Courts and Tribunals Judiciary

PRACTICE GUIDANCE ON PROCEDURE FOR HANDLING REPRESENTATIONS FROM VICTIMS IN THE MENTAL HEALTH JURISDICTION OF THE HEALTH, EDUCATION AND SOCIAL CARE CHAMBER[1]

PRACTICE GUIDANCE NO. 2 OF 2023

This Practice Guidance revises and replaces the Practice Guidance on Procedures Concerning Handling Representations from Victims in The First-Tier Tribunal (Mental Health) dated 1 July 2011

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Unless stated otherwise, the Rules referred to in this document are the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008

[1] Issued by the Chamber President under Schedule 4 of the Tribunals, Courts and Enforcement Act 2007

I. BACKGROUND

1) This Guidance Note is drafted to assist judges and members of the Health, Education and Social Care Chamber who sit in the Mental Health jurisdiction ("the tribunal"), in managing, amongst other things:
    a representations from victims;
    b applications for attendance at hearings from victims; and
    c applications for reasons for decisions from victims.

2) This guidance is issued by the President of the Health, Education and Social Care Chamber following the decision in *Maher v FtT (Mental Health) and Ors* [2023] EWHC 34 (Admin) (*'Maher'*), which concerned a claim by Ms Maher, whose son Kyle had his life taken in an unlawful killing in 2017. The intention is to implement the ruling in that matter to ensure that going forward victims' representations are considered as part of the open justice framework identified in that judgment.

II. OPEN JUSTICE

3) The case of *Maher* raises important principles about victims' participation in proceedings before the Mental Health jurisdiction and reflects a growing trend towards greater openness in the legal process.

4) The primary consideration in *Maher* was the sharing of the tribunal's decision or reasons for the decision with the victim (as a close relative and family member). The High Court found that the failure of the First-tier Tribunal ('FTT') to provide Ms Maher reasons, or the gist of the reasons, for its conditional discharge decision was unlawful.

5) Open justice helps ensure public confidence in judicial decisions through transparency and enables others to understand and scrutinise how the justice system works and why decisions are taken. All courts and tribunals have an inherent jurisdiction to determine what the open justice principle requires in terms of access to judicial decisions, documents or other information placed before the court or tribunal in question.

6) While the principle of open justice is of general application, its practical operation (as *Maher* confirms) varies according to the nature of the work of the particular judicial body and there are exceptions to the principle in order to protect the rights of others, such as the right to a private life maintained under Article 8 of the European Convention on Human Rights ('ECHR').

7) Importantly, in all Mental Health cases there is a presumption of privacy. Rule 38(1) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 ("the TPR") provides:

> "All hearings must be held in private unless the Tribunal considers that it is in the interests of justice for the hearing to be held in public."

8) Further, in Mental Health cases, disclosure or publication of documents or information is governed by rule 14 of the TPR. Rule 14(7) states that information about the case and names of persons concerned in such cases must not be made public unless the tribunal gives a direction to the contrary.

9) The tribunal also has general powers (not limited to Mental Health cases) to:
    - prohibit the disclosure or publication of documents or information 'relating to the proceedings' (rule 14(1));
    - prohibit the disclosure of a document or information to a person if the tribunal is satisfied that such disclosure would be likely to cause the person or some other person serious harm and considers it proportionate to give such a direction (rule 14(2)).

10) Following *Maher*, when considering rule 14, tribunals must take into account the open justice principle. Notably, the court in *Maher* found that the mental health privacy exception is not an absolute rule to be applied in a blanket fashion. It still has to be weighed against the open justice principle given the tribunal does have a discretion to disclose under rule 14(7).

III. VICTIMS

11) The Domestic Violence, Crime and Victims Act 2004 ("DVCVA") requires the Secretary of State for Justice to issue a code of practice on the services provided to a victim of criminal conduct ('the Victims' Code') (s.32(1)). The most recent version of the Victims' Code was issued in April 2021. This defines a 'victim' as:

- a person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence;
- a close relative (or a nominated family spokesperson) of a person whose death was directly caused by a criminal offence.

12) A person may also receive rights under the Code if they are:

- a parent or guardian of the victim if the victim is under 18 years of age or
- a nominated family spokesperson if the victim has a mental impairment or has been so badly injured because of a criminal offence that they are unable to communicate or lack the capacity to do so.

