Mental Health Review Tribunal
New South Wales

Case Name:	Mr Green
Medium Neutral Citation:	[2025] NSWMHRT 1
Hearing Date(s):	21 February 2025; 7 March 2025 close of submissions
Date of Orders:	7 April 2025
Date of Decision:	7 April 2025
Jurisdiction:	Mental Health Review Tribunal
Before:	President Carolyn Huntsman Dr Clive Allcock – Psychiatrist Mr Peter Bazzana – Mental Health Nurse
Decision:	Consent is given to publication of the name of Mr Harold as set out in the Tribunal's order
Catchwords:	Consent as exception to statutory prohibition; non-publication; nature of forensic jurisdiction and mental health legislation; open justice; protective jurisdiction; change of name; Charter of Rights of Victims of Crime; non- disclosure
Legislation Cited:	*Mental Health Act 2007 No.8* (NSW) *Mental Health Cognitive Impairment Forensic Provision Act 2020* (NSW) *NSW Trustee and Guardian Act* *Mental Health Regulation 2019* *Court Suppression and Non-publication Orders Act 2010* *Victims Rights and Support Act 2013* *Birth Deaths and Marriages Registration Act 1995* *Children (Criminal Proceedings) Act 1987* (NSW) *Interpretations Act 1987* (NSW)
Cases Cited:	Adams J, in *A v Mental Health Review Tribunal* [2012] *A (by his tutor Brett Collins) v Mental Health Review Tribunal (No4)* [2014] NSWSC 31

	Roberts [2019] NSWMHRT 2 *Z v Mental Health Review Tribunal (No 3)* [2023] NSWCA 38 *Attorney General for the State of New South Wales v XY [2014] NSWCA 466*
Texts Cited:	
Category:	Principal judgment
Parties:	Nationwide News Pty Limited, Applicant Mr Green, Forensic Patient
Representation:	Mr Coombs for applicant Mr Im, Mental Health Advocacy Service, for forensic patient
File Number(s):	[2025] NSWMHRT 1
Publication Restriction:	This is a de-identified version of the decision

JUDGMENT

1. On 7 April 2025 the Tribunal gave consent to the publication of the name of Mr Harold in a Daily Telegraph article based on an interview with Mr Harold about his experiences with the Tribunal. The Tribunal made the following order:

   i) The Tribunal consents to the publication of Mr Harold's name in the following manner – Mr Harold's name may be published in a report in the Daily Telegraph (in the *Daily Telegraph* newspaper being the Saturday or Sunday Telegraph, and on the website www.dailytelegraph.com.au) – such report to be based on an interview with Mr Harold about his experiences of the forensic system and the Mental Health Review Tribunal.

2. These are the Tribunal's written reasons for its decision of 7 April 2025 on an application considered at a hearing on 21 February 2025. On that date the Tribunal reserved its decision as submissions were to be provided in writing by legal representatives after the hearing. The closing date for submissions was 7 March 2025.

BACKGROUND

3. The hearing considered the application for consent to be provided to publication of the name of Mr Harold. The applicant is the Nationwide News Pty Limited on behalf of the *Daily Telegraph*.

4. Applications for consent of the Tribunal to publication of names are made pursuant to s162 of the *Mental Health Act 2007*. Under s162(3) "name" includes a reference to any information, picture or material that identifies the person or is likely to lead to the identification of the person.

STATUTORY CRITERIA AND CASE LAW GUIDANCE

5. Section 162 of the *Mental Health Act 2007* (MHA) provides that names and identifying material in relation to patients, forensic patients and correctional patients, and witnesses and those involved or mentioned in Tribunal proceedings, may not be published unless the Tribunal consents:

   162 Publication of names

   (1) A person must not, except with the consent of the Tribunal, publish or broadcast the name of any person—

   (a) to whom a matter before the Tribunal relates, or

   (b) who appears as a witness before the Tribunal in any proceedings, or

(c) who is mentioned or otherwise involved in any proceedings under this Act or the Mental Health and Cognitive Impairment Forensic Provisions Act 2020,
whether before or after the hearing is completed.
(2) This section does not prohibit the publication or broadcasting of an official report of the proceedings of the Tribunal that includes the name of any person the publication or broadcasting of which would otherwise be prohibited by this section.
(3) For the purposes of this section, a reference to the name of a person includes a reference to any information, picture or material that identifies the person or is likely to lead to the identification of the person.

6. Section 68 of the MHA provides the principles for care and treatment. As indicated by the Supreme Court, (see *A v Mental Health Review Tribunal* [2012] NSWSC 293 at paragraphs 32 and 33 (extracted below)) these principles are relevant to consider when determining whether to provide consent under s162. Section 68 of MHA applies to all Tribunal functions in relation to forensic and correctional patients: s70 of *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (MHCIFPA).

7. Section 68 of the MHA provides for the principles for care and treatment 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.

SUPREME COURT GUIDANCE AS TO LEGISLATIVE PROVISIONS/ CONSIDERATIONS

8. Guidance as to considerations for the Tribunal, in determining whether to provide consent under s 162 of the MHA, is provided by the Supreme Court, per Adams J, in *A v Mental Health Review Tribunal* [2012] NSWSC 293 at paragraphs 32 and 33:

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 a 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.

9. The legislation indicates that the current application does not constitute review proceedings under MHA or MHCIFPA – and this is also clear from Justice Adams decision at paragraph 12: Justice Adams notes that an application for consent under s162 is not part of a review as to the persons care, detention or treatment. Whilst Justice Adams was considering s46 of the former legislation, such observations would apply to review proceedings under s78 of the current Act, the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (MHCIFPA). The current proceedings are not a statutory review of a forensic patient pursuant to s 78 of the MHCIFPA.

10. The Supreme Court decision of *A (by his tutor Brett Collins) v Mental Health Review Tribunal (No4)* [2014] NSWSC 31 provides a detailed summary of legislative provisions and the protective considerations that operate within the forensic system. Whilst the court was considering the protective nature of the Tribunal's functions within the context of a statutory review of the care and treatment of a forensic patient, the guidance provided as to the protective nature of the Tribunal's functions is relevant.

11. Where it is a statutory review of care and treatment, the principles and concepts in the current legislation - s69 of the MHCIFPA - would also be relevant (the wording in s69 differs from that used in ss74 of the former Act under consideration in *A (by his tutor Brett Collins) v Mental Health Review Tribunal (No4)*; although s76B of the former Act similarly stated the application of s68 of MHA to forensic and correctional patients). As noted above, the current application is not a statutory review of care and treatment, however the guidance of the Supreme Court is relevant given the requirement for the Tribunal to consider s68 of the MHA in determining this application. The Supreme Court, per Justice Lindsay, observed:

146 The foundational idea is that the protection and care to which such a person is, or may be, entitled is to be provided, and assessed, primarily by reference to the

welfare of the person in need of protection: by reference, more particularly, to whether it is for the benefit, and in the best interests, of that person.

147 It is a "working assumption" because, in a particular case, measures designed to promote the interests of a person in need of protection may need to accommodate a competing need for protection of others or the community generally.

148 Sections 40 and 74 of the Mental Health (Forensic Provisions) Act and s 68 of the Mental Health Act serve as more than a checklist of considerations relevant to the operation of ss 46(1) and 47(1)(a) of the Mental Health (Forensic Provisions) Act.

149 They are: (a) part of a legislative affirmation of the principles that inform any exercise (by the Court as a delegate of the Crown and, more generally, by the State) of parens patriae jurisdiction; and (b) an adoption of those principles for administrative decision making, and administrative law, purposes as a standard that brings coherence to decision making across the spectrum of decision makers providing protection and care for persons in need of protection.

150 The Mental Health Act, the Mental Health (Forensic Provisions) Act and chapter 4 of the NSW Trustee and Guardian Act provide an administrative structure, subject to judicial oversight, for discharge of the protective function of the state which, in the Anglo-Australian tradition, once resided in the Crown: P Powell, The origins and development of the protective jurisdiction of the Supreme Court of NSW (Forbes Society, Sydney, 2004), pp 1-9 and 73-76.

151 The various purposive provisions of that legislation do not uniformly, in terms, incorporate principles that inform an exercise of the parens patriae jurisdiction of the Court (derived ultimately from the Crown) but they unmistakably mirror those principles……

….161 The statements of principle found in s 39 of the NSW Trustee and Guardian Act (and in s 4 of the Guardianship Act) more closely resemble the principles that govern an exercise of the Court's inherent, parens patriae jurisdiction than do the express terms of ss 40 and 74 of the Mental Health (Forensic Provisions) Act and ss 3, 68 and 105 of the Mental Health Act because the first of the seven specified principles requires that "the welfare and interests of [a protected person or patient be] given paramount consideration".

