

**THIS IS AN OFFICIAL REPORT OF THE MENTAL HEALTH
REVIEW TRIBUNAL PROCEEDINGS IN RELATION TO A s162
APPLICATION BY ASSOCIATE PROFESSOR ISAAC AND
PROFESSOR JANZIK TO PUBLISH OR BROADCAST NAME OF
A FORENSIC PATIENT, AUTHORISED BY THE PRESIDENT OF
THE TRIBUNAL ON 10 NOVEMBER 2014**



This is an edited version of the Tribunal's decision. The applicants have been allocated pseudonyms for the purposes of this Official Report

Applicants: Associate Professor Isaac and Professor Janzik
Date: 20 March 2014
Location: Forensic Hospital (Austinmer/Bronte Wards)
Panel: Daniel Howard SC President
Charles Doutney Psychiatrist
Stephen Woods Other Member
Application: Application to Publish or Name, s162 *Mental Health Act 2007*
Decision: Approved subject to conditions.

This is an application seeking the Tribunal's consent pursuant to section 162 of the *Mental Health Act 2007* made by Associate Professor Isaac and Professor Janzik who are both members of a journalism team that has been involved in producing a report about the circumstances of a forensic patient with a view to this being broadcast on a radio program ("the program").

The Tribunal notes that it previously granted consent pursuant to section 162 of the *Mental Health Act 2007* to the operator of the radio station to the broadcasting of the forensic patient's name for the purposes of that documentary program.

By virtue of the present application, the Professors have sought to use the forensic patient's name in scholarly publications that emanate from the program, including in "*the usual outlets for academic scholarship including academic journal articles, books and book chapters, and in our research blogs on such topics.*"

BACKGROUND

In 2004 the forensic patient was found not guilty by reason of mental illness on certain charges.

The forensic patient has been reviewed pursuant to the requirements of the *Mental Health (Forensic Provisions) Act 1990* on numerous occasions by the Tribunal.

The Tribunal has recently reviewed the forensic patient pursuant to section 46 of the *Mental Health (Forensic Provisions) Act 1990* and was satisfied that the forensic patient does suffer from a mental illness.

ATTENDEES

The forensic patient attended the hearing accompanied by his lawyer. Also in attendance were:

- Consultant Psychiatrist;
- Associate Professor Isaac;
- Professor Janzik;
- Psychiatrist;
- Registered Nurse;
- Registered Nurse;
- Primary Carer,
- Representative Justice Action.
- Consumer Support Worker (by phone)

Evidence on the Application

This application was heard in conjunction with the forensic patient's regular review under section 46 of the Act and the forensic patient was present throughout the application. He confirmed with the Tribunal that he gave his consent to his name being used by the Professors for the purposes they are seeking the Tribunal's consent for. This was also confirmed by the solicitor appearing for the forensic patient.

In a letter to the Tribunal's Registrar dated 11 March 2014, Professor Janzik states:

"We seek permission to name the forensic patient in the usual outlets for academic scholarship including academic journal articles, books and book chapters and in our research blogs on such topics"

Professor Janzik amplifies in his letter that the research ground likely to be covered in such scholarly articles relate to the Professors' areas of research, which include media law and ethics, the role of open justice at Tribunal hearings and mindful practice in journalism, focusing on the ethical and legal considerations involved in compiling the report.

Professor Janzik also sets out in his letter some of the research that both he and Professor ISAAC have done in this field. It is clear to the Tribunal that the Professors are genuinely engaged in academic research into these questions and that such research is clearly worthwhile.

Professor Janzik states in his letter that the limited publication of the forensic patient's name in such low circulation outlets for academic purposes does not represent a significant extension

beyond the broadcast of his name in the program on the radio. Professor Janzik submits that such publication will raise awareness among journalism and media law academics, students and journalists of the restrictions, the reasons for their existence and the competing rights at stake in relation to the reporting and broadcasting of the names of forensic patients in circumstances such as those of the forensic patient. Professor Janzik also submits that the granting of permission to publish the forensic patient's name in such circumstances will serve to demonstrate in that very scholarship that the Tribunal's practice direction and also section 162 of the *Mental Health Act* can operate effectively for the greater public interest in circumstances that warrant it.

Professor Janzik told the Tribunal at the hearing for this application that the Professors' purpose is not to go to the heart of the forensic patient's application and not to consider the "*pros and cons of the forensic patient's circumstances, but is rather focusing on the question of open justice.*" Professor ISAAC told the Tribunal that no application was being made for the use of names of witnesses, members of the Tribunal or any other persons involved in any way in matters before the Tribunal.

