Mental Health
Review Tribunal

Law Reform Commission NSW - Open Justice Review
Preliminary submission from the Mental Health Review Tribunal

Thank you for the opportunity to provide a preliminary submission to this review.

Background

The NSW Mental Health Review Tribunal (MHRT) exercises two separate jurisdictions.

In its jurisdiction under the *Mental Health Act 2007*, the MHRT makes orders requiring a person to have involuntary mental health treatment. The MHRT may make orders for a person's detention for involuntary treatment in a mental health facility, for mental health treatment in the community or to undergo electro-convulsive therapy. The Tribunal also has a role in conducting reviews for people who have been long-term voluntary patients.

The Tribunal also has a forensic jurisdiction, exercised under the *Mental Health (Forensic Provisions) Act 1990* (MHFPA). In that setting, the Tribunal makes decisions about people who have committed serious criminal offences whilst mentally unwell (or who are unfit to stand trial). For people who have been found not guilty of an offence by reason of mental illness, the Tribunal makes decisions about where the person should be detained, when the person can be transferred to another place of detention, when the person should have leave from that facility and when they can be released to live in the community under conditions. The Tribunal also decides when a person can safely live in the community without a forensic order. Finally, the Tribunal has a role in ordering and overseeing the delivery of compulsory mental health care to people in custody.

Sections 151(3) and 162 of the *Mental Health Act 2007*

In terms of Mental Health Tribunals, the MHRT is unique in Australia, in that its hearings are open to the public: s 151(3) *Mental Health Act 2007* (MHA). The origin of this provision is unclear, but may reflect the need for transparent decision making about compulsory mental health treatment, given the past abuses of mental health patients.[1] The Tribunal does have the power to conduct its hearings wholly or partly in private and to prohibit the disclosure of evidence or documents: s 151(4) MHA.

On the other hand, s 162 of the MHA prohibits the publication or broadcast of information that might identify a person involved in proceedings before the Tribunal, unless the Tribunal grants permission. The prohibition extends to any person that appears as a witness or is mentioned or otherwise involved in proceedings before the Tribunal. This provision appears to recognise the intensely personal information which is discussed in Tribunal hearings and the ongoing stigma which people living with mental health issues experience.

There is no capacity for a person to consent to their name or identity being published or broadcast, although the Tribunal has considered a person's views on this subject when deciding whether to

[1] Section 272 of the *Mental Health Act 1990* also provided that Tribunal hearings should be open to the public

grant permission under s 162: *Mr Ephram* [2013] NSWMHRT 7; *Ms Kerr & Ms Liu* [2014] NSWMHRT 4.

The Tribunal has issued a Practice Direction which sets out the procedures to apply to the Tribunal for consent under s 162 MHA.[2]

Reconciling transparency and privacy

The Tribunal has published a number of (anonymised) decisions which grapple with the tension between allowing hearings to be open to the public and ensuring that a person who appears before the Tribunal has their privacy is protected.[3] Protecting a person's privacy is important not only to protect a person from being stigmatised as a person living with a mental illness. It encourages a frank discussion of sensitive issues in the Tribunal hearing, which in turn improves the quality of Tribunal decision making.

On the other hand, the Tribunal recognises that there can be a genuine public interest in the reporting of Tribunal review hearings. This is particularly the case where the Tribunal is exercising its forensic jurisdiction and the public may be interested in understanding the progress of a forensic patient after a publicly conducted court hearing has concluded.

This issue was considered by the then President of the Tribunal in *Mr Turner* [2019] NSWMHRT 4. It was also canvassed by the Hon Anthony Whealy QC in his *Review of the Mental Health Review Tribunal in respect of Forensic Patients* (2017) at pp 55-56. Mr Whealy QC recommended that the provisions remain and that further information and education be provided to victims, patients and the community in relation to the requirements and operation of s 162.[4]

Interestingly, when applications have been made to the Supreme Court in relation to forensic patients, the Court has not taken a consistent approach to the question of whether a forensic patient's identity should be reported. In contrast, people who have appealed the Tribunal's decisions made under the MHA to the Supreme Court have had a pseudonym allocated. [5]

Challenges with prosecuting breaches of s 162

It is an offence to publish or broadcast the name of a person contrary to s 162: s 162(1). Prosecuting offences against s 162 can be difficult. First, the MHA does not make it clear who is the agency responsible for bringing a prosecution.

Secondly, it is not always easy to identify an alleged offender, particularly when information is published electronically. There have been occasions where the name or identity of a person to whom a matter before the Tribunal relates has been included on a website. Where the information has been included on websites hosted by individuals or unincorporated associations, it can be difficult to prove who has "published" the information.

---

[2] https://www.mhrt.nsw.gov.au/files/mhrt/pdf/Practice%20Direction%20Publications%20of%20Names%20August%202018.pdf

[3] *Mr Ephram* [2013] NSWMHRT 7; *Ms Kerr & Ms Liu* [2014] NSWMHRT 4; *A. Prof Isaac & Prof Janzik [2014]* NSWMHRT3; *Mr Turner* [2019] NSWMHRT 4; *Mr Roberts* [2019] NSWMHRT 2; *Mr Qadar* [2019] NSWMHRT 1

[4] https://www.health.nsw.gov.au/mentalhealth/reviews/tribunal/Publications/mhrt-review-report.pdf

[5] See references at [54] in judgement of Button J in *Attorney General of New South Wales v HRM (No 2)* [2016] NSWSC 751; contrast judgement of Button J in *Attorney General of NSW v McGuire* [2018] NSWSC 1795 in relation to the same defendant.

Challenges in understanding s 162

However, as Mr Whealy pointed out, it can be difficult to distinguish the kinds of information that can be published and those that cannot. A forensic patient's pathway through the courts is often discussed in public judgments with no restriction on their reporting. Yet, some victims have felt that they cannot publicly discuss the loss of their loved one without being in breach of s 162.

Alternatively, a person may wish to speak about their experiences of mental ill health, which may have included time as an involuntary patient and experience at Tribunal hearings. They may struggle to understand which parts of their story they can tell without being in breach of s 162.

Recommendation

The Tribunal considers that generally speaking, the current legislative regime under the MHA remains appropriate and strikes the right balance between privacy and transparency. It strikes an appropriate balance between protecting the privacy of people who are potentially subject to compulsory mental health care, whilst allowing the Tribunal the discretion to approve publication in appropriate cases. However, the Tribunal would welcome the Law Reform Commission's consideration of any improvements to clarify s 162.