Practice Direction

No.4 of 2023 – The Participation of Victims in Tribunal Reviews

This Practice Direction will apply to hearings listed after 1 January 2024.
NOTE: General information describing the review process can be found in the Information Sheet: Victims – Mental Health Review Tribunal Review of Forensic Patients

1. Introduction

1.1 Section 69(1)(f) of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (the Act) notes that one of the objects of Part 5 of the Act is to protect the safety of victims of forensic patients and acknowledge the harm done to victims.

1.2 Section 145 of the Act provides that a victim of a forensic patient may make a submission to the Tribunal if the Tribunal is considering the release of, or the grant of leave of absence to, the forensic patient.

1.3 The Act and the related *Mental Health and Cognitive Impairment Forensic Provisions Regulation 2021* ("the Regulation") contain a number of provisions relating to victim participation in Tribunal reviews.

1.4 This Practice Direction is intended to provide guidance to victims, their representatives and other participants in Tribunal proceedings as to how victim submissions will be received and considered by the Tribunal having regard to the requirements under the legislation.

1.5 Any reference to a "victim" in this Practice Direction is also a reference to a "registered victim" excepting in the Definitions or where the distinction is made explicit.

2. Definitions

family victim	means a person who is a member of the immediate family of a primary victim who has died as a direct result of the act of violence. A member of the immediate family may be a spouse of the victim, a de facto partner of the victim, a parent, guardian or step-parent of the victim, a child or step-child of the victim, or a brother, sister, half-brother, half-sister, step-brother or step-sister of the victim (see s22 *Victims Rights and Support Act 2013*)
patient	means the forensic patient who is the subject of the review
primary victim	means a person who is injured or dies as a direct result of the act of violence (see s20 *Victims Rights and Support Act 2013*)
registered victim	means a victim registered on the Victims Register (see s156 of the Act)
review	means the hearing conducted by the Tribunal to review a forensic patient
SVSS	means the Specialist Victims Support Service
treating team	means those persons who are ordinarily involved in the clinical management of the forensic patient
Tribunal	means the Mental Health Review Tribunal
victim	of a forensic patient means a primary victim, or a family victim, of an act of violence committed by the forensic patient
Victims Register	means the Register established under Part 8 of the Act

3. Balancing test

3.1 While it is not always the case that the submissions of a victim will be different to that of a patient there will often be different perspectives as to what is an appropriate outcome for a forensic patient.

3.2 In making its decision the Tribunal will need to balance a number of factors including the following considerations:

3.2.1 Whether or not care of a less restrictive kind that is consistent with safe and effective care is available to the patient;

3.2.2 Procedural fairness to all parties who have a proper interest in the matter;

3.2.3 Whether a proposal for leave or release of a patient seriously endangers a victim or any member of the public; and

3.2.4 The rights of victims in accordance with the Charter of Victims Rights set out in the *Victims Rights and Support Act 2013.*

4. Victims and registered victims

4.1 The Act creates a distinction between a "victim" and a "registered victim".

4.2 A victim may make a submission to the Tribunal if the Tribunal is considering the release of or grant of leave of absence to the forensic patient – s 145(1) of the Act.

4.3 A registered victim may make submissions to the Tribunal and may apply for a non-association order and/or a place restriction order – s 146(2) of the Act. The Tribunal interprets cl 11 of the Regulation to provide the same opportunity to victims to make submissions so long as their identity is known to the Tribunal, however a victim must be a registered victim to apply for orders.

4.4 A registered victim will receive notice from the Commissioner of Victims Rights of various matters which are before the Tribunal concerning the relevant forensic patient.

4.5 The Commissioner of Victims Rights has delegated certain functions to the SVSS. While victims are encouraged to use the services of a representative such as the SVSS they are not required to do so.

5. What can victims do at a Tribunal review?

5.1 Victims can listen to the proceedings either via an audio-visual link, or through a representative such as the SVSS. This is generally referred to as "observing the proceedings".