162 Nevertheless, upon the proper construction of ss 46(1) and 47(1)(a) of the Mental Health (Forensic Provisions) Act and the legislative provisions that feed into them, or are ancillary to them, it is necessary to bear specifically in mind the importance attached (as a working assumption and foundational, informing idea) to consultation of "the welfare and interests" of a forensic patient.

163 With varying degrees of emphasis depending on the context in which they must operate, ss 40 and 74 of the Mental Health (Forensic Provisions) Act and s 68 of the Mental Health Act (in common with s 39 of the NSW Trustee and Guardian Act) require that practical expression be given to that foundational, informing idea.

164 An exercise of protective jurisdiction affecting a person in need of protection must be for the benefit, and in the best interests, of that person as an individual, and not for the benefit of the state, or others, or for the convenience of carers: Re Eve [1986] 2 SCR 388 at 409-411, 414, 425-428, 429-430, 431-432 and 434; 31 DLR (4th) 1 at 16-17, 19, 28-30, 31, 32 and 34.

165 Sections 40 and 74 of the Mental Health (Forensic Provisions) Act serve not to displace this foundational, informing idea but to highlight the need to take into account: (a) the status of a person as a forensic patient; and (b) the practical realities that have led to the patient's acquisition, and present enjoyment, of that dubious honour.

166 Prima facie, a forensic patient is in need of detention, treatment, care and control on the fringes of, or within, the criminal justice system. The Tribunal is bound to take this state of affairs into account - within the framework of a protective concern for the benefit, and best interests, of each forensic patient as an individual.

12. In considering s68 of the MHA, the interconnections between s68 of MHA and the objects of the Act in s3 of the MHA, and s70 of the MHCIFPA, must be borne in mind. It is also appropriate for a decision in respect of a forensic patient to have regard to the objects of Part 5 of the MHCIFPA at s69, given these apply to statutory reviews under that Act.

13. In determining an application for consent to publication under s162, the Tribunal is guided by the authorities referred to above. It is worth noting the recognition by the Supreme Court of the significance of the protective jurisdiction which is being exercised

by the Tribunal; and also the status as a forensic patient and the realities which led to that. The Supreme Court in *A (by his tutor Brett Collins) v Mental Health Review Tribunal (No4)* [2014] NSWSC 31 noted that:

> *in a particular case, measures designed to promote the interests of a person in need of protection may need to accommodate a competing need for protection of others or the community generally…..*
>
> *…. that a forensic patient is in need of detention, treatment, care and control on the fringes of, or within, the criminal justice system. The Tribunal is bound to take this state of affairs into account - within the framework of a protective concern for the benefit, and best interests, of each forensic patient as an individual.*

14. Consideration of whether to provide consent to publication, pursuant to s162 of the MHA, requires the Tribunal to consider the best interests of the forensic patient and the interests of the person who will be subject to publication. Where there may be identification of the forensic patient, this necessarily involves consideration of the impact on the mental health of the forensic patient, and impact on safety including, in the case of a forensic or correctional patient, the potential effect on the person's ability to safely achieve community living/integration at the current time or in the future. This issue may not be resolved by the consent to publication being given by the forensic patient. The Tribunal's protective role requires careful consideration of the impacts of that person's consent.

15. The Tribunal set out in the Official Report *Roberts [2019]* NSWMHRT 2 *(Roberts)*, that the consent of the Tribunal to publish in s162(2) is an exception to the s 162 prohibition. As was stated in *Roberts*:

> *The prohibition itself is clear: a person "must not … publish or broadcast the name of any person" the subject of a Tribunal hearing or who is a witness or who is mentioned. But there is an exception: persons are prohibited "except with the consent of the Tribunal". Being an exception, it is dependent on the main prohibition and not an independent enacting clause. It should "not be interpreted as if it were a substantive provision independent of the provisions to which it is a proviso" (Latham CJ in Minister of State for the Army v Dalziel (1944) 68 CLR 261 at 274, acknowledging that his Honour was speaking of a proviso and not an exception).*
>
> *What then informs the prohibition? The answer to that question must assist the Tribunal in deciding whether or not to make an exception.*

16. The decision of his Honour Judge Cogswell, President MHRT, in *Roberts* sets out the basis for the prohibition, tracing the history of persons being detained at the Governor's pleasure to the approach implemented in more recent legislation of treatment with a view to reintegration with the community, if safe and appropriate. His Honour also noted the need for information to be freely and openly disclosed in Tribunal hearings, to further the Tribunal's legislated function, and that this also informed s162.

17. As was stated by his Honour in *Roberts*:

> *The Tribunal needs to be confident that the information it is receiving and testing is not compromised by a lack of frankness brought on by a fear of disclosure. This is a key factor in the Tribunal providing effective oversight of the State's forensic patients and therefore exercising its jurisdiction.*
>
> *So, in deciding whether to make an exception to the prohibition in any given case, the Tribunal will make its decision in the context of those purposes for the primary prohibition. Those purposes underlie the public policy that informs the prohibition; so where the Tribunal is asked to make an exception, it must take into account that policy and the justification for the policy being compromised in the particular case.*

18. For the purpose of determining an application under s162 a hearing is not required but may be appropriate to ensure procedural fairness. When hearing an application under s162 the Tribunal may be constituted by a Presidential Member, a three member panel is not required (refer s150 MHA and cl16 *Mental Health Regulation 2019* (MH Regulation)).

The View of the Forensic Patient

19. The forensic patient's views are important to take into account but are not determinative. This is an outcome of the protective nature of the jurisdiction and the need to consider the patient's treatment and care. The NSW Court of Appeal has stated (*Z v Mental Health Review Tribunal (No 3)* [2023] NSWCA 38 (a decision of a single Judge of Appeal)), as follows:

> *50 Further, as discussed above, under s162 of the Mental Health Act the power to lift the general prohibition on identifying a relevant person within relevant Tribunal proceedings is given to the Tribunal; it is not something the person in question can waive. No doubt any views of the person would be an important consideration in the Tribunal's determination. Nevertheless, the section manifests a parliamentary judgment that the views of the person in question should not be determinative. That*

no doubt reflects the potential vulnerability of at least some of the people in question.

An Observation about Open Justice

20. It is noted that the Tribunal decision in *Roberts* refers to the requirement for consideration of the public interest in open justice before the making of a non-publication order under the *Court Suppression and Non-publication Orders Act 2010* (CSNPA) and states this does not apply to the Tribunal because it does not administer justice. The Tribunal prefers to approach this issue on a construction of the legislation. On this basis, the CSNPA does not apply because the Tribunal does not make a non-publication or suppression order, rather it makes an order under s162 giving consent to publication which is otherwise prohibited by s162. Orders under CSNPA are made on application or the court's own initiative and operate to restrict information which is otherwise publicly available in open court. This differs from the Mental Health Act 2007 (MHA) where names may not be published by operation of the MHA (s162) unless the Tribunal consents.

21. Where the Tribunal considers an application for consent to publish under s162 it is not engaged in making a non-publication or suppression order, it is engaged in deciding whether to consent as an exception to the statutory prohibition.

22. The Tribunal is also of the view that s5 of the CSNPA makes clear that s162 MHA continues to apply:

    5 Other laws not affected

    This Act does not limit or otherwise affect the operation of a provision made by or under any other Act that prohibits or restricts, or authorises a court to prohibit or restrict, the publication or other disclosure of information in connection with proceedings.

23. The Tribunal notes that s6 of the CSNPA provides that the requirement to take into account the public interest in open justice applies when a court is deciding whether to make a non-publication or suppression order – as stated above when determining whether to consent to publication under s162, the Tribunal is not making such an order and therefore s6 CSNPA would not apply. Section 6 provides:

    6 Safeguarding public interest in open justice

    In deciding whether to make a suppression order or non-publication order, a court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.

24. The Tribunal values transparency of proceedings to promote accountability and public confidence – this is facilitated by open justice. One must recall that the Tribunal performs its functions within the legislative constraints of its enabling statutes which includes s162 of the MHA.

