



MENTAL HEALTH REVIEW TRIBUNAL

A REVIEW IN RESPECT
OF FORENSIC PATIENTS

APPENDICES



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APPENDIX 1

Review of the Mental Health Review Tribunal
in respect of forensic patients

Terms of Reference



REVIEW OF THE OPERATION OF THE MENTAL HEALTH REVIEW TRIBUNAL IN RESPECT OF FORENSIC PATIENTS

TERMS OF REFERENCE

A. Review Principles

A review will be undertaken in relation to the operation of the Mental Health Review Tribunal in respect of forensic patients. A key focus of the Review will be consideration of whether current law and current operational processes and procedures appropriately balance:

- community safety;
- the interests of victims and the families of such victims; and
- the care and treatment needs of forensic patients.

B. Terms of reference of the Review

The Review will consider and make such findings and recommendations for administrative, procedural or legislative change as it considers appropriate regarding:

1. whether decisions by the Mental Health Review Tribunal on leave and release in forensic cases strike an appropriate balance between the interests of community safety, victims (including the families of victims) and the care and treatment needs of forensic patients, having regard to matters including, but not limited to:
 - (a) the information available to the Tribunal and the method adopted to assess and determine questions of risk of harm (to victims and their families, to the community and to patients);
 - (b) the legislative test for leave and release in the *Mental Health (Forensic Provisions) Act 1990*, Tribunal interpretation of the test and similar tests relied on in comparable jurisdictions;
 - (c) the methods available for supervising forensic patients whilst on leave and release;
2. options to improve the engagement of victims with the Mental Health Review Tribunal, including in relation to information available to victims, the mechanisms for victims to be heard by the Tribunal when considering the leave or release of a forensic patient, and support services;
3. whether the policy objectives for prohibiting the publication of the name of any person in relation to a forensic matter before the Tribunal remain valid;
4. whether the criteria used to recruit members of the Mental Health Review Tribunal are appropriate.

C. Process of review

The Review will be undertaken by the Hon Anthony Whealy QC, a lawyer and former judicial officer with the significant experience and expertise required to undertake the Review (the Reviewer). The Reviewer will be provided with appropriate administrative support staff.

The Review will be conducted through:

- a public call for submissions to the Review that will remain open for 8 weeks;
- meetings or engagements with interested groups or individuals, including but not limited to consultation with representatives from victims groups, forensic patient groups and people with a lived experience of mental illness, carers, the medical profession and other health professions, law enforcement agencies and the legal profession.

The Review is not to investigate or make findings in relation to individual forensic patient cases or Tribunal decisions, but instead will assess and make recommendations for improvement in relation to broader forensic administration and appointment processes (including by having regard to the findings and decisions in individual cases and Tribunal decisions).

The Review is to report to the Minister for Mental Health and the Attorney General in December 2017.

APPENDIX 2

Steering Group Terms of Reference

Review of the operation of the Mental Health Review Tribunal in respect of forensic patients Steering Group - Terms of Reference

Background

- The Minister for Mental Health, the Hon Tanya Davies has requested a review of the operation of the Mental Health Review Tribunal in respect of forensic patients.
- A key focus of the Review will be consideration of whether current legislation and operational processes and procedures appropriately balance
 - community safety;
 - the interests of victims and the families of such victims; and
 - the care and treatment needs of forensic patients.
- The Hon Anthony Whealy QC has been appointed reviewer, responsible for leading the Review and providing expert advice and input to the Review process and approach.
- The Executive Director, Mental Health Branch, is responsible for the administration of the Review and ensuring that the Review delivers on the Terms of Reference.
- The Review will report to both the Minister for Mental Health and the Attorney General.

Functions

A Steering Group is being established to provide advice and input to the Review. This will include advice on Review process, approach, outcomes and deliverables. The Steering Group will also support cross-agency collaboration.

Responsibilities

The Steering Group will:

- Provide input to and support for the Review's overall approach, as articulated in the project plan, consultation plan, and other plans that may be produced.
- Provide ongoing input and advice across all deliverables identified in the project plan, to see that the Review delivers high quality outputs and outcomes, consistent with the agreed project plan.
- Support the identification of risks and issues, and the management of these throughout the Review.
- Provide support and a coordinated approach to the management of stakeholder engagement and communications.
- Report on progress to respective agencies/Ministers as appropriate.
- Provide input and advice on the draft and final reports, ahead of submission to the nominated Ministers.

Members

1. Dr Karin Lines, Executive Director, Mental Health Branch, Ministry of Health (Chair)
2. The Hon Anthony Whealy QC, Reviewer
3. Paul McKnight, Executive Director, Strategy and Policy Branch, Department of Justice

Participants

1. The Hon Judge Richard Cogswell SC, President, Mental Health Review Tribunal (where needed and without comprising the integrity of the review)
2. Damien Eggleton, A/Director Forensic Mental Health, Justice Health & Forensic Mental Health Network
3. Gemma Broderick, Senior Legal Officer, Legal and Regulatory Services, Ministry of Health

Secretariat

1. Claire McKendrick, Project Lead, Mental Health Branch
2. Policy Officer, Mental Health Branch

Proxies: Members and participants (representing agencies) are encouraged to nominate a proxy should they be unable to attend a scheduled meeting in person (or by teleconference).

Scheduled Meetings

The Steering Group will meet as required throughout the course of the Review. Given the tight Review timeframes, the project team may request input and advice from Steering Group members outside of scheduled meetings.



APPENDIX 3

Consultation Summary



Review of the Mental Health Review Tribunal (Tribunal) in respect of forensic patients

Consultation Summary

Over 120 stakeholders were consulted through face to face roundtables and site visits as part of the Review. The roundtables were an opportunity to engage and learn about people's experiences with the Tribunal and what improvements could be of benefit. As part of the consultation, 23 victims and their representatives attended two roundtables in Parramatta and Hornby.

These roundtables were attended by patients, victims, carers, representatives from victims' groups, forensic patient groups and people with a lived experience of mental illness, the medical profession and other health professions, law enforcement agencies, the legal profession, the Tribunal and academics.

A Discussion Paper was prepared to support these Roundtables. It provides information and commentary on each of the review's four main areas.

Site visits in August 2017.

23 August	<p>Site visit - Bunya Unit, Cumberland Hospital</p> <p>Meeting with clinicians and treating team</p> <p>A/Prof Beth Kotze, Director of Mental Health, Western Sydney Local Health District (WSLHD) Mr Charles McMillan, Director of Nursing, Mental Health, WSLHD Dr John Basson, Clinical Director, Bunya Unit, WSLHD Lee Stevens, Nursing Unit Manager, Bunya Unit, WSLHD Community Mental Health Service case managers (8, names redacted)</p> <p>Meeting with patients</p> <p>Forensic patients (7, names redacted)</p> <p>Site visit - Metropolitan Remand & Reception Centre (MRRC), Silverwater</p> <p>Mr Gary Forrest, Chief Executive, Justice Health & Forensic Mental Health Network (JHFMHN) Mr Chris Puplick, Chair, JHFMHN Board Mr Trevor Perry, A/Director Forensic Mental Health, JHFMHN Dr Gerald Chew, Clinical Director Custodial Mental Health, JHFMHN</p>
24 August	<p>Mental Health Review Tribunal Hearings, The Forensic Hospital – 2 patients</p> <p>Site visit - The Forensic Hospital, Malabar</p> <p>Meeting with Executive, clinicians and treating team</p> <p>Mr Chris Puplick, Chair, Justice Health and Forensic Mental Health Network (JHFMHN) Board Mr Gary Forrest, Chief Executive, JHMFHN Adj Prof Steven Bernardi, Executive Director, Clinical Operations, JHMFHN Mr Trevor Perry, A/Director Forensic Mental Health, JHFMHN Dr Tobias Mackinnon, Statewide Clinical Director Forensic Mental Health Mr Michael Sterry, Forensic Legal Officer Dr Adrian Keller, Clinical Director, Forensic and Long Bay Hospitals Mr Glen le Clerc, Acting Service Director, Forensic Hospital Ms Vindya Nanayakkara, Operations Manager CFMHS*</p>

	<p>Ms Hooma Mishra, Policy Manager, Justice Strategy & Policy, Department of Justice (DoJ) Ms Kavitha Selvakumar, Senior Policy Officer, Justice Strategy & Policy, DoJ</p> <p>Meeting with patients Forensic patients (20, names redacted)</p> <p>Site visit - Long Bay Hospital, Malabar Mr Chris Puplick, Chair, JHFMHN Board Mr Trevor Perry, A/Director Forensic Mental Health, JHFMHN Dr Tobias Mackinnon, Statewide Clinical Director Forensic Mental Health Mr Michael Sterry, Forensic Legal Officer Dr Adrian Keller, Clinical Director , Forensic and Long Bay Hospitals Ms Elizabeth Twomey, A/Operations Manager Long Bay Hospital</p>
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Consultations

9 August	<p>Mental Health Review Tribunal Judge Richard Cogswell SC, President, Mental Health Review Tribunal (MHRT) Ms Anina Johnson, Deputy President, MHRT Mr Rodney Brabin, Registrar, MHRT Ms Siobhan Mullany, Forensic Team Leader, MHRT</p>
6 September	<p>Victim Representatives Roundtable Ms Nicola O'Brien, Victim Support Specialist, Victims of Crime Assistance League Inc NSW Ms Catherine Rothery, Court Support Officer, Victims & Witnesses of Crime Court Support Ms Martha Jabour, Executive Director, Homicide Victims Support Group</p> <p>Clinical Roundtable Mr Damien Eggleton, A/Director Forensic Mental Health, Justice Health & Forensic Mental Health Network Dr Murray Wright, Chief Psychiatrist, Ministry of Health Mr Jason Crisp, Director Integrated Mental Health and Drug & Alcohol, Western NSW Local Health District Dr Nicholas Burns, Clinical Director Forensic Services, Western NSW Local Health District Dr Adrian Keller, Clinical Director Forensic and Long Bay Hospitals, Justice Health & Forensic Mental Health Network Conjoint A/Prof, John V Basson, Forensic Psychiatrist, Cumberland Hospital - Bunya Unit Dr Elizabeth McVie, Clinical Director Forensic Mental Health, Hunter-New England Local Health District (via teleconference)</p>

7 September	<p>Consumer, Carer & Advocacy Groups Roundtable</p> <p>Ms Catherine Lourey, Commissioner, Mental Health Commission of NSW Ms Irene Gallagher, Chief Executive Officer, Being Mr Robert Wheeler, Solicitor in Charge, Legal Aid NSW Ms Karen Lenihan, Principal Official Visitor, NSW Government Ms Michelle Everett, Program Manager for the Official Visitors Program Ms Caitlin Bambridge, Project Manager, Mental Health Carers NSW Ms Elena Katrakis, Chief Executive Officer, Carers Australia NSW</p> <p>Victim Representative Consultation</p> <p>Mr Howard Brown, Victim Representative</p> <p>Academic Roundtable</p> <p>Dr Arlie Loughnan, Associate Professor, Sydney Law School Dr Linda Steele, Senior Lecturer, UTS Law (Teleconference) – Study into S32 Diversion MH criminal Act Dr Leanne Dowse, Associated Professor/ Chair in Intellectual Disability Behaviour Support, UNSW Associate Professor Kimberlie Dean, Chair in Forensic Mental Health, UNSW Associate Professor Dan Howard SC, UNSW</p>
8 September	<p>Legal Sector Roundtable</p> <p>Mr David Jordan, Barrister, New South Wales Bar Association Mr Paul McKnight, Executive Director, Justice Strategy and Policy, Department of Justice Ms Hooma Mishra, Policy Manager, Department of Justice Ms Johanna Pheils, Deputy Solicitor for Public Prosecutions, Office of the Director of Public Prosecutions (DPP)</p> <p>Local Health District Mental Health Directors - 15 Attendees</p>
27 September	<p>Victims Services NSW Roundtable</p> <p>Ms Mahashini Krishna, Commissioner of Victim Rights, Victim Services NSW Ms Lauren Judge, Victim Services NSW Mr Alex Tilley, A/Senior Manager Client & Legal Services, Victim Services NSW</p> <p>Former President of the Tribunal Consultation</p> <p>Associate Professor Dan Howard SC, UNSW</p> <p>Attorney General Consultation</p> <p>The Hon Mark Speakman SC MP, Attorney General</p>

	<p>Tribunal Members Roundtable</p> <p>Dr Michael Giuffrida, Forensic Psychiatrist Mr Peter Hidden, Legal member Ms Meg Smith, Other member Ms Corinne Henderson, Other member Ms Diana Bell, Other member Ms Lynn Houlahan, Other member Ms Angela Karpin, Deputy President Mr John Laycock, Other member Mr Charles Doutney, Psychiatric member</p>
28 September	<p>Victim Roundtable (Parramatta)</p> <p>14 victim and 3 victim support person attendees (names redacted)</p> <p>Victim Roundtable (Hornsby)</p> <p>6 victim attendees (names redacted)</p>
19 October	<p>Queensland Health Victim Support Service</p> <p>Mr Michael Power, Director, Queensland Health Victim Support Service Ms Jan Rodwell, Manager, Policy, Systems and Compliance, Office of the Chief Psychiatrist, Mental Health Alcohol and Other Drugs Branch, Queensland Health Ms Leola Powell, Senior Policy Officer, Mental Health Alcohol and Other Drugs Branch Ms Grace Hur, Consultant, Legislation Reviewer</p>

Review of the Mental Health Review Tribunal (Tribunal) in respect of forensic patients

Submission Summary

A public call for submissions was advised as open from 28 August to 6 October 2017. A Discussion Paper was prepared to support submissions. It provides information and commentary on each of the review's four main areas. 74 submissions were received from:

- 18 registered victims and their families
- 14 patients and/or their families and carers
- 13 clinicians and health services
- 5 NSW Government agencies and a Parliamentary representative
- 24 other stakeholders [Individual, academics, peak bodies, NGOs, victim representatives]

Additional submissions are anticipated and will be accepted until 20 October 2017 (eight weeks from opening date).

- 51% of submissions were made via the consultation portal.
- 84% of submissions were from people/organisations residing in NSW.

Submissions

Registered victims, their families or representatives

1. Redacted - Registered Victim
2. Redacted - Registered Victim
3. Redacted - Registered Victim
4. Redacted - Registered Victim
5. Redacted - Registered Victim
6. Redacted - Registered Victim
7. Redacted - Registered Victim
8. Redacted - Registered Victim
9. Redacted - Registered Victim
10. Redacted - Registered Victim
11. Redacted - Registered Victim
12. Redacted - Registered Victim
13. Redacted - Registered Victim
14. Redacted - Registered Victim
15. Redacted - Registered Victim

- 16.Redacted - Registered Victim
- 17.Redacted - Registered Victim
- 18.Redacted - Victims family

Patients and/or their families and carers

- 19.Redacted - Forensic patient
- 20.Redacted - Forensic patient
- 21.Redacted - Forensic patient
- 22.Redacted - Forensic patient
- 23.Redacted - Forensic patient
- 24.Redacted - Forensic patient
- 25.Redacted - Forensic patient
- 26.Redacted - Forensic patients (on behalf of 25 patients)
- 27.Redacted - Forensic Patient Family
- 28.Redacted - Forensic Patient Family
- 29.Redacted - Forensic Patient Family
- 30.Redacted - Forensic Patient Family
- 31.Redacted - Forensic Patient Family
- 32.Redacted - Forensic Patient Family

Clinicians and health services

- 33.Northern Sydney Local Health District
- 34.Macquarie Forensic Unit, Bloomfield Hospital, WNSW LHD
- 35.Redacted - Individual - Clinical Director
- 36.Redacted - Individual - Health Services Manager
- 37.Redacted - Individual - Health Services Manager
- 38.Redacted - Individual - Health Services Manager
- 39.Redacted - Individual - Health Services Manager
- 40.Redacted - Individual - Health Services Manager
- 41.Redacted - Individual - Clinician
- 42.Redacted - Individual - Clinician
- 43.Redacted - Individual - Clinician
- 44.Redacted - Individual - Clinician
- 45.Redacted - Individual - Clinician

NSW Government & Parliament

46. Department of Family and Community Services, Community Justice Program
47. Shadow Minister for Mental Health, Member for Bankstown
48. Multicultural NSW
49. Office of the Director of Public Prosecutions (NSW)
50. Department of Justice

Organisations other stakeholders -Individual, academics, peak bodies, NGOs etc

51. Being
52. Carers NSW
53. Homicide Victims' Support Group (Australia) Inc.
54. Justice Action
55. Legal Aid NSW
56. Medical Services Committee of NSW
57. Mental Health Carers NSW
58. Mental Health Commission of NSW
59. Mental Health Coordinating Council
60. Mental Health Review Tribunal
61. Mental Health Tribunal Tasmania
62. School of Law, University of Sydney
63. Supreme Court of New South Wales
64. The Public Defenders
65. University of NSW
66. University of Technology
67. Victims & Witnesses of Crime Court Support Inc (VWCCS)
68. Victims of Crime Assistance League Inc NSW (VOCAL)
69. Redacted - Individual
70. Redacted - Individual - Academic
71. Redacted - Individual – Legal
72. Redacted - Individual - Tribunal Member
73. Redacted - Individual - Victims Representative
74. Redacted - Individual - Victims Representative



APPENDIX 4

Mental Health Review Tribunal Information for Victims
- fact sheet



Information for Victims



Mental Health
Review Tribunal

The Role of the Mental Health Review Tribunal

The Mental Health Review Tribunal was established under the *Mental Health Act 2007*. It has a wide range of responsibilities and can make orders about the treatment, care, detention and release of forensic patients.

A forensic patient is a person who the Court has:

- Found unfit to be tried for an offence and ordered to be detained in a correctional centre, mental health facility or other place (potential victims cannot register at this stage);
- Found not guilty by reason of mental illness or nominated a limiting term and ordered to be detained in a prison, hospital or other place
- Found not guilty by reason of mental illness and released into the community subject to conditions.

All forensic patients are reviewed by the Tribunal. The Tribunal may issue orders after a hearing in relation to the care, treatment, detention, leave or release.

The Forensic Patient Victim Register

The Tribunal maintains a Forensic Patient Victim Register. A person who is a victim of crime or a member of their immediate family can be registered. Registered victims can ask to be notified by the Tribunal about upcoming hearings, be told about the outcome of hearings, make submissions about certain kinds of restrictions or be contacted if a forensic patient escapes or the Tribunal issues an order for the apprehension of a conditionally released patient.

Eligibility to register as a victim

A person who is a victim of an act of violence or, in the case where the victim has died as a result of the act of violence, a member of the victim's immediate family is eligible to register on the Forensic Patient Victim Register.

The family members of the person who has died as a result of the act of violence who are able to register are:

- the victim's spouse
- de facto partner (including of the same sex) who has cohabited with the victim for at least 2 years
- parent, guardian, or step parent of the victim
- child or step child of the victim or some other child of whom the victim is the guardian
- brother, sister, half brother, half sister, step brother or step sister of the victim

When to register

The Tribunal will only register people as a victim after the Court process has been finalized. This means that a person could be registered after a patient is found not guilty by reason of mental illness or after the Court has set a Limiting Term(s).

Your rights

A registered victim can ask the Tribunal to tell him/her of the date of the next hearing, whether any changes to the arrangements for the patient are likely to be considered, if there is a request to release the patient or if the patient has escaped or failed to return from leave and the Tribunal has issued an order for apprehension.

A registered victim has the right to ask the Tribunal to put restrictions on the place where a patient can visit or live. This is usually done because the victim or their family lives or works in that area. A victim can also ask the Tribunal to order that a patient not contact them. There is only a need for these restrictions if the Tribunal is considering a request to give a patient leave or release.

Apart from these special rights victims are entitled to attend hearings and listen to proceedings in the same way as other members of the public.

You can decide how much you want to be involved in Tribunal hearings. You can:

- Ask the Tribunal to write to you before each hearing to tell you of the date of the hearing and whether any changes will be discussed.
- Ask the Tribunal to tell you the outcome of the hearing.
- Write to the Tribunal if you do not want the patient to visit or live in an area, or contact victims or members of the victim's family.

- Attend the Tribunal hearing (usually by a video link from the Tribunal's buildings in Gladesville).
- Ask that a representative attend the hearing on your behalf.

You will stop being a registered victim when the forensic patient has been:

- unconditionally released or
- when the forensic patient's Limiting Term has expired (whichever comes first) or
- you ask to be removed from the register.

The Charter of Victims Rights under the *Victim's Rights and Support Act 2013* sets out the rights of a victim. In particular, 6.15 of the charter states that:

A victim will, on request, be kept informed of the offender's impending release or escape from custody, or of any change in security classification that results in the offender being eligible for unescorted absence from custody.

How to be involved in the Tribunal's decisions

If you are a registered victim, you can be sent a letter that tells you of the date of the hearing. The letter will say if a change is being requested. Some registered victims find this distressing and choose to only be notified when a change to the conditions of detention is being requested.

If you would like the Tribunal to make an order restricting the patient from visiting or living in certain places, you can write to the Tribunal and your letter will be read by the Tribunal members. It may also be shown to the patient and/or their lawyer. If you do not want this to happen, you should say so in your letter. You can ask that your first letter be considered at each hearing, or write a new letter before each hearing.

If you would like to attend the Tribunal's hearing, it is best if you let the Tribunal know first. As many of the Tribunal's hearings are in secure facilities (prisons or hospitals) the easiest way to participate in a hearing is to be linked in by phone or video from the Tribunal in Gladesville.

If you come to the hearing, and if you are asking the Tribunal to make restrictions, you may be asked to say something extra in the Tribunal hearing.

If you knew the forensic patient before the offence occurred, you may be able to give the Tribunal information that is relevant to the Tribunal's decision about the patient's care, treatment or detention. If you have information of this kind, it is best if it is provided to the Tribunal in writing before the hearing. In the interests of procedural fairness, the information will be provided to the patient's lawyer. It may be necessary to disclose the information to the patient's treating team. The information can be deidentified if you have concerns about disclosing the information. These concerns should also be explained in the letter to the Tribunal.

Otherwise, under the *Mental Health Act*, you are only allowed to listen to or watch the hearing.

It is possible that the Tribunal will be asked to exclude all members of the public from certain parts of the hearing. In that case, the video-link may be put on mute, or you will be asked to leave the hearing room.

Some victims find it easier if they are supported by a victims' support group. Details of these groups are at the end of this document. Some people prefer that the support person attends the hearing as their representative and then tells them what happened at the hearing.

Applications before the Tribunal

The Tribunal is responsible for deciding:

- where a forensic patient should be detained,
- whether the patient can have any leave from the hospital (ie go outside of the hospital),
- if a patient is ready to be released into the community with conditions,
- if a patient is ready to be unconditionally released (so that they are completely free to resume their life in the community without conditions).

The Tribunal will be told in advance if the treating team or the patient is requesting a change to the arrangements for a patient. The Tribunal will then notify you, if you are a registered victim and have asked to be advised about this.

Types of Leave

Escorted Day Leave

When the patient is transferred to another facility, he/she may at first not be allowed to leave the hospital. Leave may at first be restricted to the grounds of the hospital under the direct supervision by one or more staff. Leave is then gradually increased.

Supervised Day Leave

The forensic patient is allowed to leave the hospital in the trust of a person, usually a family member or a friend, who has been approved by the treating team as having the necessary understanding of how to look for and to respond to triggers that might mean the patient is becoming unwell. This type of leave allows the patient to exercise leave outside the hospital grounds and is gradually increased over time.

Supervised Overnight Leave

The forensic patient is allowed to leave the hospital in the trust of a person, usually a family member or a friend, who has been approved by the treating team as having the necessary understanding of how to look for and to respond to triggers that might mean the patient is becoming unwell. This type of leave allows the patient to exercise leave outside the hospital grounds and to stay in a house overnight.

Unsupervised Day Leave

In most cases this is the next step after supervised day leave and supervised overnight leave. It may be granted with a geographical restriction and/or non association clause which means the patient is not to contact you or come to your area. This type of leave is often allowed so the patient can attend programs for rehabilitation and education which are not available within the hospital grounds.

Unsupervised Overnight Leave

The forensic patient is initially introduced to one or more overnight stays in accommodation where he/she may be taking up a permanent residence when it is time to return to the community. This may be increased. It is usually in the care of a family member or friend or an approved residential facility.

Assessment for Leave

When hearing an application for leave, the Tribunal must consider the risk to the safety of the greater community and the forensic patient. It does this by scrutinizing the treating team's assessment of risk which is done by means of tests and other clinical tools, and testing the evidence at a hearing.

The Tribunal also considers any requests for geographical restriction and non association from registered victims.

On any particular day, leave will only be allowed if the patient has been assessed by staff of the hospital to be well enough on that day. All leave is subject to the conditions and restrictions that apply to the individual forensic patient's circumstances including time, place or other conditions imposed by the Medical Superintendent.

Leave is closely monitored on an ongoing basis by the treating team and the forensic patient may need to be tested for alcohol and drug use when returning to hospital.

Conditional/unconditional release

Conditional Release

When a patient no longer needs to be kept in the kind of restrictive environment that is offered by a hospital, the patient can be conditionally released.

The forensic patient is no longer held in a locked environment and is living in the community. He/she may be managed by a community mental health team.

Before an order for conditional release is made, there is an independent risk assessment required by the Tribunal.

The Tribunal will include a number of conditions in the order for conditional release and the forensic patient must obey these. These conditions could include restrictions on where the patient can live or visit, and restrictions on contacting people.

Unconditional Release

When the patient is ready to safely live in the community without any restrictions, the patient can be unconditionally released.

The person is no longer a forensic patient and is not required to obey any conditions imposed by the Tribunal. Tribunal hearings will no longer be held and the person resumes independent living. Before an order for unconditional release is made, there is an independent risk assessment is required and must be considered by the Tribunal.

When a forensic patient is unconditionally released, you are no longer a registered victim.

Mental Health Facilities Locations

Forensic patients who are detained in a hospital are usually housed in one of these hospitals (high and medium secure facilities are discussed later in this document):

Long Bay Hospital is a maximum security facility jointly managed by Corrective Services NSW and Justice Health. It is located within the grounds of Long Bay Correctional Centre.

The **Forensic Hospital** is located on Anzac Parade at Malabar. It is a high security facility managed by Justice Health.

The **Bunya Unit** at Cumberland Hospital is located in Parramatta. It has medium secure facility.

The **Kestrel Unit** at Morisset Hospital in Morisset is also a medium secure facility.

The **Macquarie Unit** at Bloomfield Hospital in Orange is a medium secure facility.

The **Macquarie Hospital** at Ryde is a medium secure facility.

The **Concord Centre for Mental Health** is a low secure facility.

Frequently Asked Questions

What the Tribunal can do

- Advise registered victims of the general pathway for forensic patients
- Make an order for the forensic patient's transfer to another facility with leave
- Make an order for the forensic patient's conditional release
- Make an order for the forensic patient's unconditional release
- Consider applications for non association and the forensic patient's geographical restriction when the forensic patient is to exercise leave or be conditionally released.

What the Tribunal can't do

- The Tribunal cannot provide legal advice to you or to the treating team
- The Tribunal cannot change a Court's ruling
- The Tribunal cannot provide information to registered victims about medical treatment
- The Tribunal cannot provide information about exact details of the address where leave is to be exercised

How do I register?

Forensic Patient Victim Registration Forms can be found on the Mental Health Review Tribunal's website at: www.mhrt.nsw.gov.au or you may wish to contact the Forensic Division on (02) 9816 5955. Tribunal contacts are listed at the end of this document.

When filling out the form you will need to tell the Tribunal how much you want to be involved in tribunal hearings and what things you want to be informed about.

I received a letter, what should I expect to happen at a hearing?

The Tribunal will send a letter advising of a proposed date with a time to be advised. The letter will tell you the nature of the application for consideration. When you receive your letter, you will

need to contact the Tribunal to let us know if you will be making a submission and whether you would like to attend the hearing. The Tribunal will send another letter after the hearing to officially let you know the result of the hearing.

If you have chosen to attend the hearing, you should remember that hearings may run later or earlier than scheduled. It is best that you arrive fifteen minutes before the scheduled time and be prepared for possible delays. If you are attending by video-link from Gladesville, a staff member from the Tribunal will sit with you and arrange for you to be linked in by video to the place where the hearing is being held.

Hearings are recorded. Registered Victims attending a hearing are expected to remain quiet unless asked a question by the person chairing the hearing.

Do I need to attend hearings?

You do not need to attend hearings. You can ask that any letter you write requesting restrictions be considered at each review hearing. You will still be informed about what orders were made at the hearing. The Tribunal can let you know of the outcome of a hearing. You need to let the Tribunal know which hearings you want to be told about.

What are my rights?

Registered victims' rights are discussed above. They are also set out in the Charter of Victims Rights under the *Victims Rights Act 1996*. Your rights before the Tribunal are limited to submissions for non association and geographical restriction where leave or release is requested. However, the Tribunal can also take into account relevant information that you may have about the forensic patient's behaviour before the offence.

Do I see the forensic patient and does the forensic patient see me?

The patient cannot see you but can hear you. The three panel members will see you and announce that you are at the hearing. All efforts are made during the hearing to stop registered victims being in view of the forensic patient. But there are limitations in the facilities and equipment at places where the hearings are held and this may not always be possible.

I want to register but don't want the forensic patient to know

The Tribunal understands that in many cases registered victims can be close family members of the forensic patients. The Tribunal is aware that in some cases family members are supportive of the forensic patient receiving appropriate care and treatment but at the same time do not wish to let go of their role as a registered victim. The Tribunal can help by ensuring that any identifying details are blacked in written submissions.

How long before the forensic patient is released?

People who have been found not guilty by reason of mental illness will continue to be forensic patients up until they are unconditionally released. The length of time varies depending on how each patient responds to treatment and rehabilitation. The length of time can vary from a few years to never being unconditionally released. A person on a limiting term will be released from the forensic order at the end of their limiting term unless released earlier by the Tribunal.

I received a letter notifying that the forensic patient is to be transferred to another facility with escorted day leave, supervised day leave or supervised overnight leave. What does this mean?

This means that the team responsible for treating the forensic patient have applied to the Tribunal for the patient to move to another hospital or facility and to have access to some level of leave.

When an application for transfer and leave is made, the most important consideration for the Tribunal is the analysis of risk to the safety of the community and to the patient. Risk assessment tools are used by qualified forensic clinicians to assess the level of risk and to address other factors that may contribute to the forensic patient's potential for destabilization.

The Tribunal will not approve any leave unless it has considered the safety of the community and the forensic patient.

What do the terms high security and medium security mean?

High security

As a general rule this means that the forensic patient does not have access to leave outside of the perimeter walls except for emergency leave. The Medical Superintendent of a mental health facility can issue leave for emergency medical appointments or other emergency subject to assessment.

