

# PROCEDURES CONCERNING THE RIGHTS OF ACCESS TO MHT HEARINGS OF VICTIMS OF CERTAIN CRIMINAL OFFENCES COMMITTED BY PATIENTS

## PART A: TRIBUNALS COVERED BY THE DOMESTIC VIOLENCE, CRIME AND VICTIMS ACT 2004

### Background

1. The *Domestic Violence, Crime and Victims Act 2004* (DVCV Act 2004) contains a number of measures improving services and support to victims of certain criminal offences (hereinafter described as 'victims'). The DVCV Act 2004 covers victims of offenders sent from prison to hospital for psychiatric treatment, as well as offenders subject to hospital orders. Under Schedule 6 of the Mental Health Act 2007, which amends the DVCV Act 2004, these rights are extended to the victims of violent or sexual offences committed by offenders who are detained in hospital but are not subject to special restrictions (unrestricted patients). This section provides information about the procedures for information-sharing and forwarding victims' representations about discharge conditions.
2. The extended duty is not retrospective, and applies only to victims where the court sentences the offender to certain disposals on or after **1 July 2005** or, for non-restricted patients, **3 November 2008** [PART B below deals with the position regarding disposals prior to these dates]: The disposals include the following:
  - Those convicted of a sexual or violent offence (**see Definitions Section**), who are then made subject to a hospital order.
  - Those found
    - a) unfit to plead and to have committed the act or made the omission charged as the offence; or
    - b) not guilty by reason of insanityunder the Criminal Procedure (Insanity) Act 1964 as amended by the DVCV Act 2004 in respect of a sexual or violent offence, and then made subject to a hospital order.

- Those convicted of a sexual or violent offence who are then made subject of a hospital direction and limitation direction (if the associated prison sentence is for 12 months or more).
  - Those sentenced to 12 months imprisonment or more for a sexual or violent offence and transferred from prison to hospital under a transfer direction.
  - The regime also applies to those patients in the above categories who have been made the subject of conditional discharge (restricted patients) or a Community Treatment Order (unrestricted patients).
  - If an offender is subject to a hospital order with restrictions but has had those restrictions removed (on, or after, 3 November 2008) or been made subject to a transfer direction without restrictions being made, the victim will continue to enjoy the access offered by DVCV as long as the offender was sentenced after 1 July 2005.
3. The Ministry of Justice (MoJ) Mental Health Unit (MHU) carries out the Secretary of State's responsibilities under the Mental Health Act 1983 and related legislation. They direct the admission to hospital of patients transferred from prison and consider recommendations from Responsible Clinicians (RCs) in hospitals for leave, transfer or discharge of restricted patients. The MHU also prepare documents for Mental Health Tribunals (MHTs), and monitor patients who are conditionally discharged. Each restricted patient has a caseworker at MHU.
  4. For each new case, including transferred prisoners, the Victim Liaison Officer (VLO) will contact the MHU caseworker. MHU will inform the VLO of the details for the care team or RC in each case, where this is known. For unrestricted patients, the role of probation services (Area or Trust) is limited to identifying the victim(s) and, if they consent to it, passing on their details to hospital managers. For these cases, the ongoing statutory victim liaison role rests with the hospital managers, or staff to whom the function has been delegated

## **Responsibilities**

### **Restricted Cases**

5. A detained patient may apply to have his/her case heard by a MHT once each year. If the patient does not apply, their case will be referred to a Tribunal every three years. In addition, after a conditionally discharged patient has been recalled, the Secretary of State must refer the case to a Tribunal within one month of recall. The Tribunal will consider whether the individual needs to be detained in hospital for the purposes of mental health treatment.

6. When the Secretary of State refers a patient to the Tribunal, MHU will forward the details of the relevant VLO to the MHT Office. When an application is made to the Tribunal, the Tribunal office will obtain the details of the relevant VLO from MHU. In both circumstances, the MHT Secretariat will then inform the VLO of the Tribunal date once it has been set, as well as the date the victim's representations must be received to be considered at the hearing.
7. VLOs should consult victims about their representations relating to discharge conditions and forward them to the Tribunal Office by the specified date.

### **Unrestricted Cases**

8. Hospital Managers have the responsibility for liaising with victims in unrestricted patients. Therefore, it is the Hospital Managers' responsibility to ensure that the victim is aware of the proceedings and to ascertain whether the victim wishes to make representations. The managers are required to pass any such representations to the responsible clinician who should then forward them to the Tribunal Office.

### **Victims' attendance at Hearings**

9. If victims wish to attend a Tribunal this will be handled in the same way as victims not falling within the act – see **PART B paragraphs 17- 19 (below)**

### **Disclosure of Victim's Representations to the Offender**

10. Victims should be made aware that no guarantees can be given that any representations they make will not be disclosed to the patient.
11. The expectation is that all documents are disclosed to the **patient** and the circumstances in which documents can be withheld are very limited. Rule 14 of the Tribunal Procedure (First –tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (“the Rules”) allows for the Tribunal to withhold any document from the patient if they are satisfied that:
  - disclosure would be likely to cause that person or some other person serious harm

- having regard to the interests of justice, it is proportionate not to disclose.

In such a case the Tribunal will probably disclose the document to the patient's legal representative (if the patient has one). This is done on the basis that the legal representative must not disclose the contents of the document to the patient, either directly or indirectly. This would not apply if the representative was not a lawyer bound by a professional code of conduct.

12. It is a decision for the Tribunal whether or not any document should be withheld under Rule 14. Where the victim wishes for this to be considered this should be clearly indicated on the victim's representations. The Tribunal will consider whether or not to disclose the document to the patient. This may be done at the hearing or by the Tribunal Judge at a preliminary hearing. A victim may request to attend in person to argue that a document be withheld, but whether or not this is allowed will be a matter for the discretion of the Tribunal. The decision on whether to order disclosure involves consideration of general ECHR principles as well as rule 14 – see **Dorset NHS Healthcare Foundation Trust v NH (2008)** (available on the Member's website with commentary).
13. Any application by a victim to attend the Tribunal hearing and give oral evidence must be considered under Rule 38. In particular, the Tribunal has power under Rule 38(5) to exclude a victim from a hearing until the victim gives their evidence.
14. In restricted cases, the Tribunal Secretariat will inform the VLO of the outcome of the hearing, in writing, within seven days. The VLO will take responsibility for contacting the victim in restricted cases to inform him/her of the outcome of the hearing, including any relevant conditions imposed by the Tribunal. Where a Tribunal decides to direct the conditional discharge of a patient it may defer the discharge until it is satisfied that adequate arrangements have been made for the discharge to take place. It may impose any conditions on discharge for the protection of the public or the patient him/herself, such as residence at a stated address and supervision by a social worker (social supervisor) as well as cooperation with psychiatric treatment. Conditions relevant to victims would relate to 'no contact' conditions or exclusion zones.
15. Transferred prisoners are eligible to be considered by a Tribunal, but they cannot be discharged in this way. However, the Tribunal may make recommendations on how they would have acted had the offender not been a transferred prisoner. Therefore, VLOs may forward the victim's representations about conditions of discharge in these cases, as the Tribunal's deliberations will be forwarded to the Parole Board where appropriate.

16. In unrestricted cases, the Hospital Managers are responsible for notifying the victim of the outcome of the hearing. The managers, will have their own arrangements to ensure that they have the information they need to comply with this duty.

## **PART B: CASES NOT COVERED BY THE DOMESTIC VIOLENCE, CRIME AND VICTIMS ACT 2004.**

### **Background**

17. As outlined at Part A above, the *Domestic Violence, Crime and Victims Act 2004* (DVCV Act 2004) came into force on 1 July 2005, but it does not apply to victims of incidents involving restricted patients that occurred prior to that date, as the Act is not retrospective. For non-restricted patients, the relevant date is 3 November 2008.
18. The MHT has given careful consideration to the position of victims who have been subject to sexual or violent offences committed by persons who were subsequently detained under the provisions of the Mental Health Act 1983, where such assaults occurred prior to the introduction of the DVCV 2004. The MHRT has determined that where in such circumstances a victim wishes to have access to any future Tribunal proceedings concerning that patient, they shall normally be permitted such access on the following terms:
  - The victim must give notice to the MHT of their wish to be informed of any future Tribunal hearing arising in connection with the named patient.
  - Such notice must be in writing, and addressed to **Ms E Ralph, Tribunal Service Mental Health, PO Box 8793, 5<sup>th</sup> Floor, Leicester. LE1 8BN** The MHT will log and acknowledge in writing all such applications.
  - The victim will subsequently be informed of the date, time and place fixed for any hearing concerning that patient in advance of the hearing.
  - The victim shall have the right: (a) to apply to the Tribunal to attend the hearing in order to give evidence to the hearing; and (b) to submit to the Tribunal any written evidence that he or she wishes the Tribunal to consider.