The Tribunal also heard from the forensic patient's treating psychiatrist at the Forensic Hospital. The psychiatrist considered that there may be a negative impact on the forensic patient's mental health if his name were to be used in the way proposed. However, the treating psychiatrist also fairly stated that these issues needed to be weighed up against the public interest and issues of the forensic patient's autonomy. The treating psychiatrist acknowledged that he did not consider that the use of the forensic patient's name on research blogs had the potential to create any additional problems over and above any potential that the program might have. The treating psychiatrist noted that the Tribunal had already given consent for the forensic patient's name to be used in relation to that program.

CONSIDERATION

In *A v Mental Health Review Tribunal* [2012] NSWSC293 Justice Adams stated as follows in the context of an application under section 162 of the *Mental Health Act 2007*:

32. It seems to me that, amongst the matters that are necessarily relevant to deciding whether consent to the plaintiff's application to publish his own name are the principles specified in s 68 of the Act which are "as far as practicable, to be given effect to with respect to the care and treatment of people with a mental illness or mental disorder". These include the receiving "the best possible care and treatment in the least restrictive environment enabling the care and treatment to be effectively given", providing "care and treatment ... designed to assist people with a mental illness or mental disorder, wherever possible, to ... participate in the community, and keeping "to the

minimum necessary in the circumstances...any restriction on the liberty of patients ... and any interference with their rights, dignity and self-respect."

33. Also relevant is the psychiatric health of the plaintiff. Thus, does he have the capacity to determine for himself whether he should use his name in the way he envisages? Is there a real (as distinct from merely speculative) risk that his mental health will be adversely affected by his doing so. The material before me in the form of the transcript of proceedings before the Tribunal certainly suggests that there is a medical opinion that this could be a significant issue. Plainly enough, it cannot be answered without a consideration of the plaintiff's medical history and an understanding of his present state of mental health. Whether a sensible medical opinion could be given without information that indicates what the plaintiff wishes to publish is a live question, but I am minded to think that it could not.

The Tribunal is satisfied that the forensic patient has capacity to consent to the application and has given that consent. The treating psychiatrist, considers that the forensic patient has a mental illness. Despite his illness, it is clear that the forensic patient is an articulate and intelligent man and that he understands the nature of the proposed use of his name in the type of publications in relation to which the Professors seek the Tribunal's consent.

The Tribunal takes into consideration the views expressed by the treating psychiatrist and it must also take into consideration the need to weigh those issues against other considerations including the principles referred to in section 68 of the *Mental Health Act 2007*. These have been referred to in the quotation from the judgment of Justice Adams referred to above.

The Tribunal is satisfied that having regard to the material before it, and the objects of the *Mental Health Act* and the principles to be given effect to under section 68 of that Act, together with the wishes of the forensic patient expressed through his solicitor and by himself to the Tribunal, it would be appropriate to grant Professor Isaac and Professor Janzik consent to publish the forensic patient's name as a person to whom a matter before the Tribunal relates, but subject to conditions discussed below.

The Tribunal expects that the consent that it gives to Professors Isaac and Janzik will be exercised responsibly by them. They will need to be careful not to commit any breach of the non-disclosure provisions of section 189 of the *Mental Health Act*.

Section 189 is in the following terms:

189 Disclosure of information

(cf 1990 Act, s 289)

(1) A person must not disclose any information obtained in connection with the administration or execution of this Act or the [Mental Health \(Forensic Provisions\) Act 1990](#) or the regulations unless the disclosure is made:

(a) with the consent of the person from whom the information was obtained, or

(b) in connection with the administration or execution of this Act or the [Mental Health \(Forensic Provisions\) Act 1990](#), or

(c) without limiting paragraph (b), to a [primary carer](#) of a person in connection with the provision of care or treatment to the person under this Act or the [Mental Health \(Forensic Provisions\) Act 1990](#), or

(d) for the purposes of any legal proceedings arising out of this Act or the [Mental Health \(Forensic Provisions\) Act 1990](#) or the regulations or of any report of any such proceedings, or

(d1) for a purpose referred to in health privacy principle 10 (1) (f) (research) under the [Health Records and Information Privacy Act 2002](#), or

(e) with other lawful excuse.

Maximum penalty: 50 penalty units.

(2) A person is not required to comply with subsection (1) if non-compliance is necessarily implied or reasonably contemplated under an Act or law.

It can be seen that section 189 is cast in very broad terms.

In this context, it is appropriate to note that section 151(3) of the *Mental Health Act* provides that proceedings of the Tribunal are to be open to the public. However section 151(4) relevantly expressly gives to the Tribunal a power to make an order prohibiting or restricting the publication or broadcasting of any report of proceedings before the Tribunal, and an order prohibiting or restricting the publication of evidence given before the Tribunal. By implication, this section must be taken to permit a media report of the proceedings unless the Tribunal orders otherwise in accordance with section 151(4). However, unless the Tribunal grants an appropriate consent under section 162(1), section 162 prohibits the naming in any such report or otherwise, of any person to whom the matter relates, or who appears as a witness before the Tribunal, or who is mentioned or otherwise involved in any proceedings under the *Mental Health Act, 2007* or the *Mental Health (Forensic Provisions) Act, 1990*.