Where the forensic patient is detained in a prison, that patient is subject to the security conditions agreed between the Director-General of the Ministry for Health and the Commissioner of Corrective Services or the Department of Juvenile Justice.

Medium security

A medium secure facility is a locked facility within a hospital. The forensic patient may be given various forms of leave, to allow him/her access to the grounds or the community outside. The facility may include a closed ward environment where entry and exit is prohibited for patients and limited to authorised visitors only.

I fear for my safety and the safety of my family, I don't want him/her released, is there anything I can do?

Registered victims who have concerns about their safety can make a submission to the Tribunal requesting that a non association clause and geographical restriction be considered for the periods the forensic patient is on leave or while on release. This means that the patient is not allowed to contact you or enter the area you live in. If you have immediate concerns for your safety you should contact the Police.

Where is the forensic patient? I want to know where he/she is located? Can I have a photograph?

The Tribunal is not allowed to tell you the location or address of a forensic patient, or provide you with personal information about the patient. It can only tell you that the person is being detained in a prison or a hospital.

I want to know what treatment he/she is receiving and I want to see medical reports.

The Tribunal is not allowed to give you any information about the forensic patient's medical treatment or history.

What happens if the forensic patient does not comply with the conditions of the Tribunal order?

If a forensic patient who has been granted leave does not comply with the conditions of the order, that leave may be suspended. Leave can restart when the patient is better. If a patient has become very unwell, the patient may be transferred to another hospital for treatment.

What happens if the forensic patient absconds or breaches the conditions of release?

Where a forensic patient has escaped or has continuously not obeyed the conditions of a Tribunal order, the Tribunal will issue an order that will authorize police to return the patient to a hospital or prison.

You can tick the box on the registration form to say that you wish to be told when a patient escapes or absconds. If you have ticked this box, the Tribunal will contact you if the patient has escaped from the facility, or the patient has not returned to the facility as required and the Tribunal has issued an order for the patient to be apprehended.

The Tribunal will then hold a review to find out why the patient has not followed the conditions of the order and may make an order after the hearing as to where the patient should be held or should continue to live.

I oppose the transfer and/or leave, how can I appeal this decision

Tribunal decisions can be appealed to the Supreme Court. However, registered victims can only appeal the Tribunal's decision regarding non association and geographical restriction.

Tribunal contacts

Principal Forensic Officer – Community Team

Principal Forensic Officer – Correctional Team

Forensic, Team Leader

Tel: (02) 9816 5955

Fax: (02) 9879 6811

Email:

mhrforensic@doh.health.nsw.gov.au

Postal Address:

Mental Health Review Tribunal

PO Box 2019

BORONIA PARK NSW 2111

Other useful contacts

- **Victims of Crime Assistance League (VoCAL)** (02) 4961 4755
www.vocal.org.au
- **Homicide Victims' Support Group (HVSG)** (02) 8833 8400
www.hvsgnsw.org.au
- **Victims' Services at Ministry of Justice** (02) 8688 5511
www.lawlink.nsw.gov.au/vs
- **Enough is Enough** (02) 9542 4029
www.enoughisenough.org.au
- **Police Assistance Line** 131 444



APPENDIX 5

Academic report to support the review



Review of the Operation of the Mental Health Review Tribunal in respect of Forensic Patients

An academic report to support the review

A report for NSW Health

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Summary

The New South Wales Mental Health Review Tribunal (NSW MHRT) has responsibility for detention, leave and release decisions with regard to a subgroup of mentally disordered offenders called Forensic Patients, the majority of whom have been found Not Guilty by Reason of Mental Illness (NGMI) at court. The NSW Minister for Mental Health has ordered a review of the NSW MHRT with regard to Forensic Patients and the following academic report is intended to support that review, particularly in relation to two of the four Terms of Reference for the review – the appropriateness of leave and release decisions, and the possibilities for improving victim engagement. The Report provides a background to the issues, an overview of the relevant local, national and international published literature, and a summary of preliminary results from analysis of the Forensic Patient Database. While there are many jurisdictions, particularly in the UK, Europe and North America which have similar bodies with responsibility for a similar patients group, there are significant differences between jurisdictions in terms of legislative provisions, policies and practices, and forensic mental health services arrangements that make comparisons and generalisations to our local situation difficult. In addition, many of the key research questions relevant to the Review have not been systematically addressed in the international literature to date. Despite these limitations, there has been considerable research, particularly in the UK, with regard to outcomes, particularly reoffending outcomes, for those forensic patients released conditionally or unconditionally from secure care back into the community. Further research is needed to inform the work of Mental Health Review Tribunals with regard to forensic patients and locally in NSW, the Forensic Patient Database has the potential to provide data for such research in the future.

Terms of reference for The Review

The Minister for Mental Health has requested NSW Health review the operation of the Mental Health Review Tribunal regarding forensic patients. The Review's Terms of Reference focus on four key areas:

- Do current law and operational processes and procedures of the Tribunal regarding leave and release decisions appropriately balance community safety, interest of victims, and the care and treatment needs of forensic patients?
- Are there options that can improve victim engagement with the Tribunal?
- Do the policy objectives prohibiting the publication of the name of any person in relation to a matter before the Tribunal remain valid?
- Are the criteria used to recruit members of the Tribunal appropriate?

Description of approach taken to The Report

This Report is intended to provide a summary of the academic literature relevant to the Review. The Report will focus on a review of the current academic literature in the field of forensic mental health to address the first two questions detailed in the Terms of Reference above. The Report is not, however, a formal systematic review of all relevant literature, nor is it a comprehensive review of the functioning and outcomes of MHRTs in other jurisdictions except where these have been the subject of formal and published research, and, finally, it is not a review of legislative frameworks.

1. Background to the report

1.1. NSW Mental Health Review Tribunal (NSW MHRT)

The NSW Mental Health Review Tribunal (NSW MHRT) is an independent quasi-judicial body established under the *Mental Health Act 2007*. One of its responsibilities includes making orders for the detention, leave and release of Forensic Patients under another piece of NSW legislation, the *Mental Health (Forensic Provisions) Act 1990*, the MHFPA (see 1.2 for description of Forensic Patients).

As the recently updated Forensic Guidelines produced by the NSW MHRT describe, the NSW MHRT conducts regular reviews or hearings of Forensic Patients to make decisions about detention, leave and release, and to review care and treatment.⁽¹⁾ These reviews are typically undertaken every six months. The NSW MHRT powers under sections 46 and 47 of the MHFPA are very broad with regard to the reviews conducted. It also has the power to make recommendations under section 76(A), a power used to formally highlight issues of concern where necessary.

In certain circumstances, the NSW MHRT also has to consider specific statutory issues during a review hearing – e.g. when a court finds an individual to be unfit to stand trial, the NSW MHRT must determine whether on the balance of probabilities if it is likely that the person will become fit to be tried in the following 12 months (section 16).

1.2. Forensic patients and mentally disordered offenders

Those persons in contact with the criminal justice system are well known to have high rates of mental illness, including severe mental illnesses such as schizophrenia.⁽²⁾ A systematic review of prison studies across 24 countries revealed a pooled prevalence of psychosis of

3.6% (95% CI 3.1–4.2) in male prisoners and 3.9% (95% CI 2.7–5.0) in female prisoners; the pooled prevalence of depression was found to be 10.2% (95% CI 8.8–11.7) in male prisoners and 14.1% (95% CI 10.2–18.1) in female prisoners. In NSW, the prevalence of mental illness found amongst prisoners has also been established to be much higher than in the general population.⁽³⁾ This burden of mental illness amongst those in contact with the criminal justice system has led to the development of diversionary programs and services, particularly at courts but also at police stations and in prison. The aim of diversion is to identify those mentally disordered offenders who are in need of treatment and facilitate their access to mental health services. A sub-group of mentally disordered offenders who have typically committed serious violent offences and have severe mental illnesses such as schizophrenia may be considered unfit to plead or stand trial by the court if they are unwell during the initial legal process that follows a serious charge being made. Those determined to be sufficiently mentally unwell at the time of the alleged offence may also be found Not Guilty by Reason of Mental Illness (NGMI), although the specific term used varies between jurisdictions. Those found unfit and those found NGMI form the sub-group of mentally disordered offenders typically managed by forensic mental health services. In jurisdictions outside NSW, including the UK, another group of prisoners (on remand or sentenced) who become mentally ill and require treatment (termed correctional patients in NSW) are also typically transferred out of prison and treated by forensic mental health services in secure settings. Although NSW legislation supports similar treatment of correctional patients it is not common in practice for such patients to be transferred out of prison to secure hospitals for treatment.

1.2.1. Terminology

It is very important to clarify what is meant by the term ‘forensic patient’ as used in this report since use of the term varies internationally. In many jurisdictions, including the UK where the origins of medico-legal concepts relevant to the NSW context today originate (see 1.2.3.), ‘forensic patient’ is a term commonly used to refer to any mentally disordered offender; that is any person who has engaged in offending behaviour or is at risk of doing so

and also has mental health problems. Such individuals may or may not be in contact with the criminal justice system and are not necessarily specifically defined by any legislation. They may be in contact with forensic mental health services, including inpatient secure care.

As a result of the local legal and health service arrangements in NSW, the term is used more specifically to refer to those deemed to be forensic patients under the *Mental Health (Forensic Provisions) Act 1990*, which includes the following three groups of people with mental or cognitive impairment (1):

- Those who have been accused of committing a crime and have been refused bail after having been found unfit to be tried, or
- Those who have been found unfit to be tried, had a special hearing, found to have committed one or more offence(s) and been ordered to be detained for not longer than a 'limiting term' nominated by the court, or
- Those who have been found not guilty by reason of mental illness of one or more offence(s) after a trial or special hearing, and either detained or conditionally released (NGMI patients)

The Report will use the term Forensic Patients (capitalised with intention) to refer to this specific group defined in NSW. It should be noted that the majority of Forensic Patients in NSW belong to the third category (NGMI), although many NGMI patients have been found unfit at some point during their contact with the criminal justice system. The review of the literature contained in the Report will, however, refer to research involving forensic patients in other jurisdictions where the term may be used more generally but where the research is still of relevance to Forensic Patients in NSW.

The report will also use the term 'Mental Health Review Tribunal (MHRT)' to refer to such bodies in general, and the 'NSW Mental Health Review Tribunal (NSW MHRT)' to refer to the specific local MHRT body.

1.2.2. A brief history of the NGMI defence

Not surprisingly, legislative and case law developments in NSW and the other Australian states and Territories have their origins in, and continue to be influenced by, English law. Offenders with mental illness have long been treated differently under the law in many contexts throughout history, typically with recognition that abnormal mental functioning should be considered to limit criminal responsibility in certain circumstances.(4) In England this notion dates back in legal history to at least the 13th century but the pivotal case, which is still at the heart of many of the legal tests for the defence of insanity, is the case of Daniel McNaughton in 1843. McNaughton was acquitted of murder, having attempted to shoot the English Prime Minister, and his acquittal led to guidance regarding the legal test for insanity being issued by the Law Lords. The so-called ‘McNaughton Rules’ (see Box below) still determine the application of the insanity defence in the UK today, and have strongly influenced legislation and case law in many other jurisdictions, including in Australia. Our own NGMI defence detailed in the *Mental Health (Forensic Provisions) Act 1990* relies on the McNaughton Rules.

McNaughton Rules (1843)

At the time of committing the act, the offender must be proven to have been suffering such a defect of reason, from disease of the mind, that:

- He did not know the nature or quality of his act or
- He did not know that what he was doing was wrong

While the McNaughton Rules form the basis of the legal test for the full defence of insanity (not guilty by reason of insanity/mental illness; or guilty but insane/mentally ill) in many jurisdictions including NSW, local developments in case law and local circumstances have altered the interpretations, applications, and outcomes of the defence. In England, for example, the defence is rarely used, to some extent because there exist other legal options for forensic patients and the test is perceived to be too restrictive in comparison. Diversion

from the criminal justice system to the mental health system is available at higher as well as local courts in England, with the test for a hospital detention disposal being analogous to the civil application of mental health legislation in that country and not being restricted to only those sufficiently unwell at the time of the offence to meet the M'Naughton Rules. There is also a partial defence of diminished responsibility due to mental illness available to those charged with homicide, the legal test for which is also less restrictive than that for insanity. In other jurisdictions, including NSW, where diversion at higher courts is unavailable, the insanity defence is used more frequently and, interestingly, both case law and legislative provisions have changed over time to broaden the applicability of the M'Naughton Rules. In practice, this means that the majority of cases meeting the standard for an NGMI defence in NSW would not meet the standard for an insanity defence in the UK. These historical and jurisdictional differences make comparisons of the use of the defence between jurisdictions and over time very difficult.

1.2.3. Mental Health Review Tribunal models

Bodies such as the NSW MHRT exist for similar purposes in many, particularly Western jurisdictions, including the UK, Ireland, Canada, Japan and New Zealand. In other European countries, involuntary detention to hospital for mental health treatment (not only of forensic patients) is typically reviewed by a judge rather than MHRT, while in the US, hearings are held before a court. The specific functions and processes of each MHRT or equivalent body also vary between countries and even between states in Australia.

With regard specifically to forensic patients, approaches also vary. In the UK, for example, MHRTs (renamed First-Tier Tribunals in 2008) have the power to uphold the detention of a patient or direct their discharge, with the legal test focused on the lawful basis of detention (under the Mental Health Act 1983). Many forensic patients detained in secure hospital facilities in the UK will be treated in a legal sense by the MHRT no differently from other 'civil patients', while a subgroup of forensic patients referred to as 'restricted patients' can be discharged by the MHRT either conditionally or absolutely. Restricted patients are those

who have been detained under a hospital order at the time of sentencing at court and have been held on restriction orders due to the risk they are deemed to pose to the public, a group perhaps most equivalent to Forensic Patients in NSW. As a result of the legal provision for a hospital order (with or without restriction order) to be imposed instead of a sentence at crown courts in the UK and the availability of a guilty plea for manslaughter on the grounds of diminished responsibility, the use of the full defence of Not Guilty by Reason of Insanity, is used rarely in the UK, compared to other Western jurisdictions. It is also true in a number of jurisdictions, particularly historically, that the powers typically exercised an independent MHRT in relation to forensic patients are rather held by the relevant Government Minister. In NSW, for example, the MHRT was granted powers to make unconditional release decisions for forensic patients only in 2007.

2. Leave and release decisions

Leave beyond the boundaries of the facility where a Forensic Patient is detained requires formal approval by the NSW MHRT (except in the case of medical emergencies). Leave is typically granted in a step-wise manner, testing the safety and success of any leave plan at each step before progressing to the next. Three levels of leave are typically allowed: escorted day leave (where the Forensic Patient is escorted by a staff member outside the detention facility), supervised day leave (where the patient is supervised by a responsible and appropriate adult approved by the treating team; supervised overnight leave is also possible), and unsupervised day or overnight leave. The NSW MHRT often sets further limits and conditions on approved leave, tailored to the individual circumstances. Such limits or conditions might include, for example, restrictions as to the locations beyond facility that can be visited and for how long, a condition that the patient remain abstinent from alcohol and illicit substances and that they will submit to formal testing for such use on return from leave. Once approved, the provision of leave is then at the discretion of the Medical Superintendent of the detention facility.

With regard to release from detention, the NSW MHRT must be satisfied that the safety of the individual and the public would not be seriously endangered. The NSW MHRT can approve two types of release from the detention facility:

- Conditional release: where a Forensic Patient is able to reside in the community but only under specified conditions (e.g. place of residence, abstinence from alcohol and illicit substances, attendance at clinical appointments, avoidance of particular locations and/or individuals, compliance with prescribed medication)
- Unconditional release: where a Forensic Patient is no longer deemed to be a Forensic Patient and is no longer under the control and monitoring of the NSW MHRT

2.1. Research exploring decision-making by mental health tribunals

There is a limited but expanding body of research focused on an exploration of the decision making of mental health review tribunals, including with regard to leave and release decisions for forensic patients. In 2014, a broad systematic review of the qualitative and quantitative literature dealing with mental health review tribunals identified 50 papers.⁽⁵⁾ The majority of papers came from the UK (70%; N.B. 7 came from Australia), just over half were quantitative in design and just under half relied on an analysis of patient records. The decision-making of the MHRT was the focus of just over one-third of studies. Following a synthesis of the literature, 11 distinct themes emerged: prominence of extra-legal factors, dominance of health context, role of the psychiatric member, inadequate preparation of clinicians, importance of dangerousness and risk, going beyond jurisdictional limits, marginalization of lay members, experiences of powerlessness, enhancing therapeutic outcomes, inadequate legal representation, and the future of the tribunal system. Although the role of the MHRT in relation to forensic patients was not specifically considered in this review, the emergent themes are clearly of potential relevance to this context.

2.1.1. Quantitative research & the role of evidence-based risk assessment

Prior to the development of the structured evidence-based tools for assessing violence risk (e.g. the HCR-20) that are now commonly used by forensic mental health clinicians, research has focused mainly on the static or historical factors (e.g. demographic factors, past behavior including the nature of the index offence) associated with MHRT decisions and often without separating civil from forensic groups.

One recent study in the UK investigated predictors, including both historical static (including the nature of the index offence) and dynamic clinical factors, of MHRT outcomes in a forensic inpatient population (6). Over a two-year period, 79 patients were reviewed at a MHRT hearing and 35% were released (including conditional release). Among a range of measured factors prior to the hearing, violence risk assessment clinical scale scores

(measuring the current/recent dynamic risk factors for violence) using the HCR-20 tool commonly used by clinicians in forensic mental health settings and the occurrence of actual or attempted violence during the previous 12 months were the only independent predictors of MHRT release decisions in this study (both variables being predictive of a decision not to discharge).

Consistent with the recent UK study, a number of more recent studies have considered whether violence risk assessment tools might aid MHRT decision-making regarding forensic patients given the importance of considering risk to the public when such decisions are made. The use of structured tools which consider both dynamic clinical and historical risk factors for violence are now commonplace in forensic mental health services, including in NSW where they often inform the reports submitted by clinicians to the NSW MHRT. The presentation of violence risk assessments to MHRT panels and the way in which they are used by panels is, however, inconsistent and unclear. A series of Canadian studies have investigated the correlates of detain or release decisions by Canadian Review Boards with jurisdiction for individuals found Not Criminally Responsible on account of Mental Disorder (NCRMD) and, in particular, the extent to which decisions correlate with historical or dynamic risk factors. The latter rather than the former were found to be most strongly correlated with detain or release decisions which the authors regarded as appropriate given the legal tests to be applied and the need to focus on factors which could be the focus of intervention (i.e. dynamic).(7) In 2014, the same research group have summarized the international literature with regard to what is known about review board (MHRT) decision-making by highlighted four points: there is little evidence of consistency with regard to variables considered across studies, there is considerable variability in decision-making across settings and jurisdictions, the most salient variables in the disposition determinations sometimes have little empirical support while empirically supported variables can be overlooked, and structured risk assessment tools are insufficiently integrated into the processes.(8)

While the literature is clearly limited and jurisdictional practice and legislative provisions vary to such an extent that generalization is difficult, there is some emerging evidence to

suggest that MHRT decisions are influenced more by recent dynamic risk factors than historical static risk factors, which authors in the field to date largely regard as appropriate. The other point that is made clear by research to date is that there is often little formal structure or transparency to the way in which different case factors are presented to MHRT panels and to the way in which those factors are considered by the MHRT panels in making their decisions. Given the widespread use of Structured Professional Judgment risk assessment tools intended to aid clinicians assess and manage risk of violence (e.g. the HCR-20), there may be a specific need to consider how these tools are used in clinician reports presented to panels and how the results of the tools are interpreted and considered by panel members.

2.2. Research exploring reoffending rates amongst released forensic patients

Although, as noted earlier, there are many differences between jurisdictions internationally and nationally that make generalisations difficult (i.e. differences in definitions of forensic patients, differences in health and legal systems, etc), there have been a number of studies published in the peer-reviewed literature in recent years attempting to examine rates of reoffending in forensic patients following release into the community from secure care. Reoffending is not, of course, the only factor to consider when evaluating the outcomes of tribunal decisions or the outcomes of forensic mental health care, but it is an important one. Forensic patients have typically committed serious, usually violent, offences and management of their future risk of violence and reoffending is an important component of their forensic mental health care and of importance to the decisions made by MHRT panels. Reoffending rates in the community following release is also one of the key ways in which the outcome of criminal justice system interventions, including imprisonment, is judged.

2.2.1. Recent systematic review and meta-analysis

In 2016, Fazel et al (9) published an important systematic review and meta-analysis of patient outcomes following discharge from secure psychiatric hospitals. Searching across 11 computer-based literature indexes up until March 2013, they identified 35 studies from 10 countries. Importantly, they considered reoffending as an outcome of release but they also examined mortality rates, suicide rates, and readmission rates. For inclusion in the review, studies had to involve follow-up of patients discharged from a secure hospital (high, medium or low security) and had to provide sufficient quantitative information to be included in the meta-analysis. The authors also considered a number of possible comparison groups (community psychiatric patients, prisoners and forensic patients sentenced to community-based interventions). The total sample included 12,056 patients (75% male) with a mean age of 34.5 years and an average length of admission of 3 years. The majority

of studies were from England and Wales (18 investigations). The period of follow-up after discharge ranged from 1.5 to 13.6 years for the reoffending analysis.

With regard to reoffending following discharge, 30 papers reported criminal outcomes with crude reoffending rates ranging from 0 to 24,244 per 100,000 person-years. The pooled estimate across studies was 4,484 repeat offences per 100,000 person-years (95% CI 3,679-5,287) (see figure below from the Fazel et al paper summarising the reoffending findings).

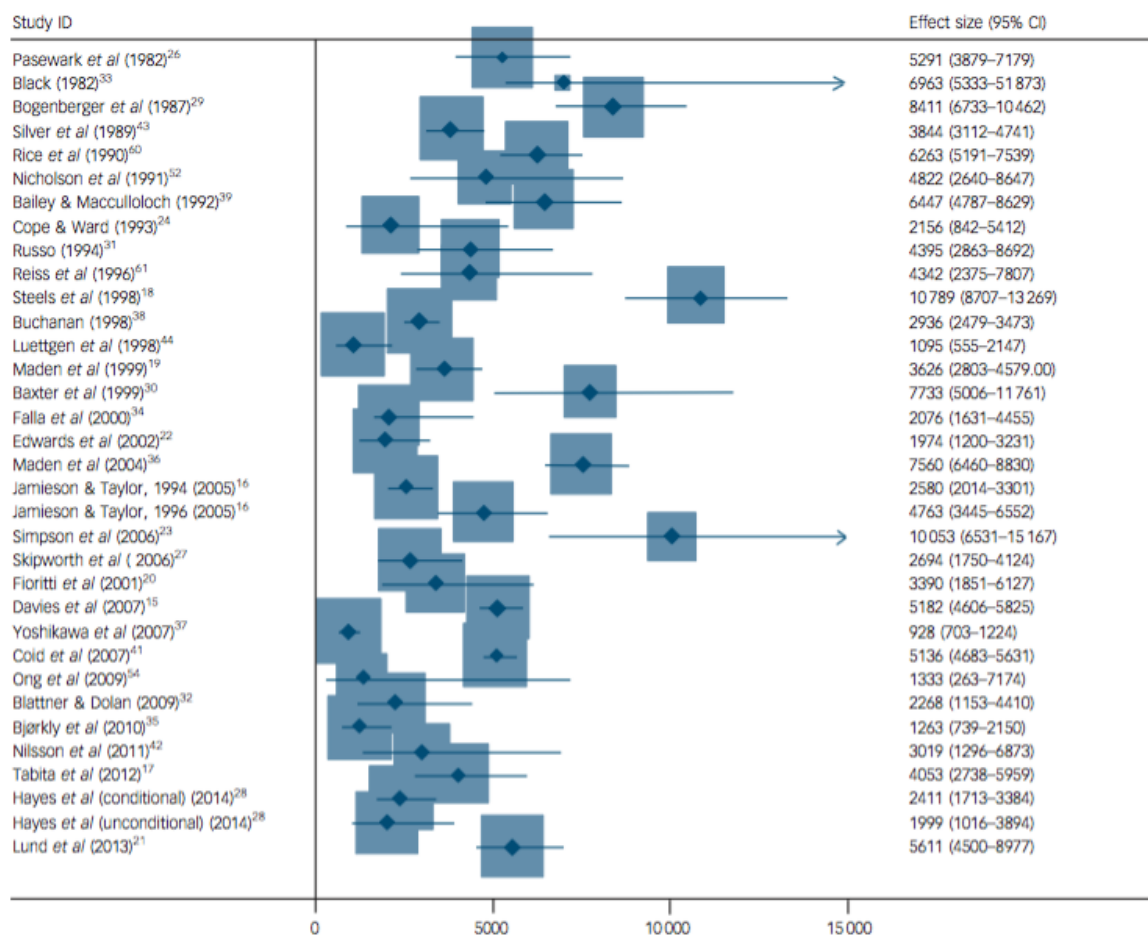


Fig. 3 Repeat offending rates for discharged forensic patients per 100 000 person-years.

Weights are from random-effects analysis. The two outliers (combined no. reoffenders = 6) are not shown.

The authors identified substantial heterogeneity across studies, partly explained by the higher rates reported by earlier studies, but did not find evidence that study findings differed due to differences in the age of patients, geographical region, type of index offence, duration of admission, Mental Health Act status or history of in-patient treatment.

Ten studies reported reoffending rates for comparison populations (released prisoners, offenders with personality disorder, mentally disordered offenders and offenders with mental illness). Rates for these comparison populations ranged from 4,535 to 36,964 repeat offences per 100,000 person years, and all were higher than the reoffending rate reported for the forensic patient sample in each of the studies.

Fifteen studies reported findings for violent reoffending specifically and the pooled estimate was found to be 3,902 violent re-offences per 100,000 person years (95% CI 2,671-5,187) again with substantial heterogeneity identified. This rate of violent reoffending compares favourably to released prisoners (7,200 US; 25,494 UK).

Fazel et al also undertook a number of specific comparisons between reoffending rates for discharged forensic patients reported in the studies and the reoffending rates obtained for prisoners using data from the same country, similar calendar period, same gender, and similar age bands where possible (see figure below taken from the paper). The prevalence ratios were found to be one or above in all cases indicating that rates of prisoner offending were universally higher than forensic patient reoffending (the ratios ranged from 1.4 to 7.7).

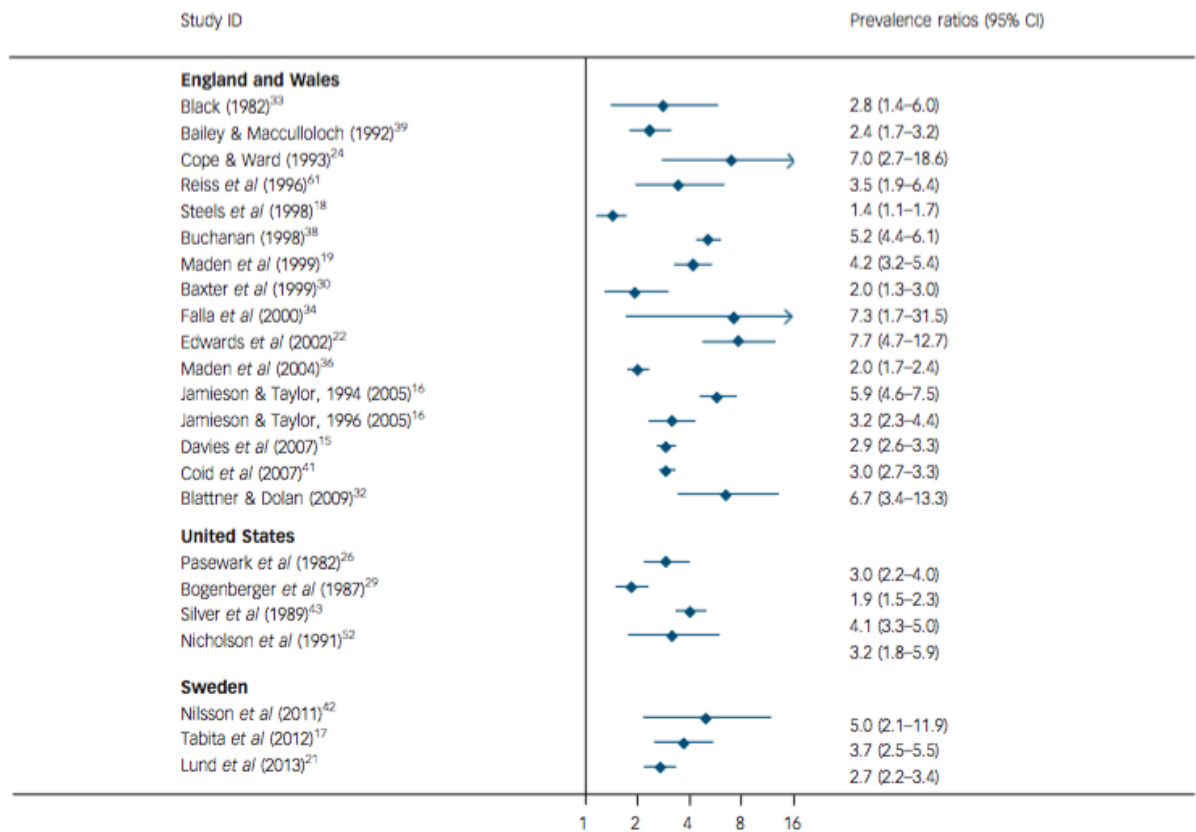


Fig. 5 Prevalence ratios comparing reoffending rates of released prisoners with forensic psychiatric patients.
 Weights are from random-effects analysis. Prevalence ratios above 1 mean that rates of reoffending are higher in prisoners than in forensic psychiatric patients matched by age-band where possible.

Overall, the authors conclude that ‘there is some evidence that patients discharged from forensic psychiatric services have lower rates of repeat offending than many comparative groups’.

2.2.2. NSW and other Australian jurisdictions

A small number of Australian studies were included in the systematic review of forensic patient outcomes following discharge by Fazel *et al*, including a study based in NSW by Hayes *et al* published in 2014 (10). Over a 21-year period in this study (beginning of 1990 until the end of 2010), 364 offenders received an NGMI (Not Guilty by reason of Mental Illness) verdict and were placed under the supervision of the NSW MHRT.

By the end of 2010, 197 of the cohort had been released into the community; 85 were released unconditionally, the vast majority after a period of conditional release. Of those ever released conditionally (186) and excluding those who could not be followed for reoffending with official criminal records (25), the rate of reoffending leading to a criminal charge during the period of conditional release was 18% and the rate of reconviction was 11.8%. A smaller proportion was charged with a violent offence (8.7%) and only 3.1% were convicted of a violent offence.