13) The DVCVA makes provision for a number of measures improving services and support to victims of sexual, violent or terrorism offences. This includes offences committed by people sent from prison to hospital for psychiatric treatment, as well as patients subject to hospital orders. (See s 39 of the DVCVA for victims' rights under the Act.)

14) Where the court sentenced the patient/offender to certain 'disposals' (see paragraph 15 below), the tribunal has a statutory duty to permit a victim, usually via their Victim Liaison Officer ('VLO'), to make representations to the tribunal on what conditions should be attached to the patient's discharge from hospital, so long as sentencing

occurred on or after 1 July 2005 or, for non-restricted patients, after 3 November 2008. This duty is not retrospective and applies only to victims.

15) Those disposals include the following:

- those convicted of a sexual, violent or terrorism 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, violent or terrorism offence; and are then made subject to a hospital order;
- those convicted of a sexual, violent or terrorism 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, violent or terrorism offence, and transferred from prison to hospital, under a transfer direction.

16) Under the DVCVA (s 45 (2)), a "sexual, violent, or terrorism offence" falls within one of the following descriptions:

- Murder or any offence in either Schedule 15 to the Criminal Justice Act 2003 or Schedule 18 to the Sentencing Code.
- An offence which requires that a patient complies with the notification requirements of Part 2 of the Sexual Offences Act 2003.
- An offence against a child within the meaning of Part 2 of the Criminal Justice and Courts Services Act 2000.

17) 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 ('CTO') (unrestricted patients). (The tribunal has no power to impose conditions on an unrestricted patient made subject to a CTO, (see paragraph 44 below)).

18) If a patient 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 patient was sentenced after 1 July 2005.

19) Under Schedule 6 to the Mental Health Act 2007, which amends the DVCVA, these rights are also extended to the victims of a sexual, violent or terrorism offence committed by patients who are detained in hospital but are not subject to restrictions.

IV. THE ROLE OF VICTIM LIASON OFFICERS

20) Victim Liaison Officers (VLO) should act as a bridge between the victim and the tribunal. The Victims Code provides:

The Victim Contact Scheme

11.1 If you are the victim or a bereaved family relative and the offender was convicted of a specified violent or sexual offence, and sentenced to 12 months or more in prison (or detained in a hospital for treatment under the Mental Health Act 1983 with or without a restriction order), you have the Right to be automatically referred within 10 working days of sentencing to the National Probation Service Victim Contact Scheme and be assigned a Victim Liaison Officer. The Victim Liaison Officer will contact you within 20 working days of the referral.

21) For each new restricted patient case, including transferred prisoners, the VLO, who is ordinarily a Probation Officer with special responsibility for liaising with victims of sexual, violent or terrorism offences, will contact the Mental Health Casework Section ('MHCS') caseworker. The MHCS will inform the tribunal of the details of the VLO.

22) For unrestricted patients, the role of probation services 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 a 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.

23) The tribunal would ordinarily expect any applications to first come through the VLO or hospital manager, rather than directly from the victim.

V. PRELIMINARY MATTERS

24) There are three important considerations that victims and others should bear in mind when contemplating contacting the tribunal:

- Victims and their close family members are not parties to the case. Parties to mental health cases are the patient, the 'responsible authority' (the managers of the hospital), the Secretary of State for Justice (if the patient is a restricted patient), and any other person who starts a case by making an application (rule 1(3)).

- When a person is detained under the Mental Health Act 1983 ('MHA'), they are diverted away from punishment for treatment. The person being detained is a mental health patient, and as such is considered vulnerable. The patient's right to privacy will be a consideration to be balanced against any application that is made.

- When discharge is considered by the tribunal it is, pursuant to the MHA, focused on the statutory criteria set out in that Act. The tribunal cannot operate outside of the statutory scheme.

VI. VICTIMS WHO WISH TO KNOW THE DATE OF THE NEXT HEARING

25) A detained patient may apply to have their case heard by a tribunal once each year. If the patient does not apply, their case is currently referred to the tribunal every three years. In addition, after a conditionally discharged patient has been recalled, the Secretary of State for Justice (SOSJ) must refer the case to the tribunal within one month of recall. (The MHCS is the department that will refer on behalf of the SOSJ.) The tribunal will then consider whether the individual needs to be detained in hospital under the MHA.