5.2 Clause 13 of the Regulation provides that victims may appoint a representative subject to certain conditions. One of those conditions is that the representative must fill out a Statutory Declaration as to confidentiality and this is available at:
https://www.mhrt.nsw.gov.au/forensic-patients/involvement-of-registered-victims.html

5.3 Victims or their representative can make submissions to the Tribunal in certain circumstances – see Paragraph 7 of this Practice Direction.

5.4 Registered victims or their representative can ask the Tribunal to consider certain orders in relation to the forensic patient in certain circumstances – see Paragraph 8 of this Practice Direction.

5.5 Victims or their representative can ask questions with the permission (leave) of the Tribunal (see Paragraph 9 of this Practice Direction).

6. **Observing the proceedings**

6.1 The legislation states that Tribunal proceedings are open to the public which means that a person, including a victim, may observe the proceedings. The Tribunal conducts many forensic hearings from secure facilities which do not provide public access and therefore observers usually attend proceedings by audio-visual link. The Tribunal has instituted procedures where members of the public advise the Tribunal in advance of their intention to view proceedings. Wherever possible, the Tribunal will advise other parties of the intended attendance by a member of the public or a victim.

6.2 Any person who observes Tribunal proceedings must not publish or broadcast the name of any person who is the forensic patient, a witness, a victim, or anyone mentioned or otherwise involved in the Tribunal proceedings unless they have the express consent of the Tribunal to do so – see s162 *Mental Health Act 2007*. This includes referring to any information that may lead to the identification of the person.

6.3 Victims or their representative appearing using audio-visual means can request to do so anonymously. If you do not wish your presence at the review to be made known to the forensic patient, please advise your representative if you have one or otherwise request this on the Victim Submission Form where indicated.

6.4 Victims who wish to observe proceedings can either seek the assistance of a representative such as the SVSS or contact the Tribunal at the following email address: MHRT-Forensic@health.nsw.gov.au. You should make these arrangements at least one week before any review date.

6.5 The SVSS will advise registered victims, or their representative of the date and approximate time of the review however please understand that the Tribunal cannot guarantee that a particular review will start on time. Delays may be experienced due to some reviews running longer than expected or other matters intervening outside of the Tribunal's control.

7. **Making submissions to the Tribunal**

7.1 Victims can make submissions to the Tribunal when the Tribunal is considering either a release of a forensic patient or leave for a forensic patient. A release can be unconditional or with conditions. Leave orders always have conditions attached. Victims can make submissions at the first application for leave or release, or subsequent applications (which may be described as "continuing order" applications).

7.2 Clause 11 of the Regulation says that victims may make submissions to the Tribunal about the following matters:

7.2.1 The forensic patient's behaviour and the impact of the behaviour on the victim or the victim's family,

7.2.2 The risk posed by the forensic patient to the victim, the victim's family or any other person,

7.2.3 The impact on the victim and the victim's family if the forensic patient is released or granted leave of absence, whether unconditionally or subject to proposed conditions,

7.2.4 The conditions that should be imposed on the release of or grant of leave of absence to forensic patients including non-association conditions and place restriction conditions.

7.3 Submissions can be in writing, or they can be made orally.

7.4 The Tribunal's preference is for submissions to be in writing. Submissions in writing provided before a hearing give all parties an opportunity to carefully consider those submissions. Victims should refer to the following steps to provide submissions in writing:

7.4.1 Make sure the review is one in which victim submissions can be made. See 7.1.

7.4.2 Find out when the review of the forensic patient is going to occur.

7.4.3 Prepare your written submissions on the Victim Submission Form having regard to the matters set out at 7.2. Use your own words and seek the assistance of a representative such as the SVSS if you wish to. The Form will ask you to indicate whether you have any wishes around disclosure of your submissions to various parties, whether you are seeking orders, and whether you wish to ask questions.

7.4.4 Submit your submissions to MHRT-Forensic@health.nsw.gov.au no later than two weeks prior to the review date.

7.4.5 If the submission will include an application for a place restriction order it should be submitted on the Victim Submission Form three weeks prior to the review (see 8.4 and 8.6).

7.4.6 If the submission is returned later than three weeks prior to the review, the Tribunal may not be able to consider the request at the hearing.

