

**THIS IS AN OFFICIAL REPORT OF THE MENTAL HEALTH
REVIEW TRIBUNAL PROCEEDINGS IN RELATION TO MS KERR
AND MR LIU AUTHORISED BY THE PRESIDENT OF THE
TRIBUNAL ON 17 NOVEMBER 2014**



This is an edited version of the Tribunal's decision. The patient has been allocated a pseudonym for the purposes of this Official Report

APPLICATION TO PUBLISH OR BROADCAST

Section 162, Mental Health Act 2007

ORDER OF TRIBUNAL

On **15 August 2014** the Tribunal considered an application from Mental State Pty. Limited and Eye Spy Productions Pty. Limited Trading as Northern Pictures to publish or broadcast information relating to **Mr Liu** and **Ms Kerr**.

DETERMINATION

The Tribunal is satisfied that it should grant the application for consent pursuant to s 162 of the Act and proposes to make the Order in the following terms:

The Tribunal grants consent, pursuant s 162 of the Mental Health Act, 2007, to:

- (a) **Mental State Pty. Limited and Eye Spy Productions Pty. Limited (Trading as Northern Pictures), and their contractual licensees and assignees of the intellectual property in and ownership of the television production known as 'Changing Minds', and**
- (b) **any parties with whom Mental State Pty. Limited and Eye Spy Productions Pty. Limited (Trading as Northern Pictures) or its licensees or assignees have contracted or may in future contract for the purpose of broadcasting and/or promoting and/or advertising the production known as 'Changing Minds';**
- (c) **The Australian Broadcasting Corporation, and**
- (d) **Any person lawfully commenting on or reproducing parts of the television production known as 'Changing Minds'**

to broadcast and/or publish the names of the following persons in the television production known as 'Changing Minds' or in connection with it, including for the purposes of any promotional or marketing material in relation to that production:

Mr Liu
Ms Kerr

being a person

- (a) to whom a matter before the Tribunal relates, and
- (b) who appears as a witness before the Tribunal in proceedings, and
- (c) who is mentioned or otherwise involved in proceedings under the Mental Health Act, 2007.

SIGNED BY THE MEMBER OF THE TRIBUNAL ON 20 August 2014

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Daniel Howard SC
President

REASONS FOR DECISION

Section 162 of the *Mental Health Act, 2007*, provides as follows:

162 Publication of names

(1) A person must not, except with the consent of the Tribunal, publish or broadcast the name of any person:

- (a) to whom a matter before the Tribunal relates, or*
- (b) who appears as a witness before the Tribunal in any proceedings, or*
- (c) who is mentioned or otherwise involved in any proceedings under this Act or the Mental Health (Forensic Provisions) Act 1990, whether before or after the hearing is completed.*

Maximum penalty:

- (a) in the case of an individual — 50 penalty units or imprisonment for 12 months, or both, or*
 - (b) in the case of a corporation — 100 penalty units.*
- (2) This section does not prohibit the publication or broadcasting of an official report of the proceedings of the Tribunal that includes the name of any person the publication or broadcasting of which would otherwise be prohibited by this section.*
- (3) For the purposes of this section, a reference to the name of a person includes a reference to any information, picture or material that identifies the person or is likely to lead to the identification of the person.*

The Applicant companies have made application under s 162 of the *Mental Health Act, 2007* ('the Act'), to the Tribunal today for consent to broadcast and publish the name of two named individuals, namely, Mr Liu and Ms Kerr, in circumstances whereby it will be disclosed to anyone hearing or viewing the broadcast and/or publication that those individuals are persons:

- (a) to whom a matter before the Tribunal relates, and
- (b) who appears as a witness before the Tribunal in any proceedings, and
- (c) who is mentioned or otherwise involved in any proceedings under the *Mental Health Act, 2007*

Section 162(3) of the Act provides:

For the purposes of this section, a reference to the name of a person includes a reference to any information, picture or material that identifies the person or is likely to lead to the identification of the person.

