Mental Health Review Tribunal

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

3 August 2021

Dear Commissioner

Comment on Draft Proposals – Open justice: Court and tribunal information: access, disclosure and publication

Thank you for the opportunity to provide submissions in relation to the Draft Proposals in response to the review *Open Justice Court and tribunal information: access, disclosure and publication*.

The Tribunal only wishes to comment on some of the Draft Proposals, as many of the Proposals would not affect the Tribunal.

The Tribunal **agrees** with **Proposals 3.1, 3.2, 3.5, 3.9, 5.4, 5.14, 6.10** and **11.1**.

As to **Proposal 3.3**, I understand that this would not apply to s 162 of the *Mental Health Act 2007* (MHA). MHRT proceedings do not have “parties” as such. Defining “party” in s 162 would be confusing. In addition, the proposed definition in Proposal 3.3 appears to be narrower than the categories captured in s 162 MHA. The proposal refers to "any person named in evidence given in proceedings" whereas s 162 refers to, amongst other things, a person "who is mentioned or otherwise involved in any proceedings … whether before or after the hearing is completed". The current MHA definition captures members of the family and/or the treating

team who are referred to in the documentation (including things such as progress notes) which are before the Tribunal but do not form part of any major debate or consideration

As to **Proposal 3.4(2)**, my understanding is that this recommendation would not apply to the MHRT. If it were to apply, then the definition should be altered. Victims are involved in some forensic Tribunal hearings. The term "victim" is defined in the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (MHCIFPA) and victims whose names are included on the Victims Register have special rights under the MHCFIPA: see Part 8. That definition is different to the one suggested in Proposal 3.4(2).

As to **Proposal 6.9** the Tribunal anticipates that most of its orders are likely to be required indefinitely, or at least for very long periods of time. The prohibition on publication in the MHA is directed towards protecting private medical and other information from public disclosure and shielding the subject person from the stigma attached to living with a mental illness. Their situation is analogous with the position of children in the justice system. As the draft proposals note at [5.4] one of the "strong" arguments favouring prohibition of the identity of children in that specific legislation is "reducing community stigma for child defendants, facilitating the rehabilitation and reintegration into society" [5.4]. Therefore, the protections afforded by non-publication orders made under the MHA are likely in almost all cases, to continue to exist over lengthy periods of time or indefinitely. The Tribunal submits that s 151 MHA should not include a requirement to define the length of the order.

As to **Proposal 9.5**, as a specialist tribunal, privacy considerations apply to all people the subject of Tribunal proceedings. Therefore, the need for a register substantially or completely falls away. Further, it is hard to envisage how the Tribunal could operate an online register of the non-publication or suppression or closed court orders that it has made without also identifying people as being involved in MHRT proceedings. This would involve a breach of s 162 of the MHA.

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

Yours sincerely

Judge P I Lakatos SC
President