## Application to Attend the Hearing

19. Rule 33 (e) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 allows the Tribunal to give notice of the hearing to any person who in the opinion of the Tribunal 'should have an opportunity of being heard'.
20. Rule 36(2) confers a discretion to allow such a person to attend a Tribunal. Rule 38(4) is also relevant when a Tribunal is deciding what approach to take when dealing with victims' evidence if they attend a hearing. Whatever the Tribunal's decision, it must give effect to the overriding objective in Rule 2.
21. Rule 5 empowers a Tribunal Judge to exercise the above power on behalf of the Tribunal at any time up to the hearing.
22. The manner and format in which the applicant's oral evidence is presented to the Tribunal (e.g. whether it is in the presence or absence of the other parties to the hearing) will be determined under Rule 38 either by the Tribunal Judge, in advance of the hearing, or at the hearing itself. In particular, it should be noted that Rule 15 (2) states that the Tribunal may admit evidence any document or information, whether or not that such document or information "would be admissible in a civil trial".
23. If the applicant submits any written evidence to the hearing either in place of, or in addition to attending the hearing, Rule 14 applies. This Rule requires the Tribunal to copy such written evidence to the patient unless they are satisfied that there are grounds not to disclose – see above. If the Tribunal does decide not to disclose the written evidence to the patient it would still be forwarded to the patient's legal representative, but they would not be permitted to show the written evidence to the patient [see **PART A: paragraphs 8-10**].

## DEFINITIONS

- 1) An offence is a "**sexual or violent offence**" if it falls within one of the following descriptions,
  - Murder, attempted murder or conspiracy to murder and any offence in **Schedule 15 Criminal Justice Act 2003 (c.44)**. This includes: manslaughter; kidnapping; false imprisonment; assaults under sections 18, 20 or 47 Offences Against the Person Act; child cruelty; possession of a firearm with intent; burglary; robbery; affray; death by dangerous driving; and a wide range of sexual offences.
  - An offence which requires that a patient complies with the notification requirements of **Part 2 of the Sexual Offenders Act 2003 (c.42)**. This

- An offence against a child within the meaning of Part 2 of the Criminal Justice & Courts Services Act 2000.

**2) Restricted** patients are those patients who were given:

- a restricted hospital order (i.e. a hospital order accompanied by a restriction order) (Section 37 and section 41 orders); or
- hospital and limitation directions (Section 45A); or
- Sentenced to imprisonment for a qualifying offence but subsequently transferred to hospital by a restricted transfer direction (i.e. a transfer direction accompanied by a restriction order) (Section 47 and 49 orders).

In these cases, existing victim contact arrangements as set out in Probation Circular 42/2005 will continue to apply, and Probation Victim Liaison Officers remain the main conduit of information to and from victims. If, however, these patients cease to be subject to restriction orders, limitation directions or restriction directions on or after 3 November 2008, then the new arrangements for victim contact via hospital managers will apply from the point at which restrictions are removed.

**3) Unrestricted** patients whose victims qualify for contact are those patients who are convicted of a violent or sexual offence on or after 1 July 2005 and made subject to an unrestricted hospital order or transfer direction on or after 3 November 2008. In addition, they also include patients subject to a hospital order with restrictions whose victims fall within the scope of the statutory victim contact scheme from whom restrictions are removed on or after 3 November 2008 whilst they remain detained in hospital. In both cases, these patients continue to fall under the new arrangements for contact with their victims via hospital managers if they are subsequently discharged from hospital on to a Supervised Community Treatment Order.

Judge Ian Keates

February 2010