In support of the application, the Tribunal has been provided with a number of documents as follows:

- A document from Northern Pictures entitled 'Background Notes', a copy of which is annexed and marked 'A'
- A document from Northern Pictures entitled 'Changing Minds' Patient Consent Flowchart, which is annexed and marked 'B'
- In relation to Mr Liu:
 - A psychiatric report by Dr MT dated 5th August, 2014
 - Producer's notes
 - A form entitled 'Patient Interview & Certification of Capacity to Consent'
 - A Patient Deed of Consent & Release
 - An 'Appearance Release' Form
 - An 'Artwork Release form'
 - A 'Material Release form'

- A 'Location Release form'
 - Email correspondences dated 12th August and 15th August, 2014, between the Tribunal's Registrar and Mr Robert Wheeler, who is the Principal Solicitor of the NSW Mental Health Advocacy Service.
- In relation to Ms Kerr:
 - A psychiatric report by Dr MC dated 11th August, 2014
 - Producer's notes
 - A form entitled 'Patient Interview & Certification of Capacity to Consent'
 - A Patient Deed of Consent & Release
 - An 'Appearance Release' Form
 - A 'Photographs Release form'
 - A 'Location release form'
 - Email correspondences dated 12th August and 15th August, 2014, between the Tribunal's Registrar and Mr Robert Wheeler, who is the Principal Solicitor of the NSW Mental Health Advocacy Service.

The Tribunal has had regard to all of the said documents.

By way of summary, the applicants have been engaged by the Australian Broadcasting Corporation (the ABC) to produce a three part documentary entitled 'Changing Minds' which it is proposed will go to air on ABC television during the week commencing 6th October, 2014, which has been designated 'Mental Health Week' in New South Wales.

As the 'Background Notes' make clear, the purpose of the documentary is to challenge the stigmas and taboos around mental health in Australia by showing what actually happens in the closed wards of a mental health unit. The mental health unit chosen for the purposes of the documentary was Liverpool Hospital, which has one of the busiest mental health units in New South Wales.

Northern Pictures has been meticulously careful in the way in which it has managed privacy and consent issues in relation to this project, which has now reached the stage where filming has taken place and each of the three episodes has now been essentially completed, subject to some minimal additional editing that will be attended to in the near future. The Tribunal has had the opportunity to view each of the three episodes for the purposes of this application.

It is clear from the documentation that Mr Liu and Ms Kerr have given their written consent to be filmed and recorded – including their name, image and voice - for the purpose of the documentary, for the programs or portions thereof, and related promotional and advertising materials incorporating images of them, to be published and/or broadcast by Northern Pictures, the ABC and also any future licensees and/or assignees of Northern Pictures. It is clear that they have also consented to the program, or parts thereof, including promotional and advertising materials, to be used on the ABC and elsewhere (including on the internet and overseas). It is also clear from the documentation that Mr Liu and Ms Kerr have each given their consent to have their hearings before the Mental Health Review Tribunal, and the fact that they were the subject of such hearings, filmed and broadcast and/or published.

In the case of both Mr Liu and Ms Kerr, the psychiatric report confirms that they each had the capacity to give the consents that they have given in relation to their appearance before the Mental Health Review Tribunal being filmed.

In the case of Mr Liu, the 'Patient Interview & Certification of Legal Capacity to Consent' form dated 15th July, 2014, completed by Dr C, consultant psychiatrist, makes it clear that Mr Liu was aware that the filming would include filming of him including "discussion about, and your appearance before, the Mental Health Review Tribunal" and Dr C gives a certificate to the effect that, as at that date, Mr Liu had capacity to answer the questions he was asked about this, and to provide his consent/release on the

related form. The patient Deed of Consent & Release was signed by Mr Liu on the same date as Dr C's report.

In the case of Ms Kerr, the 'Patient Interview & Certification of Legal Capacity to Consent' form dated 15th July, 2014, completed by Dr C, who was Ms Kerr's treating psychiatrist, makes it clear that Ms Kerr was aware that the filming would include filming of her "at a Mental Health Review Tribunal Hearing regarding your admission to Liverpool Hospital under the NSW Mental Health Act" and Dr C gives a certificate to the effect that, as at that date, Ms Kerr had capacity to answer the questions she was asked about this, and to provide her consent/release on the related form. The patient Deed of Consent & Release was signed by Ms Kerr on the same date as Dr C's report.

In relation to Mr Liu, the Tribunal also has before it an email sent to the presiding member by the Tribunal's Registrar, Mr Rodney Brabin, dated 12th August, 2014, which is in the following terms:

12/8/14 Phone call to Mr Liu to discuss the Tribunal hearing about his involvement in the documentary. Mr said that he had been rung by Jenny from the film crew this morning who had explained that I would be calling.

I explained that we needed to have a hearing as he was filmed before and after his Tribunal hearing. He said he was OK with this. He said that he knew he could have said no to being filmed, but he 'trusts the ABC' and "trusts the people involved with the filming". I said he could speak to a lawyer about our hearing if he wanted - he said that "I don't think that is necessary' and 'it's all OK'.

I told him we were planning to have a hearing on Friday and that I would call him back if there was any problem, otherwise it should all be OK. Mr Liu said that was fine and thanked me for my call.

*Rodney Brabin
Registrar*

In relation to Ms Kerr, the Tribunal also has before it an email sent to the presiding member by the Tribunal's Registrar, Mr Rodney Brabin, dated 12th August, which is in the following terms:

12/8/14 Phone call to Ms Kerr to discuss the Tribunal hearing about her involvement in the documentary. Ms Kerr said that she had been rung by Jenny from the film crew this morning who had explained that I would be calling.

She said that she was very happy to be involved in the documentary. I said that because her Tribunal hearing was filmed and was included in the documentary, then we needed to have a hearing to make sure this was OK. She said she understood this and was happy for her Tribunal hearing to be filmed. She said that she was not happy in the hearing, as she was trying to get leave and get out of there. But she said 'it was real'. I asked Ms Kerr if she knew that she could have said no to be filmed, she said she did, but that she was 'happy to do it'. I said she could speak to a lawyer about the Tribunal hearing if she wanted, she said 'that is not necessary' and 'just do it'.

I told her we were planning to have a hearing on Friday and that I would call her back if there was any problem, otherwise it should all be OK. Ms Kerr said that was fine and thanked me for my call.

*Rodney Brabin
Registrar*

In the case of Mr Liu, the report dated 5th August, 2014 of Dr T states, inter alia, as follows:

We discussed (Mr Liu's) consent at every review both during his admission and after discharge. We did this without the film crew present so that he did not feel pressured and we emphasised he was free to withdraw his consent at any time. Mr Liu did not waiver in his wish to be involved.

Dr T also expresses the opinion in his report that:

In the final analysis the filming probably had minimal impact on his recovery.

In relation to Ms Kerr, the report dated 11th August, 2014 of Dr C stated, inter alia:

The impact that the filming of the ABC documentary had on Ms Kerr's treatment and recovery was more positive than negative in that she felt she had a voice and someone objective to discuss her issues with. In my opinion her treatment and recovery were not impeded by the filming and after she improved and was discharged, she gave full consent to being shown on the program. She stated that she hoped her story would help understanding of what people like her have to go through.

The Tribunal further notes that the email dated 13th August, 2014 from Mr Wheeler, Principal Solicitor with the Mental Health Advocacy Service, states, inter alia:

I can confirm that the lawyers in both hearings were provided by Legal Aid NSW. In my case as you know, I am an employee. Kelly Stares, the other lawyer, is a private barrister on our panel. We both spoke to our respective clients before the hearing about it being filmed and were satisfied that they agreed to the filming at the time for inclusion in a documentary to be aired on the ABC. We did not consider that they had full capacity to consent at that time, and understood that final consent for broadcast would be sought when they did have capacity and the hospital certified this.

In a subsequent email to the Registrar, dated 15th August, 2014, Mr Wheeler stated, inter alia:

I have now seen the third episode and have no objections to it. As advised below, I have not advised the participants about their rights to consent and offer no view as to their capacity to do so. I understand that evidence about this will be provided to you by the hospital. No-one has sought our advice about this since last we communicated about it.

CONSIDERATION

It is clear from the documentation before the Tribunal, including the opinions of Dr C and Dr T, and the respective communications of Mr Liu and Ms Kerr with the Tribunal's registrar, that Mr Liu and Ms Kerr have given their consents to the proposed broadcasting/publication of the documentary and publication of related materials including images of themselves in the context of them being persons having a matter before the Mental Health Review Tribunal. It is clear that they had the capacity to give that consent at the time that it was given, and their conversations with the Tribunal's Registrar on 12th August, 2014 clearly indicate that they remain willing participants in the program and are happy for the broadcast to go ahead. The Tribunal notes that both Mr Liu and Ms Kerr have been discharged from Liverpool hospital and are living in the community.