25. The Tribunal supports public access to Tribunal hearings and the legislation provides that Tribunal hearings are open to the public – this differs from many interstate Mental Health Review Tribunals where the proceedings are not public (note the Victorian MHT may decide to order that a hearing is to be open or partially open if in the public interest but the standard position under the Victorian legislation is that hearings are closed to public, s375 *Mental Health and Wellbeing Act 2022 (Vic)*; the Queensland MHRT proceedings are not open to the public however in certain circumstances an order can be made for open proceedings - s741 *Mental Health Act 2016 Qld*).

26. While the NSW Tribunal hearings are open to the public the MHA provides other restrictions - those attending NSW Tribunal hearings are bound by s162 and s189 of the MHA as discussed further below. These provisions are statutory provisions which apply and are decided by Parliament. It appears that the intention is that hearings can be open, in compliance with the public interest in open justice, however protection of sensitive personal and health information, and/or information about victims discussed in hearings, is protected by s162 and s189 MHA. In addition s151(4) MHA allows for orders restricting publication of information presented in a hearing.

27. It is important to remember that the majority of Tribunal hearings involve Civil patients detained in hospitals throughout NSW for health reasons – having been found to have a mental illness with a risk of serious harm to self for others and a need for a period of inpatient treatment. These patients are not forensic patients and there is usually no connection with criminal court proceedings. It would not generally be in the public interest for there to be publication or disclosure of the private health and personal information of Civil patients. An observation to that effect was made by the NSW Court of Appeal in *Z v Mental Health Review Tribunal (No 3)* [2023] NSWCA 38 (a decision of a single Judge of Appeal). That case considered the interaction between s162 MHA and the CSNPA and noted that s162 MHA did not apply to the Supreme Court. The court stated:

> *44. As was indicated in Misrachi of s65 of the NCAT Act, s162 can be seen as evincing a legislative sensitivity to publication or broadcasting of the identity of persons involved in such matters: see also State of New South Wales v BP*

(Preliminary) [2019] NSWSC 699 at [9]. That sensitivity can be relevant to assessing what is "otherwise necessary in the public interest" for the purposes of s 8(1)(e) of the Court Suppression Act. This view is consistent with what was said in Secretary v W at [6]…..

…49. The solicitude of the law with regard to the effect of publicity on persons said to be suffering from mental illness does not detract from the need to consider the issue within the terms of the Court Suppression Act. That consideration must include the direction in s6 that "[i]n deciding whether to make a suppression order or non-publication order, a court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice". Nevertheless, the general law can inform, in particular, what might be considered "otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice", being one of the grounds on which an order may be made under the Act: s8(1)(e).

28. The decision of *Z v Mental Health Review Tribunal (No 3)* [2023] NSWCA 38 cited above also observed in paragraph 39 in relation to the applicability of s162 MHA to the Supreme Court that:

s162 creates a criminal offence with the effect of restricting open justice. The importance of that principle in courts is recognised and given effect to in the Court Suppression Act. If the Parliament had intended s162 to apply directly so as to restrict what people may say about proceedings in the courts, clearer language would have been employed.

29. Paragraphs 39 was relied upon by the legal representative for the applicant in submissions – in relation to applicability of the principle of legality in construction of the MHA. It is important to note that paragraph 39 of the decision was setting out the court's reasoning for why s162 MHA did not apply to the Supreme Court hearing an appeal from the Tribunal.

Criticism of the Tribunal

30. The Tribunal agrees with the reasoning in *Roberts* that where a purpose of seeking consent to publish under s162 is to criticise Tribunal processes this is not a relevant consideration. There is a public interest in the Tribunal being open to public scrutiny. As was stated in *Roberts*:

"The fact that some criticisms may be arguably ill-informed or misdirected is no

reason to prohibit them. The remedy for any such criticisms is not their suppression by the Tribunal, but responses by the Tribunal or the Minister for Mental Health to any public comment or any concern arising from the criticisms. The prohibition is there to protect the patient and the patient's progress, not the Tribunal's reputation or perceived competence.

It also seems to me that the publicity already in the public domain about Mr Roberts through his trials must be an important context in this decision. The public already know a lot about Mr Roberts and about what he has done. There is a legitimate public interest in the processes of the Tribunal being subjected to public scrutiny by a participant (the applicant). What the Tribunal should not permit by way of an exception is any publicity which could adversely impact on the important process of Mr Roberts' treatment and rehabilitation".

Nature of Mental Health Legislation

31. The reasoning in *Roberts* included that the Tribunal did not administer justice - and this was a basis for the finding that *Court Suppression and Non-publication Orders Act 2010* (CSNPA) requirement to consider the public interest in open justice did not apply to Tribunal consent under s162 - as set out above the Tribunal considers that the CSNPA does not apply on basis of construction/interpretation of the legislation. In *Roberts* the Tribunal was considering the previous forensic legislation and not the current *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (MHCIFPA). The basis of the reasoning was that mental health legislation was public health legislation.

32. Without needing to determine the issue of whether the Tribunal is outside of the system of administration of justice for the current matter, it is not clear the Tribunal operates only in a public health realm as was suggested in *Roberts*. However it is clear that many decisions are made within an administrative structure – see *A (by his tutor Brett Collins) v Mental Health Review Tribunal (No4)* at paragraph 150.

33. The *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (MHCIFPA), contains various provisions governing criminal court proceedings, including verdicts and imposition of limiting terms, and this appears to remove it from the domain of public health legislation. The criminal court provisions in the MHCIFPA are in addition to those providing for Tribunal reviews. When conducting a review under MHCIFPA the Tribunal receives, upon referral of the matter from the criminal court, various court documents including Victim Impact Statements. The Forensic Division of the Tribunal in conducting

reviews is required to consider Victim Impact Statements tendered in criminal proceedings and must have regard to submissions of victims, and is to recognise the harm to victims. The Forensic Division of the Tribunal is required to make various decisions with regard to public safety and the safety of victims, as well as the care, treatment and control of the forensic patient. Many decisions of the Forensic Division of the Tribunal may only be made where the Tribunal panel includes a current or former judicial officer. Where requested to order conditional release of a forensic patient subject to a limiting term (imposed by the criminal court on a qualified finding of guilt) the Tribunal is required to consider whether the forensic patient has spent sufficient time in custody and is to have regard to the sentencing reasons of the criminal court in considering this issue.

34. The Tribunal is persuaded by the view of the of the Supreme Court of NSW - *A (by his tutor Brett Collins) v Mental Health Review Tribunal (No4)* at [166] - of the need to recognise –

> *"that a forensic patient is in need of detention, treatment, care and control on the fringes of, or within, the criminal justice system. The Tribunal is bound to take this state of affairs into account - within the framework of a protective concern for the benefit, and best interests, of each forensic patient as an individual."*

35. The Tribunal notes that the Presidential members of the Forensic Division of the Tribunal take action to protect the community and victims, by upholding Tribunal orders through issue of orders to apprehend and detain a forensic patient who has breached a Tribunal order (s109 MHCIFPA). These orders are commonly executed by police. For the above detailed reasons the Tribunal is not of the view that the MHA and MHCIFPA may be characterised as solely public health legislation, given the risk and safety concerns which are required to be considered in decisions under both Acts. In addition there are detention powers under both Acts, for civil and forensic patients, which may take the legislation out of the purely public health domain.

36. Further support for this view may be found in *Attorney General for the State of New South Wales v XY [2014] NSWCA 466*. This decision of the Court of Appeal considered various matters under the former legislation and the words used in the current legislation are largely unchanged. In particular the Court of Appeal considered the meaning of "care of a less restrictive kind" and "seriously endangered". The Court of Appeal noted that "care" encompasses the physical controls put on the forensic patient, such as leave or restriction of leave – the Court of Appeal recognised that the imposition of physical

controls was part of Tribunal jurisdiction, and this may be an indication that the legislation is not purely public health legislation. The President of the Court of Appeal stated:

> *The mental health legislation is concerned, not only with the "care" of a mentally ill person, but with "the care, treatment and control" of such persons: see, for example, the objects of Pt 5 stated in s40(b) and (c). The words, as used in the objects, clearly delineate different aspects of the overall care of a forensic patient. I am of the opinion, however, that the word "care", as used in s43, encompasses a person's overall care, including care in the sense used by Dr Kavanagh, as well as the physical controls that are placed on a person, including the extent of leave that a person is given and whether that leave is restricted or unrestricted.*

37. The Tribunal function of assessing risk and protecting public safety is reflected in the Court of Appeal's discussion of the test of serious endangerment: the Court of Appeal noted the legislation uses the words:

> *"... the safety of the patient or any member of the public will not be seriously endangered by the patient's release"* and stated, per Beasley P at [51]:
> *that phrase, as used in s43(a), involves a consideration of both the probability and the gravity of the risk*

38. The Court of Appeal recognised that the Tribunal has a function to evaluate risk – its probability and gravity – in assessing endangerment.

