THE ROLE OF VICTIMS IN NSW FORENSIC PATIENT PROCEEDINGS

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CONTENTS

I INTRODUCTION

While victims of crime has become a topic of increasing academic interest over the past 40 years, particularly with respect to the role of victim impact statements, one group of victims has thus far received relatively little attention.[1] This group comprises the victims of offences by forensic patients, the latter being persons who have been found by a court to be 'not guilty by reason of mental illness' of the offences for which they are on trial ('NGMI'). This is an especially complex and problematic area because the proceedings are fundamentally different to criminal law proceedings. The law recognises under an NGMI that the person does not have legal responsibility for the commission of a crime. Nevertheless, there are clearly victims of the acts, being either

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1 See, eg, Edna Erez & Leigh Roeger, 'The Effect of Victim Impact Statements on Sentencing Outcomes and Disposition' (1995) 23(4) *Journal of Criminal Justice* 363; Edna Erez & Leigh Rogers, 'Victim Impact Statements and Sentencing Outcomes and Processes' (1999) 39(2) *British Journal of Criminology* 216; Edna Erez & Pamela Tontodonato 'The Effect of Victim Participation in Sentencing on Sentencing Outcome' (1990) 28(3) *Criminology* 451; Donald Hall, 'Victims Voices in Criminal Court: The Need for Restraint' (1991) 28(2) *American Criminal Law Review* 233; Tyrone Kirchengast, 'Sentencing Law and the 'Emotional Catharsis' of Victims Rights in NSW Homicide Cases' (2008) 30 *Sydney Law Review* 614; Joanna Shapland, Jon Willmore & Peter Duff, *The Victim in the Criminal Justice System* (1985); Brian Forst, *The Criminal Justice Response to Victim Harm* (1985); Tracey Booth, 'The Contentious Role of Victim Impact Statements in Sentencing Offenders in NSW' (2007) 45 *Law Society Journal* 68.

direct victims or family or friends. Moreover, in a number of cases involving NGMI, the circumstances are horrendous involving homicide or serious physical and mental harm. A large number of index offences involve murder, attempted murder, manslaughter and serious assaults.[2]

This paper examines the current legal, administrative and policy responses to the victims of forensic patients before the New South Wales Mental Health Review Tribunal. In particular, the paper assesses the new legislative measures relating to such victims under the *Mental Health (Forensic Provisions) Act 1990* (NSW).[3] First, the paper outlines the NSW forensic patient scheme and the new provisions on victims. The paper then considers the approaches of other Australian jurisdictions. The next section identifies and discusses key issues such as balancing victims' rights against the rights of patients, the provision and content of written and oral submissions by victims, confidentiality, methods of participation (in person, by video and telephone), and information and education for both victims and Tribunal members and staff. The paper concludes by discussing some reforms and proposals to help make these provisions work fairly and effectively.

The paper draws upon the personal experience of one of the writers who was President of the NSW Mental Health Review Tribunal from 1990-2000.[4] We have also had informal consultations with a number of members of the Tribunal and those discussions have provided us with valuable information and insights. We thank those people for their contribution. However, the views expressed in this paper are those of the writers alone and do not purport to reflect the views of the Tribunal or any members of it.

We use therapeutic jurisprudence as an analytical tool, which argues that the law acts as a therapeutic agent, meaning that the law can have therapeutic or anti-therapeutic consequences. The objective of the theory is that the therapeutic consequences should be maximised but that in achieving that end, due process principles and primary legal principles should not be subordinated.[5] In mental health proceedings

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2 Based on unpublished data provided by the NSW Mental Health Review Tribunal.

3 The new provisions were enacted by the *Mental Health Amendment (Forensic Provisions) Act 2008* (NSW) and are now incorporated in the *Mental Health (Forensic Provisions) Act 1990* (NSW) (previously titled the *Mental Health (Criminal Procedure) Act 1990* (NSW).

4 Robert Hayes.

5 Michael Perlin, 'Preface' in Kate Diesfeld and Ian Freckelton (eds), *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment*

this involves balancing the legal and therapeutic rights and interests of participants and in particular shaping legal processes and outcomes as much as possible to maximise positive therapeutic outcomes such as improving the well being of the patient.[6] For the purposes of this paper, the discussion of therapeutic consequences is focussed on the rights and interests of patients and victims in forensic proceedings both of which groups may have significant legal, psychological and emotional interests at stake, together with a consideration of the interests of the community as a whole. In general terms, the legal rules relating to victims in forensic proceedings should as much as possible contribute to the psychological health of both patients and victims without infringing procedural fairness. As indicated in the literature relating to the psychology of procedural fairness, providing participants such as patients and victims with a fair process that satisfies their need to be treated with dignity and respect is likely to improve their satisfaction with the system and compliance with outcomes.[7] The community interest is met by providing fair and efficient processes that appropriately balance patients' and victims' rights and interests with the need for community protection.

II OUTLINE OF NSW FORENSIC PATIENTS SCHEME

A forensic patient is a person detained in a mental health facility, correctional centre or other place or released from custody subject to conditions after an order by a court that the person is not guilty of an offence on the grounds of mental illness or who is found to be unfit for trial or has been the subject of a limiting term imposed by the court at a special hearing.[8] The court in a case of NGMI has determined that the person is so affected by mental illness that they lacked the requisite intent to be found guilty of the offence and hence are not legally responsible for their actions and no conviction can be recorded in relation to that offence. Once a court makes such a finding it then has three options before it, all to be exercised on the basis of an assessment of the potential risk of harm to the person or to the community:

(2003) xxxxiii, xxxiv; See also David Wexler & Bruce Winick (eds), *Law in a Therapeutic Key: Developments in therapeutic jurisprudence* (1996).

6 See, eg, Bruce Winick, 'A Therapeutic Jurisprudence Model for Civil Commitment' in Kate Diesfeld and Ian Freckelton (eds), *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment* (2003), 23, 26.

7 Ibid 34; Tom Tyler, 'The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings' (1992) 46 *Southern Methodist University Law Review* 433.

8 *Mental Health (Forensic Provisions) Act 1990* (NSW) s 42.

- Where it considers that the person does not present a risk to him/herself or the community it may release the person unconditionally (not often done).
- Release to the community but subject to conditions such as compulsory treatment, abstinence from alcohol or other substances and restrictions on movement and travel and restrictions on contact with persons.
- An order for detention in a secure psychiatric unit in a hospital, which in some cases may be situated in correctional centres.