26) Where a victim wishes to be advised of the date of any pending tribunal proceedings concerning that patient/offender, their VLO shall, following a written request from the VLO to the tribunal on behalf of the victim, 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 HMCTS Mental Health, PO Box 8793, 5th Floor, Leicester, LE1 8BN or via email: mhtcorrespondence@justice.gov.uk

27) The tribunal will log and acknowledge all such requests. The VLO/victim will subsequently be informed of the date fixed for the hearing. (NB. this is not a notification under rule 33(e) of the TPR, but merely an informal practice to be adopted in order to allow a victim to know when a tribunal hearing is taking place so that the victim may have the opportunity of providing written information or submissions to the tribunal in advance, should they wish to do so (pursuant to TPR rule 5(3)(d) and rule 15(1)(e)(ii).)

28) There may be some cases in which the victim believes that this is not sufficient and may decide to ask, via the VLO, to attend the hearing. This is dealt with at paragraph 45 below.

VII. VICTIMS WHO WISH TO PROVIDE DOCUMENTS, WRITTEN INFORMATION OR SUBMISSIONS TO THE TRIBUNAL

29) Having submitted a written request to be advised of the date fixed for any hearing concerning a restricted patient in advance of the hearing, a victim has the right to provide to the tribunal (preferably via the VLO) any relevant documents, written information or submission that they wish the tribunal to consider relating to the question of discharge conditions, as set out in paragraph 34 and following below.

30) Under rules 5 and 15 of the Rules, 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 submission or statement. A copy of the relevant form may be found on the .gov.uk site under ‘Form T144: Victim's representations to the Tribunal’ and has been added to the Health, Education and Social Care Chamber news page of the judiciary.uk website.

31) Victims should also note the points made below at paragraph 60 in respect of ‘Disclosure of the Victim’s Evidence to the Patient’.

32) It should be noted that there is currently no entitlement for victims of mentally disordered offenders to submit a Victim Personal Statement to the tribunal for consideration as part of this process ('VPS', sometimes referred to as a victim impact statement).

33) The court in *Maher* confirmed this was not unlawful, finding that a victim/the family would have had an opportunity to provide a VPS at the time of the Crown Court sentencing hearing and that that was the opportunity to explain the impact of the crime upon the victim/their family. The High Court also confirmed that it was directly relevant at that stage as the Crown Court is required to consider the level of harm in the sentencing exercise, but that there was a different purpose to the FTT hearing, and that a VPS would have very limited relevance to the nature of the exercise the tribunal undertook, which is to consider the characteristics of the patient's mental disorder and the risks the patient now presents to themselves and others after receiving medical treatment.

VIII. VICTIMS REPRESENTATIONS RELATING TO POSSIBLE DISCHARGE CONDITIONS

34) The tribunal can only impose conditions on the discharge of restricted patients.

35) Restricted patients are those patients who were given:

> A hospital order accompanied by a restriction order (section 37 and section 41 MHA 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 MHA orders).

36) A person who is a victim of a serious crime by a restricted patient detained because of mental illness can ask the tribunal to consider certain conditions by way of written representations when the tribunal is due to consider the patient's release ('discharge') (section 36(5), DVCVA).

37) It is important to note that in deciding whether to direct a conditional or absolute discharge, the tribunal must apply the law set out in sections 72 and 73 of the MHA. This is sometimes referred to as 'the statutory criteria' and is focused on clinical considerations such as the extent of the patient's mental disorder and what that means in terms of the patient's risk to either themselves or others.

38) It follows that representations made by a victim can only cover a limited range of issues: the kind of representations that are helpful and relevant relate to the conditions element of the decision. For example, what exclusions zones are suggested and why, or whether a no-contact condition should be imposed.

39) The representations from the victim should therefore focus on the following questions:

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

40) VLOs should consult victims about representations that they may wish to submit relating to possible discharge conditions and forward them to the tribunal office by the date specified. A copy of the relevant form may be found on the .gov.uk site under 'Form T144: Victim's representations to the Tribunal' and has been added to the Health, Education and Social Care Chamber news page of the judiciary.uk website.

41) 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.

42) The victim should be advised by the VLO that the tribunal will be required to consider a large amount of information from different sources. A victim's representations, whilst potentially relevant and helpful, are only part of a range of factors that will help inform the tribunal's final decision as to the conditions that it imposes upon the patient.

Unrestricted Cases

43) Unrestricted patients whose victims may make relevant written representations are those patients who are convicted of a sexual, violent or terrorism 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.

44) 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.17B of the MHA. The tribunal may, however, summarise any relevant representations from a victim in its decision for the patient's psychiatrist to consider if they are discharged.

IX. APPLICATION FROM A VICTIM TO ATTEND THE HEARING

45) In most cases, a written statement will be the most satisfactory way for the victim to express their views because direct involvement in the proceedings, or a procedure that brings the victim into direct contact with the patient, is unlikely to be helpful to the victim, to the patient, or to the tribunal.

46) The rules concerning private and public hearings in mental health cases are set out at rule 38 of the Rules which provides:

(1) All hearings must be held in private unless the Tribunal considers that it is in the interests of justice for the hearing to be held in public.
(2) If a hearing is held in public, the Tribunal may give a direction that part of the hearing is to be held in private.
(3) Where a hearing, or part of it, is to be held in private, the Tribunal may determine who is permitted to attend the hearing or part of it.
(4) The Tribunal may give a direction excluding from any hearing, or part of it—
(a) any person whose conduct the Tribunal considers is disrupting or is likely to disrupt the hearing;
(b) any person whose presence the Tribunal considers is likely to prevent another person from giving evidence or making submissions freely;
(c) any person who the Tribunal considers should be excluded in order to give effect to a direction under rule 14(2) (withholding information likely to cause harm); or
(d) any person where the purpose of the hearing would be defeated by the attendance of that person.
(5) The Tribunal may give a direction excluding a witness from a hearing until that witness gives evidence.

47) The tribunal is required to give notice of proceedings to interested persons (i.e., date, time and place), including (if applicable) any guardian, the Court of Protection, in unrestricted cases the nearest relative of the patient, and any other person who in the tribunal's opinion should have an opportunity to be heard, such as victims, and therefore may permit such persons to attend the hearing (rule 33 (e)). A request by a VLO to observe on behalf of a victim may also be considered.

48) If the victim believes that there are special circumstances that mean written submissions will not be sufficient, the victim, via their VLO, may ask to attend the hearing. Any such requests will be treated on a case by case basis applying the principles of open justice, the overriding objective as set out in rule 2, and the fact that the hearing will be in private unless otherwise ordered. Any application to attend may require the tribunal to seek representations from the parties.

49) Rule 36(2) 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 all the relevant circumstances, including the principle of open justice and the privacy of the patient.

50) Upon a written request to attend being made by the VLO on behalf of the victim, the tribunal is likely to give directions to clarify why the victim wants to be present (if not already explained) and to explore the practicalities of attendance, which might include taking the victim’s statement separately, and/or on a different day to the tribunal hearing. The VLO’s request, and the directions and decision made by the tribunal in response, will be sent to all parties unless rule 14(2) of the TPR applies.

51) In deciding whether a victim should attend, the tribunal is also likely to have regard, amongst other things, to:

(a) the need to protect the patient’s privacy;
(b) the nature of the evidence in the proceedings;

(c) whether the tribunal location where the hearing will be held has video or other facilities appropriate to allow access to the hearing, and whether it would be practicable or proportionate to move to another location or hearing room;
(d) whether there is any risk of disruption to the hearing;
(e) any representations the parties may wish to make.

52) If the tribunal determines that a victim should have an opportunity of being heard in person, then the tribunal will advise the VLO of the date, time and place that they should attend. If permission to attend is granted, attendance is likely to be via remote video link (as most hearings are now dealt with remotely).

53) Rule 38(4) and (5) of the TPR (set out above at paragraph 46) will be a consideration 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 their evidence. However, the tribunal will need good and evidentially supported reasons for so doing.

54) It is likely that the patient will be entitled to remain in the hearing room to hear a victim's oral evidence. The VLO should ensure that the victim is made aware of this before making an application. Panels should be aware, and VLOs should explain, that if the victim attends to give evidence, they may be questioned by the tribunal or patient's representative (or if unrepresented, the patient). This may extend to any submissions about exclusion zones, no contact clauses or any other evidence that is given.

55) Rule 5 empowers a judge to consider the above 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. Any such decisions should be supported by written reasons.

Fully public hearing

56) If the tribunal is asked to consider a fully public hearing under rule 38(1), the tribunal shall have, amongst other things, regard to para 23 of *AR v West London [2020] UKUT 273 (AAC)* and ask whether a public hearing is in the interests of justice.

