THIS IS AN OFFICIAL REPORT OF THE MENTAL HEALTH REVIEW TRIBUNAL PROCEEDINGS IN RELATION TO MR POWERS AUTHORISED BY THE PRESIDENT OF THE TRIBUNAL ON 21 MAY 2019

Mental Health Review Tribunal

This is an edited version of the Tribunal's decision. The patient has been allocated a pseudonym for the purposes of this Official Report

SECTION 162 PUBLICATION OR BROADCAST NAME: **Mr Roberts**

TRIBUNAL: **Richard Cogswell** **President**

PLACE: **Mental Health Review Tribunal**

APPLICATION: **s 162 Publication or Broadcast name**

REASONS FOR DECISION

Background

1. The applicant is the father of the late victim. The victim was tragically stabbed to death. Mr Roberts was arrested and charged with murder. Ultimately a limiting term was imposed by the Supreme Court.

2. The applicant and his wife, have written a book about the victim's death and the legal processes which followed. They found those processes demanding and extremely frustrating. Naturally the book will make extensive reference to Mr Roberts and the various proceedings he has been engaged in. Those proceedings have taken place in two jurisdictions: the Supreme Court and the Mental Health Review Tribunal. There is no restriction on the applicant and his wife making reference to Mr Roberts' Supreme Court proceedings. But writing about Mr Roberts and his proceedings in the Mental Health Review Tribunal is another matter. Section 162 of the *Mental Health Act 2007* prohibits that. The section relevantly provides:

"(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,

…

whether before or after the hearing is completed.

…

(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 the identification of the person."

3. Mr Roberts is a person "to whom a matter before the Tribunal relates". Hence although the applicants need no one's permission to publish information in their proposed book about the Supreme Court proceedings involving Mr Roberts, they need the Tribunal's consent for any reference to his involvement in proceedings before the Tribunal.

4. They are seeking the Tribunal's consent.

Representation, evidence and submissions

5. At the hearing, the applicant was represented by Mr Dauid Sibtain of counsel[1] and Mr Roberts was represented by Mr Paul Coady of counsel. They both put on evidence in advance of the hearing as well as leading evidence at the hearing. Both made very helpful written and oral submissions. It is convenient to place the evidence and submissions in annexures [not included in this official report]. Hence annexure A is a summary of the evidentiary material and annexure B is a summary of the parties' submissions.

An important distinction

6. As Mr Sibtain points out, one has to distinguish between publicity concerning, on the one hand, the death of the late the victim and the consequential court proceedings and, on the other, the proceedings in the Tribunal once Mr Roberts became a forensic patient. The Tribunal has no power to prohibit the former. My impression is that the overwhelming impact of any publicity from the book's publication will stem from material concerning the death of the victim and the court proceedings. This is reflected in the book itself. Most of its content relates to the tragic death of the victim and its aftermath in the courts. There are references to the Tribunal as an institution, its procedures and some communications. Many of these references involve no more than what is already available in the public domain and do not touch on Mr Roberts personally.

7. There is an obvious concern amongst those supporting Mr Roberts in his ongoing rehabilitation that his name will be thrust again into the public view and linked (following the Court's finding that he was responsible) with the tragedy of the victim's death. As Mr C [Mr Robert's clinical case manager] said, the "publication is unlikely to be positive for [Mr Roberts] and is more likely to create concerns related to his care and treatment". This would happen in any event if the book was limited to the events and processes through the courts

1 The Tribunal notes with appreciation to both that Mr Sibtain of counsel appeared pro bono for the applicants facilitated by the Arts Law Centre of Australia.

and up to Mr Roberts becoming a forensic patient. This is an example of where the Tribunal must distinguish between such an impact resulting from publicity about the court proceedings as distinct from publicity about the Tribunal proceedings. The difficulty which Mr C frankly acknowledged is the same difficulty facing the Tribunal: the nature and severity of the crime in the public's view can impact on the availability of services; but Mr C could not point to any additional effect beyond a service provider's knowledge of past criminal behaviour (which is already in the public domain).

8. This may be regrettable for Mr Roberts and it may frustrate his progress, but the Tribunal has no power to prevent such exposure. It is a discourse about a very public and tragic event with a high public interest. The impact on Mr Roberts follows from those events and the legal court processes. The public has a legitimate ongoing interest. Frustration of Mr Roberts' progress or rehabilitation resulting from actions by cautious service providers are, the evidence suggests, more likely a response to what is already in the public domain. Such public interest in and responses to an 'index event' will follow many forensic patients. By definition, such events must involve behaviour that attracted a serious criminal charge by the police and court proceedings to determine that charge.

9. As Mr Sibtain argues, the "veil of privacy" extends to Tribunal proceedings and not to the court proceedings.

10. Mr Sibtain referred to the public interest in "open justice" and relied on the proposition that "[Mr Roberts'] right to privacy ought yield to open justice". This submission along with references to the *Court Suppression and Non-Publication Orders Act 2010* leads to another question to which it is convenient to now turn.