As of June 2009 there were about 320 people currently subject to the provisions of the new legislation, with the vast majority being NGMI patients.[9] There are also about 80 people currently released in the community subject to conditions.[10]

A *Role of the NSW Mental Health Review Tribunal*

The Tribunal is a quasi-judicial body established under the NSW *Mental Health Act 1990* and generally comprised by a lawyer, a psychiatrist and 'other member' with appropriate expertise and experience. Forensic patients are usually detained in specialist forensic mental health facilities or in units in correctional centres where some mental health services are provided. Consequently, the Tribunal conducts forensic hearings at a number of venues around NSW including maximum-security centres such as at Long Bay Correctional Centre and Morrisett Hospital.

Under the *Mental Health (Criminal Procedure) Act 1990* (NSW) the Tribunal had only a recommendatory role to the Minister for Health about the disposition of forensic patients. Under this old Act the Minister for Health or the Governor acting on the advice of the Executive Council was authorised to make orders as to a forensic patient's detention, care treatment or release. This system was criticised as leaving too much discretion with the executive and being inconsistent with Principle 17(1) of the Principles for the Protection of Persons with Mental Illness & the Improvement of Mental Health Care adopted by the United Nations General Assembly in 1991 which

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9 J Fenely & S Hanson, 'Changes to Determinations of Forensic patients: *Mental Health Legislation Amendment (Forensic Provisions) Act 2008*' (2009) 47(5) *Law Society Journal* 62, 62-65.

10 Ibid.

requires review of mentally ill patients by a judicial or other independent and impartial body established by domestic law and functioning in accordance with procedures laid down by domestic law.[11]

Under the new legislation it is the Tribunal through the establishment of its Forensic Division that now exercises determinative powers in relation to forensic patients as to their treatment, care, detention or release.[12] That Division is to consist of the President or a Deputy President, a psychiatrist, a registered psychologist or other suitable expert in relation to a mental condition and a member who has other suitable qualifications or experience. The Tribunal must not order the release of a forensic patient under the Act unless it is constituted by at least one member, including the President or a Deputy President, who is the holder of former holder of a judicial office.[13]

The Act provides that without limiting any other matters the Tribunal may consider, the Tribunal must have regard to the following matters when determining what orders it shall make:

> (a) whether the person is suffering from a mental illness or other mental condition,
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> (b) whether there are reasonable grounds for believing that care, treatment or control is necessary for the person's own protection from serious harm or the protection of others from serious harm,
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> (c) the continuing condition of the person, including any likely deterioration in the person's condition, and the likely effects of any such deterioration,
>
> (d) in the case of a proposed release, a report by a forensic psychiatrist or other person of a class prescribed by the regulations, who is not currently involved in treating the person, as to the condition of the person and whether the safety of the person or member of the public will be seriously

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11 Dan Howard, 'The Detention of Forensic Patients in New South Wales and other Australian Jurisdictions – Some New Developments and Some Thoughts on Uniformity' (Paper presented at the International Criminal Law Conference, Sydney, 11 October 2008).

12 *Mental Health (Forensic Provisions) Act 1990* (NSW) s 47. Under the new provisions the Tribunal also has determinative powers in relation to a correctional patient, those persons who develop a mental illness while in custody on remand or while serving a sentence.

13 *Mental Health (Forensic Provisions) Act 1990* (NSW) s 73(3).

endangered by the person's release,

(e) in the case of the proposed release of a forensic patient subject to a limiting order, whether or not the patient has spent sufficient time in custody.

The Tribunal must not make an order for the release of a forensic patient unless it is satisfied on the evidence available to it that the safety of the patient or any member of the public will not be seriously endangered by the patient's release and other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the patient or that the patient does not require care.[14] The Tribunal, as soon as practicable after a person has been found not guilty of an offence but detained or released on conditions, must review the person's case and make orders as to the person's care, detention and treatment or as to the person's release (either unconditionally or conditionally).[15] The Tribunal must also consider whether or not the person has become fit to be tried for an offence and advise the Director of Public Prosecutions of its findings.[16] The Tribunal must subsequently review each forensic patient every six months but may review the case of any forensic patient at any time.[17] The Tribunal must provide written reasons for its decisions. A forensic hearing will usually involve expert evidence from the patient's treating team, both written and oral, from other professionals and from the patient and family members.

Therefore, the Tribunal may order the continuing control and detention of patients or make a range of orders relating to unconditional release or conditional release with the latter comprising unsupervised ground leave, escorted outside day leave and supervised outside day leave. If the Tribunal makes an order for conditional release the conditions may include requirements as to taking medication, restrictions or prohibitions on the use of alcohol or other substances, and conditions on living arrangements.

It should also be noted that a forensic patient must be legally represented unless the forensic patient decides that he or she does not wish to be represented.[18]

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14 *Mental Health (Forensic Provisions) Act 1990* (NSW) s 43.

15 *Mental Health (Forensic Provisions) Act 1990* (NSW) s 44.

16 *Mental Health (Forensic Provisions) Act 1990* (NSW) s 45.

17 *Mental Health (Forensic Provisions) Act 1990* (NSW) s 46.

18 *Mental Health Act 2007* (NSW) s 154(2).

III NSW FORENSIC PROVISIONS RELATING TO VICTIMS

The *Mental Health (Criminal Procedure) Act 1990* (NSW) contained no formal recognition of the rights or roles of victims of the acts of forensic patients and correctional patients. The Tribunal implemented its own policy of involving victims in hearings by attaining their views about any proposed recommendation about leave or release of forensic patients. There was a clear attempt to balance patient and victim interests according to the principles of procedural fairness and the therapeutic interests of the patient.[19] However, victims could also make representations directly to the executive without any reference to the Tribunal, which meant that there might be no fair, transparent and accountable process for assessing those representations including the weight given to those representations by the executive.

A general review of the New South Wales forensic mental health legislation was conducted by Mr Greg James QC, President of the NSW Mental Health Review Tribunal.[20] As a result of the review, the *Mental Health Legislation Amendment (Forensic Provisions) Act 2008* retitled that 1990 Act and amended it to recognise, inter alia, victims and their rights. The legislation came into effect on 1 March 2009.

Section 41 provides that 'victim' means a primary victim within the meaning of the *Victims Support and Rehabilitation Act 1996* and includes a member of the immediate family of a victim within the meaning of s 9 of that Act. Furthermore 'victim of a patient' means a victim of an act of violence within the meaning of the *Victims Support and Rehabilitation Act 1996* committed by a patient. Thus the immediate family members of homicide victims may come within the definition of a victim for the purposes of the new legislation.

Amendments to section 160 of the *Mental Health Act 2007* in schedule 2 to the Act allow further regulations to be made to provide for the establishment and use of a victims register, the notification of victims of Tribunal decisions in proceedings relating to forensic patients or correctional patients, and notification of victims of the termination of status of persons as forensic patients. These changes have allowed for the introduction of a statutory based victims register enabling the Tribunal to notify victims of key information affecting them, including Tribunal decisions, prospective releases and when a forensic patient's

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19 Consultations with Tribunal members.

20 Hon Greg James QC, *Review of the New South Wales Forensic Mental Health Legislation* (2007) <http://www.health.nsw.gov.au/pubs/2007/pdf/forensic_review.pdf>. See also the *Mental Health (Criminal Procedure) Act 1990* (NSW).

status is terminated. The Centre for Mental Health is to maintain the victims register and must notify the Tribunal as soon as a new victim is registered. The Tribunal must notify the Centre for Mental Health of any forthcoming hearings in which a victim is registered where possible with a minimum of three weeks' notice.

These regulations were intended to enhance the former processes under the old Act put in place by the Tribunal, which allowed victims of crime to make submissions to the Tribunal on release issues.

The Minister for Health and the Attorney-General may appear before the Tribunal and make submissions concerning the possible release or grant of leave to a forensic patient.[21] However, the provisions go further in that they provide that a victim may apply to the Tribunal for restrictions to be placed on forensic patients as to with whom they may associate or contact, thus preventing contact with victims or their families. [22] This is an important development, giving the victims a right to seek amendment or variations of condition and leave orders. This allows victims the opportunity to bring to the Tribunal any issues they have about release or leave and their safety. This discretion on the Tribunal becomes complex if the victim is a family member of the patient and the patient wants contact with the family but all or some family members do not want any contact. The Tribunal would necessarily have to balance the rights of a patient to exercise their ordinary civil rights of freedom of association against the right of victims to ensure their security and safety. One would normally expect that if victims were strongly opposed to having any further contact with forensic patients, then their views would be respected and appropriate orders made, as it would appear to be futile and unacceptable for the Tribunal indirectly to sanction any further unwanted contact. Under s 77A(3) a victim in relation to their rights to seek amendments or variations of conditions and leave orders may by leave, appeal to the Supreme Court from any determination under that section in those proceedings on a question of law or 'any other question'.

Thus the provisions establish a victim registration and notification system and give victims a right to apply for variations and amendments of orders but limited to matters of association and contact. All other matters of victims' participation in relation to forensic proceedings before the Tribunal are left to the discretion of the

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21 *Mental Health (Forensic Provisions) Act 1990* (NSW) s 76A(2).

22 *Mental Health (Forensic Provisions) Act 1990* (NSW) s 76.

Tribunal under its general powers of practice and procedure.

IV OTHER AUSTRALIAN JURISDICTIONS' APPROACHES

All Australian jurisdictions have a process that provides a form of review of forensic patients either by a court or a review tribunal or board. The criteria for review in each jurisdiction broadly encompasses, inter alia, an assessment of the likely risks of harm to the forensic patient or a member of the community if the patient were to be granted conditional or unconditional release as primarily determined by considering the nature and extent of the mental illness or disability of the forensic patient. A further common principle is that the restrictions placed on a patient should be of the least restrictive kind that is consistent with their safe care and treatment and with the protection of the community. Some of the jurisdictions give statutory recognition to the right of victims to make written or oral submissions. No jurisdiction gives a victim the status of a party to forensic review proceedings. The following summarises the legislative role of victims:

- ***The Australian Capital Territory.*** The relevant legislation requires the ACT Civil and Administrative Tribunal ('ACAT') which has the mental health jurisdiction to review an 'order for detention'. There is no direct recognition of victims but with the permission of the Tribunal, non parties (that is including victims) may give evidence and can make a written submission and those who wish to make a written submission are to be given an opportunity to do so.[23]
- ***The Northern Territory.*** A person subject to a 'supervision order'[24] must be reviewed every year by the Supreme Court. The court is required to consider an appropriate medical report and treatment plan[25], and to receive and consider any report from the victim and from members of the accused person's family about the impact of the person's conduct upon them and the impact of the release of the person.[26]
- ***South Australia.*** 'Supervision orders' relating to forensic patients can be revoked by the Supreme Court, and the person can thereby be released, and the court in making such

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23 *Mental Health (Treatment & Care) Act 1994* (ACT), s 80(2), (3) and s 84.

24 *Criminal Code* (NT) s 43ZC.

25 *Criminal Code* (NT) s 43ZK.

26 *Criminal Code* (NT) s 43ZL.

decisions can require the Crown to provide, inter alia, a report on the views of the victim or the next of kin of the victim and take those matters into account.[27] Thus, there is no avenue for direct victim participation.

- ***Victoria.*** The court must review 'custodial supervision orders'.[28] A victim of the offence may make a report to the Court for the purpose of assisting counselling and treatment processes for all people affected by an offence and assisting the Court in determining any conditions it may impose on an order made in respect of a person under this Act or in determining whether or not to grant a person extended leave.[29] The Court, at the request of any party to the proceedings, may call upon a person who has made such a report to give evidence. This person giving evidence may be cross-examined and re-examined.[30]

- ***Queensland.*** A 'forensic order' made by the Mental Health Court in respect of a forensic patient remains in force until it is revoked by the Mental Health Review Tribunal.[31] The Tribunal must not revoke a forensic order unless it is satisfied that the patient does not represent an unacceptable risk to the safety of the patient or others.[32] There is no specific right of victims to provide reports or statements to the Tribunal, although the Tribunal can make non-contact conditions.[33]

- ***Western Australia.*** Although its legislation is under review and is soon expected to be change, Western Australia still retains the executive release model whereby the Governor may order the release of the person from custody if the Minister, based on a recommendation by the relevant Board, advises the Governor to do so.[34] There is no express provision for the views of victims or relatives of the patient to be taken into account.

- ***Tasmania.*** Forensic patients must be reviewed every 12

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27 *Criminal Law Consolidation Act 1935* (SA) s 269R.

28 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 39.

29 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 42.

30 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 46.

31 *Mental Health Act 2000* (Qld) s 207.

32 *Mental Health Act 2000* (Qld) s 204(1).

33 *Mental Health Act 2000* (Qld) s 203(3).

34 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 33 & 35.

months by the Forensic Tribunal, which can issue a certificate if it determines that the order is no longer necessary[35] whereupon the person may apply to the Supreme Court to discharge or revoke the order.[36] The court must consider any report on the attitudes of victims, if any, and next of kin.[37] There is a system for registered victims and a notification system for them when a forensic patient seeks a leave of absence[38] and when a decision is made to grant, extend, cancel or amend the conditions of a leave of absence, or to release or transfer a forensic patient.[39] A registered victim has a right to make a written submission in relation to such an application but has no express right of appearance at Forensic Tribunal hearings.

