

# MENTAL HEALTH TRIBUNAL

## PRACTICE NOTE 3

### OBSERVERS AT MENTAL HEALTH TRIBUNAL HEARINGS

#### I. PRELIMINARY

##### Authority

1. This Practice Note has been issued by the Rules Committee of the Mental Health Tribunal (the Tribunal) established by section 389 of the Mental Health and Wellbeing Act 2022 (the Act) and this Practice Note has been made pursuant to section 391 of the Act.

##### Commencement date

2. This Practice Note takes effect on 1 September 2023.

##### Introduction and purpose

3. The Tribunal conducts hearings at venues across Victoria. Pursuant to section 375 of the Act, hearings are closed to the public.
4. This Practice Note relates to the attendance of observers at hearings only and does not limit the exercise of the Tribunal's power pursuant to subsection 375(2) to order that a hearing or any part of a hearing be open to members of the public if the Tribunal is satisfied that it is in the public interest.

##### Definitions

5. Unless otherwise specified, all references to sections in this Practice Note are to sections of the Act.
6. Unless otherwise specified, terms in this Practice Note have the same meaning as in the Act.
7. The term 'patient' used in this Practice Note includes:
  - (a) the definition of 'patient' in section 3 of the Act, which defines 'patient' as:
    - (i) an assessment patient; or
    - (ii) a court assessment patient; or
    - (iii) a temporary treatment patient; or
    - (iv) a treatment patient; or
    - (v) a security patient; or
    - (vi) a forensic patient;
  - (b) any other person who is the subject of the proceeding but does not fall into the definition of 'patient' under section 3 of the Act.
8. This Practice Note may be referred to as '*PN3 – Observers at Mental Health Tribunal Hearings.*'

## **People who are not 'observers' and can participate in Tribunal hearings**

9. This Practice Note does not apply to the following people who are generally permitted to participate in Tribunal hearings and are not 'observers':
  - (a) the patient;
  - (b) the treating psychiatrist;
  - (c) members of the patient's treating team whether or not they are participating to present evidence to the Tribunal;
  - (d) a patient's carer;
  - (e) a person identified by the patient as being a support person;
  - (f) a patient's family member;
  - (g) a patient's guardian;
  - (h) a patient's nominated person;
  - (i) an advocate or legal representative attending the hearing;
  - (j) a person giving evidence at the hearing;
  - (k) security or other personnel employed by the designated mental health service; and
  - (l) interpreters.

## **II. PROCEDURES FOR THE ATTENDANCE OF OBSERVERS AT HEARINGS**

### **Persons permitted to observe hearings**

10. In cases that meet the requirements of this Practice Note, the Tribunal may allow the attendance of observers at hearings, however the decision whether to allow an observer remains at the discretion of the Tribunal.
11. Where the Tribunal has allowed an observer to attend the hearing, the Tribunal may request an observer to leave the hearing at any time for any reason it thinks fit.
12. Observers of hearings are limited to persons with a legitimate purpose for observing.
13. The Tribunal considers the following observers to have a 'legitimate purpose':
  - (a) persons employed by or engaged in training at the designated mental health service who are not a member of the treating team;
  - (b) persons undertaking research in mental health (including mental health legislation and tribunal processes);
  - (c) persons employed by or engaged in training with the body providing legal representation or advocacy to the patient at the hearing;
  - (d) persons appointed to, employed by or engaged in training at the Tribunal; and
  - (e) persons whose interest and/or functions in the field of mental health would benefit by observing a hearing.

### **Observation of hearings by Tribunal Members and staff**

14. Where the observer is a Tribunal member or a member of staff of the Tribunal, paragraphs 20, 21, 22, 23, 24 and 31 shall not apply.
15. When considering whether to permit Tribunal members or staff to observe hearings, the Tribunal will take into account the patient's views and preferences as to whether a Tribunal member or member of staff should be permitted to observe the hearing.

### **Obtaining the patient's consent**

16. Where the person observing the hearing is engaged by the designated mental health service or the body providing legal representation or advocacy to the patient, the designated mental health service or the body should seek and obtain the patient's verbal consent to the observation before the hearing.
17. In seeking the patient's consent, the relevant designated mental health service or body must discuss the following matters with the patient:
  - (a) the name of the observer and why they wish to observe;
  - (b) that the observer has been made aware of the confidentiality provisions under the Act;
  - (c) that the patient may refuse to give their consent;
  - (d) that there is no need to give any reason for such refusal; and
  - (e) that refusal will in no way impact on the outcome of their hearing.
18. Where the patient consents to the observer, the relevant designated mental health service or body must inform the Tribunal at the hearing of the discussions it has undertaken with the patient in accordance with paragraph 17.