39. In addition to risk evaluation, the Tribunal in both the Civil and Forensic Divisions observes the s68 Principals for Care and Treatment and Objects of the relevant Acts (MHA and MHCIFPA), and applies the guidance of the Supreme Court that the Tribunal exercises a protective jurisdiction.

40. The Tribunal has set out these aspects of the Tribunal's jurisdiction to indicate that its Forensic Division has jurisdiction to make orders for control, and the forensic system operates within or on the fringes of criminal justice system, as this is relevant to a consideration of whether the Tribunal is purely public health legislation outside of the administration of justice. The Tribunal does not need to definitively determine this point for current purposes.

THE APPLICATION

41. In written submissions the application is described, by the applicant, as follows:

> *If the application is successful, News will conduct an interview with Mr Harold and*

publish a news story regarding his experience with the Tribunal in either the Saturday or Sunday Telegraph, and on the website www.dailytelegraph.com.au. That interview would be conducted by Investigations Editor Ms XX. The matters that will be canvased in that interview are set out in Mr Harold's affidavit, in particular his intention to describe his experiences with the Tribunal, and give his opinion about ways in which the system could be improved.

EVIDENCE BEFORE THE TRIBUNAL

42. The primary evidence relied upon by the applicant is the affidavit of Mr Harold. That affidavit details the index offence occurring when Mr Harold was a child and his experience and his family's experience of the criminal court proceedings including the sentencing proceedings. The affidavit details the experience of Mr Harold and family members of Court and Tribunal processes. These processes have extended over more than two decades since the index offence. This period has also seen legislative changes where the Tribunal has been given expanded decision-making powers, and where the participation of victims has been facilitated by amending legislation.

43. Mr Harold states in his affidavit that the forensic patient was detained by the criminal court and then by the Tribunal, and he believes there was a review about twice a year. He holds this belief because he recalls that before each hearing his family received a letter from the Tribunal advising of an upcoming hearing. He states that neither himself, nor other members of his family have appeared at a Tribunal hearing. They have had a victims advocate who has attended the hearings at the Tribunal since they first started, according to Mr Harold.

44. Mr Harold states in his affidavit that he recalls one year that his aunt was advised of a Tribunal hearing for a person by a different name to what he knew was the legal name of the forensic patient. This different name was Mr Green (previous name Mr D). Mr Harold states that his aunt told him that the forensic patient had changed his name to Mr Green while in custody. Mr Harold states he was very angry that the name change had been allowed.

45. He stated that on a date about 15 years ago he contacted the Tribunal to talk to someone about it – he cannot recall what number he called or who spoke to. He says he was told was something to the effect of "we can't give you any information about that. It's legal, there's nothing you can do to appeal it". He says after that phone call he formed the view that the Tribunal was never going to give him any information about the forensic patient

and he made no further attempts to contact the Tribunal directly.

46. He deposes in his affidavit to further advice received from his aunt over the years about Tribunal processes including a decision about eight years ago of a change being considered to the forensic patient's detention which would result in him being moved to a medium secure facility, and inviting the family to make any submissions. He believes that a submission was made although he does not believe any family member kept a copy of it – however he thinks that the family urged the Tribunal not to release the forensic patient because he was too dangerous. He states that despite their objections his family member received a letter informing that the forensic patient was being moved to a medium secure facility. He says he was told that his family member received further letters from the Tribunal that the forensic patient was going to be allowed to leave the hospital on supervised day release and then unsupervised leave.

47. Mr Harold states in his affidavit that his uncle told him on a date about five years ago that the victims' advocate had called with advice that the forensic patient had absconded from the medium secure unit while he was out on day release, and that his whereabouts were unknown and he was on the run. Mr Harold stated that around that time he made contact with the victims' advocate:

> "Later on [date] when I was at my computer at home, I found a Missing Persons post for Mr D in his new name of Mr Green. I was shocked that the post did not warn the public about who Mr D was or what he had done and included a very poor quality photograph of him. I did not keep a copy of the post.
>
> On or about [date] I was contacted by a reporter from Channel ZZ who had become aware that Mr D had escaped and was seeking a quote from my family. I told the reporter words to the effect of:
>
> *"Two years ago, when they told us he was going to be put on day release, we told them the second you give him an inch, he will take* a *mile and he's gonna run".*
>
> *"I actually slept with* a *knife next my bed [since finding out]".*
>
> *"It just puts* a *scare into you like nothing else, it's like* a *real-life horror movie.*
>
> *"I still get goosebumps when I think about it ... he could have hurt someone else.*
>
> *"He wasn't just* a *lost person like the police had put out."*
>
> On or about [date], Mr Green was discovered in Parramatta and returned by

police to the Hospital. I believe I was told this by [family member], or by Mr CC [victims advocate] and later saw it on the news.

The Tribunal did not, at any time during Mr D's absence from the Hospital, inform my family that he was missing or otherwise make contact with my family.

I was later informed by Mr CC that Mr D had been returned to Long Bay jail. I was never given this information by either the police or the Tribunal.

While I have seen and read some of the letters referred to [in paragraphs 9, 11, 14, 16 and 17 of affidavit] , I did not take a copy of any of them and I do not believe that any of them were kept by [family members].

Despite everything set out above, my family and I feel very lucky as Mr D has never been officially released from detention and remains in Facility A today. Over the years we have become aware of other families who have lost relatives to crimes committed by people suffering from mental illness who have later had to come to terms with the person who harmed their family-member being released from custody where they cannot be monitored or required to take their medication. I am very glad that my family has never had to do that.

Since Mr D was convicted I have, at various times, considered attending a Tribunal hearing to speak on my own behalf. However, as Mr CC attends the Tribunal hearings on behalf of my family, I have not felt the need to attend. If Mr CC was unable to continue in this role, I would take over, and attend via video link if possible".

The facts that the Tribunal:

(a) would not talk to me or give me any information about Mr D changing his name;
(b) allowed Mr D to be released to a medium security facility from which he later absconded, despite the concerns raised by my family in its submission referred to at paragraph 15; and
(c) made no contact with me or my family after Mr D went missing from the Hospital or to inform us he had been captured,

have led me to believe that the Tribunal is not really interested in hearing from my family as the victims of Mr D's crime.

If I receive consent from the Tribunal to be identified I intend to describe my experiences with the Tribunal as set out in this affidavit and give my opinion about ways in which the system could be improved.

It has been explained to me by the Applicant's lawyer, …, that if the Application is successful *The Sunday Telegraph* will not be able to identify Mr D, any other member of my family, or any other person who has been mentioned during a Tribunal hearing: the Application only allows me to be identified.

48. The Tribunal engaged with Mr Harold's affidavit during the hearing. The Tribunal explained that the Tribunal should have regard to the *Charter of Rights of Victims of Crime* and this included respect for his rights and recognition of the harm he has experienced. The *Victims Rights and Support Act 2013* contains the *Charter of Rights of Victims of Crime* – which deals substantially with court and parole processes and also states at 6.1:

    6.1 Courtesy, compassion and respect

    A victim will be treated with courtesy, compassion, cultural sensitivity and respect for the victim's rights and dignity.

49. Legislative amendments added further Charter rights/considerations in relation to victims of forensic patients in s6A of the *Victims Rights and Support Act 2013* (sec 6A was inserted in 2018 and amended in 2020). Section 6A provides:

    6A Additional matters for Charter of victims rights of forensic patients

    The following comprises the Charter of rights of victims of crime who are victims of forensic patients—

    6A.1 General matters

    Each right referred to in section 6.

    6A.2 Treatment of victim

    A victim will be treated with respect and compassion, having regard to the fact that proceedings may touch on painful or tragic events in the victim's life and cause the victim to experience further grief and distress.

    A victim making a submission before the Mental Health Review Tribunal should be listened to respectfully and in a way that is cognisant of the effects of the victim's experience and the benefit of expressing views about its impact.

    6A.3 Information about reviews of and other proceedings relating to forensic patients

    A victim will be informed in a timely manner of any matter before the Mental Health Review Tribunal, or the release of or granting of leave to a forensic patient or any

other matter, that the victim is required to be informed of under the Mental Health and Cognitive Impairment Forensic Provisions Act 2020.