V KEY ISSUES AND COMMENTARY

A *The Need for Victims to Have an Opportunity to Participate*

There are strong ethical and practical reasons for allowing victims a clear and formal opportunity to participate in forensic proceedings before the Tribunal. Victims clearly may have genuine and legitimate concerns with the release of forensic patients about their own safety and security and that of others and therefore need to have the opportunity to contribute.[40] In some cases their input may provide relevant and significant evidence or information for the decision makers. Even in cases where the input has no significant probative value, the participation may have significant therapeutic consequences in reassuring victims about their safety and security and confidence and respect for the legal process. It also should be borne in mind that in forensic cases the victims will not have had the opportunity to make a victim impact statement in the course of any criminal proceedings because there has been no ordinary sentencing process. Involvement in forensic hearings is thus the only avenue open to victims who wish to participate in decisions about the disposition and release of a forensic patient. Moreover, victimization by a family member or acquaintance,

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35 *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 37(1).

36 *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 37(3)(d).

37 *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 35(2)(b).

38 *Mental Health Act 1996* (Tas) s 72P(7)(a).

39 *Mental Health Act 1996* (Tas) s 72R(1), s 73P.

40 Consultations with Tribunal members.

which is a typical scenario in forensic cases, tends to be more personal and therefore more painful and generally is a continuing cause of stress and fear because such victims know that they may encounter the perpetrator in the future and moreover they may feel that they are a likely potential target.[41]

B *Registration and Notification*

A register for victims is a vital aspect of any victim participation scheme because it helps to ensure that all victims who wish to participate can be advised in due time of their opportunities to participate. A register also helps to ensure that victims who do not wish any involvement are not inadvertently contacted, which is a waste of resources and may cause concern and anxiety for such victims.[42]

Notification of impending proceedings or the release of patients is a crucial factor because without advance notice of a hearing, the opportunity to contribute is lost or compromised by lack of reasonable time to prepare. All jurisdictions need an effective managed victims register with clear notification requirements that give victims at least reasonable notice of forthcoming proceedings. The system has to be proactive and accurate and impose statutory obligations on those maintain registers and on the Tribunals or boards involved.

C *Providing Assistance to Victims in Preparing their Submissions*

Another significant issue will be the extent to which victims are given assistance in preparing written statements or giving evidence. Thus, for example, in South Australia victim impact statements in relation to ordinary criminal proceedings are prepared for sentencing courts by police and in that jurisdiction over 90% of higher court cases have a victim impact statement.[43] A possible suggestion to increase the level of victim participation is to have victim submissions prepared by a 'victim advocate' within a designed content framework so that victim

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41 Robert Davis & Barbara Smith, 'Crimes Between Acquaintances: the Response of Criminal Courts' (1981) 6(1-4) *Victimology* 175; Edna Erez & Pamela Tontodonato, above n 1, 468.

42 The importance of registers was noted during the Victims Rights Bill, Victims Compensation Bill, Sentencing Amendment (Parole) Bill, Second Reading Speech NSWPD (LC) in New South Wales, *Parliamentary Debates,* Legislative Council, 15 May 1996, 979 (Hon J W Shaw, Attorney-General).

43 Edna Erez & Leigh Roeger, above n 1.

input occurs more consistently and there is standardisation in the presentation of submissions.[44]

Further, assistance to victims in preparing statement is also likely to increase the level of participation. If victims have to prepare their own reports and are given little assistance in this task then it is likely that there will be lower participation rates. The writers do not consider that Tribunals and courts in forensic proceedings should prepare reports on behalf of victims or offer specific assistance. Such a course of action would at least have the perception of compromising the independence of the Tribunals and courts. Tribunals and courts should be able to provide information about services for victims but should not provide any further assistance. State victims services and private services should provide direct assistance to victims in preparing victim impact statements. It is important that such organisations should be aware of the role and issues in forensic proceedings and give victims accurate and relevant information and advice. Again, it is important that such groups and services give a realistic picture of the role and impact of victim participation.

However, it may be appropriate for Tribunals to develop broad pro forma guidelines for statements which provide information to victims about relevant issues (for example, safety and security concerns and the location of patients on limited release) but also allow victims to put any matters that they consider relevant or important.

D *Balancing Victims' Rights with Rights of the Patient*

The Tribunal is not bound by the formal rules of evidence but may inform itself of any matter in such manner as it thinks appropriate and as the proper consideration of the matter permits.[45] Moreover, hearings of the Tribunal are to be conducted with as little formality and technicality, and with as much expedition, as the requirements of the Act and the proper consideration of the matter permits.[46]

Thus, the Tribunal has a general power to involve victims in its hearings as it sees fit and appropriate, which could include written or oral submissions by victims. It can and does take evidence as it sees fit from registered victims, the patient's family, medical practitioners and

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[44] Matt Black, *Victim Submissions to Parole Boards: The Agenda for Research* (2003) No 251 *Australian Institute of Criminology: Trends and Issues in Criminal Justice* <http://www.aic.gov.au/publications/>.

[45] *Mental Health Act 2007* (NSW) s 151(2).

[46] *Mental Health Act 2007* (NSW) s 151(1).

other independent experts, the patient's family members and doctors and members of the treating team.[47] The Tribunal will always have to assess the relevance, value, and reliability of any input by a victim as it must do in relation to any information before it.

The fundamental guiding common law principle is procedural fairness which essentially consists of the following: the right of a party to know the case against them; the right of a person whose interests are affected by a decision to be heard; and the right for decision making to be free from either bias or reasonable apprehension of bias.[48]

The writers would suggest, given the nature of forensic proceedings and the operating guiding principles, that a Tribunal should generally err on protecting the rights and interests of a forensic patient if it is satisfied that a particular involvement by a victim is likely to result in long term damage to the well being of a patient. There is nothing in the legislation to suggest that a victim's right or claim for involvement should be paramount or usurp the rights and interests of a patient. Under s 3 of the *Mental Health Act* a primary object is the care, treatment and control of persons who are mentally ill or disordered. Moreover under s 68 principles of care and treatment include the following:

- People with a mental illness or mental disorder should receive the best possible care and treatment in the least restrictive environment enabling the care and treatment to be given,
- Any restriction on the liberty of patients and other people with a mental illness or disorder and any interference with their rights, dignity and self-respect are to be kept to the minimum necessary in the circumstances.

The Tribunal also has to take into account where appropriate, the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.

The Tribunal has the challenging and complex task of protecting and fostering the rights of the patient including providing high quality service, but also protecting the rights and interests of the community, including victims.

The therapeutic role of the Tribunal's decision making must be

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47 Consultations with Tribunal members.

48 See, eg, Michael Barnett, 'Dobbing–in and the High Court – *Veal* Refines Procedural Fairness' (2007) 30(1) *UNSWLJ* 127, 128-129.

acknowledged and considered a primary factor in its processes and decision-making. The Tribunal must strive to achieve positive therapeutic outcomes for patients, their carers, and victims and treating teams. It follows that all participants must be treated with respect and sensitivity to their needs and interests. Tribunal members tend to put the forensic patient at the centre of the hearing in a way that promotes the therapeutic well being of the patient.[49] The therapeutic relationship between the patient and treating team is clearly of fundamental importance to the well-being and improvement in health of the patient, and the Tribunal must recognise that relationship and, wherever possible and practical, foster and enhance that relationship.