The precise interplay between section 151 and section 189 is not straightforward. This was the subject of some discussion at the hearing of this matter, during which the Tribunal panel expressed the view that section 189 may well limit the extent to which Tribunal proceedings held

in public might be reported. However, on further consideration, the position is perhaps more accurately stated as follows.

Whilst proceedings of the Tribunal may be reported subject to the restrictions stipulated in section 162 and provided that the Tribunal does not make an order restricting such report in any manner indicated in section 151(4), care will need to be exercised by any person doing any such report not to name any person involved in the proceedings unless consent is given by the Tribunal pursuant to section 162, and care will also need to be taken to ensure that the provisions of section 189 are not breached. Section 189 may well restrict any disclosure of material obtained outside of the formal hearing if such information has been obtained in connection with the administration or execution of the *Mental Health Act* or the *Mental Health (Forensic Provisions) Act 1990* unless such disclosure comes within one of the exceptions referred to in section 189. Thus, by way of example, any written reasons that the Tribunal may issue in relation to any hearing before the Tribunal, are not generally published or read at a public hearing, but are issued separately only to a restricted number of interested parties, such as the patient's legal advisor, appropriate members of the treating team, and where appropriate, to persons making an application before the Tribunal. The Tribunal itself is entitled to distribute such reasons as an exception to the non-disclosure prohibition in accordance with section 189(b) of the *Mental Health Act*. However, any such person to whom the Tribunal provided its written reasons under that exception, could only further distribute them or publish or broadcast the information contained in them, if it is done in connection with the administration or execution of the *Mental Health Act* or *Mental Health (Forensic Provisions) Act 1990* or if it falls within one of the other exceptions stipulated in section 189. Suffice it to say that in most cases further distribution of the Tribunal's reasons as indicated may well be in breach of section 189 and accordingly unlawful.

On occasions, the Tribunal will publish Official Reports pursuant to section 162(2), on its website. Such Official Reports may be further published or broadcast pursuant to section 162(2). However, most Tribunal reasons are not Official Reports under section 162(2). The Tribunal's practice in relation to Official Reports is set out in a Practice Direction dated 19th June, 2013 which can be accessed on the Tribunal's website at <http://www.mhrt.nsw.gov.au/the-tribunal/>

The Tribunal also wishes to make it clear that the consent it proposes to give to Professor Isaac and Professor Janzik under section 162 is given to them personally and does not extend to any other person or persons. This is an important factor in enabling the Tribunal to monitor the conditions that the consent will be subject to.

The order that the Tribunal proposes to make will be:

Pursuant to section 162(1) of the *Mental Health Act, 2007*, the Tribunal gives consent to Associate Professor Isaac and Professor Janzik to publish from the date of this order the name of the forensic patient as a person to whom a matter before the Tribunal relates, subject to the following conditions:

1. The means of broadcasting and of publication are restricted to the following outlets for academic scholarship:

- (a) Academic journal articles, books and book chapters authored by Professor Isaac and/or Professor Janzik.
- (b) Academic research blogs authored by Professor Isaac and/or Professor Janzik

2. Any such broadcast or publication must indicate that Professor Isaac and/or Professor Janzik is the author thereof.

3. Any such blog site where the forensic patient is named must carry the following warning:

“Warning: It is an offence under the Mental Health Act 2007 (NSW) section 162 to publish or broadcast the name of any person to whom a matter before the Mental Health Review Tribunal relates or who appears as a witness before the Tribunal in any proceedings or who is mentioned or otherwise involved in any proceedings under the *Mental Health Act 2007* or the *Mental Health (Forensic Provisions) Act 1990*, unless consent has first been obtained from the Tribunal. The author has obtained such consent to publish the forensic patient’s name..”

4. Such consent may at any time be withdrawn, in relation to any or all future broadcasts and/or publications by the President or a Deputy President of the Tribunal, for any reason he or she may think fit. Notice of any such withdrawal of consent may be communicated by the Registrar of the Tribunal to Professor Isaac and/or Professor Janzik by email or over the telephone or in such other manner as the President or a Deputy President of the Tribunal may stipulate.

The Tribunal notes that the permission given in this matter does not extend to the naming of any person who appears as a witness before the Tribunal in any proceedings (apart from the forensic patient himself) or any person who is mentioned or otherwise involved in any proceedings under the *Mental Health Act, 2007* or the *Mental Health (Forensic Provisions) Act, 1990*.

Without limiting the circumstances in which consent might be withdrawn, The President or Deputy President of the Tribunal may consider withdrawing consent if it appears that the forensic patient's mental health has been or is likely to be adversely affected by any broadcast or publication.

Signed:

Professor Daniel Howard SC
President

Dated this day: