



TRIBUNALS  
JUDICIARY

## Practice guidance on procedures concerning handling representations from victims in the First-tier Tribunal (Mental Health)<sup>1</sup>

The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008

### Background

- 1) This Guidance Note is drafted to assist judges and members of the First-tier Tribunal, Mental Health - (the tribunal) - in handling relevant representations from the victims of patients, where such patients have applications or referrals before the tribunal. This guidance has been issued by the Chamber President of the Health, Education and Social Care Chamber and it is intended to promote consistent and high standards in making judicial decisions, particularly in relation to Rule 5 (Case management powers); Rule 15 (Evidence and submissions), Rule 33 (Notice of proceedings to interested persons); Rule 36 (Entitlement to attend a hearing), and Rule 38 (Public and private hearings).
- 2) The definition of “victim” is taken to include any person in relation to the patient’s index offence or offences who appears to the relevant local probation board to be the victim of the offence or offences. This includes a victim’s family in a case where the offence has resulted in the victim’s death or incapacity and in other cases where the victim’s age or circumstances make it more sensible to approach a family member.

### Part A: Cases covered by the Domestic Violence, Crime and Victims Act 2004

- 3) The Domestic Violence, Crime and Victims Act 2004 (DVCVA) made provision for a number of measures improving services and support to victims of sexual or violent offences (see *Definitions*, below). This includes offences committed by people 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 2004 Act, these rights are extended to the victims of a sexual or violent offence committed by offenders who are detained in hospital but are not subject to special restrictions (unrestricted patients).
- 4) This Guidance Note suggests how the judiciary should approach requests from victims to make written representations, or to attend a hearing in person or through a representative. The Guidance Note does not address in detail the

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<sup>1</sup> Issued by the Chamber President under Schedule 4 of the Tribunals, Courts and Enforcement Act 2007

duty of the tribunal to notify the relevant local probation board if relevant applications or referrals or made, and the Guidance Note does not address in detail the duty of the tribunal to notify the local probation board of certain aspects of the outcome of the proceedings.

## The Statutory Regime

A victim is not a party to the proceedings. However, where the court sentenced the patient to certain **disposals** the tribunal has a statutory duty to permit a victim to make certain **representations** to the tribunal, so long as sentencing occurred on or after 1 July 2005 or, for non-restricted patients, after 3 November 2008<sup>2</sup>. This duty is not retrospective, and applies only to victims.

The **disposals** include the following:

- those convicted of a sexual or violent offence who are then made subject of a hospital order;
- those found to be
  - 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 insanity, under the Criminal Procedure (Insanity) Act 1964 as amended by the DVCVA in respect of a sexual or violent offence;and are 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); and
- 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 **representations** must only relate to the following questions:

- **whether the patient should, in the event of his or her discharge or release from detention, be subject to any conditions and, if so,**
- **what particular conditions should be imposed.**

- 5) These arrangements also apply to those patients in the above categories who have subsequently been made the subject of Conditional Discharge (restricted patients) or a Community Treatment Order (unrestricted patients). If an offender was subject to a hospital order with restrictions but had those restrictions removed on or after 3 November 2008, or was made subject to a transfer direction without restrictions being made, the victim will continue to enjoy the rights offered by the DVCVA, as long as the offender was sentenced after 1 July 2005.

## Restricted Cases

- 6) The Ministry of Justice (MoJ) Mental Health Casework Section (MHCS) carries out the Secretary of State's responsibilities under the Mental Health Act 1983, and related legislation. It directs the admission to hospital of

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<sup>2</sup> Note: PART B below deals with the position regarding disposals prior to these dates.

patients transferred from prison, and considers recommendations from Responsible Clinicians (RCs) in hospitals for leave, transfer or discharge of restricted patients. MHCS also prepares documentation for the tribunal and monitors patients who are conditionally discharged. Each restricted patient has a caseworker at MHCS.

- 7) For each new restricted case, including transferred prisoners, the Victim Liaison Officer (VLO), who is a Probation Officer with special responsibility for liaising with victims of sexual or violent offences, will contact the MHCS caseworker. MHCS will then inform the VLO of the details for the care team or RC, where this is known.
- 8) A detained patient may apply to have his or her case heard by a tribunal once each year. If the patient does not apply, his or her 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 then consider whether the individual needs to be detained in hospital for the purposes of appropriate and available mental health medical treatment.
- 9) When the Secretary of State refers a patient to the tribunal, MHCS will forward the details of the relevant VLO to the tribunal office. When an application is made to the tribunal, the tribunal office will obtain the details of the relevant VLO from MHCS. In both circumstances, the tribunal office will then inform the VLO of the **date (but not the venue)** of the tribunal hearing, once it has been set, and also advise of the date by which any written information, representations or submissions from the victim must be received. Note that a victim is not permitted to see the reports prepared for the tribunal by the witnesses in the case.
- 10) VLOs should consult victims about the information or submissions that they may wish to submit relating to possible discharge conditions, and forward them to the tribunal office by the specified date. VLOs should **not** encourage victims to make a general 'impact statement' because the tribunal is unable to take account of any representations from victims except those relating to the matters set out above.
- 11) If a restricted patient ceases to be subject to a restriction order, limitation direction or restriction direction on or after 3 November 2008, the arrangements below for unrestricted cases, involving hospital managers, will apply from the time when the restrictions are removed.

### **Unrestricted Cases**

- 12) Unrestricted patients whose victims may make relevant written representations are those patients who are convicted of a sexual or violent offence on or after 1 July 2005 and are made subject to an unrestricted hospital order or transfer direction on or after 3 November 2008. In addition, they also include patients (whose victims fall within the scope of the statutory scheme) who were initially subject to a hospital order with restrictions, but in relation to whom restrictions were removed on or after 3 November 2008, whilst they remained detained in hospital.

- 13) For unrestricted patients, the role of probation services (Area or Trust) is limited to identifying the victim(s) and, if they consent, to passing on their details to hospital managers. For these cases, hospital managers (or staff to whom the function has been delegated) have the statutory duty to liaise with victims. 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 RC, who should then forward them to the tribunal office.
- 14) Victims continue to fall under the new arrangements even if the relevant patient is subsequently discharged onto a Community Treatment Order (CTO). Note, however, that the tribunal has no power to attach conditions to a CTO or to amend conditions imposed under S.17(B) of the Mental Health Act 1983 (as amended). The tribunal may, however, summarise any relevant representations from a victim in its decision.

### **Provision of documents, written information or submissions to the tribunal**

- 15) Where a victim wishes to do so, and having submitted a written request to be advised of the **date** fixed for any hearing concerning that patient in advance of the hearing, a victim shall have the right to provide to the tribunal any **relevant** documents, written information or submissions that he or she wishes the tribunal to consider. Documents, information or submissions should only be regarded as relevant if they are capable of amounting to persuasive and cogent evidence, upon which the tribunal would be entitled to rely, relating to the following questions:
- **whether the patient should, in the event of his or her discharge or release from detention, be subject to any conditions and, if so,**
  - **what particular conditions should be imposed.**
- 16) Conditions relevant to victims could, for example, relate to 'no contact' conditions or limited and carefully defined exclusion zones.
- 17) In the event of any difficulty, the tribunal will consider exercising its case management powers. In particular, under Rules 5 & 15, the tribunal may give directions as to the manner in which any representations are to be provided, which may include a direction for them to be given by written submissions or statement. Alternatively (and exceptionally), the tribunal may take the view that the victim should have an opportunity of being heard in person, or through a representative.

### **Application to Attend the Hearing**

- 18) Rule 33(e) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 ("the Rules") compels the tribunal to give notice of the proceedings (i.e. date, time and place) to any person who in the opinion of the tribunal: 'should have an opportunity of *being heard*'.

- 19) Representations made by a victim can only cover only a limited range of issues (see above) and the victim is not a party to the proceedings. In most cases, therefore, a written statement will be the most satisfactory way for the victim to express his/her views because direct involvement in the proceedings, or a procedure that brings the victim into direct conflict with the patient, is unlikely to be helpful to the victim, to the patient, or to the tribunal. However there may be some cases in which the victim believes that this is not sufficient and may decide to ask to attend the hearing. Any such requests will be treated on a case by case basis applying the principles in the overriding objective as set out in Rule 2. The victim will have to demonstrate that the opportunity to make written representations is insufficient and that he or she needs an opportunity to *be heard* in relation to **relevant** matters (see paragraphs 4 & 15 above).
- 20) If a victim wishes to contend that he or she needs an opportunity to give oral evidence in relation to relevant matters, they must make a written application to the tribunal in advance of the hearing. The application must explain why the right to provide relevant documents, or relevant information or submissions in writing is not sufficient to enable the tribunal to deal with the case fairly and justly.
- 21) The victim should understand that the tribunal will be required to consider a large amount of information from different sources, including confidential medical reports which the victim will not be permitted to see. A victim's representations, whilst potentially relevant and helpful, are only part of a constellation of factors that will inform the tribunal's final decision.
- 22) If the tribunal determines that a victim should have an opportunity of being heard, then the tribunal will advise the victim of the **date, time and place** of the hearing. Rule 36(2) then permits such a person to attend and take part in the hearing to such extent as the tribunal considers proper. This gives the tribunal a wide discretion to regulate its own procedure, taking account of all the relevant circumstances.
- 23) Rule 38(4) and (5) may be particularly helpful when a tribunal is deciding what approach to take when dealing with the oral evidence of a victim who is permitted to attend a hearing. In particular, the tribunal has power under Rule 38(5) to exclude a victim from a hearing until the time comes for the victim to give his or her evidence. However, notwithstanding Rule 38(4), the tribunal will be reluctant to exclude a patient from a hearing relating to that patient's liberty, unless there are strong and evidentially supported reasons for doing so. Rule 5 empowers a tribunal judge to consider these matters at any time up to the hearing. Consequently, the manner and format in which the victim'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) can be determined either by the judge dealing with the management of the case in advance of the hearing, or by the panel at the hearing itself.

#### **Disclosure of the Victim's Evidence to the Patient**

- 24) Rule 15 (2) provides that the tribunal may admit in evidence any document or written material, whether or not that such document or material would be

admissible in a civil trial. However, the tribunal will generally wish to copy such information or written material to the patient, unless it is satisfied that there are grounds to prohibit disclosure under Rule 14. If the tribunal decides to prohibit disclosure to the patient, it will usually send a copy of the material to the patient's legal representatives. In such circumstances, the representatives will not be permitted to disclose material, or the information contained within it, to the patient.

- 25) Victims should be made aware that no guarantees can be given that any representations they make will not be disclosed to the patient. The expectation is that all documents will be disclosed to the patient, and the circumstances in which documents can be withheld are very limited. Rule 14 allows the tribunal to withhold any document from the patient if they are satisfied that:
- a) disclosure would be likely to cause that person or some other person serious harm, and
  - b) having regard to the interests of justice, it is proportionate not to disclose.
- 26) Rule 14 requires compliance with some important procedural steps. Further guidance is available in the tribunal's [Reports Guidance Booklet](#) "*Reports for Mental Health Tribunals*", available on the tribunal's website.
- 27) When deciding whether it is in the interests of justice to direct that the material must be withheld from the patient, the tribunal must ask itself whether non-disclosure would prevent the patient from participating effectively in all aspects of the proceedings (see [RM v St Andrew's Healthcare \[2010\] UKUT 119 \(AAC\)](#))

### **Decision of the Tribunal**

In restricted cases, the tribunal office should be able to inform the VLO of the relevant aspects of the tribunal's decision, in writing within seven days. In particular, the victim is entitled to know

- whether the patient is to be discharged and, if so, when the discharge will take effect;
- if a restricted patient is to be discharged, whether the discharge is to be absolute, or subject to conditions;
- if a restricted patient is to be discharged subject to conditions, what the conditions are;
- if a restricted patient has previously been discharged subject to conditions, of any variation of these conditions by the tribunal; and
- if the restriction order is to cease to have effect by virtue of action to be taken by the tribunal, of the date on which the restriction order is to cease to have effect.

- 28) With regard to prisoners who have been transferred to hospital, the tribunal may make recommendations on how they would have acted had the patient not been a transferred prisoner. Therefore, VLOs may forward the victim's

representations about possible conditions in these cases, and the tribunal's conclusions in relation to possible discharge and conditions will be forwarded to the Parole Board where appropriate.

- 29) In unrestricted cases, the hospital managers are responsible for notifying the victim of the relevant aspects 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.
- 30) A victim is not permitted to make an application for permission to appeal on point of law to the Upper Tribunal under S.11 of the Tribunal Courts and Enforcement Act 2007, because this right is limited to parties to the proceedings, and a victim is not a party.

### **Part B: Cases not covered by the Domestic Violence, Crime and Victims Act 2004**

- 31) As outlined at Part A above, The Domestic Violence, Crime and Victims Act 2004 ('DVCVA') came into force on 1 July 2005, but it does not apply to victims of incidents involving restricted patients where sentencing occurred prior to that date, as the DVCVA is not retrospective. For non-restricted patients, the relevant date is 3 November 2008.
- 32) The tribunal has given careful consideration to the position of persons who have been subject to a sexual or violent offences committed by persons who were subsequently detained under the provisions of the Mental Health Act 1983, where such offences occurred prior to the introduction of the DVCVA.
- 33) The tribunal has determined that where a patient's victim wishes to be advised of the date of any pending tribunal proceedings concerning that patient they shall, upon written request, be informed in advance of the **date (but not the venue)** fixed for any hearing concerning that patient. Such request must be in writing, and addressed to HM Courts & Tribunals Service, Mental Health, PO Box 8793, 5th Floor, Leicester. LE1 8BN.
- 34) The tribunal will log and acknowledge in writing all such requests. The victim will subsequently be informed of the **date (but not the venue)** fixed for the hearing. Note, however, that this is **not** a notification under Rule 33(e), but merely a practice to be adopted in order to allow a victim to know when a tribunal hearing is taking place in order that the victim may have an opportunity of providing written information or submissions to the tribunal, under Rule 5(3)(d) and Rule 15(1)(e)(ii).

### **Definitions**

A "**Sexual or Violent Offence**" falls within one of the following descriptions:

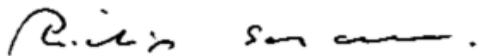
- Murder, attempted murder or conspiracy to murder and any offence in Schedule 15 Criminal Justice Act 2003 (c.44). This includes: manslaughter; kidnapping; false imprisonment; assaults under sections 18, 20 or 47 Offences Against the Person Act 1861 (as amended);

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 refers to a large number of offences set out at schedule 3 which includes: rape; indecent assault; sexual offences involving children; and possession of indecent photographs of children;
- An offence against a child within the meaning of Part 2 of the Criminal Justice & Courts Services Act 2000

**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
- a sentence of imprisonment for a qualifying offence but were subsequently transferred to hospital by a restricted transfer direction (i.e. a transfer direction accompanied by a restriction order) (Section 47 and 49 orders).



**His Honour Judge Sycamore,  
Chamber President,  
Health, Education and Social Care Chamber,  
First-tier Tribunal (Mental Health)**

**1 July 2011**