After unconditional release, 12.5% were charged with a further offence and 9.4% received a conviction during the period. The authors of the NSW study also examined readmission and revocation of conditional release based on data obtained from MHRT records. During the period of conditional release, 48.1% were readmitted at least once, typically for mental illness relapse, and 25.9% had their conditional release revoked at least once. The most common reason for revocation was substance misuse; an act or threat of violence was recorded in more than half of revocations and non-adherence to medication was also not uncommon. The authors of this paper comment on the relatively low incidence of criminal charges and convictions among forensic patients released by the MHRT compared to other offender samples and conclude that their results represent a 'strong endorsement of the treatment and rehabilitation of forensic patients in NSW, and the decision-making process of the MHRT'.

A small Victorian study published in 2009 looked specifically at outcomes for mentally disordered homicide offenders.⁽¹¹⁾ Of the 25 released patients, there was a single occurrence of re-offending during 3 years following release (recidivism rate of 4% over 3 years) and 12 patients were readmitted (48%). The authors commented on the very low recidivism rate and cited well-designed and implemented forensic community treatment programs being of key importance to the achievement of such a low rate.

2.3 Research exploring other outcomes for forensic patients

While clearly important, reoffending is not the only measure of outcome for released forensic patients. The systematic review and meta-analysis conducted by Fazel et al and published in 2016 examined mortality, suicide and readmission as outcomes of discharge from secure psychiatric care as well as reoffending. They found that mortality rates among discharged forensic patients are high both in absolute and relative terms. Interestingly, mortality rates were found to be higher among released forensic patients than released prisoners but were comparable to mortality rates for patients with schizophrenia, suggesting that the elevated mortality seen amongst forensic patients is related more to the impact of their mental illness than their offender status. They found that mortality rates were lower in England and Wales than in other Western jurisdictions and suggested that the reason may be that forensic mental health services are more well developed in the former, extending into the community. With regard to readmission, the authors found that the rates varied widely between jurisdictions and comparative data for psychiatric patients is largely lacking. They did call for future research to examine readmission but also to examine outcomes for forensic patients more broadly, including markers of functioning and quality of life.

3. Engagement of victims

A search of the published literature using the search terms ‘victim engagement’ and ‘mental health review tribunal’ yielded very little. The systematic review described earlier on mental health review tribunals in general also failed to identify victim engagement or any topic related to victims as a key theme (5). This may be a formal role in MHRT procedures for the victims of offences perpetrated by forensic patients varies considerably and is absent in many jurisdictions (e.g. UK). Thus, the key questions about whether MHRT decision-making is appropriately influenced by the views of victims and whether engagement with the MHRT is associated with, or perceived to have, any benefits for victims, are largely unknown. A formal role for victims and their views on outcomes for perpetrators is more prominent outside the MHRT and forensic mental health settings, particularly in the courts, where victim impact statements can be delivered prior to sentencing in many jurisdictions, including in Australia (12, 13). Victims also have a formal role in making submissions to parole boards in some jurisdictions (14), and this context may be more analogous to their role with the NSW MHRT perhaps. One study from the US found, in contrast to research on victim impact statements made prior to sentencing, that victim impact statements did have a significant impact on parole outcomes (14).

For the victims of forensic patients, an additional complication relevant to engagement with the MHRT is that the forensic patient is particularly likely to be a family member. The UK National Confidential Inquiry into Suicide and Homicide by people with mental illness has reported that perpetrators of stranger homicide are less likely to have mental illness than perpetrators of homicide where the victim is a family member.(15)

There is another important way in which victimisation is relevant to forensic patients and the work of the NSW MHRT, and that is to appreciate the fact that there is a significant overlap between victims and perpetrators (16), such that a majority of forensic patients have themselves a history of victimisation and are at risk of victimisation in the future. Further, the victims of forensic patients are at increased risk of mental illness and may have

mental health treatment needs of their own. What follows below is a brief summary of the evidence demonstrating a link between mental illness and risk of being a victim rather than a perpetrator of crime and violence, and finally consideration is given to the need to consider victim needs beyond formal engagement with the MHRT, perhaps with adoption of victim services models trialled successfully elsewhere.

3.1. Evidence supporting the notion that those with mental illness are at elevated risk of victimisation

In 2008, a review of US violence perpetration and victimisation studies was published with the startling conclusion that ‘victimization [for those with serious mental illness] is a greater public health concern than perpetration’.(17) Compared to victimisation rates in the general population, individuals with mental ill health appear to be at considerably increased risk. In a survey of persons with mental illness under the care of secondary mental health services in several London boroughs, risk of criminal and violent victimisation, including domestic and sexual violence, was much higher than that reported in a comparable survey of the general population.(18, 19) It must be noted that there have been few longitudinal studies of the relationship between mental illness and risk of victimisation and it is very likely that causal relationships extend in both directions in a complex manner (i.e. that victimisation increases risk of subsequent mental ill health and that mental ill health in turn increases vulnerability to victimisation), particularly for those experiencing chronic or repeated victimisation. In one longitudinal population-based birth cohort study in the UK, mental disorder was certainly confirmed to increase risk of subsequent crime victimisation (20). Operating in the other direction, there is increasing evidence to indicate that trauma and abuse suffered early in life can increase later risk of the onset of serious mental illness (21).

There have been few studies of victimisation vulnerability among those with mental illness conducted in Australia. The recent Australian National Survey of Psychotic Illness, a study which included individuals with psychotic illnesses receiving treatment from services (public or NGO) in seven catchment sites across the country, found that 38.6% had been victimised

during the year prior to the survey (22). Almost a quarter reported being a victim of assault, a figure which is dramatically higher than found in general population surveys where rates of around 5% are more typical. A Victorian case linkage study compared official records of victimisation for those with schizophrenia-spectrum disorder to a comparison group from the general population and found an increased risk for violent and sexually violent victimisation for the former (23).

3.2. Support for victims

In a number of jurisdictions, formal support services for victims of crime have been established with various models used. One of the best established of these is Victim Support in the UK (www.victimsupport.org.uk). The organisation is an independent charity that provides free and confidential information and support to victims of crime. They recognise that victims may well have mental health needs, either because their pre-existing mental illness increased their vulnerability to crime or because the experience of being victimised has precipitated development of a mental illness or both. They have also been instrumental in improving the understanding and approach of the criminal justice system with regard to victims with mental illness. Criminal justice practices, policies and procedures have long considered the mental health needs and impact of mental illness on offenders but victims needs in this context have been largely ignored. Individuals with mental illness often perceive themselves to be viewed as unreliable with regard to providing evidence about having experienced or witnessed crime.(24)

4. NSW Forensic Patient Database Project

The NSW Forensic Patient Database project is a collaboration between UNSW School of Psychiatry, the NSW Mental Health Review Tribunal and the NSW Mental Health Commission. The project centres on an electronic repository containing detailed and anonymised demographic, clinical and legal information about Forensic Patients, created for the purposes of answering specific research questions. The electronic database has been developed from extracting information from the paper-based records held by the NSW MHRT. The database contains information on over 250 variables on almost 500 Forensic Patients from records kept over the past 25 years. The project builds on the work undertaken by Hayes et al published in 2014 (described earlier).(10)

4.1 Research aims and methodology

The Forensic Patient Database project is intended to address the following research aims and questions:

1. Determine the characteristics of individuals in the Forensic Patient group and the extent to which these have changed over time:
 - *Have the numbers of new forensic patients changed over time?*
 - *Has the nature of index offences changed over time?*
 - *Has the nature of mental health diagnoses changed over time and what is the extent of mental illness co-morbidity?*
 - *What is the extent of traumatic developmental histories?*
 - *Is there evidence of changes in the demographic characteristics of individuals over time?*
2. To determine the pattern of criminal justice system contact prior to the index offence, during the period of MHRT oversight and following release from MHRT oversight:
 - *What is the rate of re-offending following release from secure care (both under conditional and unconditional release)?*
 - *What is the type and frequency of re-offending among those Forensic Patients who do re-offend?*

- *What is the rate and type of re-offending which appears to occur prior to conditional release (e.g. on leave)?*
 - *Do the rates of reoffending differ among those conditionally released from court compared to those released by the MHRT?*
3. To determine the pattern of mental health service contact prior to and subsequent to the index offence:
- *What proportion of those found NGMI for an index offence were in contact with mental health services prior to the offence and, for those in contact, what type of contact, for how long and what was the timing in relation to the index offence?*
 - *What are the care pathways followed by Forensic Patients? How long are they detained in prison versus secure hospital care and has this changed over time? Does the duration of detention (in prison or hospital or overall) reflect patient characteristics and/or index offence characteristics?*
 - *For those forensic patients released at court or released unconditionally at a subsequent point, is mental health service contact ongoing and what proportion fail to have significant further contact?*

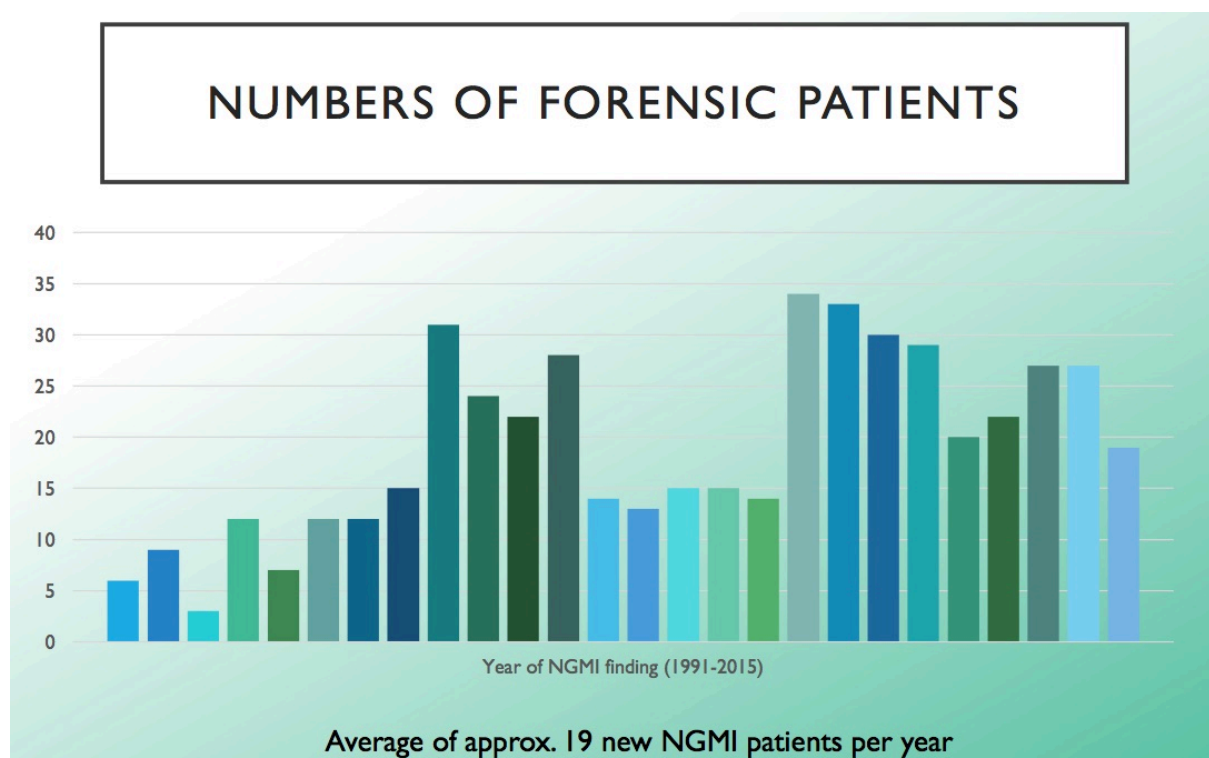
Ultimately, the Forensic Patient Database project aims to provide the information needed to enable evidence-based developments in the services and interventions offered to Forensic Patients in NSW, improving the health of Forensic Patients and enhancing community safety.

With regard to methodology, the Forensic Patient Database, having first involved the extraction of information from paper-based records held by the NSW MHRT for creation of an electronic database, will be expanded through the use of record linkage methodology. It is intended that identifying information held by the NSW MHRT will be used by an independent agency, the Centre for Health electronic Record Linkage (the CHeReL), to link the database information to administrative datasets held by data custodians in NSW. This will add longitudinal information on criminal offending, mental health service contacts, other health service contacts, and mortality. Record linkage to add criminal offending data is expected to be completed early in 2018, while linkage to health information is expected to be completed in mid 2018.

4.2 Some preliminary findings

While the Forensic Patient Database is not yet finalised, the following are the results of some preliminary analyses undertaken for the purposes of the Report. The Forensic Patient Database currently contains information on 487 NGMI patients and 69 Limiting Term patients. The results of preliminary analyses will relate to the NGMI sample only. The preliminary findings presented relate predominantly to the first set of research questions detailed in the preceding methodology section (e.g. relating to the characteristics of the sample, circumstances surrounding the index offence, and the mental health and offending profile of patients prior to the index offence).

The figure below presents the numbers of new NGMI patients presenting to the NSW MHRT each year between 1991 and 2015.



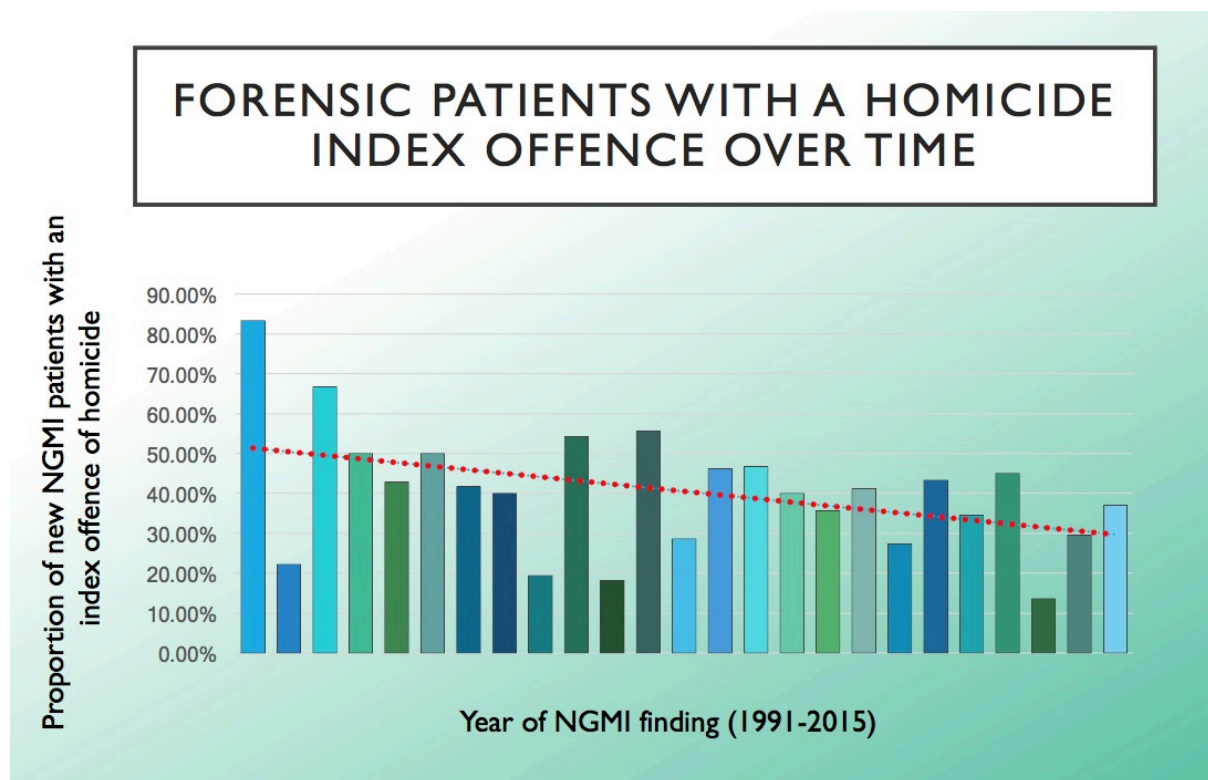
4.2.1. Sample description

At the time of data collection, the majority of NGMI patients were still detained (n=233; 47.8%), the remainder having been released either conditionally (n=144; 29.6%) or unconditionally (n=95; 19.5%). A small number had died at the time of data collection (n=13; 2.7%). The majority of NGMI patients were male (n=419; 86.0%) and the majority were Australian-born (n=344; 70.6%). The median age recorded at the time of the NGMI finding was 35 years with the age range extending from 18 to 88 years. Only a small minority of patients were noted in the records to be of Aboriginal and/or Torres Strait Islander background (n=40; 8.2%). It is important to note that records may well underestimate the proportion who would self-ascribe their background as Aboriginal and/or Torres Strait Islander but, even taking this into account, the proportion is notably lower than found amongst those in contact with the criminal justice system more generally.

Current relationship status was described as single or never married for the majority of NGMI patients (n=312; 64.1%) and over half reported having no children (n=284; 58.3%). Prior to the index offence, NGMI patients reported low levels of educational attainment with a significant proportion leaving school before completing year 10 at high school (n=135; 27.7%). With regard to employment, just under 10% reported never having been employed (n=43; 8.8%) and almost half had only undertaken unskilled work (n=235; 48.3%).

4.2.2. Index offence

The most common offence leading to an NGMI determination was homicide (n=183; 37.6%), with wounding/GBH (n=93; 19.1%) and attempted homicide (n=71; 14.6%) the next most common offences. The figure below displays the proportion of new NGMI patients presenting following an index offence of homicide between the period 1991 and 2015. There appears to be a trend towards this proportion decreasing over time although there is significant variation in the proportion between individual years.



At the time of the index offence, almost half of NGMI patients were living with family members (n=243; 49.9%), one-fifth were living alone (n=98; 20.1%) and one-tenth were homeless (n=53; 10.9%). The most common location for the index offence to have occurred was in the home of the patient (n=205; 42.1%); index offences occurred in a public place in around one-third of cases (n=162; 33.3%). A weapon was used in the index offence in 76.8% of cases (n=274), with the most common weapon being a knife (or similar; n=228; 46.8%). In one-fifth of cases, 2 or more victims were involved in the offence (n=102; 20.9%). The

majority of victims were known to the patient, with 37.0% being a relative (n=180) and 30.2% (n=147) being a friend or acquaintance.

In the period immediately prior to the index offence, over half of NGMI patients had been misusing substances (n=265; 54.4%) and one-third were noted to be intoxicated around the time of the index offence (n=170; 34.9%).

4.2.3. Mental illness and mental health service contact

The majority of NGMI patients had been diagnosed at some point with a psychotic illness. The most recent diagnosis at the time of data collection was schizophrenia-spectrum disorders (including schizoaffective disorder and delusional disorder; n=409; 84.0%). Bipolar disorder was the next most common diagnostic group (n=19; 3.9%). At the time of the index offence, a substantial proportion of patients with a diagnosis of a schizophrenia-spectrum disorder were experiencing the first episode of illness (n=113; 27.6%).

Co-morbid diagnoses were common in the NGMI patient group. The majority of NGMI patients had a diagnosed substance use disorder (n=316; 64.9%). Alcohol was the most commonly misused substance (n=117; 24.0%) followed by cannabis (n=128; 28.3%) and stimulants (n=36; 7.4%). A formal diagnosis of any personality disorder was recorded in 11.9% of patients (n=58), although the presence of traits of personality disorder was also noted (64 were described as having traits of antisocial PD; 22 had traits of borderline PD and 58 had traits of other PD). One-third had a recorded history of head injury (n=163; 33.5%). Cognitive impairment or IQ assessment results were not routinely recorded but it was noted that 14 patients had mild or moderate intellectual disability and 33 had borderline intellectual disability.

Prior to the index offence, the majority of NGMI patients had had contact with mental health services (n=390; 80.1%). Two-thirds of patients had been previously hospitalised

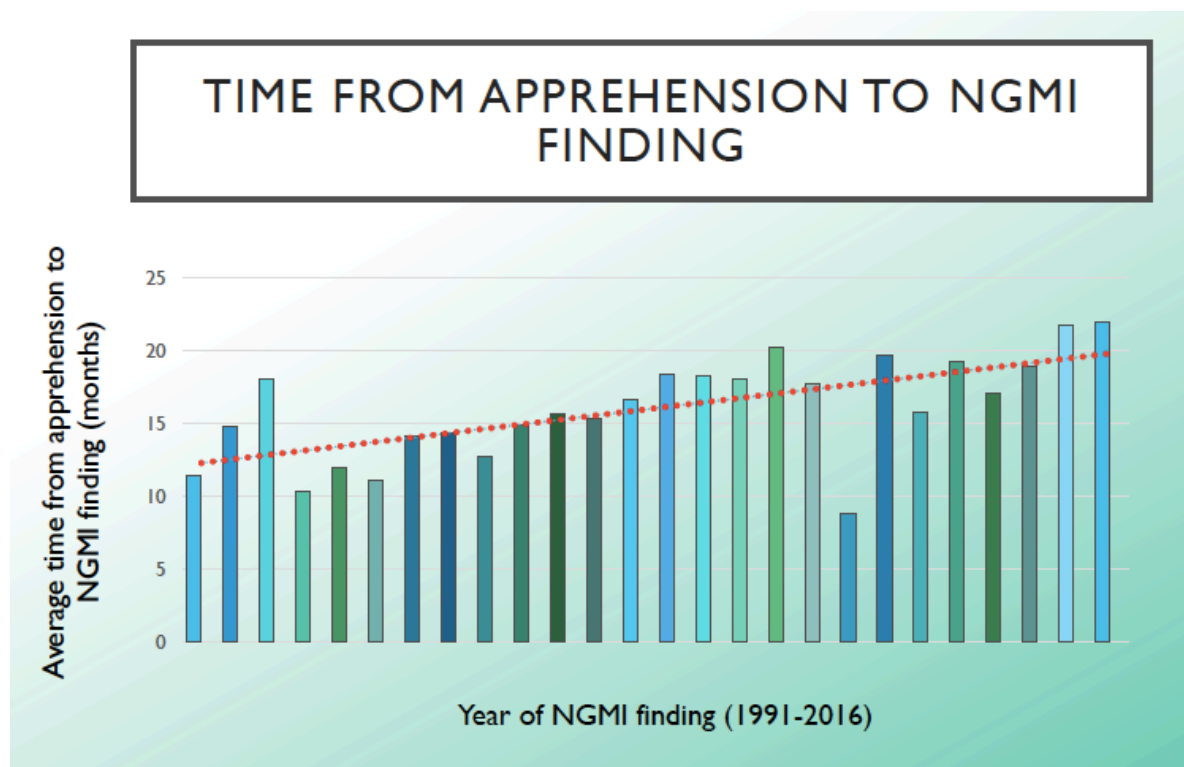
(n=328; 67.4%); a significant minority had a history of repeated psychiatric admissions (n=74; 15.2% had a history of six or more admissions) and a significant proportion had been admitted involuntarily in the past (n=215; 44.1%). The majority of patients had previously been treated with at least one antipsychotic medication (n=307; 63.0%) and one-quarter had previously been treated under a Community Treatment Order (n=118; 24.2%).

A family history of mental illness was common in this group with 39.0% reporting mental illness in a first-degree relative (n=190) and 8.6% reporting illness in any other relative (8.6%). A substantial proportion of NGMI patients had a history of child abuse or trauma noted in their records (n=210; 43.1%). A history of self-harm was also common in the NGMI patient group (n=282; 57.9%).

4.2.4. Offending prior to the index offence and the NGMI finding

Over half of NGMI patients had been convicted of an offence prior to the index offence (n=303; 62.2%) and one-third had been convicted of a violent offence (n=162; 33.3%). A significant proportion had served at least one term of imprisonment prior to the index offence (n=132; 27.1%).

The average time between apprehension for the index offence and the NGMI finding was 16.85 months (SD 8.74; median 14.98; range 0.62-68.96). The average time between apprehension and NGMI finding appears to have increased over time (see figure x below).



The majority of NGMI patients were detained following their NGMI finding (n=407; 83.6%), with the remainder being conditionally released (n=78; 16.0%). Almost one-fifth had been found unfit to stand trial at some point prior to their NGMI finding (n=92; 18.9%).

Conclusions

The international literature of relevance to the work of Mental Health Review Tribunals with regard to forensic patients is limited in both amount and scope, particularly in relation to the key questions addressed in the Report (leave/release decisions and victim engagement). The conclusions that can be drawn from the international literature are further limited by differences in terminology, legislative provisions, service arrangements, and medico-legal practices between jurisdictions. With these caveats in mind, the following conclusions may be drawn:

- The decision-making of MHRT panels with regard to release may be influenced more by recent and dynamic clinical risk factors than by historical and static risk factors. This balance is generally perceived by evaluators to be appropriate given the role of the MHRT.
- MHRT decision-making in relation to forensic patients relies to some extent on panels considering how individual case variables might impact on the likelihood of future adverse outcomes (e.g. reoffending) and crucially how to best manage such outcomes (e.g. setting specific conditions). This process may be aided by the use of clinically-administered Structured Professional Judgment (SPJ) violence risk assessment tools (e.g. the HCR-20). This would require MHRT panel members to have an appropriate level of understanding of these tools (particularly the psychiatric panel member) and clarity for clinicians about how the qualitative (rather than quantitative) results of these tools should be submitted.
- Research questions focused on reoffending rates for released forensic patients have been extensively pursued. Reoffending rates vary between studies from different jurisdictions and over time (i.e. earlier studies report higher rates indicating the possibility that rates have dropped over time).
- A proportion of studies report reoffending rates for forensic patients which are compared to other offender samples. Forensic patients are consistently found to have lower reoffending rates following release than comparison groups of offenders.

Australian reoffending studies, including in NSW, have reported findings consistent with the wider international literature.

- The literature focused on other outcomes for released forensic patients is smaller but suggests that mortality rates are high (likely in keeping with the known raised mortality rates for patients with severe mental illness).
- There is very little literature available which is relevant to the topic of victim engagement with the MHRT. Risk of becoming a victim is known to be higher for those with mental illness compared to the general population and victimisation can increase risk of developing a mental illness. Formal support services for victims may be a worthwhile consideration and may be associated with better outcomes for victims than can be achieved specifically from changes to the way in which victims are engaged with the MHRT (see Victim Support in the UK).
- The NSW-based Forensic Patient Database project, which makes use of data collected by the NSW MHRT with plans to obtain linked health and criminal records, is a potential future source of locally relevant information about Forensic Patients and their outcomes. A preliminary analysis of data for almost 500 NGMI Forensic Patients collected by the NSW MHRT over the past two decades suggests the following:
 - Offenders with an Aboriginal and/or Torres Strait Islander background may be under-represented in the Forensic Patient population (compared to the incarcerated population in NSW)
 - NGMI patients typically come from disadvantaged backgrounds and have often experienced trauma earlier in life
 - Whilst homicide has been the most common offence leading to an NGMI finding, the proportion of new NGMI patients who have committed homicide appears to have decreased over time
 - Victims are typically known to NGMI patients and are often family members
 - NGMI patients are commonly diagnosed with a psychotic illness and co-morbidity, particularly with substance use disorders is common
 - The majority of NGMI patients have had contact with mental health services prior to the index offence

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APPENDIX 6

Audit of legislative frameworks from other jurisdictions





An audit of legislative frameworks from other jurisdictions

Review of the Mental Health Review
Tribunal in respect of forensic patients

Grace Hur

Executive summary

Reviewing bodies

1. The regime under which forensic patients are reviewed varies from state to state. New South Wales and Queensland have established tribunals for the purpose of reviewing forensic orders and determining leave and release of forensic patients. Western Australia (Mentally Impaired Accused Review Board ('MIARB')) and Tasmania (Mental Health Tribunal) have established bodies which may review forensic orders but which cannot themselves grant leave or release of a forensic patient. These bodies merely make recommendations and further action is required for a grant of leave or release to be made. For example, in Western Australia, the MIARB provides a report to the Attorney-General that leave or release be granted, based on which the Attorney-General provides advice to the Governor who will ultimately give effect to that recommendation and grant leave or release to a forensic patient. Tasmania's Mental Health Tribunal provides certificates which recommend discharge, variation or revocation of forensic orders on which a forensic patient may then apply to the Supreme Court to give the recommendation effect.
2. In South Australia, the Northern Territory and Victoria the Supreme Court makes and reviews forensic orders. However a specialist panel (Forensic Leave Panel) has also been established in Victoria, which decides applications for certain types of leave (on-ground and limited off-ground). In the Australian Capital Territory ('ACT'), the ACT Civil and Administrative Tribunal reviews leave and release applications in relation to forensic orders.

Review schedule

3. Most regimes set a timetable by which a forensic order must be reviewed. Tribunals in New South Wales and Queensland generally must review a forensic order every 6 months. The reviewing bodies in Western Australia and Tasmania must make recommendations regarding forensic orders every 12 months and in the Northern Territory, the Supreme Court also reviews a forensic order every 12 months. However, in Victoria a review of a forensic order occurs as the Supreme Court directs and in South Australia forensic orders are reviewed when an application for review is made. In the ACT, forensic orders are generally reviewed when an application for review is made, or when the Chief Psychiatrist considers a forensic order is no longer appropriate.

Tests for release

4. The test for release in New South Wales, Victoria and the ACT is whether *'the safety of the person subject to the forensic order or members of the public will not be seriously endangered'* by the forensic patient's release. Unlike these states, the test for release in South Australia and Tasmania does not require 'serious endangerment' but mere 'endangerment' and asks whether the accused *'is, or would if released, be likely to endanger another person or other persons generally'*.
5. In Western Australia and the Northern Territory, the test for release focuses on the degree of risk that the release of the forensic patient poses to the safety of the community.
6. The 'protection of the public from serious harm' is the threshold applied when considering whether to release a forensic patient in Queensland and in the UK.

7. The tests for whether leave should be granted in New South Wales, Queensland, Victoria and the ACT mirror the tests for release. There is no specific reference made to leave under statute for the remaining states, but presumably the same tests for release would apply to applications for leave in those states.

Criteria for release

8. The criteria for release varies according to state. The following are a list of those factors that a number of states have listed as a criterion for release:
 - 8.1. the nature of the accused's mental impairment (New South Wales, Victoria, South Australia, Northern Territory, Tasmania);
 - 8.2. the likelihood that, if released on conditions, the forensic patient would comply with the conditions (Victoria, South Australia, Western Australia, Northern Territory and Tasmania);
 - 8.3. whether there are adequate resources available for the treatment and support of the supervised person in the community (Victoria, South Australia, Northern Territory and Tasmania); and
 - 8.4. victim impact statements (Queensland and Western Australia).
9. Other factors include:
 - 9.1. the nature of the offence and the period of time that has passed since the offending act happened (Queensland);
 - 9.2. the supervised person's recovery or progress in terms of treatment progression and personal improvement (Victoria);
 - 9.3. the likelihood that, if released, the forensic patient would be able to take care of his or her day to day needs, obtain any appropriate treatment and resist serious exploitation (Western Australia);

Review process – victim engagement

10. The way in which victims can engage with the review process varies according to each state. In New South Wales, Queensland, Victoria and Western Australia, victims may apply for conditions (to be imposed on forensic orders and release) that the forensic patient be prohibited from contacting them or others. In New South Wales an order restricting the places the forensic patient may attend may also be sought. In Western Australia, a submission from a victim must be considered when determining conditions for release.
11. In Victoria, the Northern Territory and Tasmania, a report from victims must be considered when reviewing supervision orders. In the ACT, the court must take into account the views of victims when making a forensic order and in South Australia, the views of victims must be considered when setting a limiting term for a forensic order.