57) Some of the relevant factors in deciding whether to direct a hearing in public are set out in *AH v West London MHT* [2010] UKUT 264 (AAC) (para 44), in particular:

1. Is it consistent with the subjective and informed wishes of the patient (assuming they are competent to make an informed choice)?
2. Will it have an adverse effect on their mental health in the short or long term, taking account of the views of those treating them and any other expert views?
3. Are there any other special factors for or against a public hearing?
4. Can practical arrangements be made for an open hearing without a disproportionate burden on the authority?

58) The motives of the victim for requesting a public hearing should not be given weight in the overall balance (para 43, *AH*).

59) In *AR (para 20)*, a case that concerned a request from a patient (as opposed to a victim) and centred upon the patient's capacity, the Upper Tribunal found that, while not a comprehensive list, the salient features for a public hearing were as follows:

> • The tribunal's powers of disposal are the same, regardless of whether or not the hearing is held in public. Those powers will vary according to the nature of the case. Having the hearing in public will not affect the decision that the tribunal makes within the scope of its jurisdiction under the Mental Health Act 1983. It does not acquire power at a public hearing to deal with any issue that is outside its jurisdiction.
> • The tribunal's procedural powers are also the same regardless of the form of the hearing. They include the power to exclude people from all or part of the hearing. The nature of the hearing will not affect the way that the hearing is conducted, the evidence that is relevant, what the patient is allowed to say, or the outcome of the case.
> • Members of the public, including the press, are allowed to observe and may wish to do so, although they may not. They not allowed to take any part in the proceedings.
> • A public hearing is no guarantee of publicity, even if members of the public do observe. The tribunal's power to limit disclosure remain the same as for a private hearing.
> • A hearing may adversely affect the patient's health, for example as a result of receiving adverse publicity or realising that no one is interested in the case.
> • Although the patient may want publicity, this may have a detrimental effect on others, such as his family or any victim.

X. DISCLOSURE OF THE VICTIM'S EVIDENCE TO THE PATIENT

60) As a matter of basic procedural fairness, patients can usually read and hear what is said about them and this includes representations made by victims at their hearing. Victims should therefore be made aware by the VLO that information they give either in writing or orally is very likely to be disclosed to the patient.

61) Rule 15(2) provides that the tribunal may admit in evidence any document or written material, whether or not such document or material would be admissible in a civil trial.

62) A victim who is concerned about this should contact their VLO in restricted cases or the hospital manager in unrestricted cases to seek advice.

63) A victim can apply for their representations to be withheld from the patient, but this will normally only be allowed in the circumstances outlined below. Such an

application would need to be judicially considered and any representations must be made at the time the evidence from the victim is submitted.

64) Under rule 14(2), for the tribunal to withhold information from any party they must be satisfied that:

a) there is a likelihood of serious harm to someone if the information is disclosed, and
b) that having regard to the interests of justice withholding the information is proportionate.

65) When deciding whether it is in the interests of justice and proportionate to direct that the material must be withheld from the patient (or another party), the tribunal must ask itself whether non-disclosure would prevent the patient/party from participating effectively in all aspects of the proceedings, including the hearing (see *RM v St Andrew's Healthcare* [2010] UKUT 119 (AAC)). Partial or redacted disclosure may be a consideration.

66) If the tribunal decides to prohibit disclosure to the patient having heard representations from the victim and/or others, it may still send a copy of the material to the patient's legal representatives. They will then be able to make an application for disclosure and, if successful, this may lead to the disclosing of the information to the patient. If the application is not allowed, they will not be permitted to disclose material, or the information contained within it, to the patient.

XI. SHARING THE TRIBUNAL'S CONDITIONS OF DISCHARGE WITH THE VICTIM

67) In restricted cases, the tribunal office should be able to inform the VLO of the relevant aspects of the tribunal's discharge conditions in writing. 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, whether the victim needs to know the detail of any conditions and, if so, what those conditions are;
- if a restricted patient has previously been discharged subject to conditions of which the victim has been notified, 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.

68) In unrestricted cases, the hospital manager is usually responsible for notifying the victim of the outcome of the hearing. Hospital authorities as parties to the proceedings must comply with the TPR, particularly rule 14(7), to ensure disclosure is limited to

outcome and conditions. In the event of doubt, an application should be made for the tribunal to consider further disclosure.

XII. SHARING THE TRIBUNAL'S DECISION OR REASONS FOR THE DECISION WITH THE VICTIM

69) In restricted cases, the position has been clarified following the decision in *Maher*, and now focuses upon the rights of victims to obtain information regarding the tribunal's decision and establishes that the tribunal has a discretionary power to disclose the reasons or, if there are factors that weigh against disclosure of some or all of the reasons (as there may be), to consider providing an overview (the gist or summary) or a redacted version of the reasons for the decision to the victim.