50. By s7(2) of VRSA *"Any agency or person exercising official functions in the administration of the affairs of the State (other than judicial functions) must, to the extent that it is relevant and practicable to do so, have regard to the Charter of Victims Rights in addition to any other relevant matter".* Section 7(3(e)(e) states that the Charter is implemented in the administration of matters relating to forensic patients and victims of forensic patients.

51. During the hearing in recognition of the *Charter of Rights of Victims of Crime*, the Tribunal addressed some of Mr Harold's affidavit evidence to provide relevant information, in respect for Mr Harold's position as a victim. A reason to do so included that the provision of additional information to Mr Harold may be of benefit. The Tribunal observed that the position of the applicant, Nationwide News, was that the Tribunal's comment would be sought after the interview on matters raised by Mr Harold in his interview with the newspaper. The Tribunal considered it is respectful of Mr Harold's position to provide information during the hearing which the Tribunal may subsequently provide the applicant if so requested to comment.

52. The Tribunal observed that Mr Harold's affidavit referred to communications received from the Tribunal about the outcome of the Tribunal hearings, and in relation to leave of absence and absconding. The Tribunal noted that the Commissioner of Victims Rights has legal responsibility for communication with, and notification to, registered victims and that those members of his family who were registered victims would have received communications of these matters from the Commissioner rather than the Tribunal. The Tribunal advises the Commissioner of certain matters so that information can be given to victims by the Commissioner.

53. The Tribunal advised Mr Harold that in relation to the change of name of the forensic patient in [date several years ago] this had been affected without the knowledge of the Tribunal. At that date there was no requirement for the Tribunal to be notified about an application to change a name being made to the Registrar of Births, Deaths and Marriages. The *Birth Deaths and Marriages Registration Act 1995* has since been changed to require such notification to the Tribunal and indeed to require the approval of the Tribunal to the making of an application by a forensic patient to change a legal name. This legal requirement was not in place at the time that Mr Green's name change

occurred and it was made without any Tribunal oversight or knowledge.

54. The Tribunal added that in this respect it was unclear that the phone conversations about change of name would have been held with Tribunal staff, but respected that this was Mr Harold's recollection of who he spoke to many years ago after finding out about the change of name. The Tribunal observed that if it was a staff member of the Tribunal that he spoke to during that phone call, this would have occurred about 15 years ago and before significant changes to legislation. The Tribunal advised Mr Harold that amendments made to legislation in 2020 and 2021 clarified the procedures for victim participation in Tribunal hearings and provision of information to registered victims by the Commissioner of Victims Rights. The Tribunal noted that the changes implemented by the 2020 Act (MHCIFPA) and the 2021 Regulation (MFCIFP Regulation) have led to the formulation of a Tribunal *Practice Direction on Participation of Victims in Tribunal Reviews* to set out the way victims participate in hearings and receive information.

55. The Tribunal also observed that Mr Harold could apply to be registered, as a registered victim, which would mean that he would directly receive notifications of Tribunal hearings and decisions. The Tribunal referred to information which is provided to Registered victims noting that Mr Harold's affidavit evidence detailed that much of his experience of the Tribunal hearings and decisions was relayed to him by third parties. If he wished to be directly informed, registering as a victim would ensure this.

56. The Tribunal clarified with Mr Harold whether attending the current Tribunal proceedings as a witness for the applicant was his first experience of a Tribunal hearing and he agreed that he had not previously attended a Tribunal hearing.

57. The Tribunal acknowledged the harm, loss and distress experienced by Mr Harold as victim and also acknowledged that he had experienced many years of receiving reports about Tribunal reviews from family members and/or victim advocate. The Tribunal observed that Mr Harold had experienced the legal processes of courts as well as the Tribunal, as a victim of crime/forensic patient over several years. The Tribunal noted that Mr Harold was of a young age when his interaction with the forensic system commenced and that there have been a number of changes over this time. The Tribunal acknowledges the distress set out by Mr Harold in his affidavit, and the loss which he has experienced through the death of the primary victim.

58. The Tribunal notes that it is Mr Harold's wish to recount his experience of the forensic

system, and it is clear to the Tribunal that he has experienced this system as a family member victim from a young age. He wishes to speak in his own voice about his experiences and wishes to do so with his real name rather than by a pseudonym. He wishes to share his views about improvements which could be made.

59. Mr Harold told the Tribunal that people have always reacted to the reporting of his story very positively, and each published story had resulted in support for Mr Harold and his family. Media reports have been a positive experience for Mr Harold. He intends to publish his own name only, and not to identify or name other family members.

60. The applicant submitted that Mr Harold has the right to be identified by his own name. He should not be denied the right to speak of his own experiences under his own name, this would be a restriction of some significance.

Clinical evidence of impact of current application

61. Dr Andrew Ellis, New South Wales Clinical Director, Justice Health Forensic Network, gave oral evidence at the hearing. Dr Ellis stated that he knows Mr Green's case well. He stated he is not aware that the clinical team holds any concerns about the current application. In response to a Tribunal question as to the potential impact of the current application for consent to publication, on Mr Green's clinical presentation, Dr Ellis responded as follows. Dr Ellis said that Mr Green is stable and supported in his current environment and the publicity is not likely to impact on his current mental state. He noted the thrust of the article is not Mr Green's identity but Mr Harold's experiences. Dr Ellis also noted in relation to an assessment of the potential impact of the proposed publication that Mr Green's previous non-compliance with his conditions of leave (absence from the facility) is already reported in the media and has been known in the media previously and this publicity has not adversely impacted on Mr Green's trajectory or progress in his treatment. Dr Ellis indicated no concerns for a negative impact on Mr Green's well-being or mental health rehabilitation.

62. Dr SS, Psychiatry Registrar, and member of the current treating team in the Facility A, stated that he met with Mr Green the day before the hearing and discussed the current application for consent to publication. He said that Mr Green indicated to him that being in the news would not be great but Dr SS did not think it would negatively impact on his progress in the hospital if Mr Harold's name was disclosed in association with Mr Green. In relation to whether any identification of Mr Green from the proposed publication may adversely affect his willingness to be open about his mental state, Dr SS responded as

follows. He said he doesn't know what Mr Green would be thinking, however Dr SS observations and knowledge of Mr Green are that he is very resilient and although Mr Green may be disappointed if there was publicity about himself, he is resilient and future focused.

Other evidence as to clinical condition/progress

63. The reasons for decision for the most recent statutory review by the Tribunal of Mr Green is care, treatment and control on 12 September 2024 states as follows:

> *The treating team consider that Mr Green has had a long-standing diagnosis of schizophrenia, first diagnosed at the age of 22 during a long admission from September 1994 to June 1997. The treating team opine that Mr Green's current presentation is complicated by his antisocial personality disorder, noting that he has a history of "deceitful and manipulative behaviours, which have resulted in multiple successful attempts to abscond from treatment and external custodial controls". In terms of risk factors the treating team consider that Mr Green has ongoing psychotic symptoms that profoundly affect his judgement and his plans for the future. Those symptoms they say, "motivate him to seek a way out of his legal predicament that would involve leaving Australia to escape his perceived persecutors". The treating team consider that Mr Green has "no insight into his delusions." Regarding his treatment response, the treating team opine that he engages in treatment offered, he is highly resistant to this treatment, and his behaviour generally suggests that he has motivations that would inherently direct him away from treatment."*

64. The Reasons for Decision for the prior review hearing also record:

> *Mr Green's solicitor, … said that Mr Green agrees that he suffers from schizophrenia and has issues with his memory. She said he is hoping to get out letters to international security agencies.….Dr PP at the hearing described the previous six months as uneventful and noted Mr Green's wish to send letters to various national and international security and the agencies. The treating team recommended to him that he not send the letters because he had is admitting to various crimes and that it would be inadvisable for him to send these letters. Mr Green, according to Dr PP, wants to commence a security agencies to bail out of the Facility A. The treating team advised Mr Green that he could send letters to his legal team if he intends to follow through with that."*

65. The Tribunal determined at the review on 12 September 2024 that Mr Green should continue to be detained for care, treatment and control, for protection of both Mr Green

and others from serious harm. The Tribunal also found that Mr Green should remain detained at Facility A which is appropriate to his needs and appropriate having regard to the safety of Mr Green and other persons.