7.5 If you intend instead to make your submissions orally at the review you should give notice of your intention to do so at least two weeks prior to the date of review via your representative or by sending an email to MHRT-Forensic@health.nsw.gov.au . Please note that a request does not guarantee you will be given leave by the Tribunal panel to make those submissions.

7.6 You need not prepare new submissions for every review where leave or release is being considered. If you wish your submissions to be considered at each such review of the patient, please let your representative know so they can resubmit your submissions on your behalf. If you are not represented, you will need to resubmit your submissions prior to each review at which you want the submissions to be considered.

7.7 Where a Victim Impact Statement has been prepared by a victim for a court in respect of a forensic patient now before the Tribunal the court will provide that statement to the Tribunal when it refers the patient to the Tribunal. The Tribunal will consider that statement at each review. The victim may update their Victim Impact Statement with the consent of the Tribunal (see 11.1 below)

8. Seeking orders from the Tribunal

8.1 Registered victims can seek orders which:

8.1.1 make or vary a non-association condition; and/or

8.1.2 make or vary a place restriction condition,

whenever the Tribunal is considering a grant of leave to, or conditional release for a forensic patient.

8.2 Non-association condition is one which prevents a forensic patient from contacting, approaching or being with, in any way, or the forensic patient having someone else contacting or approaching in any way, a named person. Such an order does not prevent a lawyer for the forensic patient making contact with such named persons for the purposes of negotiating outcomes or discussing other matters of a legal nature.

8.3 A place restriction condition is one which prevents the forensic patient from entering or being within named localities.

8.4 A victim may seek such orders by making it clear within their submissions (see Paragraph 7 of this Practice Direction) what orders they are seeking. The Victim Submission Form provides space to indicate what orders are sought.

8.5 The Tribunal will make requested orders if there is sufficient evidence to support the making of such an order. Submissions should set out why the orders are sought. A victim will need to be able to demonstrate some real connection with the place they are seeking to restrict the forensic patient from. Vague references to large geographical areas without sufficient reason are unlikely to be agreed to by the Tribunal. Clear boundaries for any geographical area sought will need to be identified. Sometimes geographical restrictions that are requested by a victim are not ordered because the Tribunal orders already prevent the forensic patient from travelling to that area - for example, because the order is for escorted day leave on the hospital grounds.

8.6 The Victims Submission Form should be submitted to the Tribunal at least three weeks prior to the review date.

8.7 The SVSS can assist registered victims in drafting the orders they are seeking.

9. **Asking questions at the Review Hearing**

9.1 A victim who has made submissions to the Tribunal (see part 7 of this Practice Direction) may, with the leave of the Tribunal, raise questions that the Tribunal considers to be appropriate for discussion at the review.

9.2 To ensure that a review can proceed efficiently the Tribunal directs that victims should prepare their questions, for which they seek leave, in writing on the Victim Submission Form. The form will need to be received at least three weeks prior to the review date. If the Tribunal allows the question or questions, it will determine who the best person is to respond to that question or questions.

9.3 The Tribunal will forward a copy of the proposed questions to the intended person or group so that that person or group has notice of the question and may prepare a considered response if the Tribunal grants leave in accordance with par 9.4 of this Practice Direction.

9.4 The Tribunal will rule at the review which questions may be put at the review. Alternatively, the President or a Deputy President, may determine to rule on whether questions may be put at an on-the-papers review prior to the review. The Tribunal may disallow a question however may suggest an alternative to the proposed question which may be put.

9.5 Proposed questions must be relevant to the Tribunal's determination and should avoid topics or issues which are unrelated to the Tribunal's function.

9.6 Supplementary questions to responses given at a review may only be put with the Tribunal's granting of leave to do so.

9.7 A representative such as the SVSS can assist victims in the formulation of their proposed questions.

10. **Disclosure of victim submissions**

10.1 Ordinarily, victim submissions will be distributed to the usual participants in a review of a forensic patient. That means that, in addition to the Tribunal Members, the patient, the patient's legal representative, treating team members, and representatives for the Minister and/or Attorney General (if applicable) are likely to see the victim submissions.

