the Tribunal does not hold information of a kind that the researcher seeks, we are often able to redirect them to a more appropriate agency eg NSW Health.

So far as we are aware, there have never been any concerns about the lack of access to Tribunal data by researchers. We find that this informal and open approach works and would prefer not to set out detailed rules, unless that proves necessary in the future.

8. Improve access to virtual court proceedings, with appropriate safeguards

The Tribunal routinely conducts about 50% of its hearings via a video link. From April 2020 to March 2021, all hearings were conducted remotely, mostly by video with about 10% being conducted by telephone. We are gradually returning to face-to-face hearings where we can do so safely.

Staff provide the connection details for that hearing the day prior to the hearing.

The Tribunal is aware of the issues raised in the consultation paper, and has had some limited experience of people connecting to a video hearing without the Tribunal being aware that they were there.

This is largely mitigated by the platform used by the Tribunal which shows who is connecting at any point in time, combined with the Tribunal's practice of asking everyone in the room to announce their name.

The Tribunal has also found that video hearings have allowed people who would find it hard to join face to face hearings, to connect. Family members can connect remotely to hearings, without needing to attend the hearing in person. Students have been able to watch video hearings without having to travel.

Given the sensitivity of the matters discussed in Tribunal matters, the Tribunal does not think it appropriate to publish a link to Tribunal hearings on a publicly available website.

In general, this arrangement has worked well and unexpected attendees or recording of hearings have been rare. The Tribunal is happy to leave this area unregulated at present, as this allows flexibility to manage the Tribunal's practices. A Practice Direction under the MHA could be made in the future if needed.

Yours sincerely

Judge P I Lakatos SC
President