The Tribunal has had the opportunity to view each of the three episodes of the documentary, and it is abundantly clear that the documentary is of the highest professional quality, and accurately and sensitively depicts Mr Liu's and Ms Kerr's experiences with the mental health system. Importantly, it depicts them each in a positive light, and depicts their journey from being mentally ill persons to being discharged from hospital having regained their mental health so that they could return once more to the community.

The documentary is a ground breaking one, and it will do much to overcome the so called 'stigma of mental illness' and the misperceptions that many people have about the nature of mental illness, and its

treatment. Mr Liu and Ms Kerr have courageously consented to have their mental health journey shown to the public, and the Tribunal is satisfied that they each have the capacity to consent to documentary being broadcast/published, including related advertising and promotional materials. The releases and consents that they have signed give Northern Pictures the right to licence and assign the intellectual property in the production, and the consents are wide enough such that it is possible that the documentary and/or parts thereof may be broadcast or published overseas and on the internet. As the Applicant's right to assign has been agreed to by Mr Liu and Ms Kerr, it will be appropriate for this to be reflected in the order of the Tribunal.

Dan Howard SC
President

20 August 2014

BACKGROUND NOTES

When the series was commissioned, its aim was to challenge the stigmas and taboos around mental health in Australia by showing what actually happens in the closed wards of a Mental Health Unit.

Filming patients with mental health issues is of course challenging. We were fortunate in the amount of assistance we received to ensure our coverage of these issues was subject to detailed and rigorous procedures to safeguard the interests of those involved.

Firstly the production company, Northern Pictures, and Liverpool Hospital signed an access agreement outlining the protocols for filming in the Hospital's Mental Health Unit over a 12 week period. The Hospital's approval was through its management, including the Clinical Director of the South Western Sydney Local Health District and its Chief Executive.

The New South Wales Ministry of Health and patient advocates were also included in the process.

Patient involvement in the series was crucial in telling the inside story, to convey the complexities of living with a mental illness. Of course, patient welfare was always paramount in the making of the series. We needed to make sure patient involvement was comprehensively thought through from an agreed starting point and that no filming would take place without the approval of a consultant psychiatrist.

Each time a patient was filmed, it was only with their consent.

Where relevant, we also made contact with family members

of each patient so they were aware of the decision their relative or loved one had made about being involved in the production. Family were also given the opportunity to participate in the series if they wanted to.

After filming at the Hospital was over, Northern Pictures and the Hospital held follow-up meetings with each patient, to make sure they were still comfortable appearing in the program.

These meetings included the patient, two consultant psychiatrists from the Hospital and, where relevant, the patient's care manager or family members.

At the meetings, we described for patients exactly how they would appear in the program, when well and unwell, and who else would speak about them and their illness. Some patients and family requested to see footage, and this was shared with them to view.

Only then, after any concerns had been resolved, were patients asked to formally confirm that they still wanted to be part of the series. If anyone asked to withdraw at this stage, we of course honoured that request.

The final consent meetings were also an opportunity for the attending psychiatrists to assess whether mental illness was impairing the patient's capacity to give informed consent to appear in the program.

On the one occasion where a patient was too unwell to give consent on their own behalf, the person responsible for the patient consented for them, confirming the patient's own expressed desire to participate.

Along with the Hospital, we worked closely with the NSW Mental Health Review Tribunal and lawyers for patients appearing before it to obtain necessary permissions under

the Mental Health Act (NSW).

During filming, the production crew and patient treating teams (both at the Hospital and in the Community) worked collaboratively to make sure the crew's presence did not cause disruption or make patients feel uncomfortable.

All filming was by a small specialist production team who remained constant during the 12-week filming period. The crew included Jenni Wilks, a former registered nurse with extensive experience working with Hospitals and their patients, and consultant Dr Catherine Hanrahan, a journalist specializing in Mental Health issues.

Annexure B

"Changing Minds" Patient Consent Flowchart

In accordance with protocols previously agreed with the Hospital, no patients were filmed for inclusion in the Series without their prior consent.

After filming was complete and Northern Pictures had identified patients it proposed to include in the program, Northern Pictures and the Hospital followed these procedures for each patient, to confirm patient consents and capacity.