Other evidence

66. Mr Green's legal representative from the Mental Health Advocacy Service, Mr Peter Im, relied on written submissions provided to the Tribunal. He noted that the forensic patient opposes the application.

Views of Registered Victims

67. A registered victim [not Mr Harold] provided written submissions to the Tribunal and requested that a number of questions be asked during the Tribunal hearing. The Tribunal gave leave for all questions to be asked. On behalf of the registered victim the Presiding member of the Tribunal, President Huntsman, asked all of the registered victim's questions and they were answered during the proceedings, primarily by the applicant. A number of questions asked by the registered victim were addressed to the purpose of the proposed publication, and a concern that there would be re-traumatisation of the registered victim through further media publicity which may be caused. The Tribunal during the hearing recognised the loss and harm and trauma experienced by the registered victim as expressed in submissions to the Tribunal.

68. After the hearing the Tribunal received written notification from the representative for the registered victim that having had his/her questions answered during the proceedings and having a greater understanding of the reason for the application, the registered victim withdrew opposition to the application for Mr Harold's name to be published. Given the withdrawal of objection by the registered victim, all of the questions by the registered victim and answers provided will not be detailed in these written Reasons for Decision.

69. Another registered victim had provided advice to the Tribunal prior to the hearing that the application was not opposed.

Submissions by legal representatives for the current matter/application

70. Because of late receipt of the written submissions from the Mental Health Advocacy Service, which were received on the morning of the hearing and contained lengthy legal arguments, the Tribunal was concerned about affording procedural fairness to other parties including the applicant.

71. Mr Coombs, solicitor for the applicant, suggested that the Tribunal hearing proceed, however time be granted for the applicant to provide written submissions in response to the submissions received from the legal representative for the forensic patient. A timetable for receipt of submissions was therefore set by the Tribunal. In order to expedite finalisation of the matters Mr Coombs agreed to a seven day period to provide written submissions in response to those provided by the forensic patient's lawyer, and the Mental Health Advocacy Service was allowed a further seven days to provide any further submission in response. Submissions were received on the dates set by the Tribunal from both legal representatives. Those legal submissions have been carefully considered by the Tribunal in making the current decision, however the entirety of the submissions will not all be referred to in these Reasons for Decision.

Submissions of the Applicant

Section 162 imposes a broad restriction upon publication of the names of people involved in proceedings before the Tribunal, including those who are mentioned or otherwise involved in any proceedings under the Act (pursuant to sub-section (1)(c)).

Mr Harold has not appeared at any Tribunal hearing, but as a family member of the deceased, he has been represented at the Tribunal by a victim's advocate. To that end, it appears he may be a person to whom the restriction in s162(1)(c) applies.

News and Mr Harold do not seek the consent of the Tribunal to identify Mr Green, or anyone else involved in the proceedings. To the extent that Mr Harold intends to refer to other people affected by the proceedings – who may fall within the ambit of the s162(1)(c) restriction – it is News' intention to refer to these people as "family members" without identifying them further.

News intends to identify Mr Harold's father, Michael, and takes the position that the restriction in s162 of the Act does not apply to deceased persons. [55 This position is consistent with the approach taken by the Tribunal in a section 162 application brought on behalf of the father of a man who was murdered: [Roberts [2019] NSWMHRT 2.]

If the application is successful, News will conduct an interview with Mr Harold, and publish a news story regarding his experience with the Tribunal in either the Saturday or Sunday Telegraph, and on the website www.dailytelegraph.com.au. That interview would be conducted by Investigations Editor Ms XX. The matters that will be

canvased in that interview are set out in Mr Harold's affidavit, in particular his intention to describe his experiences with the Tribunal, and give his opinion about ways in which the system could be improved.

There are no issues of capacity relating to Mr Harold. He is not subject to orders of the Tribunal and is involved in its proceedings only as a relative of a victim of crime.

"It is accepted that the Tribunal does not administer justice. [Roberts [2019] NSWMHRT 2, [11]-[16].]However, there is nonetheless a strong public interest in the community being informed of the processes of semi-judicial bodies such as the Tribunal.

It is submitted that the fact that Mr Green has previously escaped from the supervised facility in which he resided in 2020 [Harold Affidavit [18]-[24]] further strengthens the public interest argument in favour of Mr Harold being permitted to speak of his experiences with the Tribunal.

The operation of the Mental Health Tribunal, and its governing legislation is also a matter of present public interest given recent amendments by the NSW government in the Mental Health Legislation Amendment Bill 2024."….

Mr Harold can speak to all of those issues, and wishes to do so using his own name.

Though Mr Harold may not speak positively of his experience with the Tribunal, that is no reason to prohibit him from speaking on such matters.

News would seek responses from the Tribunal and the Minister to any criticisms directed at the Tribunal by Mr Harold in any interview conducted for the purposes of publication.

Submissions on behalf of forensic patient

72. The legal representative of the patient made detailed legal submissions not all of which will be referred to in these Reasons for Decision however all submissions were carefully considered. It was observed in submissions on behalf of the patient that:

The Tribunal in Isaac, Janzik [2014] NSWMHRT 3 considered the distinctions between the protections conferred by s162 and s189 and stated at [24]:

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.

73. The submission states that some of the content of Mr Harold's affidavit must have been obtained from victim notifications made under s157 of the MHCIFPA and therefore cannot be disclosed under s189, and therefore the Tribunal must exclude from any consent to publish Mr Harold's name such content.

74. The patient's legal representative also submits that NWN [the applicant] characterises their application as one that seeks to solely disclose the identity of Mr Harold, aside from the deceased whom they deem is not a 'person' contemplated under s162. It is submitted that the practical effect of permitting the disclosure of the identity of the deceased (whom the patient submits is a person contemplated under s162) or Mr Harold in relation to reports of proceedings is that the patient will also be identified and therefore no consent should be given.

75. In relation to identifying the deceased primary victim, the patient's legal representative submits that the applicant's position that the Tribunal should not consider the deceased primary victim as a "person" to whom the restrictions under s162 applies, stating that this is consistent with the approach taken by the Tribunal in *Roberts* [2019] NSWMHRT 2. The legal representative for the patient submits that this is a mischaracterisation of the Tribunal's reasoning in that decision. It is submitted that the case of Roberts was one in which the Tribunal permitted the disclosure of information already made public by reason of his public verdict, but otherwise emphasised the importance of confidentiality in relation to Tribunal proceedings. The patient accepts that the reporting of the public verdict is permissible. The patient submits that by reason of his identification in a public verdict in connection with deceased [Regina v Mr D [date] [court]], any reports of Tribunal proceedings which disclose the identity of the deceased can be linked to the patient and is therefore information contemplated by s162(3) to be "a reference to any

information…that identifies the person or is likely to lead to the identification of the person." It is submitted that it follows that the Tribunal should view this as an application which also seeks the disclosure of the patient's identity.

76. The legal representative of Mr Green submits that within the affidavit of Mr Harold on which the applicant relies, Mr Harold acknowledges having previously cooperated with a reporter from Channel ZZ in relation to the patient's absconding from Facility B. At the time of the submissions in the current matter, an article containing Mr Harold's report/statements remains available on the website of Channel ZZ in an article titled [title redacted] and identifies the patient as a subject of the Mental Health Review Tribunal's jurisdiction, identifies the deceased as Mr Harold Senior, …. and identifies the deceased's son as Mr Harold. A copy of the article is annexed at the end of the submissions.

77. The patient submits that by reason of Mr Harold's previous cooperation with Channel ZZ, and the information still available online as a result of said cooperation, any reports of proceedings which disclose the identity of Mr Harold or the deceased can be linked to the patient.

Submissions as to publication of the name of the deceased primary victim

78. Both legal representatives made submissions in relation to whether consent of the Tribunal under s162 MHA was required for the applicant to publish the name of the deceased (Mr Harold's father). The submissions focused on whether the deceased was a person under MHA – the Tribunal has carefully considered all the submissions on this point. The solicitor for the applicant submitted:

> *11.Nothing in the MHA speaks of an intention on behalf of the legislature to have the provisions apply to deceased individuals. In the context of publication restrictions more broadly, NWN [the applicant] submits that they do not ordinarily apply to deceased persons, unless explicitly so stated in the legislation.*
>
> *12. By way of example, section 15A(4)(b) of the Children (Criminal Proceedings) Act 1987 (NSW) stipulates that the prohibition on identification of children involved in criminal proceedings extends to deceased persons. If the MHA were to be understood in the manner suggested by the Patient, there would be no need for an express provision of the kind in s15A(4), which is set out below:*

(4) This section applies to the publication or broadcast of the name of a person--

…

*(b**)** even if the person is no longer a child, or is deceased, at the time of the publication or broadcast.*

13. Moreover, in NWN's submission, the wording of the section suggests the provision should be understood as restricting identification of natural persons. There are references to a person "who appears as a witness". A corporation, or a deceased person could not. While a deceased person could be "mentioned" they could not be involved.