However, in the writers' views, a concern that a patient might suffer some temporary discomfort because a victim is going to make a written or oral submission should generally not be sufficient by itself to make the Tribunal exercise a discretion to prohibit such involvement.

E *Victims Should Not be Given the Status of Parties*

The new legislation does not give victims the status of parties in forensic proceedings. Thus, victims have not been given a right to legal representation or any automatic standing to appear. They do not have a right to cross-examine (in fact no person has a right to cross-examine before the Tribunal, but it may be permitted), to have access to the relevant Tribunal file or to receive a transcript of the hearing.

The writers would not support victims having a formal role of parties in proceedings nor the right to cross-examine witnesses or the patient. This would give far too great a pre-eminence to the role of victims in such proceedings. This would take forensic proceedings outside of the usual procedure for victims in criminal proceedings who are not given party status or the right to cross-examine. This would give the role of victims a pre-eminence which is disproportionate to the real focus of the proceedings which is the assessment of the risks involved in release of patients whether conditional, or unconditionally. Allowing victims a party status would likely be counter-productive, exacerbate resentment and hostilities, make what are considered non-adversarial proceedings adversarial, threaten the therapeutic alliance of health practitioners and patients, and increase the delays and costs of hearings. It may not even increase the satisfaction rates of victims in general because even with such a significant increase in role it may not follow that this input will influence the Tribunal's decision making and it is dashed expectations

[49] Consultations with Tribunal members.

more than any other factor that is likely to cause victim dissatisfaction with the process. It is always open to the Tribunal to take into account the statement or submission of a victim and then if necessary put any matters to witnesses or to the patient. It would be a very rare situation where a victim would be permitted to ask questions of witnesses or the patient directly. This would certainly increase the prospect for a hostile, adversarial process that would run the risk of going over matters dealt with in the trial.[50]

F *Dealing with Written Submissions*

Tribunals must exercise appropriate care and caution in such situations ensuring that as much as possible the therapeutic well being of the patient is respected and protected but that any relevant matters put by a victim are assessed and if necessary appropriately put to witnesses or to the forensic patient. The victim's views could be put but with the inappropriate content or language removed. Sometimes a Tribunal panel will summarise the effect of a written submission but remove derogatory or inflammatory material.[51] It would be a matter of procedural fairness for a Tribunal to understand the relevant points made by such a statement and if necessary to put those matters to witnesses or indeed to the patient without the threatening or abusive content.

It may happen that victims attend proceedings and may be abusive or threatening themselves. Some victims come primarily to vent their anger and frustration.[52] Tribunals must deal firmly with such behaviour giving victims a clear framework of what is acceptable and what is not. Tribunal members must give victims a proper and fair opportunity to make their points but nevertheless guide the matters consistently back to the point of the proceedings. These are interpersonal skills and having a respect for individuals, which in many ways have been underestimated by formal legal systems. Law is not simply about rules or interpreting and applying rules. It also involves human responses and feelings that should not be ignored, particularly in areas involving mental health issues. It is important for Tribunals to acknowledge the distress and anxiety that many victims may feel but without removing the therapeutic focus on the patient.[53]

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[50] Consultations with Tribunal members.

[51] Ibid.

[52] Ibid.

[53] Ibid.

G *Dealing with Confidential Submissions by Victims*

Decision makers such as the Tribunal have a general responsibility under the doctrine of procedural fairness to disclose to the affected party adverse information that is credible, relevant and significant to the decision.[54] In the case of confidential material this may mean that the Tribunal will disclose to the patient and/or to their representative the substance of the allegations or assertions in the confidential material but not the detail so as not to reveal the source of the information. Thus, there can be limited disclosure of matters raised by the submission without quoting 'chapter and verse' and without disclosing details of the submission that might identify its source and without providing the submission to the patient or their legal representative. This is a frequent and generally acceptable approach to confidential material.[55] Victims are often concerned to ensure that private information such as their contact details are not disclosed.[56]

If a victim makes a statement, whether oral or written, in relation to a forensic proceeding the requirements of procedural fairness will generally require that the patient is entitled to have access to the report and other documentation.

If there is a request for confidentiality in relation to a victim's submission then the presiding member should consider the request and determine the issue. If the presiding member considers that the request for confidentiality is justified then a preliminary hearing should be held to consider the victim's submission to determine whether the submission will be considered confidential or not. The Tribunal might determine at such a hearing to provide evidence about the content and nature of the submission.

If the Tribunal decides that the nature of the case and in particular the nature and contents of the victim's submission means that it could not be put to the patient or their legal representative in any form, then the rules of procedural fairness are likely to mean that the Tribunal could put little or no weight upon it. Procedural fairness requires that any adverse material should be put to the party, in this case, the patient to be able to respond.

If the Tribunal were to decide that a request for confidentiality is not

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54 *Kioa v West* (1985) 159 CLR 550; *Veal v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88; Barnett, above n 48.

55 Michael Barnett, above n 48, 141.

56 Consultations with Tribunal members.

justified then the victim should be offered the opportunity to withdraw the submission. If this happened the Tribunal could not take the submission or its contents into account.

H *Method of Participation*

The Tribunal offers the following options for participation of a victim.

In person: Subject to the nature of the venue and appropriate security and accommodation being available a registered victim could make oral submissions in person. This might increase a registered victim's sense of importance and significance in the process but it can raise security issues and may increase the chance of heated and emotional exchanges that may have detrimental effects upon victims and/or patients.

Video-link: This is entirely dependent on whether there are suitable facilities at the hearing venue. Video conferencing has the communication benefits of allowing the Tribunal panel to view and communicate with the registered victim throughout while minimising any distress that a victim and/or patient might experience from being in close physical proximity to each other. It may also reduce the risk of confrontation between the victim and patient and their intimates. The writers would consider that video-link would generally be the preferable mode of participation where more than a written statement from the victim is to be considered. However, there are resources issues. At the present time, video conferencing predominantly takes place only from the Tribunal's Gladesville premises.[57]

Phone-link: A registered victim may choose to participate by telephone hearing and the normal practice of the Tribunal is to call the victim as the hearing commences. The registered victim can choose to hear the evidence and statements made throughout the hearing as well as the final recommendation made by the Tribunal. The registered victim can talk to the Tribunal members and make an oral statement if they wish. The advantage of the telephone conference can be that the victim and the patient will have no face-to-face contact at all. This may alleviate stress and intimidation of all participants. On the other hand, such non face-to-face participation may cause some victims to believe that their evidence or views are of less value or are not being taken seriously or that the patient is being deliberately shielded from the victim.[58]

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[57] Consultations with Tribunal members.