10.2 There may be circumstances however where a victim requests that certain aspects of their submission not be disclosed to one or more parties. For example, the victim may request:

10.2.1 That the submission only be disclosed to the patient's legal representative and not the patient; or

10.2.2 That the full submission is not disclosed to the patient and that an edited version only be provided to the patient; and/or

10.2.3 That the submission only be provided to the treating team on condition that the treating team do not disclose information in the submission to the patient; or

10.2.4 That the submission is not disclosed to the treating team or patient.

10.3 Procedural fairness requires that patients have sufficient information around a victim's submission, question or order sought so as to be able to provide informed instructions to their legal representative in response.

10.4 Where non-disclosure to the patient is requested, the Tribunal will make a decision whether it will provide the full and any edited submission to the patient's legal representative (where there is one). It will only do so where the legal representative has agreed not to disclose to their client any material that the Tribunal has determined should not be disclosed to the patient.

10.5 Where the Tribunal considers that submissions, either in whole or in part, should be disclosed to a participant in the review who is a person or group for whom the victim has requested non-disclosure, the Tribunal will give the victim the opportunity to withdraw or amend their submission before any such disclosure. This applies also to any edited version provided by the victim – if an edited version is to be disclosed:

10.5.1 The victim may amend or withdraw the edited submission.

10.5.2 The victim may prepare an edited version of the submission for disclosure, although a full version must also be provided to the Tribunal.

10.5.3 The Tribunal may decide to edit the submission and if this occurs the victim will be provided with the edited version and may request amendments to the edited version. The Tribunal may consider the victim's request for non-disclosure before or at the review. If the Tribunal considers the request before the review, it will be undertaken by a Deputy President or President of the Tribunal who will review the request and any supporting documents. In considering the request the Deputy President or President may make further enquiries of any

party (without disclosing matters the subject of the non-disclosure request) and may consider any relevant material on file. In this case the Deputy President or President will provide a preliminary view as to whether the non-disclosure request is appropriate however such a view does not bind the Tribunal panel hearing the review. The Deputy President or President may recommend amendments to the request so that the intent of the victim can be achieved.

Victims may identify the non-disclosure requirements they are seeking on the Victim Submission Form which should be submitted at least three weeks prior to the review date.

11. Victim Impact Statements

11.1 A victim who wishes to update the Victim Impact Statement (VIS) that was made to court may do so at any time. Whether or not the updated VIS will be accepted by the Tribunal is a matter for the Tribunal.

11.2 The victim should provide a copy of the proposed updated VIS to the Tribunal at least three weeks prior to any listed hearing. The updated VIS can be sent via their representative or to the Tribunal at MHRT-Forensic@health.nsw.gov.au.

11.3 The Tribunal will provide a copy of the proposed updated VIS to the patient's lawyer for comment.

11.4 The Tribunal will consider whether to consent to the victim's request to update the VIS. For this purpose, the Tribunal will be constituted by the President, or a Deputy President nominated by the President.

11.5 In addition to the preliminary view provided for at par 10.6 of this Practice Direction, the Tribunal may issue procedural orders, rulings or advice prior to a review either on its own motion or at the request of a party or victim in order to facilitate efficient proceedings at review. A Deputy President or the President will give these orders, rulings or advice.

12. After the review hearing

12.1 The Tribunal prepares reasons for its decision which are provided to the forensic patient and treating team.

12.2 Where there are identified registered victims, and the application is for leave or release (conditional or unconditional) the Tribunal will also prepare a separate "Victim's Reasons" which will be provided to the Commissioner of Victims Rights for onforwarding to the registered victim in accordance with cl 25 of the Regulation. These reasons will include a summary of the basis for the Tribunal's decision, the orders made and the period of time before the next review.

13. **Help for victims**

13.1 Victims are encouraged to seek the advice of a service such as the SVSS in understanding their rights and obligations under the legislation and this Practice Direction.

13.2 Where there is any concern or question arising from the Tribunal's review victims should direct their enquiry in the first instance to their representative if they have one.

Magistrate Carolyn Huntsman
President
Dated 25 January 2024

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