Does the Tribunal administer justice?

11. Whether or not the *Court Suppression and Non-Publication Orders Act 2010* applies to these proceedings raises the question of whether the Tribunal is engaged in "the administration of justice". The MHRT has not been prescribed as a court by any regulations under that Act: see the definition of "court" in s 3 of the Act. When one has regard to s 6 of that Act, a reason for not prescribing the MHRT as a "court" appears. Section 6 of the Act is as follows:

> **"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".

12. It seems to me that proceedings such as regular reviews of patients under mental health legislation do not amount to "the administration of justice". They are proceedings under

public health legislation. The Tribunal is not dispensing "justice". By this I mean that the Tribunal is not handing down verdicts or sentences or determining rights between individuals (personal or corporate) or individuals and the State. But the State's public health legislation - which includes the *Mental Health (Forensic Provisions) Act* - grants wide coercive powers that affect the lives of citizens. To say that the Tribunal does not dispense "justice", in the sense described above, is still consistent with the Tribunal having to act according to the rules of natural justice. Any public administrator or institution making decisions which may impact unfavourably upon the life of an individual must act in accordance with natural justice. Such rules govern the procedure. But the subject matter of Tribunal proceedings is public health, rather than the adjustment of rights and liabilities between the State and its citizens or between citizens.

13. The *Mental Health Act* makes its own provision for openness. The Tribunal must act informally, does not have to apply the rules of evidence and "proceedings … must be open to the public" (s 151(1), (2), (3)). Reasons for the requirement of openness must include the protection of the individual, the reassurance of the public and the principled exercise of powers given to doctors and the Tribunal. The subject matter concerns administration of coercive health powers. The Act provides that the exercise of such powers should be undertaken or reviewed in public. On the other hand, balance is provided by a requirement that personal information identifying the patient cannot be disclosed, published or broadcast.

14. The objects of both pieces of public health legislation (s 3 of the *Mental Health Act* and s 40 of the *Mental Health (Forensic Provisions) Act*) focus on the patient, the nature of his/her illness, care and treatment and the safety of the public. In that sense, the focus is not on the administration of justice as such.

15. It is therefore hardly surprising that details about a patient are kept confidential. Patients are public patients: forensic patients, involuntary patients or patients on a Community Treatment Order. They receive compulsory mental health care. They have no choice about being subjected to a hearing before the Tribunal and the presentation to the Tribunal of reports about their history, treatment and progress. In addition, despite public policy and developments in community attitudes, there remains some stigma attached to mental illness, so publicity could be prejudicial to a patient.

16. There is therefore a distinction between, on the one hand, the administration of justice in a court and, on the other hand, review proceedings in the MHRT. There is a real public interest in how a charge of murder has been dealt with in court and the outcome is important. But once the person charged with that murder is found "not to be responsible according to law, for his or her action" (s 38 of the *Mental Health (Forensic Provisions) Act*), or that "on the

limited evidence available" the accused person "committed the offence charged" (s 22(1)(c)) which is a "qualified finding of guilt" (s 22(3)(a)), then the circumstances change. The person is no longer an accused person, but a public patient. It is quite reasonable that the person would not want publicity to do with their diagnoses, treatment, progress, medication and its effects. It is that interest that the law (s 162 and s 189 of the *Mental Health Act*) protects, given that the person has to undergo a compulsory review by an agency of the State which has coercive powers to direct detention and compulsory treatment. Oversight of the exercise of those coercive powers is provided for by public access to the proceedings. They "are to be open to the public."

17. It follows from the focus on the patient in the objects of the legislation and the coercive treatment that can be imposed, that the attitude of the patient would be a paramount consideration in determining whether the Tribunal should consent to an application to publicise or broadcast details. (In this regard, the Tribunal accepts Mr Coady submissions.) If the patient objects, they are simply saying that they want the protection afforded to them by the legislation to be maintained and there should not be an exception in their case.

18. In this case Mr Roberts objects to his progress in the Tribunal being publicised.

19. The decided cases where the patient himself or herself consents to publicity (*A v Mental Health Review Tribunal* [2012] NSWSC 293 and the published MHRT reports) are in a different category. Consent by a patient does not lead to an automatic consent by the Tribunal. Factors then relevant to the Tribunal would include whether the patient has the appropriate capacity to consent and also whether consent by the Tribunal would cause unacceptable damage to the patient's care, treatment and rehabilitation.

20. I am not saying that a patient's consent is a necessary prerequisite to the Tribunal granting consent under s 162. The Tribunal cannot add such a requirement as a gloss to the statute. But the purposes of the legislation and how the legislation affects a patient must be taken into account. It could be that other circumstances outweigh such considerations. It is not fruitful to speculate on what might amount to such circumstances.

The rationale of the s 162 prohibition

21. 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).