[58] Ibid.

Written submission: Any registered victim may submit a written statement to the Tribunal to be included in the Tribunal's papers for hearing. There is no obligation on a victim to attend a hearing once she or he has provided a statement. The Tribunal has indicated to victims that such statements should address the care, treatment, detention and release of a forensic patient.[59] The Tribunal has also indicated that the focus of such statements should be on any concerns the victim has about the risk of serious danger to individuals, including themselves or to the community. This could include any new information. However, whilst many submissions do refer to perceived risks to the victim, they also often refer to the injustice of the system that allows a patient to be found NGMI.[60] The normal practice is that the Tribunal would reveal at least the contents of the submission to the patient and/or legal representative. Any evidence by a victim may be considered as it sees fit by the Tribunal.

The statement should also indicate whether the victim can or wishes to be contacted by the Tribunal on the day of the hearing, if the Tribunal wishes to speak directly with a victim.

There is nothing in the legislation that is concerned with the evidentiary status of the statement or indeed any evidence or information provided by a victim.

I *Involvement in Hearings*

The Tribunal as part of its hearing plan for each matter where a victim has already made a written submission or indicated a desire to make an oral submission should consider any issues arising from the involvement of the victim in its hearing plan which is used to identify and plan for issues that will or may arise in the course of the hearing, including for example, the confidentiality of documents and the type, level and relevance of evidence and information available.

J *The Opportunity to Make Oral Submissions*

Under its broad evidentiary powers and its broad practice and procedure powers, the Tribunal can allow victims to make oral submissions and allow them to attend hearings whether in person or by video link or telephone. The new legislation does not alter that position.

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[59] Ibid.

[60] Ibid.

The New South Council For Civil Liberties in its submission to the review of the forensic provisions of the *Mental Health (Criminal Procedure) Act 1990* stated that the role of victims should be confined to making written submissions which the Tribunal could take into account of so far as relevant. The Council submitted that otherwise the interests of victims could be appropriately represented in hearings by the Attorney-General for example in relation to matters dealing with public safety. The Council argued that the reasons for this limited role were based on the unique forensic jurisdiction where a finding of NGMI was found and where disposition of the patient was not at all concerned with punishment. The Council suggested that victim involvement in forensic proceedings was perhaps broadly comparable to executive decisions relating to parole. The Council cautioned against further victim involvement that might lead to double punishment of a crime for which they had already been acquitted.

The writers, while agreeing with the general view that caution must be exercised in prescribing a role for victims in forensic proceedings, do not support the Council's blanket view that victims should be limited to written statements. Instead, the writers consider that the Tribunal should have a capacity to allow oral statements by victims after an assessment of the particular circumstances of the case and an appropriate balancing of the rights and interests of the patient and the victim. There may well be a number of significant advantages in at least some victims being allowed to make an oral submission. First, it may well increase the victims' sense of satisfaction and involvement in the process because it is a far more direct and immediate input than merely providing a written submission before the hearing. Oral presentation involves some degree of human interaction whereas a written submission can be dealt with impersonally and perhaps perfunctorily. Also some victims may lack written communication skills and find it difficult to make their points in a written submission. An oral submission also allows the Tribunal the opportunity to consider directly the credibility and concerns of the victim and if necessary allows the Tribunal to seek clarification of any points made by the victim. This opportunity is particularly important if the victim is seeking a non-association or place restriction order.[61] Oral submissions could also have substantial psychological benefits for the victim and their relatives and intimates.

As Mr Richard Amery MP, Minister for Corrective Services said of the

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[61] Consultations with Tribunal members; see *Mental Health (Forensic Provisions) Act 1990* (NSW) s 75.

change to the NSW law to allow victims to make oral submissions in parole hearings without needing to seek leave of Parole Board: 'Making a personal approach can often demonstrate a victim's concerns far more clearly than a written submission'.[62]

These matters in the writers' view should not be merely dismissed as being only symbolic or psychological. The law and legal systems should be more concerned with the satisfaction and views of participants in the process. All institutions of a society should be measured in terms of the good they do, both in material and psychological terms. In some cases such participation may increase the sense of confidence and security of victims. It may alleviate some fears and concerns of the victim about the risks posed by the patient. It may assist some victims to understand the illness of the patient and the nature of treatment and rehabilitation and progress and matters such as conditional release. Oral participation may assist some victims to feel more secure because they see the victim in a secure and safe environment, which in some cases may allow the victim to put the ordeal of the index offence behind them. In some cases, victims who are at first very hostile have come to appreciate and support therapeutic outcomes for the patient.[63]

The second major advantage of allowing oral submissions is that it should not be assumed that, in every case, the greater participation of a victim will necessarily be counter-productive for the patient. There may some cases where some contact may assist patients in coming to terms with what has happened and for example, in dealing with guilt or expressing sorrow, in gaining insight into the effects of the index offence, and in being more motivated to take their medication and in some cases avoid substance abuse which may have precipitated the index offence. Of course, however, there may be other cases where interaction with victims, particularly or confrontational interaction may be counter-productive and anti–therapeutic. It will be necessary for the Tribunal in each particular case to work out an appropriate plan for the involvement of victims that takes into account the rights and interests of victims, patients and other participants and is based upon a considered view of the likely consequences of particular participation. In addition the Tribunal must also manage the input of victims in the hearing to ensure procedural fairness but also to where necessary

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62 Crimes (Administration of Sentences) Amendment Bill, Second Reading Speech, New South Wales, *Parliamentary Debates,* Legislative Assembly, 8 May 2002, 1805 (Hon R Amery, Minister for Corrective Services).

63 Consultations with Tribunal members.

protect the psychological well being of both victims and patients.

It may be a very complex and problematic matter to attempt to forecast the immediate and longer-term consequences for victims and patients in relation to victim participation. Thus, for example, it may be that for some victims and patients some degree of interaction may be of benefit to one or both, particularly where both are receptive to some positive interaction. On the other hand, in some cases direct contact with a victim may be distressing to the victim and or patient and of no therapeutic value or even worse be extremely negative experience, perhaps retarding or impeding the patient's progress and/or making a victim more distressed and more antagonistic. Clearly Tribunals may need some assistance from experts and professionals, particularly treating teams, about the likely consequences of particular contact. Sometimes, treating teams approach the Tribunal before or during a hearing to advise that the involvement of the victim may have adverse consequences for the patient's wellbeing.[64]

K *Open or Closed Proceedings and Confidentiality*

The proceedings of the Tribunal are to be open to the public.[65] However, if the Tribunal is satisfied that it is desirable for the welfare of a patient or for any other reason, it may of its own motion or on the application of the patient or another person appearing at the proceedings make orders that the hearing be conducted wholly or partly in private and/or orders prohibiting or restricting the reporting of the proceedings or publication or disclosure of evidence or reports given in the proceeding.