Victims Registers

12. Victims Registers have been established specifically for the victims of forensic patients in New South Wales, Queensland, the ACT and Tasmania. Victims who apply for and are granted registration are entitled to information including:
 - 12.1. when a review of a forensic order is to occur and when applications for leave and release have been made;
 - 12.2. the outcomes of reviews and applications and the reasons for the decision;

- 12.3. when leave has been granted and when a forensic order has been confirmed, revoked or varied and what conditions have been imposed;
 - 12.4. when a patient has been transferred; and
 - 12.5. when a patient has absconded whilst on leave and when they were returned (New South Wales, Queensland and the ACT).
13. In Victoria, South Australia, the Northern Territory and Western Australia, victim registers have been established for all victims of crime. Those who apply for registration on these registers may receive information including:
- 13.1. the earliest possible release date for a prisoner;
 - 13.2. a prisoner's eligibility to apply for rehabilitation;
 - 13.3. a prisoner's proposed release on parole ;
 - 13.4. details of a prisoner's escape; and
 - 13.5. any leave of absence taken by a prisoner.

Victim support services

14. Queensland is the only jurisdiction that has established a support service specifically for victims of forensic patients. All other jurisdictions provide support to forensic mental health victims through services intended to provide support to all victims of crime which forensic mental health victims, as a subgroup, may also utilise. These services cover therapeutic counselling whether by telephone and in person, the provision of financial assistance and court support services. Court support services help victims navigate the justice system and legal process and also help victims exercise their rights, for example by providing assistance with the preparation of victim impact statements and the preparation of submissions regarding conditions to be imposed on forensic orders. These services refer victims amongst each other and to other appropriate victim support agencies and appropriate counselling services, including a range of government funded and non-government organisations which provide general victim support services. There are also services established specifically for victims of certain crimes, for example, for victims of homicide, sexual assault and domestic violence, which may be utilised by victims of forensic patients if the offence committed against them is of a type covered by the service.
15. The ACT has appointed a Victims of Crime Commissioner and in South Australia a Commissioner for Victims Rights has been appointed. In the ACT, the views of the Victims of Crime Commissioner are considered when a forensic order is made if the proceeding involves a registered victim. In South Australia, the Commissioner for Victims Rights can furnish the court with a community impact statement outlining the effect of an offence committed by a forensic patient on their community. Victoria has also appointed a Victims of Crime Commissioner however the functions of that office focus more on the improvement of services and systems within government departments, victims' service providers and the justice system to meet the needs of victims of crime.
16. This report examines the legislation and operational processes and procedures regarding leave and release decisions for forensic patients and also victim support services available to forensic mental health victims. The report is arranged into chapters according to state and each chapter has been split into two parts which address the leave and release process and victim support services for forensic mental health victims respectively. At the conclusion of this report is a brief overview of the UK Home Office Guidelines regarding leave and release and Victim Support UK.

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CHAPTER 1 NEW SOUTH WALES

PART I: FORENSIC MENTAL HEALTH REVIEW REGIME - LEAVE AND RELEASE

Forensic patients

1. A forensic patient is a person who is detained in a mental health facility, correctional centre or other place, or released from custody subject to conditions under the *Mental Health (Forensic Provisions) Act 1990* ('**the Act**').¹
2. A forensic patient is a person who the Court has found:
 - 2.1. unfit to be tried for an offence and ordered to be detained in a correctional centre, mental health facility or other place;
 - 2.2. on the limited evidence available, to have committed an offence,² who has been given a 'limiting term'³ (a limiting term is the best estimate the Court would have imposed had the trial proceeded on the basis that the accused had capacity and was found guilty of that offence) and the court has then ordered, that they be detained in a mental health facility or another place.⁴ and
 - 2.3. not guilty by reason of mental illness and ordered to be detained in a prison, hospital or other place, or released into the community subject to conditions.⁵

Mental Health Review Tribunal – Review of forensic orders

3. The Mental Health Review Tribunal ('**the Tribunal**')⁶ must:
 - 3.1. review the cases of persons who have been detained in custody in a mental health facility or another place following a finding of not guilty by way of mental illness at either a special hearing, in the case of persons unfit to be tried, or after a trial by a court;⁷ and
 - 3.2. make an order as to the person's care, detention or treatment or the person's release (either unconditionally or subject to conditions).⁸
4. The Tribunal is constituted by a President, a psychiatrist or other mental health expert and another member with 'suitable qualifications or experience'.⁹ A judge or former judge must sit on the panel when an application for release is being heard.¹⁰

¹ Mental Health (Forensic Provisions) Act 1990 ('**MHFP Act**'), s42.

² Ibid ss19,23.

³ Ibid s 23(1)(b) includes definition of 'limiting term.

⁴ Ibid s27.

⁵ Ibid s25.

⁶ Ibid s73 The Tribunal must have the following members when making any decisions on forensic patients:

- the President or a Deputy President;
- a member who is 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.

⁷ Ibid s 44(1).

⁸ Ibid ss 44(2), 47(1).

⁹ Ibid s73 (2).

¹⁰ Ibid s73(3).

Frequency of review

5. The Tribunal must review the case of each forensic patient:
 - 5.1. every 6 months (with the possibility of extension)¹¹, and
 - 5.2. otherwise upon request by the Minister for Health, the Attorney-General, the Minister for Justice, the Minister for Juvenile Justice, the Secretary or the Medical Superintendent of the mental health facility in which the patient is detained.¹²

The Tribunal may also review a forensic patient at any time.

6. The Tribunal must conduct reviews of those forensic patients who are the subject of community treatment orders and detained in a correctional centre every 3 months.¹³
7. On review of these cases the Tribunal may order:
 - 7.1. the detention, care or treatment of the forensic patient in a mental health facility, correctional centre or other place; or
 - 7.2. the release (with or without conditions) of the forensic patient;¹⁴ or
 - 7.3. a community treatment order.¹⁵

LEAVE

8. The Tribunal may approve leave to be absent from a mental health facility, correctional centre or other place for such period and on such terms and conditions as it considers appropriate.¹⁶

Criteria for leave

9. In granting leave the Tribunal must consider whether the *safety of the patient or any member of the public will not be seriously endangered* if the leave of absence is granted and must also consider the matters referred to at paragraph 14 below.¹⁷

¹¹ Ibid s46(4).

¹² Ibid ss46(1), 46(2).

¹³ Ibid s 46(3).

¹⁴ Ibid s47(1).

¹⁵ Ibid s67.

¹⁶ Ibid s49(1).

¹⁷ Ibid s49(3).

Types of Leave

10. Types of leave include:¹⁸

- 10.1. **Ground leave (escorted, supervised or unsupervised):** where a forensic patient may enter the grounds of the detention facility;
- 10.2. **Escorted day leave:** where a forensic patient may -under close supervision and escort by at least one member of staff approved by the Medical Superintendent- access a place outside the detention facility;
- 10.3. **Unsupervised day leave:** where a forensic patient may access a place outside a detention facility for a specific purpose without being accompanied by a supervisor or an escort;
- 10.4. **Supervised overnight leave:** where a forensic patient may leave a detention facility for up to 24 hours per day, while under the close supervision of at least one responsible adult (approved by the Medical Superintendent);

- 10.5. **Leave for special circumstances or medical emergencies:** the Director-General of the Department of Health may grant leave (and apply conditions) where the Tribunal has not refused leave in the same or similar circumstances.¹⁹ Special circumstances include:²⁰

- 10.5.1. appointments in other hospitals for medical treatment or investigations, and
- 10.5.2. court or other tribunal appearances- for example, Parole Board hearings.²¹

11. Once the Tribunal has granted a type of leave, the Medical Superintendent of a detention facility decides when the leave is used. Risk assessments are conducted by the treating team on forensic patients prior to the anticipated leave and leave is only taken when the treating team is satisfied that it is safe and appropriate to do so.²²

RELEASE

Types of release:

12. The Tribunal can order the following types of release:

- 12.1. **Conditional release:** where a forensic patient is released to live in the community subject to conditions. Forensic patients on conditional release are designated a case manager and psychiatrist from the treating mental health service and are required to regularly attend appointments with these specialists. The Community Forensic Mental Health Service also provides support to local mental health services in managing these patients;²³ and

¹⁸ Mental Health Review Tribunal Forensic Guidelines August 2015

http://www.mhrt.nsw.gov.au/assets/files/mhrt/pdf/Forensic_Guidelines_Aug%2015.pdf

¹⁹ MHFP Act s50.

²⁰ Id.

²¹ NSW Health Policy Directive (2012) Forensic Mental Health Services, PD2012_050, s 4.1.5.

²² Ibid at s 4.1.2.

²³ NSW Ministry of Health, *Review of the Operation of the Mental Health Review Tribunal in respect of forensic patients discussion paper* p8

12.2. **Unconditional release:** where the person is discharged absolutely and is no longer under the Tribunal's control.

Criteria for release

13. Applications for release must be heard by a panel of the Tribunal which includes a judge or former judge.²⁴ In considering an application for release, the Tribunal must consider whether:

- 13.1. *the safety of the patient or any member of the public will not be seriously endangered by the patient's release; and*
- 13.2. 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.²⁵

Matters for considerations by the Tribunal regarding decisions to grant leave and release

14. In making that assessment, the Tribunal must consider:²⁶

- 14.1. whether the person is suffering from a mental illness or other mental condition;
- 14.2. whether there are reasonable grounds for believing that care, treatment or control of the person is necessary for the person's own protection from serious harm or the protection of others from serious harm;
- 14.3. the continuing condition of the person, including any likely deterioration in the person's condition, and the likely effects of any such deterioration;
- 14.4. 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 any member of the public will be seriously endangered by the person's release; and
- 14.5. in the case of the proposed release of a forensic patient subject to a limiting term, whether or not the patient has spent sufficient time in custody.

Application for leave or release

15. Before making an application for leave or release, the patient's treating team should consider if the patient is likely to meet the requirements for such release under the NSW Health Policy Directive, PD_2012_050, *Forensic Mental Health Services* to assess whether the patient²⁷:

- 15.1. has complied with the applicable forensic order, including, where appropriate, having had successful periods of ground access and leave without any significant incidents;
- 15.2. has consistently demonstrated socially appropriate behaviour over a substantial period of time;
- 15.3. is a low risk of harm to themselves or others in the context of the proposed conditions of release;
- 15.4. has complied with medication and the treating team's directions; and

²⁴ MHFP Act s73(3).

²⁵ *Ibid* s43.

²⁶ *Ibid* s74.

²⁷ NSW Health Policy Directive (2012) *Forensic Mental Health Services*, PD_2012_050, s 7.2.3 and 7.3.3.

- 15.5. has abstained from taking illicit substances, as evidenced by at least two negative urine samples in the preceding six months.

Clinical reports

16. The Tribunal may request reports from treating teams which can contain the following information:²⁸

- 16.1. a summary of the patient's personal and medical background;
- 16.2. progress since the last Tribunal hearing (if relevant);
- 16.3. current mental state presentation;
- 16.4. current medications;
- 16.5. current risk assessment; and
- 16.6. recovery pathway and future plans.

Conditions on leave or release

17. The Tribunal may impose conditions on leave or release including but not limited to:²⁹

- 17.1. the appointment of a case manager, psychiatrist or other health care professional to assist in the care and treatment of the patient;
- 17.2. the care, treatment and review of the patient by persons referred to in paragraph 17.1, including home visits to the patient;
- 17.3. medication;
- 17.4. accommodation and living conditions;
- 17.5. enrolment and participation in educational, training, rehabilitation, recreational, therapeutic or other programs;
- 17.6. the use or non-use of alcohol and other drugs;
- 17.7. drug testing and other medical tests;
- 17.8. agreements as to conduct;
- 17.9. association or non association with victims or members of victims' families (on application of victims);
- 17.10. prohibitions or restrictions on frequenting or visiting places (on application of victims);
- 17.11. overseas or interstate travel.

Conditions in practice

18. Practical examples of conditions include:

- 18.1. limiting the belongings, like money, credit or debit cards and identity documents (such as a driver licence, passport, or birth certificate) that a person may take on leave with them;³⁰
- 18.2. requiring the patient to complete a detailed itinerary before going on leave;
- 18.3. random spot checks to verify that the patient is following the itinerary;

²⁸ NSW Ministry of Health, *Review of the Operation of the Mental Health Review Tribunal in respect of forensic patients discussion paper* p10

²⁹ MHFP Act s75

³⁰ NSW Health Policy Directive (2012) Forensic Mental Health Services, PD_2012_050, 4.1.11

- 18.4. requiring the patient to carry a charged mobile phone, with credit, at all times;
- 18.5. requiring the patient to call at specified times, to answer the phone if called and if appropriate to pass the phone to another adult to verify location and activity;
- 18.6. verifying the patient's activities by contacting any sponsors of the leave; and
- 18.7. verifying the patient's activities on returning from leave, by detailed questions, checking receipts, transport ticketing and direct proof of movement.³¹

Treating clinician considerations when planning for leave and release³²

- 19. An authorised medical officer of a mental health facility must take all reasonably practical steps to:
 - 19.1. ensure that the person concerned and any primary carer of the person are consulted in relation to planning the person's leave and any subsequent treatment or other action considered in relation to the person;
 - 19.2. consult with agencies involved in providing relevant services to the person, any primary carer of the person, and any dependent children or other dependants of the person; and
 - 19.3. provide a person given leave of absence, with appropriate information as to follow-up care.
- 20. For all types of leave or ground access, the treating team should discuss the arrangements for the leave or ground access with the patient and satisfy themselves that the patient understands the arrangements and any conditions placed on the leave or ground access. The consultations and discussion should be documented in the patient's health record.³³
- 21. Treating teams should consider developing formal information sharing arrangements with agencies or persons who provide services to, or are attended by, forensic patients on leave.³⁴

Conditional release order in practice

- 22. A conditional release order usually requires a forensic patient to be linked to their local community mental health service for regular review by a case manager and psychiatrist attached to the service. While dependent on the order, supervision is usually at the discretion of the case manager and treating psychiatrist but can include the following³⁵:
 - 22.1. initially weekly contact or more frequent visits as indicated by the case manager;
 - 22.2. monthly face-to-face reviews by the responsible psychiatrist;
 - 22.3. regular monitoring of the patient's mental state to ensure timely and early intervention;
 - 22.4. a requirement for the patient to undergo random drug and alcohol screens on a regular basis; and
 - 22.5. immediately advising the Tribunal and the Community Forensic Mental Health Service of any non-compliance with the release order or any other serious concerns

³¹ NSW Ministry of Health, *Review of the Operation of the Mental Health Review Tribunal in respect of forensic patients discussion paper* p11

³² NSW Health Policy Directive (2012) *Forensic Mental Health Services*, PD_2012_050 at 4.1.9 and MHA s76G.

³³ Id.

³⁴ NSW Health Policy Directive (2012) *Forensic Mental Health Services*, PD2012_050, s 4.1.10

³⁵ NSW Health Policy Directive (2012) *Forensic Mental Health Services*, PD 2012_50, pp39-40

about the patient.

23. The Tribunal ordinarily imposes a range of other conditions relating to the patient's accommodation, drug and alcohol use and testing, and engagement in therapeutic programs.³⁶

Victims and the community: conditions on leave and release

24. A victim may apply to the Tribunal to impose the following conditions on leave and release orders:³⁷

- 24.1. that the forensic patient is not allowed to associate with victims or members of victims' families ('**non-association condition**'); and
- 24.2. that the forensic patient must not or are restricted in how they visit certain places ('**place restriction condition**').

25. The Minister for Health and the Attorney General are entitled to appear and make submissions to the Tribunal in leave and release matters.³⁸

Breach of conditional release

26. The Tribunal may order the apprehension and detention, care or treatment of a forensic patient where:

- 26.1. they have breached a condition of leave or release; or
- 26.2. the mental condition of a forensic patient has deteriorated; and
- 26.3. there is a risk that serious harm will be caused to themselves or the public they may be apprehended.³⁹

³⁶ NSW Ministry of Health, *Review of the Operation of the Mental Health Review Tribunal in respect of forensic patients discussion paper* p10.

³⁷ MHFP Act s76.

³⁸ MHFP Act s76A.

³⁹ MHFP Act s68.

PART II: FORENSIC VICTIM SUPPORT SERVICES IN NEW SOUTH WALES

New South Wales does not offer support services which operate specifically for victims of forensic patients. Victims are able to take advantage of those services which are designed to support any victim of crime which are set out below.

Victims

1. The term 'victim' is defined in the *Mental Health (Forensic Provisions) Act 1990* (NSW) in line with the *Victims Rights and Support Act 2013* (NSW). A victim is a person who is injured or dies as a result of an act of violence committed by the patient ('**primary victim**'). A victim can also include a member of the immediate family of a primary victim who died as a result of the act of violence ('**family victim**')⁴⁰.
2. As noted in paragraph 24 of Part I above, a victim may make submissions in support of non-association or place restriction conditions on the leave or release to be granted to a forensic patient. A copy of the written submissions is provided to the forensic patient's legal representative and may also be provided to the patient's treating team.
3. A victim may also submit a statement which goes to the issue of the patient's care, treatment or detention and/or risk of serious endangerment to themselves or members of the public.⁴¹

Victim Services NSW

4. While there are no specialist services for victims of forensic patients, the NSW Department of Justice- through Victims Services NSW -offers general support services for victims of crimes in NSW. These services can be provided through the Victims Compensation Tribunal and the Policy and Service Delivery Section, and include:⁴²
 - 1.1. the **Victims Access Line** (VAL), which is the first point of contact for victim services. The VAL provides referral services to counselling and court support services.
 - 1.2. The **Approved Counselling Service** and accredited counsellors. Government funded counselling is available to victims of an act of violence. Victims can be referred through the VAL or directly by police. Victims are also able to apply for counselling directly to Victims Services. Telephone and face-to-face counselling is available. The Approved Counselling Service initially provides 10 hours of counselling but further counselling can be approved where required.
 - 1.3. The monitoring of the Charter of Victims Rights- which governs how victims should be treated by agencies.
 - 1.4. The provision of information and the development of resource materials relating to support services for victims of crime.

The provision of financial support for the immediate needs and economic loss relating to the act of violence and how the victim has suffered.**Court support services**

5. The Witness Assistance Service ('**WAS**') provided by the Office of the Director of Public Prosecutions ('**ODPP**') provides a range of services to meet the needs of victims of crime and

⁴⁰ *Mental Health (Forensic Provisions) Act 1990* (NSW), s 41(1).

⁴¹ <http://www.mhrt.nsw.gov.au/forensic-patients/involvement-of-registered-victims.html>

⁴² <http://www.victimsservices.justice.nsw.gov.au/>; Standing Council on Law and Justice, *National Framework of Rights and Services for Victims of Crime – 2013-2016* pp 13,14

witnesses appearing in court matters prosecuted by the ODPP including by helping witnesses navigate the court system by:

- 5.1. helping witnesses understand their role and what to expect at court;
- 5.2. liaising with prosecution lawyers about victims' needs;
- 5.3. arranging a visit to a court and other facilities to become familiar with the environment;
- 5.4. preparing and arranging support for victims who are giving evidence in court;
- 5.5. preparing people for court outcomes;
- 5.6. providing information about the Forensic Patients Victims Register (see paragraph 8 below), victim impact statements and the sentencing process.⁴³

6. The ODPP has compiled a list⁴⁴ of court support services offered by NGOs.

Other referral services

7. There are specialist services available for victims of certain offences, such as domestic violence⁴⁵, sexual assault⁴⁶, and homicide⁴⁷.

Forensic Patients Victims Register ('Victims Register')

8. The Victims Register is maintained by the Forensic Division of the Mental Health Review Tribunal. The Victims Register notifies victims (who apply for registration) about:

- 8.1. the review of forensic patients including whether the Tribunal will be considering an application for leave or release;
- 8.2. the Tribunal's determination- including what orders were made;
- 8.3. the escape of a forensic patient from custody or his/her failure to return from leave and where the Tribunal has issued an order for the patient's apprehension and detention;
- 8.4. the ceasing of the person's status as a forensic patient;
- 8.5. administrative orders made by the Director-General of Health for forensic patients to:
 - 8.5.1. take a leave of absence for an emergency or due to special circumstances; or
 - 8.5.2. transfer between mental health facilities.

9. The Register also facilitates the receipt of submissions from registered victims for Tribunal reviews.

10. A person who is a victim of an act of violence or a member of the victim's immediate family is eligible for registration on the Forensic Patient Victim Register. Eligible family members include the victim's:

- 10.1. spouse;
- 10.2. de facto partner (including of the same sex), who cohabited with the victim for at least 2 years;
- 10.3. parent, guardian, or step parent;

⁴³ <http://www.odpp.nsw.gov.au/witness-assistance-service/about-the-was>

⁴⁴ <http://www.odpp.nsw.gov.au/docs/default-source/was/court-support-services-list-.doc?sfvrsn=0>

⁴⁵ http://www.victimsservices.justice.nsw.gov.au/Pages/vss/vs_helpandsupport/vs_help-support-contacts.aspx

⁴⁶ http://www.victimsservices.justice.nsw.gov.au/sexualassault/Pages/sexual_assault_contactus.aspx

⁴⁷ http://www.victimsservices.justice.nsw.gov.au/Pages/vss/vs_victims/vs_specific-crimes-homicide.aspx

- 10.4. child or step child of the victim or some other child of whom the victim is the guardian;
- 10.5. brother, sister, half brother, half sister, step brother or step sister.

11. There are currently 243 registered victims on the Forensic Patients Victim Register, registered in relation to 117 forensic patients.⁴⁸

⁴⁸ NSW Ministry of Health, *Review of the Operation of the Mental Health Review Tribunal in respect of forensic patients discussion paper* p14.

CHAPTER 2 QUEENSLAND

PART I: FORENSIC MENTAL HEALTH REVIEW REGIME - LEAVE AND RELEASE

Mental Health Court, unsoundness of mind and fitness for trial

1. Under sections 613, 645 and 647 of the *Criminal Code 1899*, where the Mental Health Court⁴⁹ (**'the court'**) finds that a person:
 - 1.1. is not capable of understanding the proceedings at the trial for the reason that the person is of unsound mind; or
 - 1.2. is not of sound mind; or
 - 1.3. is not guilty of the offence on account of the person being of unsound mind when the act or omission alleged to constitute the offence occurred;the person must be admitted to an authorised mental health service to be dealt with under the *Mental Health Act 2016* (**'forensic order (Criminal Code)'**).
2. The court must, within 7 days, give notice of the order to the chief psychiatrist and the Mental Health Review Tribunal (**'the Tribunal'**)⁵⁰ and, where a victim impact statement was provided at the hearing, a copy must be given to the Tribunal.⁵¹

Limited community treatment for patients under the forensic order (Criminal Code)

3. An authorised doctor may authorise or revoke, or change the nature or extent of, limited community treatment for the patient if:⁵²
 - 3.1. the chief psychiatrist has given written approval for the limited community treatment;
 - 3.2. the authorised doctor is satisfied that there is not an unacceptable risk to the safety of the community, because of the person's mental condition, including the risk of serious harm to other persons or property after having regard to:
 - 3.2.1. the patient's relevant circumstances; and
 - 3.2.2. the purpose of limited community treatment; and
 - 3.2.3. the nature of the relevant unlawful act and the period of time that has passed since the act happened.

Non-revocation period for prescribed offences.

4. For prescribed offences⁵³, the court may order that a forensic order cannot be revoked for 10 years. The Tribunal must not revoke a forensic order during this period.

⁴⁹ *Mental Health Act 2016* (**'MHA'**) s638: a division of the Supreme Court which is constituted by a Supreme Court judge, who may seek advice from two assisting psychiatrists.

⁵⁰ MHA s190.

⁵¹ *Ibid* s155.

⁵² *Ibid* s214.

⁵³ *Ibid* s137, Schedule 13: prescribed offence means an offence against any of the following provisions of the Criminal Code—

Tribunal to make new forensic orders

5. The Tribunal must, within 21 days after it is notified of the making of a forensic order (Criminal Code) conduct a hearing for the purpose of making a forensic order (mental health) or forensic order (disability) for the person.⁵⁴
6. 14 days' notice of the hearing should be given to the forensic patient, the Attorney-General, the chief psychiatrist, the director of forensic disability and the administrator of the authorised mental health service to which the person has been admitted under the forensic order (Criminal Code).⁵⁵
7. Limited community treatment together with the forensic order (Criminal Code) to which it relates, ends on the day the Tribunal decides to order a forensic order (mental health) or forensic order (disability).⁵⁶

Types of forensic orders

8. The Tribunal must order the following⁵⁷:
 - 1.1. **a forensic order (mental health)** for forensic patients whose unsoundness of mind or unfitness for trial is due to a mental illness or dual disability (that is due to mental illness **and** intellectual disability) to be detained by an authorised mental health service; or⁵⁸
 - 1.2. **a forensic order (disability)** for forensic patients with an intellectual disability to be detained by a forensic disability service;⁵⁹ and

Categories of order

9. The Tribunal must also decide whether the order falls in the inpatient category or the community category.⁶⁰

Inpatient category

10. If the order falls in the inpatient category the Tribunal may:
 - 1.3. order that the forensic patient undertake no limited community treatment;
 - 1.4. approve that an authorised doctor⁶¹ may authorise limited community treatment subject to the Tribunal's approval;

(a) section 302 (Definition of murder) and 305 (Punishment of murder);
(b) section 303 (Definition of manslaughter) and 310 (Punishment of manslaughter);
(c) section 306 (Attempt to murder);
(d) section 317 (Acts intended to cause grievous bodily harm and other malicious acts);
(e) section 320 (Grievous bodily harm);
(f) section 349 (Rape);
(g) section 350 (Attempt to commit rape);
(h) section 351 (Assault with intent to commit rape).

⁵⁴ Ibid ss 459, 461.

⁵⁵ Ibid s460.

⁵⁶ Ibid s214, 461

⁵⁷ Ibid s461.

⁵⁸ Ibid ss461(1), 134.

⁵⁹ Ibid s461(2).

⁶⁰ Ibid s138, 462.

⁶¹ Ibid ss138, 462.

- 1.5. change an order to be under the community category subject to the Tribunal's conditions⁶² where the Tribunal is satisfied that *there is not an unacceptable risk to the safety of the community, because of the person's mental condition, including the risk of serious harm to other persons or property.*⁶³

Community category

11. If the order falls in the community category the Tribunal may:

- 1.6. order an authorised doctor must not change the category to inpatient; or
- 1.7. approve that an authorised doctor may change the nature or extent of treatment subject to the Tribunal's approval.⁶⁴

Treatment and care of forensic patients

12. A psychiatrist must assess and determine a forensic patient's treatment and care as soon as practicable, but within 7 days, of their becoming subject to a forensic order.⁶⁵

13. The Assessment and Risk Management Committee ('**ARMC**')⁶⁶ must review the treatment and care of a patient within 30 days of a patient being made subject to a forensic order. The ARMC must review the treatment and care of a forensic patient at a minimum of twice per year.⁶⁷ The ARMC will:

- 13.1. review the treatment and care of required patients under the Chief Psychiatrist Policy – Treatment and care of forensic order, treatment support order and high risk patients;
- 13.2. make recommendations or decisions about a patient's treatment and care;
- 13.3. identify systematic issues in relation to the management of forensic and high risk patients; and
- 13.4. determine the frequency of monitoring and assessment of forensic and high risk patients by the case manager (or equivalent), forensic liaison officer and an authorised psychiatrist.⁶⁸

14. Outside of the above monitoring and review timeframes, the clinical director⁶⁹ is to be notified and briefed with any information they require in the following circumstances:

⁶² Ibid s139(1), 462.

⁶³ Ibid ss138, 139, 462.

⁶⁴ Ibid s140,462.

⁶⁵ Queensland Health, [Chief Psychiatrist Policy Treatment and Care of Forensic Order, Treatment Support Order and High Risk Patients, 5 March 2017](#) ('the policy'), Taken from page 2

⁶⁶ Taken from Attachment 1 to the policy: The ARMC must include at least: * the clinical director (must be a psychiatrist who has been nominated by the administrator) * the treating psychiatrist and other members of the person's treating team * the forensic liaison officer, and * a representative from the community forensic outreach service.

⁶⁷ Taken from page 2 of the policy.

⁶⁸ Taken from attachment to the policy.

⁶⁹ Taken from page 2 of the policy: 'Clinical director' means a senior authorised psychiatrist who has been nominated by the administrator of the AMHS to fulfil the clinical director functions and responsibilities outlined in this Policy.

- 14.1. a patient’s matter has been escalated to the Chief Psychiatrist;
 - 14.2. the patient’s risk profile is assessed by the treating team to have changed from low/moderate to high; or
 - 14.3. there is a material change to the patient’s circumstance; or
 - 14.4. limited community treatment is breached, suspended or cancelled.⁷⁰
15. Patient matters must be reported to the chief psychiatrist immediately when the patient is subject to a forensic order or their risk profile is assessed as high by the treating team and the matter has resulted in:
- 15.1. media attention;
 - 15.2. controversial events or situations;
 - 15.3. serious and/or continued breaches of limited community treatment; or
 - 15.4. any matter the administrator or clinical director considers is of such importance that it should be reported to the Chief Psychiatrist.⁷¹
16. Administrators will be required to report to the Chief Psychiatrist on a quarterly basis, or at other times as directed by the Chief Psychiatrist.⁷²

LEAVE

Amendment to limited community treatment by authorised doctor

Decision-making criteria for leave

17. In having regard to the patient’s relevant circumstances, the purpose of limited community treatment, the nature of the offence and the time that has passed⁷³, if the authorised doctor is *satisfied that there is not an unacceptable risk to the safety of the community, including the risk of serious harm to other people or property, because of the person’s mental condition* an authorised doctor may (but not contrary to the decision of the Tribunal) amend forensic orders to:⁷⁴
- 17.1. change the category of the order; and
 - 17.2. authorise or revoke or change the nature or extent of limited community treatment.
18. If limited community treatment is authorised or amended, the authorised doctor must state:⁷⁵
- 18.1. the type of limited community treatment, that is on grounds, off grounds or overnight, and whether the patient is to be escorted, that is with a health service employee) or supervised (that is, in the company of a person nominated by the authorised doctor);
 - 18.2. the conditions of limited community treatment;
 - 18.3. the actions to be taken if the patient does not comply with conditions

⁷⁰ Ibid p3.