### **Observer undertaking research or with an interest or function in the field of mental health**

19. If the person wishing to observe the hearing is undertaking research or is a person who has an interest and/or functions in the field of mental health, the person must write to the President of the Tribunal in advance of the hearing to request to observe the hearing.
  - (a) The person must inform the President of their area of research and/or the reason they wish to observe the hearing, and where applicable, provide information regarding ethics approval of the research;
  - (b) The person must demonstrate to the President that they are aware of the confidentiality provisions under the Act;
  - (c) If the President approves, the President will provide his or her consent in writing, including any directions or restrictions;
  - (d) If the President approves, the person is still required to complete a request form pursuant to paragraph 20. The Tribunal will contact the parties to obtain consent to such an observation and if they do not consent the observation would not ordinarily proceed.

### **Completion of the request form**

20. The person wishing to observe a hearing must complete the form at Appendix 1 prior to the hearing and email a copy to [registry@mht.vic.gov.au](mailto:registry@mht.vic.gov.au)
21. A separate form will need to be completed for each observer.
22. The Tribunal will retain the form and upload it to the Tribunal's electronic database.

### **Patient's consent at hearing**

23. Despite the requirements in paragraph 19 being met, where the patient attends the hearing, the attendance of a person observing a hearing is subject to the patient's consent at the hearing. The Tribunal division shall confirm with the patient:
  - (a) the name of the observer and why they wish to observe;
  - (b) that the observer has been made aware of the confidentiality provisions under the Act;
  - (c) that they may refuse to give their consent;
  - (d) that there is no need to give any reason for such refusal;
  - (e) that refusal will in no way impact on the outcome of their hearing; and
  - (f) the patient may withdraw their consent at any time during the hearing.
24. If a patient does not attend the hearing, the person's attendance to observe the hearing is at the discretion of the Tribunal.
  - (a) In making this decision, a relevant consideration for the Tribunal is whether the designated mental health service or body has sought consent from the patient pursuant to this Practice Note.
  - (b) The Tribunal may take into account other considerations as it sees fit.

### **Number of observers**

25. Ordinarily, a maximum of two observers will be permitted to observe a hearing. In special circumstances, the Tribunal may approve more than two persons.

### **Confidentiality and conduct of observers**

26. In addition to any confidentiality or privacy agreement an observer may be subject to at the designated mental health service or representative or advocacy body, all observers are bound by the confidentiality provisions under the Act.
27. The presiding Tribunal member shall confirm the observer's obligations under the Act with the observer.
28. The observer must not participate in the hearing or take notes.

### **Video hearings**

29. During hearings conducted by video-link, where the observer is not in the same room as the patient or the Tribunal, the observer shall remain on-screen at all times.

### **Written material**

30. Observers who are not associated with the designated mental health service, the body providing legal representation or advocacy, or the Tribunal will not be given access to the written material related to the hearing.

### **Tribunal's deliberations and decision**

31. An observer should not remain in the hearing while the Tribunal is deliberating.
32. The observer may be present when the Tribunal delivers its oral decision.

**END OF PRACTICE NOTE**



**REQUEST TO OBSERVE HEARINGS**



<b>Name</b>			
<b>Address</b>			
<b>Position/ occupation</b>			
<b>Employer/ place of study</b>			
I request to observe a Mental Health Tribunal hearing. The reason I seek to be an observer is:			
I request to observe the following hearings:			
<b>Date of hearing</b>			
<b>Hearing venue</b>			
I have read and understood Practice Note 3 and have undertaken the steps outlined in the Practice Note. I understand that even though I have complied with each step in Practice Note 3, the patient’s views and preferences are the Tribunal’s primary consideration.			
I have read and understood the provisions contained in section 376 and Part 17.1 of the <i>Mental Health and Wellbeing Act 2022</i> . I have taken note of any penalties that apply pursuant to those provisions.			
I undertake not to publish or cause to be published any report of the Tribunal hearing that may contain any particulars that may lead to the identification of the person who is subject of the proceeding or any other person concerned in the proceedings.			
<b>Signed</b>		<b>Date</b>	