Thus the Tribunal ordinarily would allow victims access to forensic proceedings but this can be restricted where necessary, particularly if an open proceeding were likely to have a serious adverse effect on the welfare and well being of the forensic patient. This provision enables the Tribunal to balance the competing rights and interests of the patient and victim in the particular circumstances of each case.

The Tribunal also has to respect the forensic patient's right to confidentiality and this would include making unlawful disclosure of information to victims.[66] The publication or broadcasting of the name

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64 Ibid.

65 *Mental Health Act 2007* (NSW) s 151(3).

66 See, eg, *Mental Health Act 2007* (NSW) s 189 creates an offence for a Tribunal member to disclose information acquired about a person in the course of exercising the jurisdiction of the Tribunal except in circumstances provided for under s 189.

of any person who has a matter before the Tribunal or who appears as a witness, or who is mentioned or otherwise involved in proceedings is also prohibited without the consent of the Tribunal.[67] The Act also prohibits the disclosure of any information in connection with the administration and execution of the Act unless such disclosure comes within the stipulated exceptions. These provisions enable the Tribunal to protect the confidentiality of patients, witnesses and victims.[68]

L *Information and Education for Victims*

A key issue for victims of forensic patients is the confusion and stress caused for the victim as to how and why the offender has been found 'not guilty'.

Many victims may not fully understand what exactly it means by not guilty by reason of mental illness. Often, these victims can feel betrayed by the criminal justice system and feel that they will receive little recognition for what happened to them. For victims, the term *not guilty* can suggest that the crime is not acknowledged or recognised by the justice system.

The expectation a victim has in making a submission is critical to obtaining positive outcomes in facilitating victim participation in hearings. Victims should as much as possible be given a realistic picture of what their role can be and the role of the Tribunal and the hearing process. They should not be given false and unrealistic expectations. For example, a South Australian study found that victim impact statements within the South Australian criminal justice system had developed into a situation of dashed expectations because victims had been allowed to believe that their statements would have a significant influence on the actual sentence given when often this was clearly not the case.[69] Such a position is likely to build up resentment and hostility within such victims.[70] One survey of victims of major indictable offences indicated that victims who thought that their statement would influence the court's sentence were significantly more dissatisfied with the sentence than victims who did not expect an

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67 *Mental Health Act 2007* (NSW) s 162.

68 See *Mental Health Act 2007* (NSW) s156 as to restrictions on disclosure of records.

69 Martin Hinton, 'Expectations Dashed: Victim Impact Statements and the Common Law Approach to Sentencing in South Australia' (1995) 14(1) *University of Tasmania Law Review* 81.

70 Edna Erez, Leigh Roeger & F Morgan 'Victim harm, impact statements and victim satisfaction with justice: An Australian experience' (1997) 5 *International Review of Victimology* 37; Matt Black, above n 44, 2.

impact'.[71] Victims may make submissions based on a belief that it will have significant influence on the outcome for the offender or patient. If this is not the case, victims may be more dissatisfied and alienated from the system than if they had no input at all.

It must be made abundantly clear what the role of the Tribunal is and what are the issues that the Tribunal must assess. It may also be useful to provide more general information about the operation of the criminal justice system to the public.

It may be that a written statement from a victim contains abusive or threatening material. In the writers' view the Tribunal in its information material provided to victims should include the direction that abusive, threatening, harassing, offensive or intimidatory views or language are not acceptable in written or oral submissions. Victims also should be given information and direction about appropriate conduct in attending hearings.

Victims when they are concerned that the patient is feigning mental illness should be given current data and information including, for example, information about the insanity defence and it potential of potentially indefinite or long term detention and the known incidences of feigning and the expertise of the medical profession and courts in detecting and dealing with feigned cases.

Victims may also need information about the influence of drugs and alcohol on the commission of the index offence and their impact on the mental health of the patient.

Clearly comprehensive and effective dissemination to victims of their rights, particularly at an early stage is likely to increase the number of victims who will register and then participate in forensic proceedings. All Tribunals need to conduct education and training on dealing with victims and this should be provided to all staff who come into contact with victims. It might be useful if a multimedia approach was adopted to provide such information. Tribunals need to have a communication protocol as to whom should have first and any subsequent contact and liaison with victims.

It is also clear that victims of forensic 'offences' will need to have access to trauma and grief counselling and programs which should be catered to deal where necessary with the forensic aspects of the event, such as the mental illness of the patient and the finding of not guilty on the basis of mental illness. Information should be provided, including by

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[71] Edna Erez, Leigh Roeger & F Morgan, above n 70.

the Tribunal as to services that provide post hearing counselling or debriefing after a victim has participated in a forensic hearing.

M *Education and Training for Tribunal Members and Staff*

It is important for Tribunal members and all staff who may have contact with victims to be aware of and comply with the general principles of dealing with victims including NSW legislation such as the *Victims Rights Act 1996* and the Charter.

Tribunals need to develop practice and procedure notes and case studies and samples to assist Tribunal members to apply legislative requirements. This should deal with matters such as the appropriate method for victims to participate, considering the balance between the rights of patients and victims, confidentiality requirements and natural justice and communicating effectively with victims. It may be a useful rule of thumb for Tribunals in their decision making to at least acknowledge the involvement of a victim and to provide some assessment or relevance of the information provided. One would expect that in many cases a Tribunal should acknowledge the concerns of the victim even if such concerns do not directly impact on the outcome of the proceedings.

N *Qualities and Skills of Tribunal Members*

The potential involvement of victims makes it paramount that Tribunal members who are dealing with forensic proceedings have superior dispute management and resolution skills and high quality interpersonal skills. The NSW Tribunal has adopted the Administrative Review Council's ('ARC') Guide to Standards of Conduct as a guide to the conduct of Tribunal members in carrying out their statutory role. Core criteria under that Code for Tribunal members include respect for the law, fairness, independence, respect of persons, diligence and efficiency, integrity, accountability and transparency.[72]

The Code relevantly provides, inter alia, that Tribunal members need to be able to respect all participants, to be patient, dignified, and courteous to all participants and should require similar behaviour of those subject to their direction and control. A Tribunal member should also endeavour to understand and be sensitive to the needs of persons

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[72] Administrative Review Council, *A Guide to Standards of Conduct for Tribunal Members* (2009), 12 <http://www.ag.gov.au/agd/WWW/arcHome.nsf>.

involved in proceedings before the Tribunal.[73]

It is submitted that these qualities and skills are particularly important in dealing with victims and patients and in general for dealing with mental health issues that inevitably involve therapeutic considerations. It should not be enough that Tribunal members dealing in mental health law are very good or excellent at the relevant law. A demonstrated ability for dealing effectively and sensitively with mentally ill people and appropriate interpersonal and dispute management skills and qualities should be key criteria for selection of members, for induction processes, for ongoing training and education of members and for performance appraisal.