⁷¹ Ibid p5.

⁷² Ibid p6.

⁷³ Queensland Health [Chief Psychiatrist Practice Guidelines Forensic Orders and Treatment Support Orders – Amending Category, Conditions and Limited Community Treatment, 5 March 2017](#) (‘the guidelines’), p5

⁷⁴ MHA s212.

⁷⁵ Queensland Health Chief Psychiatrist Practice Guidelines Forensic Orders and Treatment Support Orders – Amending Category, Conditions and Limited Community Treatment, 5 March 2017. Taken from pp 5-6

- 18.4. the duration of the limited community treatment (overnight leave cannot be more than 7 consecutive nights); and
 - 18.5. the duration of the authorisation.
19. The authorised doctor must provide the patient and the patient's support persons with an explanation and written information about the patient's limited community treatment, in particular:
- 19.1. any treatment and care to be provided to the patient (for example, fortnightly home visit, monthly appointment with authorised doctor) and
 - 19.2. the patient's obligations while receiving limited community treatment (for example, to take prescribed medication).⁷⁶

The requirement to provide information does not apply if the patient is only authorised to have escorted limited community treatment.⁷⁷

20. Examples of amendments to limited community treatment include:⁷⁸:
- 20.1. specific telephone contact requirements
 - 20.2. supervision requirements regarding with whom the patient may undertake limited community treatment;
 - 20.3. specific requirements regarding places to which the patient may or may not travel while on limited community treatment;
 - 20.4. amendments to the duration of unescorted limited community treatment and overnight leave;⁷⁹
 - 20.5. imposing or changing a condition on leave, for example the application of a global positioning system (GPS) location device while the patient is undertaking limited community treatment.

Amendment changing community order to inpatient by authorised doctor

21. If an authorised doctor reasonably believes a patient's mental state has materially changed and therefore requires urgent treatment as an inpatient in an authorised mental health service, the category of the order may be changed to inpatient and the Tribunal must review the order within 21 days after receiving written notice of the amendment.⁸⁰

Reviews of forensic orders by the Mental Health Review Tribunal

22. Reviews of forensic orders are conducted by the Tribunal, which is made up of the President (a lawyer with at least 7 years' experience), other part-time members, lawyers, a psychiatrist and another person with relevant qualifications and experiences.⁸¹

⁷⁶ Id.

⁷⁷ Id.

⁷⁸ Queensland Ministry of Health, *Annual Report Director Mental Health 2015-2016* p56.

⁷⁹ MHA s214, Chief Psychiatrist Practice Guidelines Forensic Orders and Treatment Support Orders – Amending Category, Conditions and Limited Community Treatment, 5 March 2017, p8.

⁸⁰ MHA s213.

⁸¹ Ibid s707.

Standing

23. Applications to review a forensic order may be brought by the forensic patient, an interested person, the Chief Psychiatrist or the Director of Forensic Disability.⁸² The Tribunal must give written notice of the hearing to the forensic patient and relevant persons including the Chief Psychiatrist and the Attorney-General, at least 14 days before the review hearing of a forensic order.⁸³

Frequency of review

24. Reviews occur:⁸⁴

- 24.1. generally at intervals of 6 months;
- 24.2. within 21 days of an authorised doctor notifying the tribunal that the category of a forensic order has been changed from community to inpatient by an authorised doctor;⁸⁵ and
- 24.3. also on the Tribunal's own initiative.

RELEASE

Decision-making criteria for revocation of forensic order

25. On a periodic review, the Tribunal must confirm or revoke a forensic order⁸⁶ if it is necessary because of the person's mental condition, to protect the safety of the community, including from the risk of serious harm to other persons or property.⁸⁷ The Tribunal may also:

- 25.1. change or confirm the category of the order;⁸⁸
- 25.2. approve or revoke an order for limited community treatment; and
- 25.3. change the monitoring conditions.⁸⁹

26. The Tribunal must also have regard to:

- 26.1. the relevant circumstances of the person;
- 26.2. the nature of the offence and the period of time that has passed since the act happened;
- 26.3. any victim impact statement given to the Tribunal relating to the relevant unlawful act; and
- 26.4. any recommendation by the court about an intervention program for the person and the person's willingness to participate in the program if offered to the person.⁹⁰

⁸² Ibid s433.

⁸³ Ibid ss439 and 460.

⁸⁴ Ibid s433.

⁸⁵ Ibid s213.

⁸⁶ Ibid s441.

⁸⁷ Ibid ss442, 445.

⁸⁸ Ibid ss444, 445, 446.

⁸⁹ Ibid s447.

⁹⁰ Ibid s432.

27. As noted in paragraph 4 above, forensic orders made in relation to prescribed offences are subject to a non-revocation period of 10 years. The Tribunal cannot revoke the forensic order during this period and the Tribunal for that period is taken to have confirmed the order.⁹¹

Information notices

28. A victim⁹² can make an application to receive information under an information notice via the Queensland Health Victim Support Service to the Chief Psychiatrist.⁹³ Information provided under the notice can include:⁹⁴:

- 28.1. when a review by the Tribunal of the forensic patient is to take place;
- 28.2. the Tribunal's decisions in relation to the forensic patient;
- 28.3. when a forensic order is confirmed or revoked;
- 28.4. when approval for limited community treatment is approved or withdrawn with or without conditions;
- 28.5. when a forensic patient goes absent without leave or returns from their absence;
- 28.6. the transfer of a forensic patient from one mental health service to another, and the date of the transfer;
- 28.7. variation and amendments to orders and any conditions imposed; and
- 28.8. when the forensic patient is to be discharged, the reasons why and the effective date.

29. The relevant forensic patient should not be notified that an application has been made and who has applied for it (unless the applicant desires it and the Chief Psychiatrist considers it would be in the patient's best interests to do so)⁹⁵ which can operate to encourage victims to apply for information notices.⁹⁶ Information recipients should keep the information confidential.⁹⁷

30. Disclosure will be made unless the Chief Psychiatrist considers that it is likely to result in serious harm to the forensic patient's health or welfare or place at serious risk the safety of the person or anyone else.⁹⁸ An information notice is automatically revoked⁹⁹ if:

- 30.1. the relevant forensic patient is discharged;
- 30.2. information recipients makes a request to the Chief Psychiatrist to revoke the notice;

⁹¹ Ibid s442.

⁹² The direct victim of the unlawful act(s); a close relative of the direct victim including: the victim's spouse; a child, grandchild, parent, brother, sister, grandparent, aunt or uncle of the victim or the victim's spouse, a person who has suffered harm as a result of the unlawful act(s) and has sufficient personal interest in receiving information about the relevant patient. Queensland Health Department Information Sheet 'Victim Information: Information Notices'

https://www.health.qld.gov.au/__data/assets/pdf_file/0026/637811/FAQ_Victims_Information_Notices.pdf

⁹³ MHA Part 6 Division 2.

⁹⁴ Ibid Schedule 1.

⁹⁵ Ibid s325.

⁹⁶ QHVSS, personal communication, 19 October 2017.

⁹⁷ https://www.health.qld.gov.au/__data/assets/pdf_file/0026/637811/FAQ_Victims_Information_Notices.pdf

⁹⁸ MHA s319.

⁹⁹ Ibid s322.

- 30.3. the Chief Psychiatrist is satisfied that to disclose the requested information will likely result in serious harm to the patient's health or welfare or put the safety of the relevant patient or someone else at serious risk; or
- 30.4. the patient has been transferred to an interstate mental health service.

PART II FORENSIC VICTIM SUPPORT SERVICES IN QUEENSLAND

1. The *Mental Health Act 2016* (Qld) supports victims by providing for victim impact statements to be made to the court and the Tribunal and by enabling victims to receive specific information about persons on forensic orders and treatment support orders. See paragraphs 2, 26 and 28 of Part I.

Victims

2. The *Mental Health Act 2016* defines a victim, of an unlawful act, as a person against whom the unlawful act was committed or allegedly committed.¹⁰⁰

Victims and the Mental Health Act 2016

3. The *Mental Health Act 2016* establishes the following principles by which the Act is to be administered:¹⁰¹
 - 3.1. the physical, psychological and emotional harm caused to the victim by the unlawful act ;
 - 3.2. the benefits of counselling, advice on the nature of proceedings under the Act and other support services to the recovery of the victim from the harm caused by the unlawful act;
 - 3.3. the benefits to the victim of being advised in a timely way of proceedings under the Act against a person in relation to the unlawful act;
 - 3.4. the benefits to the victim of the timely completion of proceedings against a person in relation to the unlawful act; and
 - 3.5. the benefits to the victim of being given the opportunity to express the victim's views on the impact of the unlawful act to decision-making entities
4. The principles apply to:
 - 4.1. a victim of an unlawful act
 - 4.2. a close relative of the victim, and
 - 4.3. another person who has suffered harm because of an unlawful act, for example witnesses of a crime.¹⁰²

Victim impact statements

5. As referred to in paragraph 2 of Part I, victims can confidentially¹⁰³ give statements to the court and the Tribunal about a forensic patient's condition at the time of the offence or the forensic patient's unfitness for trial.¹⁰⁴ Statements can outline:
 - 5.1. the forensic patient's behaviour and the impact on the victim;
 - 5.2. risks of harm to the victim, both past and present;
 - 5.3. specific conditions on limited community treatment and the revocation of forensic orders necessary to protect the victim;
 - 5.4. a request for a non-contact order (which operate for 2 years and which are renewable). A non-contact order can be sought on revocation of a forensic order.

¹⁰⁰ *Mental Health Act 2016* Schedule 3 Dictionary.

¹⁰¹ *Ibid* s6.

¹⁰² *Ibid* ss6 and 7, QHVSS, personal communication 19 October 2017.

¹⁰³ *Ibid* s164.

¹⁰⁴ *Ibid* ss161 and 162.

Forensic Patient Information Notices

6. As noted in paragraph 28 of Part I, a victim may apply for an information notice relating to the forensic patient to the Chief Psychiatrist¹⁰⁵ and will be granted the information unless disclosure would likely result in serious harm to the patient's health or welfare, or put the safety of the patient or someone else at serious risk.¹⁰⁶ There are currently 120 people registered to receive information under an information notice comprising of victims of crimes including murder, grievous bodily harm, attempted murder and stalking.¹⁰⁷

Queensland Health Victim Support Service (QHVSS)

7. QHVSS provides specialist forensic health support services for victims of offences committed by those who have been identified as having mental illness and have been diverted to the forensic mental health system from criminal justice system. The Police or non-government agencies may contact victims for their consent to provide their details to the QHVSS on a private and confidential basis.
8. QHVSS provides the following services:
 - 8.1. notifying victims who have obtained forensic patient information orders of the outcomes of decisions, for example when limited community treatment has been approved, and explaining the effect of decisions either by email or in person according to victim preference;¹⁰⁸
 - 8.2. making submissions on behalf of victims regarding any conditions on limited community treatment;
 - 8.3. providing information and support to victims to understand and navigate the forensic mental health and criminal justice systems;
 - 8.4. assisting victims to prepare statements and submissions to the court and the Tribunal;
 - 8.5. providing referrals to counselling through the Victims Counselling and Support Service (**VCSS**), a Queensland Government initiative managed by Relationships Australia, and also to local area mental health services providers or private counsellors;
 - 8.6. providing information and referrals to specialist services, for example:
 - 8.6.1. the Queensland Homicide Victim's Support Group which provides 24 hour phone support, meetings, seminars and assistance with seeking compensation under the Victims of Crime Assistance Act 2009;
 - 8.6.2. Lifeline, which is a telephone counselling service;

¹⁰⁵ Ibid s319(3) whether the relevant patient is a risk to the safety and welfare of the person;

(b) whether it is likely the relevant patient will come into contact with the person;

(c) the nature of the relevant unlawful act in relation to the relevant patient's forensic order or treatment support order.

¹⁰⁶ Ibid s318.

¹⁰⁷ QHVSS, personal communication, 19 October 2017.

¹⁰⁸ Id.

- 8.6.3. Court Network, which is a free support service to those attending court and giving evidence;
 - 8.6.4. DV Connect/sexual assault which provides state-wide domestic, family violence and sexual assault telephone service in Qld;
 - 8.6.5. Protect All Children Today Inc (PACT), which provides support to children and minors required to give evidence as victims or witnesses; and
 - 8.6.6. ARAFMI, which provides support for families and carers of people with a mental illness.
- 8.7.** QHVSS is comprised of 7 staff members who are senior clinicians with qualifications in social work and psychology who provide support to victims located all over Queensland and are allocated in the following way:¹⁰⁹
- 8.7.1.** QHVSS Cairns office: 1 staff member;
 - 8.7.2.** QHVSS Townsville office: 1 staff member;
 - 8.7.3.** QHVSS Brisbane office: 5 staff members

QHVSS staff often travel from these offices to provide person to person support to victims. The service also employs 1 administrative support person.

Victim Assist Queensland

- 9. Victim Assist Queensland is a victim support service providing financial assistance and referral advice for all victims of crime. Victims may claim compensation under the Victims of Crime Assistance Act 2009 to help them recover from the act of violence in a timely manner.
- 10. Victim Liaison Officers from the Office of the Director of Public Prosecutions provide support navigating the criminal justice and forensic health systems by providing information to victims on the legal process, and providing assistance in preparing victim impact statements. They may also refer victims to victim support services if required.¹¹⁰

¹⁰⁹ QHVSS, personal communication, 19 October 2017.

¹¹⁰ Standing Council on Law and Justice, *National Framework of Rights and Services for Victims of Crime – 2013-2016* p18

CHAPTER 3 VICTORIA

PART I FORENSIC MENTAL HEALTH REVIEW REGIME - LEAVE AND RELEASE

Forensic patients

1. In Victoria an individual detained under the *Crimes (Mental Impairment and Unfitness to be tried) Act 1997* (Vic) ('**CMIA**') is a forensic patient.
2. Those who are unfit to stand trial or who are found not guilty of a criminal offence by reason of mental impairment may be detained in a mental health facility under a supervision order under the CMIA.

Unfitness to stand trial

3. If the issue of unfitness to stand trial arises, an investigation is conducted in order to determine whether the person is fit to stand trial. On such an investigation, the court¹¹¹ hears from the prosecution or defence, may call its own evidence and may require that the accused undergo medical examination with the results put before the court.¹¹² If a jury finds that a person is not fit to stand trial and is unlikely to become fit within the next 12 months, then a special hearing¹¹³ must be held within 3 months¹¹⁴ to determine whether the accused is not guilty of the offence or is not guilty of the offence because of mental impairment.¹¹⁵
4. If a person who is unfit to plead is found at a special hearing to have committed the offence, or if a person is found not guilty of an offence because of mental impairment, he or she must either be released unconditionally¹¹⁶ or placed under a supervision order.¹¹⁷

Supervision orders

5. The types of supervision orders which the court can make are:
 - 5.1. a custodial supervision order for custody in prison,¹¹⁸
 - 5.2. a custodial supervision order for custody in an 'appropriate place',¹¹⁹
 - 5.3. a non-custodial supervision order releasing the person into the community subject to supervision and on certain conditions.¹²⁰

¹¹¹ Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) ('**CMIA**') s3, 'court means Supreme Court of Victoria'.

¹¹² Ibid Pt 2.

¹¹³ Ibid s15

¹¹⁴ Ibid s12(5).

¹¹⁵ Ibid s16(2).

¹¹⁶ Ibid ss18(4)(b), 23(b)

¹¹⁷ Ibid ss18(4)(a), 23(a).

¹¹⁸ Ibid s 26(2)(a)(ii). The court may only make a custodial supervision order for custody in prison if it is satisfied that there is no practicable alternative in the circumstances, s 26(4)

¹¹⁹ Ibid s26(2)(a)(i). Section 3(1) defines an appropriate place as: (a) an approved mental health service; or (b) a residential treatment facility; or (c) a residential institution.

A court may only make a custodial supervision order for custody in an appropriate place if it has received a certificate made under section 47 stating that the facility necessary for the order is available: at s 26(3).

¹²⁰ Ibid s 26(2)(b).

Detention facilities

6. Custody in an ‘appropriate place’ for a person with a mental illness means:¹²¹
 - 6.1. a designated mental health service;
 - 6.2. a residential treatment facility or residential institution.

7. The person then becomes a ‘forensic patient’ under the Mental Health Act 2014.¹²² The Victorian Institute of Forensic Mental Health (‘**Forensicare**’) is the statutory agency charged with assessing and treating adults who have a mental illness and who have come into contact with the criminal justice system. The organisation manages prisons, secure hospitals and outpatient settings in which professionals from a range of mental health disciplines provide clinical services and are responsible for managing all forensic patients.

Clinical reports to be filed with court

8. The relevant legislation requires the ‘appropriate person’¹²³ to arrange for a clinical report to be filed within 30 days of the person being declared to be liable to supervision (or such longer period as the court allows), containing a diagnosis and prognosis of the forensic patient’s condition, details of the forensic patient’s response to any treatment, therapy or counselling, and a suggested treatment plan with follow up reports to be filed annually from that point onwards with the court.¹²⁴

Appeals

9. The following parties have standing to bring an appeal:
 - 9.1. **Supervision orders:** The Director of Public Prosecutions, the Attorney-General or the Secretary to the Department of Health may appeal to the Court of Appeal where they consider a different supervision order should have been made and an appeal should be brought in the public interest.¹²⁵
 - 9.2. **Confirmation or variation of orders:** The Secretary to the Department of Health, the Director of Public Prosecutions and the Attorney-General (if they were a party to the confirmation/variation proceedings) may appeal to the Court of Appeal where they consider the order should not have been confirmed or varied, and the appeal should be brought in the public interest.¹²⁶
 - 9.3. **Revocation of non-custodial supervision order:** The Secretary to the Department of Health, the Director of Public Prosecutions and the Attorney-General (if they were a party to the revocation proceedings) may appeal to the Court of Appeal where they consider the order should not have been revoked, and the appeal should be brought in the public interest.¹²⁷

¹²¹ Ibid s 3(1) as defined in the Mental Health Act 2014 and for those with intellectual disabilities the Disability Act 2006.

¹²² Ibid ss 3(1), 305.

¹²³ CMA s41(4)(a) ‘appropriate person’ means Secretary to the Department of Justice and Regulation if the forensic patient is in prison or the Secretary to the Department of Health if the forensic patient is in an ‘appropriate place’.

¹²⁴ Ibid s41.

¹²⁵ Ibid s28A.

¹²⁶ Ibid s34.

¹²⁷ Ibid s34A.

Reviews performed by the Court

10. The CMIA provides judges with the flexibility to decide how often to review, or further review, a person's supervision order.¹²⁸
11. When a person is declared liable to supervision and the court makes a supervision order in relation to that person, the court may direct a 'review' of the matter at the end of a certain period.¹²⁹ Unless the court revokes the order, the court may also direct a 'further review' of the matter following an application to vary or revoke an order or a 'review' of an order.¹³⁰ There is no limit to the number of times the court can order a further review.
12. The court can vary or revoke a supervision order¹³¹:
 - 12.1. at a major review;
 - 12.2. in the course of a review or further review; and
 - 12.3. through an application specifically brought to vary or revoke the supervision order.

Major review

13. The court must set a 'nominal term'¹³² for the supervision order as set out in the CMIA¹³³ and must undertake a major review of the supervision order, to determine whether the forensic patient is able to be released, at least three months before the end of the nominal term and at least every five years thereafter.¹³⁴
14. In a major review of a custodial supervision order, there is a presumption in favour of varying the order to a non-custodial supervision order unless the court is satisfied that the safety of the person subject to the order or members of the public will be seriously endangered because of the variation of the order.¹³⁵

Decision-making criteria for grant, variation or revocation of supervision order:

15. In considering the revocation or variation of a custodial supervision order, the court must:
 - 15.1. be satisfied that "*the safety of the person subject to the order or members of the public will not be seriously endangered*".¹³⁶ If the court will not vary or revoke the supervision order, a new application cannot be made for another three years (unless the court directs otherwise).¹³⁷
 - 15.2. apply the principle that restrictions on a person's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community.¹³⁸

¹²⁸ Ibid ss 27(2), 32(5), 33(2).

¹²⁹ Ibid s27(2).

¹³⁰ Ibid ss 32(5), 33(2).

¹³¹ Ibid ss32, 33.

¹³² Ibid 28, for example the nominal term for murder is 25 years.

¹³³ Ibid s28.

¹³⁴ Ibid s35.

¹³⁵ Ibid s35(3).

¹³⁶ Ibid s32.

¹³⁷ Ibid s31.

¹³⁸ Ibid s39.

16. The court must also have regard to:¹³⁹

- 16.1. the nature of the person's mental impairment or other condition or disability;
- 16.2. the relationship between the impairment, condition or disability and the offending conduct;
- 16.3. whether the person would, if released, be likely to endanger themselves, another person, or other people generally because of his or her mental impairment;
- 16.4. the need to protect people from such a risk;
- 16.5. the supervised person's recovery or progress in terms of treatment progression and personal improvement;
- 16.6. whether there are adequate resources available for treatment, support or services in the community;
- 16.7. any on-ground or off-ground leave the person has been granted and his/her compliance with the conditions of leave; and
- 16.8. any other matters the court thinks relevant.

17. The court must not vary a custodial supervision order to a non-custodial supervision order unless the person has completed a period of at least 12 months extended leave.¹⁴⁰

18. The Victorian Law Reform Commission set out additional factors that have guided the court's decision-making:¹⁴¹

- 18.1. the person's responsiveness to treatment;
- 18.2. control of any ongoing symptoms;
- 18.3. the person's compliance with medical treatment;
- 18.4. the person's insight into his/her mental illness and into the circumstances of the offence.;
- 18.5. the ability to monitor any re-emergence of symptoms for example, the ability of the treating team to apprehend the person or suspend leave if necessary;
- 18.6. the views of psychiatrists;
- 18.7. a previous downgrading of supervision;
- 18.8. a willingness of the person to self-report to the area mental health service upon a relapse;
- 18.9. the likelihood of adequate care in the civil mental health system.

19. The court's decision is based on written and verbal evidence presented by a hospital psychiatrist, the allocated community psychiatrist, and a case manager. Evidence of the individual's progress incorporates his/her current mental state, assessed risk, how he or she has utilised leave, and his/her participation in hospital and community-based rehabilitation activities.¹⁴²

Reports: Clinical and Victims

20. The court cannot order a person be released (with or without conditions) or significantly reduce the degree of supervision unless it has considered a report from victims of the offence and

¹³⁹ Ibid s40.

¹⁴⁰ Ibid s32(3)(a).

¹⁴¹ Victorian Law Reform Commission Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 Final Report p387.

¹⁴² Taken from Jamie O'Donahoo & Janette Graetz Simmonds (2016) Forensic Patients and Forensic Mental Health in Victoria; Legal Context, Clinical Pathways, and Practice Challenges, Australian Social Work, 69:2, at p172.

family members of the supervised person may also make a report to the court.¹⁴³

21. 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.¹⁴⁴ 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. The person giving evidence may be cross-examined and re-examined.¹⁴⁵

Forensic Leave Panel

22. A person on a custodial supervision order can apply for leave. On-ground and limited-off-ground leave applications are heard by the Forensic Leave Panel, constituted by the Chief Psychiatrist or a nominee thereof, an experienced forensic psychiatrist, a community member, and is headed by a Supreme Court judge.¹⁴⁶

LEAVE¹⁴⁷

Types of leave

23. A forensic patient may apply for leave. Different types of leave must be made to different bodies, as follows:
 - 23.1. **Special leave:** which specifies the circumstances for which the leave is required (up to 7 days for medical treatment and up to 24 hours in other cases) can be granted by the *Chief Psychiatrist*¹⁴⁸ where satisfied on the evidence that there are special circumstances and the safety of members of the public will not be seriously endangered.¹⁴⁹ If special leave is not granted, a person can appeal to the Forensic Leave Panel.
 - 23.2. **On-ground leave:** which allows a forensic patient or resident to be absent from the place of custody while remaining within the surrounds. This order is made by the *Forensic Leave Panel* and its maximum duration is 6 months.¹⁵⁰
 - 23.3. **Limited off-ground leave:** which allows a forensic patient or forensic resident to leave their place of detention between 6am and 9pm for a maximum of three days per week. This order is made by the *Forensic Leave Panel* and its maximum duration is 6 months.¹⁵¹

¹⁴³ CMIA ss40(2)d, 42.

¹⁴⁴ Ibid s42.

¹⁴⁵ Ibid s46.

¹⁴⁶ Ibid ss59, 60.

¹⁴⁷ Ibid s49.

¹⁴⁸ Ibid s50.

¹⁴⁹ Ibid 50(3).

¹⁵⁰ Ibid ss51, 54

¹⁵¹ Ibid ss53, 54

- 23.4. **Extended leave:** A person on a custodial supervision order can apply to the court¹⁵² for extended leave, which allows the forensic patient to live in the community subject to conditions. Extended leave can be granted for up to 12 months, and can be granted more than once where the court, after considering the treatment plan, is satisfied that the safety of the person applying for leave or the safety of members of the public will not be seriously endangered as a result of the person's extended leave.¹⁵³

Criteria for decision-making by the Forensic Leave Panel ('the Panel') for on-ground leave and limited off-ground leave

24. The Panel may grant or vary an application for on-ground or limited off-ground leave if it is satisfied on the evidence that:

- 24.1. the proposed leave will contribute to the person's rehabilitation; and
- 24.2. the safety of the person or members of the public will not be seriously endangered as a result of the person's leave.¹⁵⁴

25. The Panel must also have regard to the forensic patient's:¹⁵⁵

- 25.1. current mental condition or pattern of behaviour;¹⁵⁶
- 25.2. clinical history and social circumstances;¹⁵⁷
- 25.3. recovery or progress in terms of treatment progression and personal improvement;
- 25.4. any on-ground or off-ground leave that has been granted and the forensic patient's compliance with the conditions of their leave; and
- 25.5. the applicant profile provided under section 54A of the CMIA and the leave plan or statement provided under section 54B of the CMIA¹⁵⁸ which may propose conditions including:
 - 25.5.1. any escorts that may be required;
 - 25.5.2. where the forensic patient or forensic resident may go while on leave;
 - 25.5.3. who they may meet with; their travel arrangements or any requirement to undertake drug or alcohol testing following return from leave.¹⁵⁹

Common types of on-ground and limited off-ground leave

26. The Forensic Leave Panel's Annual Report lists the most common types of leave granted, including leave to:¹⁶⁰

¹⁵² Ibid s57.

¹⁵³ Ibid s57(2).

¹⁵⁴ Ibid 54(2).

¹⁵⁵ Victorian Law Reform Commission, Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 Final Report, p478, CMIA s54.

¹⁵⁶ CMIA s54(4)(a).

¹⁵⁷ Ibid s54(4)(b).

¹⁵⁸ The leave plan or statement should also include information on the purpose of the leave and how it will contribute to the forensic patient or forensic resident's rehabilitation, any proposed conditions of the leave and any other information the Clinical Director or Secretary to the Department of Human Services consider relevant or that the Forensic Leave Panel has requested.

¹⁵⁹ Forensic Leave Panel, *Forensic Leave Panel Annual Report 2015-2016* p12

¹⁶⁰ Ibid p13

- 26.1. attend medical, legal, dental or allied health appointments;
- 26.2. undertake activities of daily living (for example, personal shopping and banking);
- 26.3. build or maintain relationships with family or friends in the community;
- 26.4. participate in therapeutic or rehabilitation groups, activities and programs;
- 26.5. attend educational and vocational activities, groups and courses; and
- 26.6. participate in or seek voluntary or paid employment.

Decision-making criteria for extended leave

27. As part of its decision-making process regarding extended leave orders, the court considers the same criteria applied in relation to applications for release of forensic patients referred to at paragraphs 30 and 31 below.

Extended leave in practice

28. Donahoo and Simmonds (2016) have described the process of rehabilitation as:¹⁶¹

‘Once granted Extended Leave, a forensic patient is followed up by the Community Forensic Mental Health Service. At the end of June 2013 there were seven forensic patients living in the community on Extended Leave from Thomas Embling Hospital (Victorian Institute of Forensic Mental Health, 2013b). Community-based intervention for a forensic patient is comprised of regular psychiatric treatment, medication, and review by a psychiatrist, as well as assertive follow-up and support by a case manager at the Community Forensic Mental Health Service. At that stage the focus is on supporting community reintegration and maintaining a stable mental state rather than intensively addressing offence-related issues. Community oversight of a forensic patient on Extended Leave continues until they apply to have their order varied to a Non-Custodial Supervision Order, usually after 2-3 years of involvement by the community clinic.’

Suspension of special, on-ground, limited off-ground and extended leave by the Chief Psychiatrist

29. The Chief Psychiatrist may suspend leave (and may apply to the court to revoke, in the case of extended leave) if satisfied on the evidence available that the safety of the person or members of the public will be seriously endangered if he or she does not suspend leave, or part of the leave.¹⁶² The Chief Psychiatrist must lift the suspension where the basis for doing so no longer exists.¹⁶³

RELEASE

Decision-making criteria for the court regarding release

30. As part of its decision-making process regarding applications for release of forensic patients, the court must consider:

¹⁶¹ Jamie O'Donahoo & Janette Graetz Simmonds (2016) Forensic Patients and Forensic Mental Health in Victoria; Legal Context, Clinical Pathways, and Practice Challenges, Australian Social Work, 69:2, at p172

¹⁶² CMIA ss55(1), 57.

¹⁶³ Ibid s 55(3).

- 30.1. the principle that 'restrictions on a person's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community';¹⁶⁴ and
- 30.2. whether the person is, or would be likely to seriously endanger themselves, another person, or other people generally because of their mental impairment.¹⁶⁵

31. The court must also consider the following:¹⁶⁶

- 31.1. the nature of the person's mental impairment or other condition or disability;
- 31.2. the relationship between the impairment, condition or disability and the offending conduct;
- 31.3. whether the person poses an unacceptable risk of causing physical or psychological harm to another person or other people generally because of his or her mental impairment;
- 31.4. the need to protect people from such a risk;
- 31.5. the forensic patient's recovery or progress in terms of treatment progression and personal improvement;
- 31.6. whether there are adequate resources available for treatment, support or services in the community; and
- 31.7. whether any on-ground or off-ground leave has been granted and the patient's compliance with the conditions of leave;

32. The court also considers the following when making an order for the release of a person:¹⁶⁷

- 32.1. the report of at least one registered medical practitioner or registered psychologist who has examined the person's mental condition and the possible effect of unconditionally releasing the person on their behaviour;
- 32.2. the person's family members and victims of the charged offence have been given reasonable notice of the hearing at which the court is proposing to order release;
- 32.3. the leave plan filed in the case of an application for extended leave
- 32.4. any report of the family members or victims, and
- 32.5. any other relevant reports.