14. Finally, notwithstanding the observations of President Cogswell in Roberts as to the limited application of the principle of open justice to proceedings within the Tribunal, the NSW Court of Appeal has stated that "s162 creates a criminal offence with the effect of restricting open justice." It follows that it should be construed consistently with the principle of legality.

15. The High Court has stated that the principle of legality requires that any statute which affects the open-court principle, even on a discretionary basis should be construed in such a way so as to have the least adverse impact upon the open justice principle and common law freedom of speech. That being so, NWN submits that its interpretation of the section is to be preferred.

16. Indeed, that accords with President Cogswell's decision in Roberts, noting that His Honour considered that he had "no power" to prohibit "publicity concerning, on the one hand, the death of the late the victim".

79. In reply the legal representative for the patient submitted:

Firstly, this position is reflected in the Tribunal's Practice Direction dated 29 August 2018 concerning "Publication of Names (s162 Mental Health Act 2007)" which provides:

"The people protected by this legislation include the patient, the patient's family, any victim or their family and any witnesses, carers or health practitioners."

Secondly, an interpretation of s162 of the MHA which excludes the identity of a deceased victim, would render the provision ineffectual, given the public linkage between the identity of a deceased victim and a forensic patient. Demonstratively,

Mr Green became a forensic patient under the supervision of the Tribunal through a public verdict that named the deceased. Under the current forensic regime, forensic patients may similarly be referred to the Tribunal by equivalent procedures under s34 of the Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW) ('MHCIFPA') following a public verdict which may name a deceased victim. The patients posits that a primary purpose of s162 of the MHA is to protect the identity of a patient in service of the objects of the Act which centre on the care, treatment and recovery of persons who are mentally ill. It is submitted that an interpretation of the provision that would render it ineffectual is contrary to the purpose of the Act. The patient's position relies on s33 of the Interpretations Act 1987 (NSW).

80. The patient's legal representative submitted that even if the deceased is not a person then identification of the deceased should be avoided as it would tend to identify the forensic patient.

81. The applicant submitted on this point that Mr Green would not be identified if the story published Mr Harold's name and the name of his father, the deceased primary victim. But if the Tribunal found otherwise then the application for consent should still be granted given the applicant would be taking a considered approach by not naming the patient or otherwise identifying by image of description.

Findings on the legal issue of applicability of s162 to the deceased primary victim

82. The Tribunal has considered the submission of the patient's representative based on a 2018 MHRT Practice Direction – and observes that the Mental Health Act provisions (s162) take precedence over any Practice Direction, and further, the reference to a victim in the 2018 Practice Direction is likely a reference to a living victim given that applicable legislation provides for victim participation in Tribunal hearings.

83. It is noted that the legal representative for the patient in submissions relies upon s33 of the Interpretation Act 1987 which states: *the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made) shall be preferred to a construction that would not promote that purpose or object*. The objects of the MHA and the MHCIFPA and the s68 principles for care and treatment, and consideration of the Tribunal's protective jurisdiction, apply to this application as set

out above in these Reasons for Decision. The Tribunal has regard to the policy rationale underlying the s162 prohibition as set out above. In relation to a construction of s162 the objects or purpose of the legislation including the protective jurisdiction which applies to forensic patients and those detained under the MHA is kept firmly in mind by the Tribunal and applied to the reasoning in this matter. Section 162 applies to protect those receiving treatment under the MHA and MHCIFPA, including protecting the patient's recovery and ability to access the community. The deceased primary victim is not someone who is receiving treatment or otherwise subject to the provisions of mental health legislation to which the objects of the MHA specifically apply, however the respect which is extended to the victims of crime/victim of forensic patients, and the rights and considerations in the *Charter of the Rights of Victims of Crime*, have relevance. The objects of the MHA do extend to the forensic patient, as set out above, however this does not assist in deciding whether the prohibition against publication imposed by s162 extends to a deceased person.

84. Section 162 of the MHA applies to a person who appears/who is mentioned or involved in, or two whom a matter before the Tribunal relates:

> *162 Publication of names*
>
> *(1) A person must not, except with the consent of the Tribunal, publish or broadcast the name of any person—*
>
> *(a) to whom a matter before the Tribunal relates, or*
>
> *(b) who appears as a witness before the Tribunal in any proceedings, or*
>
> *(c) who is mentioned or otherwise involved in any proceedings under this Act or the Mental Health and Cognitive Impairment Forensic Provisions Act 2020,*
>
> *whether before or after the hearing is completed*.

85. The wording of s162 MHA, given its ordinary meaning, suggests that it applies to a living person to whom a matter before the Tribunal relates, or who is appearing as a witness, or who is otherwise mentioned or involved – it does not appear to extend to the deceased primary victim to whom the criminal court proceedings related.

86. The Tribunal also finds persuasive the submission of the applicant, set out above, that there is no express application to deceased individuals as is the case with the section 15A(4)(b) of the *Children (Criminal Proceedings) Act 1987* (NSW). Section 162 specifically extends its operation to concluded hearings "whether before or after the hearing is completed" and it is the Tribunal's view that the absence of wording extending s162 to deceased persons is relevant in the context of this extension, given that the s162

prohibition is a restriction of open justice.

87. For the preceding reasons the Tribunal is not persuaded that the reference in s162 to the name of any person extends to the deceased primary victim.

88. If this view is not correct the Tribunal finds, in the alternative, that identification of the deceased primary victim, Mr Harold's father, by giving consent to publication of the name of Mr Harold in the context of the death of his father and Luke's experience of the forensic system, would not be a reason for refusing the consent applied for. The Tribunal finds, similarly to the finding of the Tribunal in *Roberts* that there is already this information linking the forensic patient, the deceased primary victim and Mr Harold in the public domain, and publicly available information linking the index offence, Mr Harold and the forensic patient, including the Channel ZZ reports referred to by the Legal representative for the patient. As was stated by then Tribunal President Judge Cogswell in *Roberts*:

> *the publicity already in the public domain about Mr Roberts through his trials must be an important context in this decision. The public already know a lot about Mr Roberts and about what he has done. There is a legitimate public interest in the processes of the Tribunal being subjected to public scrutiny by a participant (the applicant).*
>
> *What the Tribunal should not permit by way of an exception is any publicity which could adversely impact on the important process of Mr Roberts' treatment and rehabilitation.*

89. Consistently with the decision in *Roberts* and the protective and legislative considerations set out above, the Tribunal has carefully considered whether there would be a negative impact on the forensic patient's treatment and rehabilitation from the proposed publication.

FINDINGS – DISCUSSION AND FINDINGS OF FACT

90. At the last review the Tribunal found as follows:

> *The treating team consider that Mr Green has had a long-standing diagnosis of schizophrenia, first diagnosed at the age of 22 during a long admission from September 1994 to June 1997. The treating team opine that Mr Green's current presentation is complicated by his antisocial personality disorder, noting that he has a history of, "deceitful and manipulative behaviours, which have resulted in multiple successful attempts to abscond from treatment and external custodial controls."*

In terms of risk factors, the treating team consider that Mr Green has ongoing psychotic symptoms that profoundly affect his judgment and his plans for the future. These symptoms they say, "motivate him to seek a way out of his legal predicament that would involve leaving Australia to escape his perceived persecutors." The treating team consider that Mr Green has "no insight into his delusions."

Regarding his treatment response, the treating team opine that he "engages in treatment offered, he is highly resistant to this treatment, and his behavior generally suggests that he has motivations that would inherently direct him away from treatment."…

91. The Tribunal noted advice prior to the hearing that another registered victim did not oppose the application; and while one registered victim initially opposed the application this was withdrawn after the hearing as noted in above in these Reasons for Decision. The initial opposition to publication was in part due to a potential for re-traumatisation. Where there is such concern this would be a weighty matter and may well weigh against making a decision to consent to publication as an exception to the prohibition. However questions by the registered victim and the answers provided during the hearing, have addressed those concerns and the registered victim no longer opposes the publication of Mr Harold's name in the proposed *Daily Telegraph* report.