As noted above, treating victims with respect and dignity and providing them with a fair opportunity to voice their views is likely to increase their satisfaction with the process. It may also make them more likely to understand the issues before the Tribunal and to understand the mental illness of the patient and the risks of future harm to themselves or others. The hearing thus may play a useful educative role.

O *Evaluating Victim Involvement in Forensic Proceedings*

There is a clear need for empirical study of the participation of victims in forensic proceedings including satisfaction surveys not only of victims but other participants including Tribunal members to assess how victim participation is currently used and managed and what improvements might be made. However, some general points can be made without the benefit of direct empirical data.

It will be difficult to make generalisations that cover all or even the majority of victims and offenders. For example, it cannot be simply assumed that victims in relation to forensic patients are likely to be vindictive or seeking revenge. For example, the Tasmanian experience in parole decision-making indicates that most victims are not retributive but are focussed on ensuring that they or their families or intimates will not come into contact with the offender.[74] This accords with general research on victims in the criminal process that indicates that many victims are not revengeful or punitive.[75] For example, only

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73 Ibid.

74 Matt Black, above n 44, 4.

75 Brian Forst, *The Criminal Justice Response to Victim Harm* (1985); Mike Hough & David Moxon 'Dealing with offenders: popular opinion and the views of victims – findings from the British Crime Survey (1985) 24(3) *Howard Journal of Criminal Justice* 160.

about one third of an Ohio study of serious felonies requested imprisonment or some harsh treatment for the offender.[76] Nor does the research indicate that claims for retribution or additional or excessive punishment by victims influence a court's decision making.[77] Instead, courts continue to try to assess all relevant sentencing matters and come to an objective result that balances those factors.

People necessarily have different perceptions and needs and subjective responses to events and processes. Nevertheless, there is a significant and persuasive amount of evidence to indicate that overall a person's sense of fairness including procedural or legal fairness will be 'closely linked to the level and nature of their involvement in the process. If individuals who are treated fairly and respectfully and who are listened to and given a reasonable opportunity to participate will have a much stronger perception that they have been treated fairly and that the process is fair than if they are not so treated, and moreover this trend appears to be present regardless of the outcome of the process. This appears so of litigants and there is no reason to consider that it would be markedly different for victims.[78]

There may be some victims who can provide new information, evidence or 'special insights' into the nature of a person's mental state and the risk they may pose to victims or to others. If there is such evidence then it will have to be properly assessed and challenged. Thus for example if a written statement contained allegations about risk then the victim may need to be examined at a hearing with the prospect of examination by the representative of the forensic patient. The matters put in a victim's statement particularly where they do appear to contain probative or significant evidence would need to be put in the appropriate form to the forensic patient as a matter of procedural fairness. The Tribunal is given broad powers to investigate and determine matters as it sees fit.

Such matters will be clearly relevant to the decision making process of the Tribunal. However, in the majority of cases victims may not be

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76 Edna Erez & Pamela Tontodonato, above n 1, 467.

77 Ibid.

78 Edgar Allan Lind & Tom R Tyler, *The Social Psychology of Procedural Fairness* (1988); Edgar Allan Lind, et al, *The Perception of Justice: Tort Litigants' Views of Trial, Court Annexed Arbitration and Judicial Settlement Conferences* (1989); R J MacCoun, Edgar Allan Lind and Tom R Tyler, *Alternative Dispute Resolution in Trial and Appellate Courts* (1992); Andrew Cannon, 'Sorting Out Conflict and Repairing Harm: Using Victim Offender Conferences in Court Processes to Deal with Adult Crime' (2008) 18(2) *Journal of Judicial Administration* 85, 86.

providing additional cogent and probative evidence on matters of risk assessment and the mental state of patients that has a direct or significant impact on the decision making of the Tribunal. Assessing the mental condition of a person is a specialist field and each forensic patient will have a treating team providing regular monitoring and treatment of the patient. Risk assessment is a complex and problematic area that comprises static and non-static assessment. Victims are unlikely to be able to add any expertise to any of these specified tasks.

P *Changing the finding of NGMI*

One potential reform might be to abolish the finding of NGMI and instead use a finding of guilt but subject to exculpatory mental illness. While this is a superficially attractive idea because it would remove some victims' concerns and emotions involving a not guilty finding it would put into contention very well established principles of our criminal legal system that a person cannot be legally guilty of an offence unless they understood the nature and quality of their acts or knew what they were doing was wrong.[79] The consequences of making such a change would be immense and while it might please some victims' groups it would further stigmatise those with a mental illness. There is already significant stigmatisation and victimisation of people with a mental illness and such a move would likely only add to those problems.

VI CONCLUSION

The new provisions relating to victims are appropriate and overall provide an effective balance between the interests of victims and the rights and interests of patients and the general community. As discussed above, victims of forensic patients' index offences should have the right to seek to participate in forensic proceedings by written and/or oral submissions. However, it is clear that the right to participate cannot be absolute and must be appropriate to the circumstances of the particular case.

No system of victim input into forensic proceedings will be perfect or satisfy all participants equally all of the time or on occasions any of the time. There will be inevitably differences in views among participants and satisfaction levels will always fluctuate given the subjectivity of participants' expectations and given the task of Tribunals in balancing

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79 *R v M'Naghten* (1843) 10 CL & F 200; *R v Porter* (1933) 55 CLR 182.

competing rights and interests, particularly of patient and victim. However, it is suggested that the general approach and proposals advocated in this paper will assist in achieving that balance and providing victims with useful and accurate information and education about the forensic system and an appropriate forum and opportunity to contribute to proceedings and decisions about forensic patients.

The value and success of the victims scheme will depend on

- the administrative efficiency of the registration and notification processes;
- the effectiveness of information and education provided to victims;
- the training and education of Tribunal members and staff and other participants in dealing with victims and their commitment to acting accordingly;
- effective practice and procedure principles and guidelines established by Tribunals in relation to victims and issues arising from their participation;
- the management and dispute resolution skills and aptitudes of Tribunal members;
- the ability of Tribunal members to appropriately balance the rights and interests of patients and victims and the general community according to the requirements of the law.

The empirical data suggests that victims should, as much as possible, receive a realistic and clear picture of what their role can be and what role the Tribunal performs. Nevertheless, within those constraints and through effective management and direction from the Tribunal, it will be possible for victims to validly participate in the forensic process without compromising the rights and interests of patients and thereby achieving the optimal therapeutic result for both patient and victims in the circumstances of the particular case. Clearly such a result will often be difficult to obtain. However, it is that constant, delicate balancing of rights and interests that the Tribunal and the system as a whole must try to achieve.