Breaches of supervision order

33. Some examples of breaches of supervision orders include:

- 33.1. missing appointments with the treating team;
- 33.2. refusing to participate in programs or using alcohol or illicit drugs (where this is in breach of a condition of the non-custodial supervision order).

When Forensicare is supervising a person subject to a non-custodial supervision order and there is a concern that the person is breaching the conditions of a non-custodial supervision order, the approved mental health service providing treatment to the person must contact the Chief

¹⁶⁴ CMIA s39.

¹⁶⁵ Ibid s40(1), 57(2); Victorian Law Reform Commission Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 Final Report p377.

¹⁶⁶ CMIA s40.

¹⁶⁷ Ibid s40(2)

Psychiatrist of Forensicare immediately.¹⁶⁸ Where it is reasonably suspected that a person has failed to comply with the conditions of their non-custodial supervision order, they may be apprehended.¹⁶⁹ Within 48 hours of apprehension, the person must either be released or an application must be made to have the non-custodial supervision order varied to a custodial supervision order.¹⁷⁰

Duration of supervision

34. Research conducted in 2006 showed that detention has ranged from three months to 36 years (with some people continuing in detention). The average length of detention was just over eight years and the median length of detention was almost four years.¹⁷¹

¹⁶⁸ Victorian Department of Health, *Non-custodial Supervision Orders: Policy and Procedure Manual* (2011) p3

¹⁶⁹ *Id.*, CMIA s30.

¹⁷⁰ *Id.*

¹⁷¹ Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: Consultation Paper* p49

PART II FORENSIC VICTIM SUPPORT SERVICES IN VICTORIA

Victoria does not offer support services which operate specifically for victims of forensic patients. Victims are able to take advantage of those services which are designed to support any victim of crime which are set out below.

1. A victim in relation to an offence is defined in the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) ('**CMIA**') as 'a person who suffered injury, loss or damage as a direct result of the offence'.¹⁷²

Victim reports and notification

35. The CMIA acknowledges the role of victims through provisions requiring notification of court hearings and outcomes of decisions and enabling victims and family members to make a report to the court.
36. Victims must be notified of hearings.¹⁷³ The Director of Public Prosecutions is required to give 14 days' notice, by registered post, of:
 - 36.1. reviews (including major reviews);
 - 36.2. applications for the variation or revocation of a supervision order; and
 - 36.3. applications for extended leave, if granting the application would significantly reduce the degree of the person's supervision¹⁷⁴
2. As referred to at paragraph 20 Part I victims can submit reports to the court at various stages of the CMIA process. This includes:
 - 2.1. at any point where the court makes an order following a qualified finding of guilt or not guilty because of mental impairment;
 - 2.2. whenever there is an application for the variation or revocation of an order; and
 - 2.3. during a major review or whenever there is an application for extended leave (that, if granted, would significantly reduce the degree of supervision to which the person is subject).¹⁷⁵

Witness Assistance Service

3. The Office of Public Prosecutions through its Witness Assistance Service provides information and support to victims and family members throughout the whole process, including information about their rights to report to the court¹⁷⁶ and the legal process, updates as to progress of a matter, notice of hearings, information about the outcome of hearings and assistance to make a report to the court prior to it making a supervision order.¹⁷⁷

¹⁷² Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) ('**CMIA**') s3(1).

¹⁷³ Ibid s38C(1)

¹⁷⁴ Ibid s38C(2)-(3), 74.

¹⁷⁵ Ibid ss 42(1), 43(1).

¹⁷⁶ <http://www.opp.vic.gov.au/getattachment/bd1a06b2-7304-4b15-a552-c03b51e15550/Prosecuting-Mental-Impairment-Matters-booklet.aspx>

¹⁷⁷ Victorian Law Reform Commission *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: Consultation Paper* p47

<http://www.opp.vic.gov.au/Witnesses-and-Victims/Getting-Help-from-the-Witness-Assistance-Service>

The Victims' Charter Act 2006 (Vic)

4. The *Victims' Charter Act 2006* (Vic) (**'Victims Charter'**) recognises the 'principles that govern the response to persons adversely affected by crime by investigatory agencies, prosecuting agencies and victims' services agencies'.¹⁷⁸

Victims Register

5. The Victims' Charter also sets out the rights of victims of crime including the right of those who volunteer to be registered as a victim of a violent crime¹⁷⁹ on the Victims Register, as established under the Victims' Charter and managed by the Victims Support Agency (referred to below), to have particular information about relevant processes and court proceedings and their outcomes.¹⁸⁰ A registered victim can access the following information¹⁸¹:
 - 5.1. the earliest possible release date of a prisoner/offender;
 - 5.2. the prisoner's eligibility to apply for rehabilitation and transition permits;
 - 5.3. any transfer of the prisoner/offender interstate or overseas;
 - 5.4. any escape by the prisoner/offender;
 - 5.5. the prisoner's release on parole- at least 14 days prior to the release date;
 - 5.6. the cancellation of the prisoner's parole;
 - 5.7. where an application has been made for a supervision or detention order;
 - 5.8. where the prisoner is subject to an extended supervision order, a supervision or detention order.

Victims of Crime Commissioner ('the Commissioner')

6. The primary aim of the Commissioner is to improve services and systems within government departments, victims' service providers and the justice system to meet the needs of victims of crime. Their functions are:¹⁸²
 - 6.1. advocating for the recognition, inclusion, participation and respect of victims of crime by government departments, bodies responsible for conducting public prosecutions and Victoria Police;
 - 6.2. carrying out inquiries on systemic¹⁸³ victim of crime matters;
 - 6.3. reporting to the Attorney-General on any systemic victim of crime matter; and
 - 6.4. providing advice to the Attorney-General and government departments and agencies regarding improvements to the justice system to meet the needs of victims of crime.

¹⁷⁸ Victims' Charter Act 2006 (Vic) s 1(a).

¹⁷⁹ Includes: Murder, manslaughter, attempted murder; Rape, sexual assault and other sexual offences, including offences against children; Assault; Stalking; Kidnapping; Aggravated burglary; • Culpable driving causing death; dangerous driving causing death or serious injury; and under the Road Safety Act 1986, failing to stop and render assistance after a motor vehicle accident where a serious injury/ death has occurred.

¹⁸⁰ This includes the Victims Register, which is a tool that assists in providing information to victims on offenders: *Victims' Charter Act 2006* (Vic) s 17

¹⁸¹ <https://assets.justice.vic.gov.au/voc/resources/d7ed27ef-8778-480f-bc3217e0f9c7c19b/2011victimsregisterweb.pdf>

¹⁸² *Victims of Crime Commissioner Act 2015* (Vic) s13

¹⁸³ Office of the Victims of Crime Commissioner, *Annual Report 2015-2016 Victims of Crime Commissioner*, p7

Victims Support Agency

7. Victims Support Agency ('**VSA**'), within the Department of Justice and Regulation is the official government agency helping victims manage the effects of violent crime. The VSA operates the Victims of Crime Helpline (the Helpline) which provides:¹⁸⁴
 - 7.1. advice about reporting a crime;
 - 7.2. information about the legal process, including after the offender is in jail and providing assistance with preparing a victim impact statement and the victims register;
 - 7.3. help applying for compensation and financial assistance to the Victims of Crime Assistance Tribunal ('**VOCAT**') for costs relating to victims' pain and suffering; and
 - 7.4. connections and referrals to other support services, such as for court support, legal services, and support services for specific crimes.¹⁸⁵

Victims Assistance and Counselling Program

8. The Victims Assistance and Counselling Program ('**VACP**') is a network of agencies across Victoria that provides services to victims of violent crime against the person. The VACP is a free service that provides information, referrals to other services and practical assistance such as:¹⁸⁶
 - 8.1. referral to allied services, such as solicitors and medical and mental health practitioners;
 - 8.2. criminal justice information, advocacy, support in making statements with police and courts;
 - 8.3. support at court and VOCAT hearings;
 - 8.4. assistance with preparing victim impact statements and submissions to the Adult Parole Board; and
 - 8.5. counselling and other therapeutic interventions.
9. Victims requiring ongoing counselling and medical treatment can apply to VOCAT for financial assistance.¹⁸⁷

¹⁸⁴ <https://www.victimsofcrime.vic.gov.au/get-help>

¹⁸⁵ <https://www.victimsofcrime.vic.gov.au/get-help/>

¹⁸⁶ <http://www.sunburyhc.org.au/wp-content/uploads/Northern-VACP-Brochure-v2.pdf>

¹⁸⁷ <https://www.victimsofcrime.vic.gov.au/going-to-court/compensation-and-financial-assistance>

CHAPTER 4: AUSTRALIAN CAPITAL TERRITORY

PART I: FORENSIC MENTAL HEALTH REVIEW REGIME - LEAVE AND RELEASE

Forensic patient

1. A forensic patient is a person in relation to whom a forensic mental health order has been made.¹⁸⁸ A forensic mental health order means a forensic psychiatric treatment order or a forensic community care order.
2. In the Australian Capital Territory, the Supreme Court or the Magistrate's Court may decide whether the accused is unfit to plead.¹⁸⁹

Unfit to plead

3. If the accused is unfit to plead, and is unlikely to be fit to plead within 12 months, the court must hold a special hearing¹⁹⁰ to determine whether the accused person is guilty beyond a reasonable doubt.
4. If the accused is proven to have committed the offences beyond reasonable doubt, the court may order that the accused be detained for immediate review by the ACT Civil and Administrative Tribunal (the '**ACAT**') or submit to the jurisdiction of ACAT to enable the making of a forensic mental health order.¹⁹¹
5. If an accused is charged with a serious offence which involves actual or threatened violence or endangering life,¹⁹² the Supreme Court must order that the accused be detained for custody for immediate review by ACAT; or (after taking into account the criteria for detention)¹⁹³ make an order that the accused submits to ACAT's jurisdiction to allow it to make a forensic mental health order.¹⁹⁴
6. Following an inquiry, ACAT must determine, on the balance of probabilities, whether the person has a mental impairment, and ACAT must make recommendations to the court about how the person should be dealt with.¹⁹⁵

ACAT and Forensic Mental Health Orders

7. Before making a forensic mental health order (**FMHO**), the ACAT must hold a hearing and consider:
 - 7.1 the circumstances of the alleged offences;
 - 7.2 the nature and effect of the offender's mental illness;
 - 7.3 whether detention would prevent risk to the person's health or safety or harm to others;¹⁹⁶ and
 - 7.4 if the proceeding involves a registered affected person¹⁹⁷ the views of the victims of crime commissioner.¹⁹⁸

¹⁸⁸ *Mental Health Act 2015 (ACT)* ('**MHA**') s127

¹⁸⁹ *Crimes Act 1900 (ACT)* ('**Crimes Act**') ss 315A(3), 315D(7); *MHA* s 176(1).

¹⁹⁰ *Crimes Act* ss 315C, 316, 335.

¹⁹¹ *Ibid* ss 318, 319, 335(4).

¹⁹² *Ibid* ss325, 267.

¹⁹³ *Ibid* S308.

¹⁹⁴ *Ibid* s324.

¹⁹⁵ *MHA* s177.

¹⁹⁶ *Ibid* at ss 98, 99(1)(k).

¹⁹⁷ This expression is defined in paragraph 37 below

¹⁹⁸ *Ibid* at s99.

8. Proceedings regarding FMHOs and their review must be heard by the President and a member with a relevant interest, experience or qualification.¹⁹⁹

FMHO Criteria

9. The ACAT may make:
 - 9.1 a **forensic psychiatric treatment order ('FPTO')**²⁰⁰ if satisfied that the person has a mental illness (forensic psychiatric treatment order) or mental disorder (forensic community care order); and
 - 9.2 a **forensic community care order ('FCCO')**²⁰¹ if satisfied that psychiatric care, treatment or support would reduce the harm to or the deterioration or endangerment of the person's psychiatric condition, or lead to an improvement in that condition.

ACAT's decision-making criteria for FPTOs

10. ACAT may make a FPTO if it considers that the person, because of mental illness:²⁰²
 - 10.1 is doing, or likely to do serious harm to themselves or someone else, or
 - 10.2 is suffering or is likely to suffer serious mental or physical deterioration; and
 - 10.3 is or would endanger public safety due to their mental illness;
 - 10.4 that treatment under this order is likely to reduce this and result in improvement to their psychiatric condition; and
 - 10.5 this treatment cannot be provided in another way less restrictive to their freedom of choice and movement.

ACAT's decision-making criteria for FCCOs

11. ACAT may make a FCCO if it considers that the person because of mental illness:²⁰³
 - 11.1 is doing, or likely to do serious harm to themselves or someone else, or
 - 11.2 is suffering or is likely to suffer serious mental or physical deterioration; and
 - 11.3 is or would endanger public safety due to their mental illness;
 - 11.4 that treatment under this order is likely to reduce this; and
 - 11.5 this treatment cannot be provided in another way less restrictive to their freedom of choice and movement.

FMHO duration

12. ACAT may make an order for three months. If a person has been subjected continuously to orders for 12 months or more (that is upon the making of 4 three month orders or more consecutively), ACAT may make an order for up to 12 months.²⁰⁴

Content of FPTO

13. A FPTO may set out:

¹⁹⁹ Ibid s186.

²⁰⁰ Ibid s101.

²⁰¹ Ibid s108.

²⁰² Ibid s101.

²⁰³ Ibid s108.

²⁰⁴ Ibid s117.

- 13.1 the facility to which that person is to be admitted;
- 13.2 the types of treatment, care or support (other than ECT or psychiatric surgery) the person is to receive;
- 13.3 any restrictions on people with whom the person can communicate;
- 13.4 where the person must live (if not detained in a facility); and
- 13.5 any people or places that the person must not approach or any activities that the person must not undertake.²⁰⁵

Treatment and care under FPTO

- 14. If a FPTO is granted, the Chief Psychiatrist (or their delegate) must within 5 working days after the order is made determine in writing:²⁰⁶
 - 14.1 whether a person needs to be treated in a mental health facility;
 - 14.2 if the person is being treated in the community, when and where they need to attend to receive treatment, care or support;
 - 14.3 the nature of the treatment the person is to receive, including any medication to be given; and
 - 14.4 where the person may be directed to live, if the FPTO does not state place of residence.
- 15. In considering the types of treatment, care or support that the person is to receive, the Chief Psychiatrist (or their delegate) should consult with the relevant people²⁰⁷

Notice of FPTO treatment

- 16. The Chief Psychiatrist must give a copy of their determination to the following people:²⁰⁸
 - 16.1 the person;
 - 16.2 those who have parental responsibility, if the person is a child;
 - 16.3 ACAT;
 - 16.4 the public advocate;
 - 16.5 the guardian;
 - 16.6 the nominated person; and
 - 16.7 the health attorney.

FCCO

Content of FCCO

- 17. A FCCO may set out the types of treatment, care or support a person is to receive, where the person is to live or be detained and any restrictions on communications and people or places the person cannot approach.²⁰⁹

²⁰⁵ Ibid at s102.

²⁰⁶ Ibid at s103.

²⁰⁷ Ibid at s103(6). namely: the person; those who have parental responsibility, if the person is a child; the guardian; the attorney; the nominated person; the Corrections Director-General, if the person is a detainee, on bail or parole; and the Children and Young People’s Director-General, if the person is a child who is a detainee, on bail or a community-based sentence.

²⁰⁸ Ibid at s103(7).

²⁰⁹ Ibid at s109.

FCCO Treatment and Care

18. If a FCCO is granted, the Care Coordinator²¹⁰ (or their delegate) must, within 5 working days determine:²¹¹
 - 18.1 when and where the person needs to attend to receive treatment, care or support; and
 - 18.2 ensure that the nature of the treatment, care or support, including any side effects, are explained to the person.
19. In considering the types of treatment, care or support that the person is to receive, the Care Coordinator (or their delegate) should consult with the relevant people involved in the person's care.²¹²
20. The Care Coordinator (or their delegate) must give a copy of their determination to the relevant people involved in the person's care.²¹³

Review of FMHOs

21. ACAT must review a FMHO:²¹⁴
 - 21.1 on application by the forensic patient or their representative that the order is no longer required;
 - 21.2 within 10 days of receiving notice that the Chief Psychiatrist considers that a FPTO or FCCO is no longer appropriate; and
 - 21.3 within 72 hours of receiving notice of a contravention; andACAT may review a FMHO:
 - 21.4 on its own initiative.
22. On review ACAT may:
 - 22.1 confirm, amend or revoke any of the forensic mental health orders in force in relation to the person;
 - 22.2 make additional forensic mental health orders in relation to the person;
 - 22.3 make a mental health order in relation to the person; or
 - 22.4 make an assessment order in relation to the person.

LEAVE

23. If ACAT has ordered the detention of a person at an approved mental health or approved community care facility under a FPTO or FCCO, ACAT may grant or cancel leave on application (by the person or the Chief Psychiatrist or Care Coordinator) or on its own review.²¹⁵

ACAT decision-making criteria for leave

24. The Chief Psychiatrist and the Care Coordinator may grant leave:

²¹⁰ Ibid at s204.

²¹¹ Ibid at s110.

²¹² Ibid at s110(4).

²¹³ Ibid at s110(6).

²¹⁴ Ibid at s126.

²¹⁵ Ibid at ss119, 126.

- 24.1 in special circumstances; and
- 24.2 where the safety of the person, other people or the public will not be seriously endangered.²¹⁶

25. ACAT may refuse leave where if it satisfied that the person unsuccessfully applied for leave for the same purpose within the last 6 months.²¹⁷

Conditions on leave

26. A grant of leave must state its purpose, duration, and any conditions on leave including:²¹⁸

- 26.1 accepting treatment, care or support as required;
- 26.2 enrolling and participating in educational, rehabilitation, recreational, therapeutic or training programs;
- 26.3 not using alcohol and other drugs;
- 26.4 undergoing drug testing and other medical tests;
- 26.5 the standard of conduct required;
- 26.6 prohibitions or limits on association with stated people or kinds of people;
- 26.7 prohibitions or limits on visiting stated places, or kinds of places;
- 26.8 prohibitions or limits on travelling interstate or overseas;

Revocation of leave

27. ACAT may revoke leave on application by the Chief Psychiatrist or Care Coordinator, or of its own accord²¹⁹.

28. Notice must be given to the person, the Chief Psychiatrist or Care Coordinator that revocation is being considered. Notice of a leave determination and revocation of leave must also be given.

29. ACAT can revoke leave if it believes on reasonable grounds it is necessary because the person:²²⁰

- 29.1 is doing or is likely to do serious harm to themselves or someone else; or
- 29.2 is suffering or is likely to suffer serious mental or physical deterioration; or
- 29.3 the person has seriously endangered, is or is likely to seriously endanger, public safety; or
- 29.4 the person has contravened a condition of leave.

30. If leave is cancelled, a police officer, authorised ambulance paramedic, doctor or mental health officer may apprehend the person and take them to a relevant facility.²²¹ If a person is detained, the person in charge of the approved mental health facility must advise ACAT and the public advocate within 12 hours.²²²

²¹⁶ Ibid at s119(4).

²¹⁷ Ibid at s119(5).

²¹⁸ Ibid at s119(7).

²¹⁹ Ibid at s120(1).

²²⁰ Ibid at s120(3).

²²¹ Ibid at s120(5).

²²² Ibid at s120(6).

Expiry of FPTO and release of forensic patient

31. If the Chief Psychiatrist (or a delegate) believes that a FPTO is no longer required and it is no longer necessary to detain the person, he or she must notify ACAT and give notice to 'notified people'²²³ stating the reasons for the belief that the FPTO is no longer required and seeking their input.
32. Either the carer or nominated person is able to:²²⁴
 - 32.1 make a submission to ACAT if he or she believes that the order should not cease; and
 - 32.2 apply to ACAT to attend the hearing.
33. If after hearing from notified people the Chief Psychiatrist is still satisfied that a FPTO is no longer necessary, he or she must advise ACAT and the public advocate of his or her opinion and provide any relevant information from notified people. ACAT must then review the order within 10 days of notification.²²⁵

Expiry of FCCO and release of forensic patient

34. If the Care Coordinator (or a delegate) believes that a FCCO is no longer required, he or she must notify ACAT and give notice to notified people (as referred to above) stating the reasons for the belief that the FCCO is no longer required and the person's detention is no longer required, and seeking their input.
35. Either the carer or nominated person is able to:²²⁶
 - 35.1 make a submission to ACAT if he or she believes that the order should not cease; and
 - 35.2 apply to ACAT to attend the hearing.
36. If, after hearing from notified people, the Care Coordinator is still satisfied that a FCCO is no longer necessary, he or she must advise ACAT and the public advocate of the opinion reached and provide any relevant information from notified people. ACAT must then review the order within 10 days of notification.²²⁷

²²³ Ibid at ss105(2), 106(2): notified persons include carers, nominated persons, Director-Generals of detention facilities, or supervisors of people under bail orders.

²²⁴ Ibid at ss105(3)(d), 106(3)(d).

²²⁵ Ibid at Note to s105, Note to s106.

²²⁶ Ibid at ss112(3), 113(3).

²²⁷ Ibid at Note to s112, Note to s113.

Affected persons register

An affected person

37. An affected person is someone who has suffered harm because of an offence committed, or alleged to have been committed, by a forensic patient.²²⁸
38. The Director-General responsible for ACAT must notify affected people of their rights and responsibilities as an affected person and maintain the Affected Person's Register of affected people in relation to offences committed or alleged to have been committed by forensic patients.²²⁹
39. Affected people are included on the register if:
 - 39.1 they request or give their consent for the director-general to do so;
 - 39.2 they have signed an undertaking not to publish information disclosed to them; and
 - 39.3 the Director-General is satisfied inclusion is necessary for their safety and well-being.²³⁰
40. Registered affected persons are entitled to the following information in relation to the forensic patient:²³¹
 - 40.1 that an application for a forensic mental health order has been made or is in force;
 - 40.2 if the patient absconds, or fails to return after leave, from a mental health facility or community care facility;
 - 40.3 when the patient is transferred to or from another jurisdiction;
 - 40.4 when the patient is released from a mental health facility or community care facility; and
 - 40.5 any other information about the forensic patient that the Director-General considers necessary for the affected person's safety and well-being.

²²⁸ Ibid at s128.

²²⁹ Ibid at s131.

²³⁰ Ibid at s132.

²³¹ Ibid at s134.

PART II: FORENSIC VICTIM SUPPORT SERVICES IN THE AUSTRALIAN CAPITAL TERRITORY ('ACT')

The ACT does not offer support services which operate specifically for victims of forensic patients. Victims are able to take advantage of those services which are designed to support any victim of crime which are set out below.

Victim Support Agency

1. Victim Support ACT is an agency within the Justice and Community Safety Directorate of the ACT Government which administers a range of services and programs for victims of crime and their families.
2. The agency supports the independent statutory position of the Victims of Crime Commissioner.

Victims of Crime Commissioner

3. As outlined in the *Victims of Crime Act 1994* (ACT), the Victims of Crime Commissioner manages the victims' services scheme and is the head of Victim Support ACT. The functions of the Victims of Crime Commissioner are listed in section 11 of the *Victims of Crime Act 1994* and are as follows:
 - 3.1. to manage the victims services scheme and any other program for the benefit of victims;
 - 3.2. to advocate for the interests of victims;
 - 3.3. to advocate for the interests of affected people under the *Mental Health Act 2015*;
 - 3.4. to monitor and promote compliance with the governing principles;
 - 3.5. to ensure concerns and formal complaints about non-compliance with the governing principles are dealt with promptly and effectively;
 - 3.6. to ensure the provision of efficient and effective services for victims;
 - 3.7. to consult on and promote reforms to meet the interests of victims;
 - 3.8. to develop educational and other programs to promote awareness of the interests of victims;
 - 3.9. to distribute information about the operation of this Act and the commissioner's functions;
 - 3.10. to ensure that victims receive information and assistance they need in connection with their involvement in the administration of justice;
 - 3.11. to encourage and facilitate cooperation between agencies involved in the administration of justice with respect to victims;
 - 3.12. to advise the Minister on the matters relating to the interests of victims; and
 - 3.13. any other function given to the commissioner under this Act or another territory law
4. As noted in paragraph 7 of Part I, ACAT must consider the views of the victims of crime commissioner if the proceeding involves a registered affected person before making a forensic order.²³²

²³² This expression is defined in paragraph 37 below

Victim Support ACT

5. Victim Support ACT (**'Victim Support'**) is a general service provided by the ACT Government for victims of crime and their families in the ACT. The agency sits within the Justice and Community Safety Directorate and administers a wide range of services and programs for victims of crime and their families.²³³
6. By separate appointment, the Victims of Crime Commissioner also performs the statutory functions of the Domestic Violence Project Coordinator under the Domestic Violence Agencies Act 1986.
7. Victim Support services are available to primary, secondary, related victims and witnesses of crime who have suffered harm as a result of an offence.

Victim Support Services

8. Victim Support delivers a combination of²³⁴ a range of **clinical and non-clinical health services** to victims of crime. These services are delivered through the Victim Service Scheme in accordance with the *Victims of Crime Regulation 2000* which sets out the levels of service and the amounts of counselling to which victims are entitled. These services include:²³⁵

- 8.1. Therapeutic services, including:

- 8.1.1. in-house counselling or counselling in the community;
- 8.1.2. referrals to organisations that may be able to provide additional support;
- 8.1.3. accessing additional therapeutic services (such as physiotherapy or massage) if these services may assist recovery.

Victim Support has a list of approved providers, to which it can refer victims for counselling, psychotherapy, natural therapies, massage therapy, psychological services and educational assessment and tutoring..

- 8.2. Court support services, including:

- 8.2.1. providing information about court processes and the rights and responsibilities of victims who act as witnesses in court;
- 8.2.2. assisting victims to complete victim impact statements for sentencing hearings or to make submissions regarding parole;
- 8.2.3. advising victims of their rights;
- 8.2.4. conducting court familiarisation, and
- 8.2.5. attending court with victims.

- 8.3. Victims of crime financial assistance services. Financial assistance may be available to:

²³³ Victim Support Agency *Annual Report 2015-2016*, p5
https://www.victimsupport.act.gov.au/__data/assets/pdf_file/0007/1023487/FINAL-Victim-Support-Annual-report-2015-2016.pdf

²³⁴ <https://www.victimsupport.act.gov.au/what-we-do>

²³⁵ <https://www.victimsupport.act.gov.au/what-we-do/the-victim-services-scheme>

- 8.3.1. primary victims;
- 8.3.2. related victims of an act of violence; and
- 8.3.3. witnesses to homicide who have suffered injury as a result.

Referral

- 9. Victims may refer themselves or be referred to Victim Support directly by the police or by the Office of the Director of Public Prosecutions during the prosecution process or by government and non-government organisations.
- 10. Victim Support may refer victims to therapeutic services through Victim Support Packages, which can include gym membership or massages. Victim Support may also refer victims to general victim support services as well as support services for victims of specific crimes. The assistance here includes health care or legal assistance by providing information to the victim about available services and their contact details or by contacting the services on the victim's behalf.²³⁶

The Witness Assistance Service²³⁷

- 11. The Witness Assistance Service ('**WAS**') provided by the Office of the Director of Public Prosecutions ('**ODPP**') provides support to witnesses of serious crimes during a prosecution. The role of the WAS is to assist the Director of Public Prosecutions ('**DPP**') to:
 - 11.1. inform victims and witnesses of their rights and responsibilities in dealing with the ODPP and the criminal justice system;
 - 11.2. manage the expectations of victims and witnesses in their dealings with the ODPP and the criminal justice system;
 - 11.3. help witnesses get ready for court such as preparing witnesses for giving evidence and providing assistance with preparing a victim impact statement.

Affected Persons Register

- 12. Victims of forensic patients are also entitled to information if they are registered as an affected person. See paragraph 40 of Part I.

²³⁶ <https://www.victimsupport.act.gov.au/links/24-hour-crisis-support>

²³⁷ https://www.dpp.act.gov.au/witness_and_victim_services/the_witness_assistance_service

CHAPTER 5: SOUTH AUSTRALIA

PART I FORENSIC MENTAL HEALTH REVIEW REGIME - LEAVE AND RELEASE

1. Where the mental fitness of an accused person is raised, the Supreme Court (**'the Court'**) may investigate his/her mental fitness²³⁸ and adjourn or discontinue the trial to allow for the investigation.²³⁹ Before the investigation begins, the Supreme Court may require or itself commission psychiatric or other expert reports on the accused's mental condition.²⁴⁰ If it appears from the reports that the accused is not currently but may, within the next 12 months, become mentally fit to stand trial, the Supreme Court may adjourn the trial for 12 months.²⁴¹
2. If the Court is satisfied on the balance of probabilities that the accused is unfit to stand trial or that the accused is not guilty by reason of lacking mental competence to commit the offence²⁴², he or she is liable to supervision and the court must either²⁴³:
 - 2.1. release the accused unconditionally; or
 - 2.2. make a supervision order.

Supervision orders

3. The Court may make the following supervision orders:²⁴⁴
 - 3.1. detain the accused²⁴⁵; or
 - 3.2. release the accused on licence under specific conditions;

Limiting term

4. The Court must specify a limiting term for which the accused may be subject to supervision and/or detention, which should be equal to the length of the sentence that would have been imposed if the accused had been convicted of the offence. The order automatically lapses at the end of this term.²⁴⁶ The Court may consider the following in setting this limiting term:
 - 4.1. victim impact statements;²⁴⁷
 - 4.2. community impact statements whereby neighbourhoods and communities may through the Crown or Commissioner for Victims' Rights furnish the court with a statement outlining the effect of the offence on them²⁴⁸

²³⁸ *Criminal Law Consolidation Act 1935 (SA) ('CLCA') s269J(1).*

²³⁹ *Ibid* s269J(3).

²⁴⁰ *Ibid* s269K(1).

²⁴¹ *Ibid* s269K(2).

²⁴² *Ibid* ss269F and 269M.

²⁴³ *Ibid* ss 269E, 269F, 269O(1).

²⁴⁴ *Ibid* s269O.

²⁴⁵ *Ibid* s269V.

²⁴⁶ *Ibid* s269O(2).

²⁴⁷ *Ibid* S269R(1) and *Criminal Law (Sentencing) Act 1988 (SA) s7A.*

²⁴⁸ *Criminal Law (Sentencing) Act 1988 (SA) s7B.*

Decision-making criteria for courts making supervision orders

5. The Court must consider the following when making a supervision order:²⁴⁹
 - 5.1. the nature of the accused's mental impairment;
 - 5.2. whether the accused is, or would if released, be likely to endanger another person, or other persons generally;
 - 5.3. whether there are adequate resources available for the treatment and support of the accused in the community;
 - 5.4. whether the accused is likely to comply with the conditions of the licence;
 - 5.5. other matters the court thinks relevant;
 - 5.6. that the restrictions on the accused's freedom of personal autonomy should be kept to the minimum consistent with the safety of the community.²⁵⁰

Supervision order and clinical reports

6. If an accused is declared to be liable to supervision under Part 8A of the *Criminal Law Consolidation Act 1935 (SA)* ('**CLCA**'), the Minister for Health must, within 30 days submit to the Court a report prepared by a psychiatrist or expert on the accused's mental condition. The report must contain a diagnosis and prognosis of the accused's condition, and a suggested treatment plan.²⁵¹
7. The Minister must also arrange for preparation and submission of a report regarding the treatment and condition of the supervised person every 12 months.