92. The Tribunal is satisfied on the clinical evidence presented in the hearing that to publish Mr Harold's name, even if it tended to identify the forensic patient, would not adversely impact on Mr Green's mental health rehabilitation, well-being or treatment. This is based on the specific evidence to this effect by Dr Ellis, Consultant Psychiatrist, and the Psychiatric Registrar involved in day-to-day treatment, Dr SS. That evidence is set out above. In addition the Tribunal finds that the proposed publication will not adversely impact on Mr Green's ability to be open about his mental health with the treating team – this finding is based on the evidence of clinicians at the hearing, as set out above and also based in the context that the information has previously been ventilated in the public domain. That this occurred was raised by Mr Green's legal representative from the Mental Health Advocacy Service, Mr Im, who provided copies of previous newspaper reports by Channel ZZ in response to Mr Harold speaking to those media organisations in previous years about similar matters. Those reports named the forensic patient.

93. On this occasion Mr Harold wishes to talk about his experiences with the Tribunal. As has previously been observed by the Tribunal, and detailed in the examination of case

law above, whether the report that Mr Harold wishes to make to the media about the Tribunal is accurate is irrelevant.

94. The Tribunal finds on the basis of Mr Harold's evidence at the hearing, that Mr Harold's experience of reporting his views about/experiences of the forensic system has been a positive one. On this occasion he wishes to talk about his experiences with the Tribunal and he anticipates that he will similarly receive public support and that it will be a beneficial experience. The Tribunal considers that Mr Harold has previously engaged with press reporting, he has previously had his name in the public realm in relation to such topics, and so has some experience of the consequences of publicity generated by media reports. The Tribunal therefore has no basis on which to conclude that there may be a risk of an unanticipated negative outcome for Mr Harold, if consent to publication of his name is given. Whilst the protective jurisdiction of the Tribunal does not extend to Mr Harold as a patient, the Tribunal should have regard to public interest considerations and best interests principles in determining an application for consent to publish the name of a person involved in Tribunal proceedings who is not a forensic patient. This is in addition to the requirement of the Tribunal to consider the best interests of the forensic patient.

95. In relation to whether the reporting of Mr Harold's name may lead to identification of the forensic patient it is probable that it may do so, particularly if people go searching on-line for newspaper articles involving Mr Harold. Those articles already exist in the public domain and can be accessed. However in the current application the forensic patient will not be named and that is suitable. While naming Mr Harold may indirectly identify the forensic patient because of existing material in the public domain, given that information is already publicly available and has been for some years, this is not a reason in the circumstances of this matter to not give consent to the publication of Mr Harold's name.

96. As noted above the registered victims do not oppose the current application and this is a matter to be given weight. Whilst the forensic patient opposes the application through his legal representative, the clinical treating team do not oppose the application and do not have concerns about the application. The clinical evidence does not reveal any basis to conclude that the publication will adversely impact the forensic patient's treatment and rehabilitation.

97. There is a public interest in the accountability of Tribunal proceedings and a discussion

of those proceedings and the forensic system in the public domain. For these reasons Tribunal proceedings are open to the public. Given there is not likely to be an adverse impact to the clinical and rehabilitative progress of the forensic patient on the evidence at this hearing; and given there is no opposition by registered victims, nor the treating team, then on the evidence overall, for reasons above detailed, the Tribunal finds it appropriate to provide consent to for the publication of the name of Mr Harold in the manner described in the application. Accordingly the Tribunal so ordered.

98. The Tribunal has considered the impact of s189 MHA below in the context of the submissions by the forensic patient's legal representative set out above. It is not clear from the evidence that Mr Harold's experiences of the forensic system are based on communications received from the Commissioner of Victims Rights under s157 MHCIFPA given the number of years that he has experienced the system which includes years where previous statutory provisions were in force, and given he is not a registered victim. The Tribunal is not satisfied the evidence in this matter allows the Tribunal to form that conclusion or make that finding of fact. This issue is further discussed below.

An observation about section 189 of the Mental Health Act 1987

99. The legal representative of the forensic patient submitted that the Tribunal should specifically exclude in any consent order under s162 of MHA various matters raised by Mr Harold in his affidavit evidence because these matters could only have come to Mr Harold's attention if they were notified by the Commissioner for Victims Rights under the MHCIFPA. It is noted that the disclosures referred to happened several years ago under prior legislation however given the Tribunal's view on the submission the Tribunal will not set out the previous legislative provisions. The patient's legal representative submitted that the Tribunal should excise certain topics/statements by Mr Harold from any order for consent to publication of Mr Harold's name, if provided under s162, on the basis that those particular topics or statements would breach section 189 of MHA. As noted in the section above "FINDINGS – DISCUSSION AND FINDINGS OF FACT", the Tribunal is not satisfied that Mr Harold's experiences are information disclosed by the Commissioner under s157 MHCIFPA.

100. The current application sought the Tribunal's consent to publication of Mr Harold's name under section 162. The consent which can be provided on the current application is a consent to publish or broadcast a name however the context of the publication is considered as part of the decision whether to provide consent as an exception to the prohibition. In the current case the context of the publication is an interview with

Mr Harold about his experiences of the Tribunal to be published in the *Daily Telegraph* (newspaper and website).

101. The Tribunal does not have a consent function under section 189 of the MHA to give people permission to disclose matters. Nor does the Tribunal have a function under s189 to direct a person to not disclose, as such the submission of the legal representative of the patient that the Tribunal should make directions that certain content not be disclosed pursuant to s189 is not supported by legislative construction. Section 189 MHA is a statutory provision directed to disclosures by persons of information obtained - s189 imposes an individual liability for any breach of its provisions, and does not give the Tribunal any powers or functions.

102. All individuals should seek their own independent legal advice about any liability under s189 MHA.

103. By way of observation, a further guide to the construction of s189 may be found in its location in Chapter 9 “Miscellaneous” rather than in Chapter 6 of MHA which contains provisions applicable to the Tribunal. Sections 162 and 151(4) are located in Chapter 6 of the Mental Health Act which contains provisions specific to the Tribunal including its constitution, membership and procedures. In particular, Part 2 of Chapter 6 sets out the procedures of the Tribunal and both s151 and s162 are located here. By contrast section 189 is located in Chapter 9, Miscellaneous, which has a number of differing and miscellaneous provisions.

104. Construction of the MHA may indicate that, subject to compliance with s162 of the MHA, and compliance with any non-publication orders made under s151(4) of the MHA, information disclosed in the Tribunal hearings may otherwise be published. Support for this view includes that the proceedings of the Tribunal are open to the public pursuant to s151(3) of the MHA, unless publication is restricted by order under s151(4), and the names of people involved may not be published under s162. Section 189 may have other work to do in relation to information obtained in the course of functions performed under the MHA and MHCIFPA – the Tribunal makes no determination of this issue for the purpose of the current proceedings. The complexity of this issue is also revealed in another interpretation of s189 MHA which is open - that information provided during a hearing is also information obtained in connection with the administration or execution of the MHA or MHCIFPA to which s189 applies. It does appear that this alternative interpretation may be less persuasive than the former, given the statutory constructions

set out above as to the Parts of the MHA in which s162, and s189, are located. The Tribunal has not decided this issue for the purpose of the current proceedings. Parties should seek their own legal advice about any potential individual liability.

105. Former President Howard observed that the precise interplay between s151 and s189 Is not straightforward see *Official Report [2014] NSWMHRT 3*:

> *"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".*

106. In the present case no order was made in the last review proceedings pursuant to s151(4) for non-publication, and the Tribunal is not presently aware of any such orders having been made in the previous hearings relating to this forensic patient. The Tribunal agrees with former President Howard that the wording of s189 is of wide application. The Tribunal also agrees that further distribution by a person of the Tribunal's written reasons for decision may well breach s189 MHA. The Tribunal notes that the MHA

provides for publication by the Tribunal of an Official Report of its Reasons for Decision (s160(2) MHA).

107. The Tribunal has no consent function under s189, nor does it have any power to direct non-disclosure under s189, and the non- disclosure provisions of s189 of MHA apply to all persons.

108. The Tribunal makes no determination on the issue of the extent of the operation of s189 of the MHA for the purpose of the current proceedings. Parties should seek their own legal advice. The decision in this matter is a decision whether to consent to publication of the name of Mr Harold under s162 of the MHA and as set out above the Tribunal has determined to provide that consent.

Magistrate Carolyn Huntsman
President

8 April 2025

****