22. What then informs the prohibition? The answer to that question must assist the Tribunal in deciding whether or not to make an exception.

23. Many years ago, persons now regarded as forensic patients were locked up at the "Governor's pleasure". They were taken out of the community (thereby protecting the community) and given treatment with limited scrutiny. Similarly, persons who had serious mental illnesses or intellectual disabilities – but who had not done anything to attract the attention of the police or the courts and were not forensic patients – were often locked up out of sight or scrutiny. They could be exposed to compulsory treatment and serious abuses of their civil rights by the exercise of unregulated power over them.[2]

24. Then in moves informed by a greater tolerance, recognition and acceptance of mental illness as just that (an illness affecting many community members), Legislatures developed a more humane approach which focused on a patient's rehabilitation and reintegration into the community. The patients were seen as very vulnerable members of the community who were not responsible for their actions, who were a risk to themselves or others or who did not understand the legal processes to which they were exposed as a result of their actions. Given improvements in treatment, rehabilitation and wellness became achievable goals. Protection of the community from any risks posed by its mentally unwell or intellectually disabled members could be achieved by their effective treatment (including medication) and reintegration into the community (with supervision). The community would learn to accept people living with mental illness or intellectual disability, just as it accepted other illnesses and disabilities suffered by its fellow members.

25. The treatment and reintegration into the community comprise a far more complex and sensitive process than simply locking up patients. It is a process which focuses on the individual patient and his/her environment. Like any medical or behavioural treatment, there will be progress and setbacks. This treatment process occurs in private and within a restrictive environment. It involves trust and non-judgemental interventions. This is not a process that is likely to be successfully conducted in the public domain. Hence broadcasting or publicising Tribunal hearings where progress and setbacks, diagnoses and treatment are discussed would be unlikely to assist in a patient's progression and may well be detrimental.

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[2] Mental Health Review Tribunal Deputy President Anina Johnson sets out the following examples in Endnote 20 to her article "The Value of Procedural Fairness in Mental Health Review Tribunal Hearings" in AIAL Forum No. 86: "New South Wales, Royal Commission on Callan Park Mental Hospital, *Report of the Hon Mr Justice McClemens Royal Commissioner Appointed to Inquire into Certain Matters Affecting Callan Park Mental Hospital* (1961). See also Australian Broadcasting Commission, Radio National, 'Behind the Ha-ha Walls' *Earshot*, 6 October 2015 (Stan Alchin) <http://www.abc.net.au/radionational/programs/earshot/behind-the-ha-ha-walls-mental-as/6807712>; Australian Broadcasting Commission, Radio National, 'Closing Gladesville' *Hindsight* 5 October 2014 (Fred Kong and Janet Meagher) <http://www.abc.net.au/radionational/programs/hindsight>."

26. There is another dimension to be considered. The Tribunal itself needs to be able to effectively exercise its jurisdiction. A Tribunal panel reviewing a forensic patient needs to gather and test information provided by the patient, the treating team and other sources. This information needs to be expressed in open and frank detail for assessment and judgements to be examined and formed. Its jurisdiction includes making recommendations and orders about a patient's care, treatment and control. It also has power to order a patient's release or leave from a mental health facility. Sometimes applications for such orders are opposed. 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.

27. 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.

Resolution in this case

28. Having made those remarks, it is appropriate to observe that the applicant's application relates to a number of references to Mr Roberts' Tribunal proceedings in the chapters I have referred to at [2] in annexure A. None of those references canvases any detail about treatment or behavioural therapy. Parts of it set out correspondence between the applicant and the Tribunal.

29. Bearing in mind the policy considerations informing the prohibition and therefore the exception as well, it seems to me that there would be no reason to deny publication of certain material including –
    (a) the fact that Mr Roberts is a forensic patient over which the Tribunal is exercising its jurisdiction. Those circumstances follow from the public verdict and the legislation;
    (b) correspondence from officers of the Tribunal which set out the Tribunal procedures and the legal context; (My preference would be to delete the names of those officers, except for the Registrar's. If the applicant wants to press for their inclusion then a further submission should be made specifically on that point: see *Commissioner of Police v District Court of NSW* (1993) 31 NSWLR 606 at 625, 638-639.)
    (c) criticisms of the Tribunal by the applicant. 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.

30. 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. It is not easy to distinguish between, on the one hand, passages in the applicant's proposed publication that would be innocuous so far as Mr Roberts' treatment and rehabilitation are concerned and, on the other, passages that may have, even potentially, an adverse impact.

31. With those considerations in mind, annexure C comprises extracts of the book. The passages marked with pink highlighter are those which, on balance, I regard as impacting (or having the potential to do so) on the treatment or rehabilitation of Mr Roberts.

32. I propose to allow a limited period for Mr Roberts' and the applicant's legal representatives to make any further submissions on the specific proposal that was not before them at the hearing.

Signed at Sydney, this day of 2019

His Honour Judge Richard Cogswell SC
President