Unconditional Release

8. Unconditional release is usually appropriate where a fine or other non-custodial sentence would have been imposed on conviction, and the court considers that the accused is not likely to endanger himself/herself or the community.²⁵²

Release on licence principles and conditions

9. All licences are subject to the following conditions²⁵³:
 - 9.1. the licensee must not possess a firearm or ammunition; and
 - 9.2. the licensee must submit to reasonable testing for gunshot residue.
10. Other common licence conditions include that the licensee:²⁵⁴

²⁴⁹ CLCA s269T(1).

²⁵⁰ Ibid s269S.

²⁵¹ Ibid s269Q.

²⁵² November 2014, South Australian Attorney-General's Department Sentencing Advisory Council, *Mental impairment and the law: A Report on the operation of Part 8A of the Criminal Law Consolidation Act 1935 (SA)* p117.

²⁵³ CLCA s 269O(1a).

²⁵⁴ November 2014, South Australian Attorney-General's Department Sentencing Advisory Council, *Mental impairment and the law: A Report on the operation of Part 8A of the Criminal Law Consolidation Act 1935 (SA)* p175.

- 10.1. be housed in a certain location;
 - 10.2. refrain from consuming drugs or non-prescribed medication;
 - 10.3. must undergo drug and alcohol testing;
 - 10.4. is under the care of a psychiatrist and must comply with recommended treatment;
 - 10.5. is under the care of a mental health team;
 - 10.6. must take the medication he or she has been prescribed;
 - 10.7. must ensure that his or her blood alcohol concentration does not exceed 0.08%;
 - 10.8. will be supervised by a community corrections officer; and
 - 10.9. will be assessed for fitness to hold a driver's licence.
11. Where the accused is released on licence, responsibility for supervision is split in the following way:²⁵⁵
- 11.1. the Minister for Health is responsible for matters relating to the treatment or monitoring of the forensic patient's mental health, usually through the Community Forensic Mental Health Service²⁵⁶; and
 - 11.2. the Parole Board is responsible for all other aspects of the forensic patient's supervision.

Breaches of licences

12. Where a licensee breaches, or appears likely to contravene conditions of the licence (for example failing to keep a compulsory medical appointment), the Office of the Director of Public Prosecutions ('DPP') can apply to the Court (by telephone in emergencies) to review the supervision order. The Court may order the licensee be detained pending determination of the application. The licensee can be arrested and detained while the application is dealt with. The Court can vary the conditions or revoke the licence and order detention.²⁵⁷
13. If the contravention constitutes a criminal offence, for example drug taking or drink-driving, the licensee can be charged and arrested if necessary. However the issue of mental impairment may be raised at a trial for the new offence.²⁵⁸
14. Alternatively, if the licensee is suffering from a mental illness and needs medical treatment to protect himself/herself and others, the licensee can be examined by a doctor or authorised mental health professional, who can certify that he or she is mentally ill and needs to be detained under the Mental Health Act 2009 (SA) (MHA).²⁵⁹

²⁵⁵ CLCA s269V(3).

²⁵⁶ [July 2015 E Heffernan, B Clugston, S Patchett, *Review of the South Australian Forensic Mental Health Service* p12.](#)

²⁵⁷ CLCA 269U.

²⁵⁸ November 2014, South Australian Attorney-General's Department Sentencing Advisory Council, Mental impairment and the law: A Report on the operation of Part 8A of the Criminal Law Consolidation Act 1935 (SA) p175-176.

²⁵⁹ *Mental Health Act 2009 (SA)*s21.

Application for variation or revocation of supervision order

15. The forensic patient, the Crown, the Parole Board, the Public Advocate or any other person with a proper interest may apply to the Court to vary or revoke the supervision order at any time.²⁶⁰

Where the application is unsuccessfully made by the forensic patient, he or she cannot reapply for at least six months (unless the Court directs otherwise).²⁶¹

16. The Court cannot release the supervised person, or significantly reduce the degree of supervision to which he or she is subject, unless it has considered:²⁶²

- 16.1. the decision-making criteria referred to at paragraph 5 above;
- 16.2. at least three different reports by psychiatrists or other experts on the supervised person's mental condition and the possible effects of the proposed action on the forensic patient;
- 16.3. a recent report on the forensic patient's mental condition provided by the Minister for Health; and
- 16.4. a report on the attitudes of victims (or the victim's next of kin if the victim was killed by the forensic patient's conduct) and the next of kin.

²⁶⁰ CLCA s269P(1).

²⁶¹ Ibid s269P(2).

²⁶² Ibid s269T(2).

PART II FORENSIC VICTIM SUPPORT SERVICES IN SOUTH AUSTRALIA

South Australia does not offer support services which operate specifically for victims of forensic patients. Victims are able to take advantage of those services which are designed to support any victim of crime which are set out below.

Commissioner for Victims' Rights

1. The Commissioner for Victims' Rights ('the Commissioner') was established by the State Government to assist victims of crime access information and services.
2. The role of the Commissioner is defined by the Victims of Crime Act 2001 (SA) to be:²⁶³
 - 2.1. to marshal available government resources so they can be applied for the benefit of victims in the most efficient and effective way;
 - 2.2. to assist victims in their dealings with prosecution authorities and other government agencies;
 - 2.3. to monitor and review the effect of the law and of court practices and procedures on victims; ☐
 - 2.4. to carry out other functions related to the objects of this Act assigned by the Attorney General;
 - 2.5. if another Act authorises or requires the Commissioner to make submissions in any proceedings – to make such submissions (either personally or through counsel); and
 - 2.6. to carry out any other functions assigned under other Acts. The Commissioner can also consult public officials and public agencies regarding alleged breaches of the Declaration Governing Treatment of Victims.
3. The *Victims of Crime Act 2001 (SA)* provides for a statutory compensation scheme, including authorising the Attorney-General to approve payments from the Victims of Crime Fund to assist victims deal with those effects of crime for which they cannot receive recompense. The Commissioner receives and assesses all applications for these discretionary payments; and, in 2015–16 the Commissioner received about 205 enquiries for such payments resulting in about 125 payments.²⁶⁴

Commissioner and forensic health victims

4. If another Act requires (such as the *Criminal Law (Sentencing) Act 1988*) the Commissioner to make submissions in any proceedings, the Commissioner has the further function to make such submissions (either personally or through counsel). Under the forensic mental health regime, the Commissioner is able to furnish the Court with a community impact statement whereby neighbourhoods and communities prepare a statement outlining the effect of an offence committed by a forensic patient on them. See paragraph 4 of Part I²⁶⁵
5. In 2015-2016 the Commissioner allocated money from his legal services budget to ensure that the Forensic Mental Health – Victim Register was better staffed.²⁶⁶

²⁶³ *Victims of Crime Act 2001 (SA)* s16.

²⁶⁴ 30 September 2016, *South Australian Attorney-General's Department Annual Report 2015-2016* p67.

²⁶⁵ *Criminal Law (Sentencing) Act 1988*, s7B.

²⁶⁶ 30 September 2016, *Attorney-General's Department Annual Report 2015-2016* p66.

6. In 2015–16 the Commissioner assisted with negotiations and settlement of funding agreements for grants paid from the Victims of Crime Fund for victims in metropolitan and regional areas (ex GST), including as follows:²⁶⁷
 - 6.1. Victim Support Service SA (including metropolitan and regional services)- \$1,935,000;
 - 6.2. Road Trauma Support Team- \$87,000;
 - 6.3. Homicide Victims Support Group- \$7,000;
 - 6.4. Rape and Sexual Assault Services (including metropolitan and regional services)- \$107,000 and \$274,000;
 - 6.5. Office for Women (Family Safety Framework and Domestic Violence Legal Assistance Service)- \$121,000 and \$346,000;
 - 6.6. Funding for Child Witness Assistance Officers in the Office of the Director of Public Prosecutions- \$446,979;
 - 6.7. Compassionate Friends- \$2,000; and
 - 6.8. Forensic Mental Health Services — Victim Register- \$78,000.

The Forensic Court Service²⁶⁸

7. The Forensic Court Service is a part of the Forensic Mental Health Service and provides services to victims (and if a victim was killed as a result of the offender’s conduct—the next of kin of the victim) including:
 - 7.1. preparing reports for court on the views of the victim of the forensic patient’s behaviour;
 - 7.2. advising victims who apply to be on the Victims Register of their right to make submissions concerning the possible release or grant of leave to a forensic offender, for example, making submissions when forensic patients apply for variation of conditions on their licences. They are also notified of key information affecting them and the relevant forensic patient, including:²⁶⁹
 - 7.2.1. court orders;
 - 7.2.2. prospective release dates;
 - 7.2.3. escapes from detention and re-admissions; and
 - 7.2.4. when supervision or detention of the forensic patient is to end

8. The **Victim Support Service (VSS)**²⁷⁰ is a state-wide, community-based and not-for-profit body which provide a comprehensive range of services including: counselling, the provision of information about victims’ rights and criminal injuries compensation, a volunteer-based court companion service and support groups. The Court Companion program is a free and confidential service provided by the VSS where trained volunteers support victims and their families through the courts process. This may involve accompanying a witness throughout the process, providing

²⁶⁷ 30 September 2016, *Attorney-General’s Department Annual Report 2015-2016* p65.

²⁶⁸ *Id.*

²⁶⁹ June 2014 Government of South Australia, Attorney-General’s Department, *Information for victims of crime: Treatment, impact and access to the justice system*, p42.

²⁷⁰ *Standing Council on Law and Justice, National Framework of Rights and Services for Victims of Crime – 2013-2016* p20.

information about court processes.

9. The Office of the Director of Public Prosecutions (ODPP) operates a **Witness Assistance Service (WAS)** which provides information about and support, where the Director of Public Prosecutions is involved, during the legal process. WAS also refers to relevant services for victims of crime and their close family members or carers.²⁷¹
10. Both the VSS and WAS can refer victims to victim support agencies and appropriate counselling services, including a range of government funded and non-government organisations which provide general victim support services and other services for victims of specific crimes.²⁷²

Victims Register

11. Victims may register on the Victims Register (for which the Department of Correctional Services through its Victim Services Unit is responsible) to receive the following information:²⁷³
 - 11.1. the correctional institution in which the prisoner is imprisoned;
 - 11.2. the details of any transfer from one correctional institution to another;
 - 11.3. the details of the sentence/s of imprisonment that the prisoner is liable to serve;
 - 11.4. the date on which and circumstances under which the prisoner was, is to be or is likely to be released from the correctional institution for any reason (for example, on bail, leave of absence, home detention, parole); and
 - 11.5. the details of any escape from custody by the prisoner.

²⁷¹ <https://www.dpp.sa.gov.au/was/witnesses/witness-assistance-service/>

²⁷² June 2014 Government of South Australia, Attorney-General's Department, *Information for victims of crime: Treatment, impact and access to the justice system* at pp50-61.

²⁷³ <http://www.corrections.sa.gov.au/victims-info>

CHAPTER 6 WESTERN AUSTRALIA

PART I FORENSIC MENTAL HEALTH REVIEW REGIME - LEAVE AND RELEASE

Forensic patient

1. In Western Australia a forensic patient is a mentally impaired accused person in respect of whom an undischarged custody order has been made.²⁷⁴

Acquittal due to unsoundness of mind

2. If a forensic patient is acquitted by the Supreme Court ('the court') of serious offences listed in Schedule One of the Criminal Law (Mentally Impaired Accused) Act 1996 (WA) ('CLMIA') due to unsoundness of mind or mental unfitness it must make a custody order under Part 5.²⁷⁵

Not mentally fit to stand trial

3. Where the court finds that an accused is unfit and will not become fit within 6 months, the judge may quash the indictment without deciding guilt or innocence and may²⁷⁶:
 - 3.1. make a custody order, detaining the accused in an authorised hospital, a declared place, a detention centre or a prison, as determined by the Mentally Impaired Accused Review Board (MIARB);²⁷⁷ or
 - 3.2. release the accused unconditionally.

Test for custody order

4. A custody order can only be made by the Court when the statutory penalty for the alleged offence is or includes imprisonment and the judge is satisfied that custody is appropriate considering:²⁷⁸
 - 4.1. the strength of the evidence against the [Forensic Patient];
 - 4.2. the nature of the alleged offence and the alleged circumstances of its commission;
 - 4.3. the [Forensic Patient's] character, antecedents, age, health and mental condition; and
 - 4.4. the public interest.

Notification to the MIARB

5. When a custody order is been made the Registrar of the Supreme Court must immediately notify the MIARB and within two working days provide copies of the following to the MIARB²⁷⁹:
 - 5.1. custody order;
 - 5.2. prosecution notice or indictment;
 - 5.3. statement of facts by prosecutor;
 - 5.4. transcript of proceedings;
 - 5.5. written summary of the facts prepared by judicial officer who made the order (if no transcript available);
 - 5.6. criminal record;
 - 5.7. any pre-sentence report; and

²⁷⁴ *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ('CLMIA') s23.

²⁷⁵ *Ibid* at s21

²⁷⁶ *Ibid* at ss 19(1), 19(4), 22.

²⁷⁷ *Ibid* at s24.

²⁷⁸ *Ibid* at ss19(5)(a)-(d).

²⁷⁹ http://www.miarb.wa.gov.au/C/custody_orders.aspx

5.8. any other reports considered by the court when making the order.

6. The MIARB must consider the case within 5 working days and determine the place where the accused is to be detained (that is at an authorised hospital, a declared place, a detention centre or a prison).

Notification of forensic patients.

7. MIARB must notify both the Public Advocate²⁸⁰ and Electoral Commission²⁸¹ of all new mentally impaired accused persons.

MIARB reports to Attorney-General

8. The MIARB must give the Attorney-General a report within 8 weeks of a custody order being made and at other times, whenever it considers special circumstances exist, upon request by the Attorney-General and at least once a year.²⁸² The report must, amongst other things, recommend whether or not the Governor should be advised to release the forensic patient and any conditions to be applied.²⁸³

LEAVE

9. MIARB may at any time recommend to the Attorney-General that the Governor should grant a leave of absence to the forensic patient.
10. When deemed appropriate by the Governor in Executive Council, a forensic patient will be granted access into the community for very short periods over an extended length of time. During such periods, the forensic patient will be subject to conditions which are determined by the MIARB.²⁸⁴
11. The MIARB may allow conditional or unconditional leave at any time for a period, not exceeding 14 days at a time²⁸⁵ which it may cancel at any time.²⁸⁶ Conditions can include that the forensic patient undergo specific treatment or reside at a specified place.²⁸⁷

Criteria for leave

12. To grant leave, the MIARB must consider:
 - 12.1. the degree of risk that the release of the forensic patient appears to present to the personal safety of people in the community or of any individual in the community; and
 - 12.2. the likelihood that, the forensic patient will comply with any conditions imposed on their leave.

²⁸⁰ Guardianship and Administration Act 1990 (WA), s98(1).

²⁸¹ Electoral Act 1907 (WA), s59(2).

²⁸² CLMIA at s33(2).

²⁸³ Ibid at s33.

²⁸⁴ Ibid s28(2)(b).

²⁸⁵ Ibid at s28.

²⁸⁶ Ibid at s29.

²⁸⁷ Ibid at s28(4).

RELEASE

13. A person who is detained under a custody order must remain in detention until released by an order of the Governor.²⁸⁸
14. The Governor may, at any time,²⁸⁹ order that a forensic patient be released, conditionally or unconditionally, if the Attorney-General (based on a recommendation by the MIARB) advises the Governor of such an order.²⁹⁰ Conditions apply indefinitely, or for a period determined by the Governor to be amended or cancelled by the Governor at any time.²⁹¹

MIARB

15. The MIARB is established and governed by the CLMIA²⁹²
16. The MIARB comprises of the following:²⁹³
 - 16.1. the person who is the chairperson of the Prisoners Review Board;
 - 16.2. a deputy chairperson, to be nominated by the Attorney-General and appointed by the Governor;
 - 16.3. a person who works for and is appointed by the Disability Services Commission;
 - 16.4. persons who are community members of the Prisoners Review Board;
 - 16.5. a psychiatrist appointed by the Governor
 - 16.6. a psychologist appointed by the Governor.
17. The MIARB is required to have at least the Chairperson and two other members to constitute a quorum.²⁹⁴

Criteria for release

18. When making a recommendation to the Attorney General for the release of a forensic patient, the MIARB is to have regard for the following:²⁹⁵
 - 18.1. the degree of risk that the release of the forensic patient appears to present to the personal safety of people in the community or of any individual in the community;
 - 18.2. the likelihood that, if released on conditions, the forensic patient would comply with the conditions;
 - 18.3. the extent to which the forensic patient's mental impairment, if any, might benefit from treatment, training or any other measure;
 - 18.4. the likelihood that, if released, the forensic patient would be able to take care of his or her day to day needs, obtain any appropriate treatment and resist serious exploitation;
 - 18.5. the objective of imposing the least restriction of the freedom of choice and movement of the forensic patient that is consistent with the need to protect the health or safety of the forensic patient or any other person;

²⁸⁸ Ibid at ss 19, 24.

²⁸⁹ Ibid at s35.

²⁹⁰ Ibid at ss33, 35.

²⁹¹ Ibid at s35.

²⁹² Ibid at s41.

²⁹³ Ibid at s42(1).

²⁹⁴ Ibid at s42A.

²⁹⁵ Ibid at s33(5).

- 18.6. any statement received from a victim of the alleged offence in respect of which the forensic patient is in custody.

Victim engagement – conditions on release

19. The MIARB is required to consider any submission received from a victim when it determines the conditions of release for a forensic patient. Victims can either write directly to the MIARB or can be contacted through the Victim-Offender Mediation Unit. The Victim-Offender Mediation Unit falls under the jurisdiction of the Department of Corrective Services. The MIARB often receives reports from the Victim-Offender Mediation Unit which can recommend protective conditions to ensure the rights and safety of both the offender and the victims are protected (for example in relation to the level and nature of contact).²⁹⁶

Victim Notification Register

20. Victims who choose to be registered with the Victim Notification Register are advised when the MIARB will review forensic patient's case. Following the review, the Victim Notification Register is notified of the outcome of the MIARB and the victim will be notified of the MIARB's outcome by the Victim Notification Register. The Victim Notification Register falls under the Department of Corrective Services. Registered victims can access information including:
- 20.1. details about the offender's sentence;
 - 20.2. any escapes from custody and recapture;
 - 20.3. impending release dates; and
 - 20.4. the results of any appeals against the sentence.
21. Victims are notified in writing of any changes to the offender's circumstances, usually within 5 days of that change occurring.²⁹⁷

²⁹⁶ Ibid at s33(5)(f).

²⁹⁷ <http://www.correctiveservices.wa.gov.au/victim-services/victim-notification-register.aspx>

PART II FORENSIC VICTIM SUPPORT SERVICES IN WESTERN AUSTRALIA

Western Australia does not offer support services which operate specifically for victims of forensic patients. Victims are able to take advantage of those services which are designed to support any victim of crime which are set out below.

Victims

1. A victim is:²⁹⁸
 - 1.1. a person who suffered injury, loss or damage as a direct result of the alleged offence, whether or not that injury, loss or damage was reasonably foreseeable by the alleged offender; or
 - 1.2. where the alleged offence results in death, any member of the immediate family of the deceased.

Victim submissions and the forensic patient review process

2. The review process for release of a forensic patient provides for the submissions of victims to be considered. See paragraph 19 of Part I.

Victim Notification Register

3. Victims who choose to be registered on the Victim Notification Register are entitled to information about the relevant forensic patient. See paragraph 20 of Part I.

Victim Support Services

4. Victim Support Services ('VSS') is delivered by the Western Australian Department of the Attorney General. The VSS is the first point of contact in the service where victims go to receive information and is a free, confidential counselling and support service for all victims of crime which includes:²⁹⁹
 - 4.1. counselling and support;
 - 4.2. providing information and referrals to other support services;
 - 4.3. helping victims write a victim impact statement;
 - 4.4. preparing and supporting victims during a court case;
 - 4.5. providing support when making an application for a restraining order;
 - 4.6. providing information about criminal injuries compensation; and
 - 4.7. helping victims understand their rights within the criminal justice system.
5. The VSS also provides referrals to a range of government and non-government services based on an assessment of clients' needs including:³⁰⁰
 - 5.1. support groups;
 - 5.2. counselling;
 - 5.3. medical care;
 - 5.4. legal assistance.
6. The Child Witness Service (CWS) is a specialist service delivered by the Western Australian Department of the Attorney General which provides:³⁰¹

²⁹⁸ CLMIA at s33(6).

²⁹⁹ http://www.victimsofcrime.wa.gov.au/V/victim_support_services.aspx?uid=7806-3612-3048-1357

³⁰⁰ http://www.victimsofcrime.wa.gov.au/S/support_for_victims.aspx?uid=8083-1960-3055-1419

- 6.1. information to children and families on court process;
- 6.2. support to children who give evidence in court and by CCTV;
- 6.3. assistance and advocacy throughout the court process;
- 6.4. assistance with the preparation by children of a victim impact statement;
- 6.5. referrals to counselling; and
- 6.6. with non-evidentiary court preparation support.

³⁰¹ *Standing Council on Law and Justice, National Framework of Rights and Services for Victims of Crime – 2013-2016 pp25-26*

CHAPTER 7: THE NORTHERN TERRITORY

PART I FORENSIC MENTAL HEALTH REVIEW REGIME - LEAVE AND RELEASE

Forensic patient

1. A forensic patient is a 'a person who is the subject of a supervision order'³⁰². These may be custodial or non-custodial with conditions.³⁰³

Unfitness for trial and not guilty by reason of mental impairment

2. Where the fitness of a person to stand trial is raised by the court, prosecution or defence,³⁰⁴ the court must investigate the issue³⁰⁵ and may call evidence or require examination of the accused by a psychiatrist or other expert, where it would be in the interests of justice to do so.³⁰⁶
3. If, after investigation by the court³⁰⁷, the accused is found to be unfit for trial due to mental illness or impairment and is unlikely to be fit within 12 months³⁰⁸, and after a special hearing³⁰⁹ the jury finds the accused not guilty by way of mental impairment,³¹⁰ the court must either declare:
 - 3.1. the accused be supervised; or
 - 3.2. unconditionally release the accused.³¹¹

Decision-making criteria for supervision order

4. In making a supervision order, the court has a number of considerations:³¹²
 - 4.1. whether the accused person or supervised person concerned is likely to, or would if released be likely to, endanger himself or herself or another person because of his or her mental impairment, condition or disability;
 - 4.2. the nature of the mental impairment, condition or disability;
 - 4.3. the relationship between the mental impairment, condition or disability and the offending conduct;
 - 4.4. whether there are adequate resources available for the treatment and support of the supervised person in the community;
 - 4.5. whether the accused person or supervised person is complying with, or is likely to comply with, the conditions of the supervision order;
 - 4.6. restrictions on a supervised person's freedom and personal autonomy are to be kept to the minimum that is consistent with maintaining and protecting the safety of the community,³¹³ and
 - 4.7. any other matters the court considers relevant.

³⁰² Criminal Code Act Schedule One 43A (NT) ('CCA')

³⁰³ Ibid s43ZA.

³⁰⁴ Ibid s43N.

³⁰⁵ Ibid s43A: Supreme Court of NT.

³⁰⁶ Ibid s43P.

³⁰⁷ Ibid ss43N, 43P, 43Q.

³⁰⁸ Ibid ss43R(5)-(12).

³⁰⁹ Ibid ss43V.

³¹⁰ Ibid ss43X(2)(a).

³¹¹ Ibid s 43I(2).

³¹² Ibid s43ZN.

³¹³ Ibid s43ZM.

Clinical report of CEO of Health

5. The court orders supervision based upon reported findings by the CEO of the Department of Health which must contain:³¹⁴
 - 5.1. a diagnosis and prognosis of the accused person's mental impairment, condition or disability;
 - 5.2. details of the accused person's response to any treatment, therapy or counselling he or she is receiving or has received and any services that are being or have been provided to him or her; and
 - 5.3. a suggested treatment plan for managing the accused person's mental impairment, condition or disability.

Supervision orders

6. The types of supervision orders are:
 - 6.1. **Custodial supervision order:** where a person is detained at an 'appropriate place'- that is, a secure care facility or a custodial correctional facility subject to availability³¹⁵; custody in prison is considered to be the last resort;³¹⁶ and
 - 6.2. **Non-custodial supervision order:**³¹⁷ where the forensic patient is released with conditions.
7. The orders may contain whatever conditions the court considers appropriate.³¹⁸

Limiting term

8. Detention under a supervision order is indefinite.³¹⁹
9. However when the court makes a supervision order it must specify a nominal term for that order which is equivalent to the period of imprisonment or supervision that would, in the court's opinion, have been the appropriate sentence to impose on the forensic patient if he or she had been found guilty of the offence charged.³²⁰
10. Between 3 to 6 months before the term expires, the court must conduct a 'major review' to determine release.³²¹

Appealing a supervision order

11. The CEO Health can appeal the making of a supervision order where he or she considers:
 - 11.1. a different supervision order should have been made; or
 - 11.2. an appeal should be brought in the public interest.³²²

Applications for variation or revocation of supervision order

12. A range of people, including the DPP, the supervised person, the supervised person's carer, or anyone else the court recognises as having a proper interest, can apply to have the supervision

³¹⁴ Ibid s43ZJ.

³¹⁵ Ibid s43ZA(3).

³¹⁶ Ibid s43ZA(2).

³¹⁷ Ibid s43ZA (1).

³¹⁸ Ibid s43ZA.

³¹⁹ Ibid s 43ZC

³²⁰ Ibid s43ZG.

³²¹ Ibid s43ZG(5).

³²² Ibid s43ZB(2).

order varied or revoked. Applications are usually limited to one per year, but this can be altered by the court.³²³

Periodic Review, clinical reports and victim reports

13. The court is also mandated to review supervision orders³²⁴ every 12 months, on which occasion consideration is given to :

13.1. 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;³²⁵ and

13.2. an additional report by the CEO of Health containing:³²⁶

13.2.1. details of the treatment, therapy or counselling the supervised person has received, and the services that have been provided to the supervised person, since the supervision order was made or the last report was prepared; and

13.2.2. details of any changes to the prognosis of the supervised person's mental impairment, condition or disability and to the plan for managing that mental impairment, condition or disability.

Criteria for release

14. After considering these reports the court may conduct a periodic review to determine whether the forensic patient may be released from the supervision order³²⁷. The court may³²⁸:

14.1. if the person is subject to a custodial supervision order- vary it to a non-custodial supervision order, unless satisfied on the evidence available that *the safety of the defendant or the public will be seriously at risk if the person is released* on such an order;

14.2. If the person is subject to a non-custodial supervision order- confirm the order, vary its conditions, change it to a custodial supervision order, or revoke the order and release the forensic patient unconditionally.

Release considerations - major review

15. At the completion of the major review, and between 3-6 months before the limiting term expires, the court must release the supervised person unconditionally, unless it considers that *his or her safety, or the safety of the public, is likely to be seriously at risk if he or she is released*. In such circumstances the court must either confirm the supervision order, or vary its conditions.³²⁹

³²³ Ibid s43ZD.

³²⁴ Ibid s43ZK, 43ZH .

³²⁵ Ibid s43ZL.

³²⁶ Ibid s43ZK(1),(2).

³²⁷ Ibid s43ZH.

³²⁸ Ibid s43ZH.

³²⁹ Ibid s43ZG.

16. However, the court must not make an order releasing a supervised person from custody or significantly reducing supervision unless the court has considered a range of reports, including 2 reports from a psychiatrist or other expert and victim impact statements.³³⁰
17. The Court must also be satisfied that the victim (or next of kin), the supervised person's next of kin and, if the person is a member of an Aboriginal community that community, has been given reasonable notice of the proceedings.³³¹

³³⁰ Ibid s43ZN(2)(a).

³³¹ Ibid s43ZN(2)(b).

PART II FORENSIC VICTIM SUPPORT SERVICES IN THE NORTHERN TERRITORY

The Northern Territory does not offer support services which operate specifically for victims of forensic patients. Victims are able to take advantage of those services which are designed to support any victim of crime which are set out below.

Review process - Victim Impact Statement

1. As referred to above at paragraphs 13.1 and 16, the process by which supervision orders are made, varied and revoked by the court includes a requirement that the court consider, amongst other things, any report from the victim about the impact of the person's conduct upon them and the impact the release of the person would have on them.³³²

Victim services

2. The **Crime Victims Services Unit (CVSU)**³³³ of the Department of Justice provides financial assistance and access to free counselling for people who have been injured as a result of a violent crime. Financial assistance is available through the Victims of Crime Assistance Scheme administered by the CVSU for:³³⁴
 - 2.1. injuries received as a result of a violent act, including psychological injuries;
 - 2.2. loss of earnings;
 - 2.3. medical expenses; and
 - 2.4. other expenses such as the cost of travel to medical appointments and damage to personal items.

Victims who are assessed as requiring longer or more specialised psychological or psychiatric intervention may be eligible for financial assistance for therapeutic intervention.

Victims Register

3. The CVSU also maintains the Victims Register which was established to address the concerns of victims of crime. The Victims Register is a database which enables the Crime Victims Services Unit to provide victims of violent and sexual crimes, or other concerned persons with certain information about offender. It also allows victims to make written submissions to the Parole Board in relation to the relevant offender.

The **Witness Assistance Service (WAS)**³³⁵

4. Witnesses or victims appearing in the NT court system, prosecuted by the Department of Public Prosecutions, can receive services provided by WAS. The Witness Assistance Service is a unit within the Director of Public Prosecutions which provides support to victims of crime to understand the court and legal process and support victims who need to appear in court to give evidence. This includes:
 - 4.1. assisting preparation of victim impact statements;
 - 4.2. referring victims to counselling;
 - 4.3. contacting victims and obtaining their views on reviews or changes to the status of an offender found unfit to plead due to a mental health condition; and

³³² Criminal Code Act Schedule One s43ZL

³³³ <https://justice.nt.gov.au/programs/crime-victims-services-unit>

³³⁴ *Standing Council on Law and Justice National Framework of Rights and Services for Victims of Crime – 2013-2016*, p14

³³⁵ <http://www.dpp.nt.gov.au/witness-assistance/Pages/default.aspx>

- 4.4. assisting victims to have input into parole hearings and any special conditions for release of the offender that may relate to the victim.
5. **Victims of Crime NT (VoCNT)** is a non-government organisation funded by the Department of Justice to provide general crisis support, information, advocacy and court support and referral to other support services.
6. The Department of Justice funds Anglicare to provide free crisis counselling (up to around 8 sessions) to people who are victims of crime. People are referred to Anglicare by the CVSU, VoCNT, WAS or by other providers in the wellbeing service system.³³⁶

³³⁶ Standing Council on Law and Justice, *National Framework of Rights and Services for Victims of Crime – 2013-2016* p16.