70) Requests should be made in writing to the tribunal office: HMCTS Mental Health, PO Box 8793, 5th Floor, Leicester, LE1 8BN or via email: mhtcorrespondence@justice.gov.uk. To assist the judge, the victim /VLO should explain the reasons for the request and why it will advance the open justice principle.

71) The fact that the request from the victim/VLO may come after the tribunal's final decision has been issued (and the proceedings before the tribunal have therefore ended) shall not prevent the tribunal from considering such a request (paragraph 99 of *Maher*).

72) Once a written request is received, the tribunal will consider the application by applying the principle of open justice. The tribunal may only derogate from that open justice principle where it is strictly necessary to protect the privacy of the patient or others – see *Maher* at 116, which confirms *"The reasons for and against rebutting the presumption of privacy in mental health cases needed to be weighed against the open justice principle as a proportionality exercise for the FTT to undertake when considering whether to exercise its discretion."*

73) The tribunal will therefore consider whether disclosing the information is practicable and proportionate and may assist in justice being seen to be done, and in turn, ensuring public confidence in judicial decisions.

74) While not an exhaustive list, any application should be considered with the following factors in mind:

1. Derogations from the principle of open justice must be ordered only when it is necessary and proportionate to do so, with a view to protecting the rights which the patient (or others) are entitled to have protected (*Maher*, para 107).
2. The tribunal is entitled to start with the presumption of privacy in cases involving the mental health of a patient: there is a legitimate aim in protecting mental health patients. In particular, the privacy of the patient may be stronger after the proceedings have come to an end and a conditional discharge given.

3. The discretionary power vested in the tribunal must be exercised on each occasion in the light of the circumstances at the time (*R (MAS Group) v SSERA* [2019] EWHC 158, at para 56 and 57). Whether a departure from the principle of open justice is justified in any particular case will depend on the facts of that case. The tribunal has to carry out a balancing exercise that will be fact-specific.
4. The tribunal shall take into account not only the interests of the patient, but also engage in the wider public interest contained in the open justice principle, which is to both assist in justice being done through transparency and to enable the public to have confidence in the system.
5. Any risk of harm that the disclosure may cause to the maintenance of an effective judicial process or to the proper administration of justice or the legitimate interests of others, may amount to reasons for redaction or refusal.
6. It does not need to be all or nothing. The tribunal may consider providing the victim with a gist or summary of the reasons in a way that would protect the patient's privacy, but also provide reassurance and understanding to the victim.
7. Where it is proposed no reasons can be given to the victim, the tribunal must explain why a redacted version of the decision could not meet the privacy rights of the patient or why redacted reasons were not possible. As part of this exercise, the tribunal must engage sufficiently with the reasons that the victim has put forward for disclosure.

75) If the reasons for the decision are disclosed to the victim, they will have been provided in response to the victim's specific request via their VLO and therefore disclosure of the reasons will usually be restricted to the parties and the victim/VLO. The default position shall remain that it cannot be publicised or shared without the permission of the tribunal. (Section 12 of the Administration of Justice Act 1960 provides that where a court is sitting in private, as is nearly always the case in Mental Health proceedings, publication of information relating to proceedings will be a contempt of court (s12(1)(b).)

76) An application to publish a decision or summary may be made separately to the Deputy Chamber President of the tribunal. The tribunal can exercise its authority to disclose information more widely under rule 14(7), but this must be exercised consistently with a range of considerations, including the open justice principle, the Article 6 and 8 rights of the patient and others, and with the overriding objective of rule 2 of the TPR in mind. This may involve taking representations from the parties. The tribunal is open to such applications and will make decisions on a case by case basis.

XIII. FURTHER REVIEW

77) 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 Tribunals, Courts and Enforcement Act 2007 or request the tribunal to review a Conditional Discharge Decision under rule

49, because those rights are limited to parties to the proceedings, and a victim is not a party.

78) However, the victim may have standing in judicial review proceedings if they believe that the decision may be unlawful, irrational or Wednesbury unreasonable. They are therefore entitled to take legal advice on such matters.

JUDGE M SUTHERLAND WILLIAMS
PRESIDENT
HEALTH, EDUCATION AND SOCIAL CARE CHAMBER

23 August 2023