CHAPTER 8: TASMANIA

PART I: FORENSIC MENTAL HEALTH REVIEW REGIME - LEAVE AND RELEASE

Forensic patients: fitness to stand trial and not guilty due to unsoundness of mind

1. Where an accused has, on the balance of probabilities,³³⁷ been found to be unfit to stand trial, a court or jury must also determine whether the accused is likely to become fit for trial within the following 12 months.³³⁸ If that is unlikely, the proceedings may be adjourned for that period or, otherwise, the Supreme Court (**'the court'**) must hold a special hearing to determine whether, on the limited evidence available, the accused is or is not guilty of the offence.³³⁹
2. If the accused is found not guilty due to unsound mind, or a finding cannot be made that the accused is not guilty, the court may make:³⁴⁰
 - 2.1 a restriction order, requiring the accused to be detained in a secure mental health unit;³⁴¹
 - 2.2 release the accused under a supervision order of the Chief Forensic Psychiatrist, on such conditions as the court considers appropriate;³⁴²
 - 2.3 make a treatment order under the *Mental Health Act 2013 (TAS)*, requiring the accused be given specific treatment;
 - 2.4 conditionally release the accused; or
 - 2.5 unconditionally release the accused.

Periodic review of forensic orders by the Mental Health Tribunal

3. The Mental Health Tribunal (**'the Tribunal'**) may review forensic orders.³⁴³ The Tribunal consists of at least six persons, including an Australian lawyer with at least five years' experience, a psychiatrist, and at least four other members.

Decision-making criteria for release

4. Forensic orders (restriction and supervisions orders) are reviewed by the Tribunal within 12 months after the order is made and at least once every 12 months thereafter.³⁴⁴ The Tribunal must have regard to:³⁴⁵

³³⁷ *Criminal Justice (Mental Impairment) Act 1999 (Tas)* (**'CJMIA'**) s 9(1).

³³⁸ *Ibid* ss12(4), 14(1).

³³⁹ *Ibid* ss14(2), 15(1), 15(2). If the proceedings are in the Supreme Court, the issue must be determined by a jury: *ibid* s 15(3). The same jury may, unless the judge orders otherwise, be empanelled for the purposes of an investigation, a special hearing and the trial: s 20. The procedures at a special hearing is set out at s16. The findings available to a court at a special hearing are at s17

³⁴⁰ *Ibid* ss 18(2), 18(4), 37. For restrictions orders see *ibid* Pt 4 Div 3. For supervision orders see *ibid* Pt 4 Div 5. See also (TAS) *Mental Health Act 2013* s 68.

³⁴¹ *CJMIA* s24; *Mental Health Act 2013 (Tas)* (**'MHA'**) s68.

³⁴² *CJMIA* s29A.

³⁴³ *CJMIA* s37.

³⁴⁴ *Ibid* s37(1).

³⁴⁵ *Ibid* s35.

- 4.1 the nature of the accused's mental impairment or other condition or disability; and
 - 4.2 whether the accused is, or would if released, be likely to endanger another person or other persons generally; and
 - 4.3 whether there are adequate resources available for the treatment and support of the accused in the community; and
 - 4.4 whether the accused is likely to comply with the conditions of a supervision order; and
 - 4.5 that restrictions on the accused's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community;³⁴⁶ and
 - 4.6 other matters that the court thinks relevant.
5. Furthermore the court and the Tribunal must also consider a report on the attitudes of victims, if any, and next of kin.³⁴⁷
6. If, on review, the Tribunal determines that detention under an order is no longer warranted, or conditions are now inappropriate, and the order should not be confirmed, it must issue a certificate to the accused to that effect and the person may apply immediately to the court for discharge of the restriction order.³⁴⁸

Review of forensic orders: variation and revocation – Tribunal certificate

7. If the Tribunal determines that forensic orders or any conditions imposed are no longer appropriate, it may issue a certificate to that effect which makes recommendations to the appropriate court; for example a recommendation that:
- 7.1 a restriction order be downgraded to a supervision order or a treatment order, or conditional or unconditional release.³⁴⁹ The accused may then apply to the court for discharge or variation of the forensic order;³⁵⁰
 - 7.2 a supervision order may be revoked or varied by instead ordering a restriction order, a treatment order or release (with or without conditions).³⁵¹ If the Tribunal considers on review that a supervision order should be revoked and a restriction order be made, it must recommend to the Secretary of the Department of Health and Human Services (**'the Secretary'**) to apply to revoke the supervision order and make a restriction order, and provide a copy of the recommendation to the accused.³⁵²

³⁴⁶ Ibid s34, 37.

³⁴⁷ Ibid s35(2)(b).

³⁴⁸ Ibid s 37(3).

³⁴⁹ Ibid ss37(4), 27.

³⁵⁰ Ibid s37.

³⁵¹ Ibid ss37(5) and 37(6).

³⁵² Ibid s7(7).

8. An application for revocation or variation of a supervision order can be made by the accused (or the Chief Forensic Psychiatrist, the Secretary or anyone else with a proper interest) every 6 months (unless the court directs otherwise).³⁵³

Application for discharge of restriction order without Tribunal certificate

9. Applications by a person who is detained under a restriction order, the Chief Forensic Psychiatrist or the Secretary may be made to the court for discharge of the order to be made without a certificate from the Tribunal after 2 years from when the order was made and then at 2-yearly intervals.³⁵⁴ The Director of Public Prosecutions appears for the Crown at the hearing of these applications and the court may order the Chief Forensic Psychiatrist or anyone else to prepare a report, which will be subject to cross-examination.³⁵⁵

Appeals to decisions regarding forensic orders

10. Appeals from decisions by the court making, extending, varying, revoking and discharging restriction and supervision orders may be made by the accused, the Attorney-General and the Secretary to the Court of Criminal Appeal.³⁵⁶

Criteria - application for leave of absence to Tribunal

11. The Tribunal may grant a forensic patient who is subject to a restriction order leave of absence from a secure mental health unit for clinical or personal reasons, with or without conditions.³⁵⁷ Leave may also be extended and varied for clinical or personal reasons, with or without conditions.³⁵⁸ Leave can be cancelled at any time if the responsible authority³⁵⁹ believes that its continuation would, or is likely to:³⁶⁰
 - 11.1 seriously endanger the patient's health or safety; or
 - 11.2 place the safety of other persons at serious risk.

Applicants

12. Applications for leave can be made by:
 - 12.1 the Chief Forensic Psychiatrist for clinical or personal reasons; and
 - 12.2 the patient and a person with a genuine interest in the patient's welfare, with the Tribunal's leave, for personal reasons.³⁶¹

³⁵³ Ibid s30.

³⁵⁴ Ibid s26(1). Where the court discharges the order, it may release the defendant under a supervision order, make a treatment order under the (TAS) Mental Health Act 2013 or release the defendant with or without conditions: CJMIA ss 18(2), 21, 27.

³⁵⁵ Ibid s26.

³⁵⁶ Ibid s36.

³⁵⁷ MHA s78.

³⁵⁸ Ibid ss79, 83.

³⁵⁹ Ibid s77.

³⁶⁰ Ibid ss79 and 83.

³⁶¹ Ibid s78(4) .

Victims submission and victim notification

13. When a leave application is made, the Tribunal notifies the Secretary of Corrections who must check the Eligible Persons Register to determine whether there are any eligible persons³⁶² in relation to the patient, who must be notified of the application and their right to make written submissions within 10 days of their notification. The Tribunal must also notify anyone else it considers should be notified and advise them of their right to make written submissions within 10 days' of notification.
14. The Tribunal considers these submissions in deciding leave applications.³⁶³ Leave cannot be taken before eligible persons are first notified unless circumstances render it impossible, impracticable or inappropriate to do so.³⁶⁴
15. Similar provisions apply in relation to leave for forensic patients not subject to restriction orders.³⁶⁵ Leave can be extended, varied and cancelled and the same notification regime concerning victims and their right to make written submissions to the Tribunal applies.³⁶⁶ An eligible person must also be notified prior to the release or transfer of a forensic patient unless it is impossible or impracticable to do so in the circumstances.³⁶⁷

³⁶² Anyone who is the victim of a violent crime where the offender has been given a prison sentence by the courts, or their family member.

³⁶³ Ibid s78(7).

³⁶⁴ Ibid s80 .

³⁶⁵ Ibid ss82, 84.

³⁶⁶ Ibid ss79 and 83.

³⁶⁷ Ibid s119.

PART II: FORENSIC VICTIM SUPPORT SERVICES IN TASMANIA

Tasmania does not offer support services which operate specifically for victims of forensic patients. Victims are able to take advantage of those services which are designed to support any victim of crime which are set out below.

Charter of Rights for Victims of Crime

1. Tasmania has a Charter of Rights for Victims of Crime (**'the Charter'**). Under the charter a victim is a person who, through or by means of a criminal offence (whether or not any person is convicted of that offence), suffers physical or emotional harm, or loss or damage to property; and, where an offence results in death, the members of the immediate family of the deceased.
2. The Charter recognises that a victim shall have the right:³⁶⁸
 - 2.1. to be dealt with at all times in a sympathetic, constructive and reassuring manner with due regard to the victim's personal situation, rights and dignity;
 - 2.2. to be informed upon request about the progress of investigations being conducted by police (except where such disclosure might jeopardise the investigation);
 - 2.3. to be advised upon request of the charges laid against the accused and of any modifications to such charges and the reasons for such modifications, and where appropriate, the reasons for charges not being laid;
 - 2.4. to be advised upon request of the reasons for accepting a plea of guilty to a lesser charge;
 - 2.5. to be advised of the entering of a nolle prosequi, the filling of a no bill or the adjournment of charges sine die when the decision is taken not to proceed with charges, and upon request, the reasons for taking such action;
 - 2.6. to have property held by the Crown for the purposes of investigation or evidence returned as promptly as possible. Inconveniences to victims should be minimised wherever possible;
 - 2.7. to be informed about the trial processes and of the rights and responsibilities of witnesses;
 - 2.8. to be protected from unnecessary contact with the accused and defence witnesses during the course of the trial;
 - 2.9. to not have his/her residential address disclosed unless deemed material to the defence;
 - 2.10. to not be required to appear at preliminary hearings or committal proceedings unless deemed material to the defence;
 - 2.11. to have his/her need or perceived need for physical protection put by the prosecutor before a bail authority which is determining and application for bail by the accused person;
 - 2.12. to be advised upon request of the outcome of all bail applications and be informed of any conditions of bail which are designed to protect the victim from the accused;

³⁶⁸ http://www.justice.tas.gov.au/victims/charter_of_rights_for_victims_of_crime

- 2.13. to have the full effects of the crime upon him/her made known to the sentencing court by the prosecutor in matters relating to offences of sexual assault or other personal violence;
- 2.14. to be advised upon request of the outcome of criminal proceedings and to be fully appraised of the sentence when imposed and its implications; and
- 2.15. to be notified upon request of an offender's impending release from custody, where the offender has been imprisoned in relation to offences of sexual assault or other personal violence.

Victims Support Services

- 3. Victims Support Services (VSS)³⁶⁹ is part of the Department of Justice which manages the operation of the Victims Assistance Unit, Court Support and Liaison Services and Victims of Crime Service. VSS provides the following services for victims of crime:
 - 3.1. the Eligible Persons Register, which is an automated database which allows victims, who choose to register, to be given information about an offender's location and progress in the prison system. See paragraph 13 Part I.
 - 3.2. processing applications for Victims of Crime Assistance (financial assistance) provided by the government where victims of violent crimes are unable to recover money from the offender;
 - 3.3. assistance preparing victim impact statements to the court and Parole Board;
 - 3.4. information on the progress of cases through court including the outcome;
 - 3.5. explanation of processes within the justice system including, court processes, the prison system, parole board activities, the classification board, leave applications including types of leave;
 - 3.6. access to government services available to victims of crime;
 - 3.7. access to services provided by non-government organisations; and
 - 3.8. general information on support services available to victims of crime.

Victims of Crime Service

- 4. This is a face to face counselling and support service for self-identified victims of crime. The service also offers:³⁷⁰
 - 4.1. referral to appropriate community services;
 - 4.2. information regarding police investigations, bail and parole conditions, court processes, and victims' rights;

³⁶⁹ Standing Council on Law and Justice, *National Framework of Rights and Services for Victims of Crime – 2013-2016* pp21-22

³⁷⁰ Standing Council on Law and Justice, *National Framework of Rights and Services for Victims of Crime – 2013-2016* pp21-22, <http://www.justice.tas.gov.au/victims/services/victimsofcrime>

- 4.3. assistance with Victims of Crime Assistance applications, and victim impact statements for victims of all crimes other than violent crimes (for which the DPP and its Witness Assistance Service provide assistance as referred to at paragraph 8 below;
 - 4.4. public advocacy for victims' rights.
5. The **Victims Assistance Unit**³⁷¹ is responsible for the provision of information to victims regarding the court process and the administration of the *Victims of Crime Assistance Act* and also the provision of assistance to the Criminal Injuries Compensation Commissioners. The unit also produces and maintains the Eligible Persons Register (see paragraph 6 below).

Eligible Persons Register

6. The Mental Health Act 2013 establishes a system for registered victims and a notification system for them when a forensic patient seeks a leave of absence³⁷² and when a decision is made to grant, extend, cancel or amend the conditions of a leave of absence³⁷³, or to release or transfer a forensic patient.³⁷⁴ A registered victim has a right to make a written submission in relation to such an application but has no express right of appearance in Tribunal hearings. See also paragraph 13 Part I.

Court Support and Liaison Services

7. This service sits within the VSS and provides support to adult and child victims of family violence (including referral to appropriate counselling and other services) as well as support through the court process.³⁷⁵

Witness Assistance Service (WAS)

8. This service is located within the Office of the Director of Public Prosecutions and is available to victims of violent crimes in cases heard in the court. The WAS will:³⁷⁶
- 8.1. support the victim through court procedure and the legal process and provide explanation so that they understand the procedure and outcome; and
 - 8.2. assist in the preparation of a victim impact statement.

Referral to victim support services

9. There are also available a number of generalist victim support services and services for victims of specific crimes available.³⁷⁷

³⁷¹ Standing Council on Law and Justice, *National Framework of Rights and Services for Victims of Crime – 2013-2016* pp21-22.

³⁷² Mental Health Act 2013 (Tas) ss78, 82.

³⁷³ Ibid ss78, 83.

³⁷⁴ Ibid s 119.

³⁷⁵ http://www.justice.tas.gov.au/victims/court_support

³⁷⁶ http://www.crownlaw.tas.gov.au/dpp/witness_assistance_service

³⁷⁷ <http://voc.sa.gov.au/where-can-i-get-help#Support>

UNITED KINGDOM

PART I FORENSIC MENTAL HEALTH REVIEW REGIME - LEAVE AND RELEASE

Restricted patients³⁷⁸

1. In the UK, the Crown Court (**'the Court'**) has power under section 37 of the *Mental Health Act 1983* (UK) (*'the Act'*) to order admission to a psychiatric hospital where there is medical evidence that justifies detention on the grounds of mental disorder. Where the court makes a hospital order it may also make an order under section 41 of the Act, (a restriction order) that restricts the patient's discharge, transfer or leave of absence from hospital without the consent of the Secretary of State. The Secretary of State is to decide leave and release of these restricted patients.

FORENSIC ORDERS

Hospital orders

2. Section 37 of the Act sets out the criteria which enable the court to order hospital admission or guardianship; namely:
 - 2.1 the defendant must be:
 - 2.1.1 convicted of an offence punishable with imprisonment, other than murder; or
 - 2.1.2 found unfit to plead and to have committed the actus reus or made the omission in Crown Court proceedings; or
 - 2.1.3 charged but not convicted of an imprisonable offence triable summarily and found to have committed the actus reus or made the omission in magistrates' court proceedings.
 - 2.2 The Court must be satisfied on the written or oral evidence of two doctors, at least one of whom must be approved under section 12 Mental Health Act 1983, that :
 - 2.2.1 the defendant is suffering from a mental disorder of a nature or degree which makes it appropriate for the defendant to be detained in hospital for medical treatment; and
 - 2.2.2 appropriate medical treatment is available.
 - 2.3 The Court is of the opinion, having regard to all the circumstances, including the nature of the offence and the character and antecedents of the defendant, and to the other available methods of dealing with the defendant, that a hospital order is the most suitable method of dealing with the case.

³⁷⁸ http://www.cps.gov.uk/legal/l_to_o/mentally_disordered_offenders/#b02

- 2.4 The Court is satisfied on the written or oral evidence of the approved clinician who would have overall responsibility for the defendant's case, or of some other person representing the managers of the relevant hospital, that arrangements have been made for the defendant to be admitted to that hospital within the period of 28 days starting with the day of the order.

Restriction orders

3. The court can make a restriction order in addition to the hospital order if:
 - 3.1 at least one of the doctors whose evidence is taken into account by the court before deciding to make the hospital order has given oral evidence ; and
 - 3.2 it is necessary for the protection of the public from serious harm for the person to be subject to special restrictions, having regard to:
 - 3.2.1 the nature of the offence;
 - 3.2.2 the antecedents of the offender; and
 - 3.2.3 the risk of the offender committing further offences if set at large.

LEAVE

4. The Secretary of State expects leave programmes to be designed and conducted in such a way as to preserve public safety and, accordingly, the responsible clinician should bear this in mind when making a careful risk assessment of the patient before each instance of considering leave.³⁷⁹
5. These leave programmes should also, where appropriate, respect the feelings and fears of victims and others who may have been affected by the offences.³⁸⁰

Leave plans

6. In order to consider any request for leave, the Secretary of State will require an up to date report on all previous leave taken. The relevant form for this report may also be used to report changes in the patient's circumstances such as:³⁸¹
 - 6.1 a change or cessation of medication;
 - 6.2 attempts at self harm;
 - 6.3 the involvement of the patient in an incident in, or outside, the hospital;
 - 6.4 abuse of substances; or
 - 6.5 the added stress of bad news from outside or from another stressful occasion.

Matters for consideration in relation to leave

³⁷⁹22 February 2017 *National Offender Management Service, Mental Health Casework Section, Section 17 – Leave of Absence Guidelines*, p2.

³⁸⁰ Ibid at p2.

³⁸¹ Ibid at p8.

7. The Secretary of State also requires the following information to support a request for leave of a restricted patient:³⁸²
 - 7.1 the aims of the proposal and the anticipated benefits for the patient's treatment and/or rehabilitation;
 - 7.2 the potential risk of harm to the public, taking into account the nature and adequacy of safeguards. The responsible clinicians must also consider any other risk factors which apply individually to the patient, particularly any risks to victims and their families, and must consulting with the Victim Liaison Office where appropriate;
 - 7.3 any potential public concerns or media attention, and any measures proposed in response to such concerns;
 - 7.4 any concerns which have been expressed, or are likely to be expressed, by victims of the offences committed by the patient, or by families of the victims;
 - 7.5 , any measures proposed in response to such concerns; and
 - 7.6 where leave for rehabilitation purposes is proposed, a plan of the periods of leave which are being requested for the patient, setting out:
 - 7.6.1 the destinations of the leave;
 - 7.6.2 the length of absences from the hospital;
 - 7.6.3 the escorting arrangements, where applicable, (including any written authority required under section 17(3) of the Act);
 - 7.6.4 the part which the leave will play in the overall treatment plan;
 - 7.6.5 what, specifically, each instance of leave will seek to achieve;
 - 7.6.6 how the leave will be monitored, whether by escorting staff or through the patient's own report or both; and
 - 7.6.7 how the success or otherwise of the leave will be assessed and measured; and
 - 7.6.8 any incidents of absconding or escape.

Types of Leave

8. **Ground Leave:**³⁸³ allows the restricted patient access to the grounds of the hospital or unit in which the detention authority requires their detention.
9. **Escorted Community Leave:**³⁸⁴ If the Secretary of State consents, the patient will remain in the custody of the escort who has powers to convey and restrain the patient. The hospital assesses the number of escorts required and the level of training and experience such staff must have.
10. **Unescorted community day leave:**³⁸⁵ The Secretary of State will generally agree to unescorted leave at the responsible clinician's discretion when satisfied that the patient is sufficiently rehabilitated to respect the conditions of leave, behave safely in the community

³⁸² Ibid at p3.

³⁸³ Ibid at p4.

³⁸⁴ Id.

³⁸⁵ Id.

and abide by the time limits set for return to hospital

11. **Overnight leave:**³⁸⁶ As patients approach the stage of their rehabilitation where they are close to discharge, the Secretary of State will consent to overnight leave if satisfied the proposal does not put the patient or others at risk.
12. **Holiday type leave:** Leave is to be designed and conducted so as to preserve public safety and, where appropriate, respect the feelings and possible fears of victims and others who may have been affected by the offences. When considering requests for overnight leave to activity centres or any facility offering "holidays", scrutiny will be given to the expected therapeutic benefits of such leave, the proposed arrangements for any escorts and the availability of support for the patient should they become unwell.³⁸⁷
13. **Compassionate Leave:** patients who would not otherwise qualify, either on risk grounds or because they have been in hospital for too short a time, may obtain leave on compassionate grounds, for example to visit a terminally ill relative or to attend a funeral, subject to satisfactory risk management arrangements in place.³⁸⁸
14. **Leave for the purposes of medical treatment:**³⁸⁹ The Secretary of State's permission is required for a restricted patient to attend medical appointments outside the secure hospital. The Secretary of State will issue a general permission for a specific patient where they are satisfied attendance is necessary, and that the risk management arrangements, including physical security are sufficient. Requests for this leave should contain:³⁹⁰
 - 14.1 initial reasons for the appointment/treatment;
 - 14.2 clear evidence that any risk factors have been addressed;
 - 14.3 a full risk management plan, including any physical security arrangements;
 - 14.4 a statement as to the patient's current mental state and compliance;
 - 14.5 a consideration of the risk of absconding;
 - 14.6 details, if applicable, of whether the appointment will take the patient into any exclusion zone or into the proximity of any victim;
 - 14.7 further information if there are unusual circumstances for example, such as those likely to attract national media interest.
15. **Leave for emergency medical treatment:** Due to the urgent nature of this type of leave, the Secretary of State's consent, whilst desirable, is not always possible. Responsible clinicians can therefore use their discretion but must notify the Ministry of Justice as soon as is practicable, that the patient has been taken to hospital, what risk management

³⁸⁶ 22 February 2017 *National Offender Management Service, Mental Health Casework Section, Section 17 – Leave of Absence Guidelines* at p5.

³⁸⁷ *Id.*

³⁸⁸ 22 February 2017 *National Offender Management Service, Mental Health Casework Section Section 17 – Leave of Absence Guidelines* at p6.

³⁸⁹ *Id.*

³⁹⁰ *Id.*

arrangements are in place and must be kept informed of developments, especially the return of the patient to the secure hospital/unit.³⁹¹

16. **Leave for court proceedings.**³⁹² The Secretary of State generally consents to this leave within 48 hours of receiving a request. Some restricted patients may be required to attend court for purposes other than criminal proceedings, for example to attend the Family Court.³⁹³ The following details are required:

- 16.1 the date(s) when attendance is required;
- 16.2 the details of the Court, including location;
- 16.3 the reasons for attendance;
- 16.4 whether consideration has been given to the patient attending the hearing via a video-link;
- 16.5 The arrangements for transporting the patient to court, including physical security for example, the number of escorts/the secure van/the necessity for handcuffs;
- 16.6 the details, if applicable, of whether attendance will take the patient into any exclusion zone or into the proximity of any victim;
- 16.7 any further information if there are unusual circumstances, for example, such as those likely to attract national media interest.

Criteria for community leave

17. Generally leave in the community while detained under the Act in hospital will not be given where a restricted patient would not have been given such leave whilst in prison. However, the Secretary of State will consider requests for community leave on an individual basis.³⁹⁴

18. Careful consideration will be given to the ongoing protection of the public, the potential increase in the patient's risk and the likelihood of their being in the community without the necessary supervision and support.

19. Factors relevant to this consideration include any history of absconding or escape and the therapeutic benefits of leave.

Withdrawal of consent for leave³⁹⁵

20. The Secretary of State may withdraw consent for leave and will consider matters such as:

- 20.1 whether the patient's condition has relapsed or, if the problem was a behavioural one;
- 20.2 whether the incident that caused leave to be rescinded was a "one-off";

³⁹¹ 22 February 2017 *National Offender Management Service, Mental Health Casework Section Section 17 – Leave of Absence Guidelines* at p7.

³⁹² Ibid at pp8-9.

³⁹³ Ibid at p9.

³⁹⁴ Ibid at p10.

³⁹⁵ Ibid at p8.

- 20.3 whether or not the patient was the main instigator and, if he or she was, whether the patient shows appropriate remorse which has been consistent and sustained, as has a further period of stable behaviour;
- 20.4 what the factors were which contributed to the infraction, and how they have been addressed so as to reduce the risk both of any recurrence and of its severity and impact were it to recur; and
- 20.5 any plans that might have been put in place by the responsible clinician requiring the patient to demonstrate certain behaviours before leave can be reinstated.

Victims³⁹⁶

- 21. Victims of serious violent and sexual offences have the right to information on key developments in a restricted patient's progress and to make representations about discharge conditions.
- 22. Where the Secretary of State grants community leave, information may be passed onto victims on a discretionary basis.

Victim Contact Scheme

- 23. Victims who have opted into the Victim Contact Scheme will be informed if community leave is granted. Victims of offences committed by restricted patients will receive information via the Victim Liaison Officer. Victims of offences committed by unrestricted patients will receive information from the hospital managers or clinicians.
- 24. Where victims do not statutorily qualify, they may be made part of this scheme on a discretionary basis.

RELEASE

- 25. Where the Secretary of State is satisfied that the restriction order is no longer required for the protection of the public from serious harm they may lift the restrictions placed on a restricted patient.³⁹⁷

Criteria for release

- 26. The statutory test to be applied is³⁹⁸ 'If the Secretary of State is satisfied that in the case of any patient a restriction order is *no longer required for the protection of the public from serious harm*, he may direct that the patient shall cease to be subject to the special restrictions set out in section 41(3) above; and where the Secretary of State so directs, the restriction order shall cease to have effect, and section 41(5) above shall apply accordingly.'

³⁹⁶ Ibid at pp11-12.

³⁹⁷ 22 February 2017 *National Offender Management Service, Mental Health Casework Section Lifting of special restrictions by the Secretary of State under the Mental Health Act 1983 Guidelines*, p2.

³⁹⁸ MHA s42(1).

27. If the restrictions are lifted, the patient will continue to be detained as if he/she had been admitted to hospital under a hospital order without restrictions.³⁹⁹
28. If a restriction order is lifted whilst the patient is on conditional discharge from hospital, he or she will cease to be liable to be detained and be absolutely discharge.⁴⁰⁰
29. Decisions to lift restrictions are considered carefully and are based on evidence from the patient's responsible clinician on the level of risk presented by the patient.⁴⁰¹
30. The First-tier Tribunal (Mental Health) may recommend that a patient's restrictions be removed; however the Tribunal has no statutory powers in this regard and it remains a decision for the Secretary of State.⁴⁰²
31. It is desirable for responsible clinician to submit written request for release explaining:
 - 31.1 why the request is being made;
 - 31.2 how the level of risk posed by the patient has been reduced;
 - 31.3 how any residual risks will be managed and/or mitigated;
 - 31.4 what impact removal of restrictions will have on the patient; and
 - 31.5 a long-term prognosis for the patient and clarification as to whether any ongoing need for treatment and support within the hospital setting would also be of assistance.

³⁹⁹ 22 February 2017 *National Offender Management Service, Mental Health Casework Section Lifting of special restrictions by the Secretary of State under the Mental Health Act 1983 Guidelines*, p2.

⁴⁰⁰ *Id.*

⁴⁰¹ 22 February 2017 *National Offender Management Service, Mental Health Casework Section Lifting of special restrictions by the Secretary of State under the Mental Health Act 1983 Guidelines*, at p3.

⁴⁰² *Id.*

Part II VICTIM SUPPORT UK

1. Victim Support is one of the largest providers of services to victims of crime, their families and witnesses in England and Wales. The service was created in response to the recognition that whilst offenders' needs were catered for within the criminal justice system, specific support for victims' needs had long been neglected.⁴⁰³

Victim engagement

2. 'Victim Support' is a largely state-funded (through an annual grant from the Ministry of Justice) organisation which supports victims of a range of volume of crimes such as burglary, theft, robbery and non-intimate partner violence.⁴⁰⁴
3. More recently Victim Support has begun to offer support to victims of more serious crime, such as sexual assault and domestic violence; however, victims of these crimes would be asked explicitly by police whether they wished to be referred to the service.⁴⁰⁵
4. Victims of these crimes were referred by the police to Victim Support on an 'opt out' basis, and, as such the organisation provided a more 'generic' service.⁴⁰⁶
5. Current referral procedures require the police to provide victim contact details automatically to Victim Support within two days of their reporting of a crime, unless they – the victims – specifically request otherwise.⁴⁰⁷
6. In cases of domestic violence and sexual assault, the police must obtain specific consent before contacting Victim Support. Victims can also self-refer to the organisation, and are not required to report their victimisation to the police.⁴⁰⁸
7. In 2013, Victim Support, with approximately 1,400 staff and 4,300 volunteer workers, offered support to more than one million victims and gave support to more than 198,000 people giving evidence in court.⁴⁰⁹

Services

8. Victim Support provides a variety of information, advice and support services using face-to-face, online and telephone delivery channels. This includes emotional support, advice on personal safety and compensation, support throughout the criminal justice process, and links to other sources of help and support. It has established collaborative partnerships with children and women's support organisations, as well as the police and local authorities.⁴¹⁰

⁴⁰³ Taken from Bryce J et al, (2016) 'A qualitative examination of engagement with support services by victims of violent crime' *International Review of Victimology* Vol 22, Issue 3.

⁴⁰⁴ Taken from Simmonds L, (2016) 'The potential impact of local commissioning on victim services in England and Wales' *International Review of Victimology*, Vol 22, Issue 3.

⁴⁰⁵ Id.

⁴⁰⁶ Id.

⁴⁰⁷ Taken from Bryce J et al, (2016) 'A qualitative examination of engagement with support services by victims of violent crime' *International Review of Victimology* Vol 22, Issue 3.

⁴⁰⁸ Id.

⁴⁰⁹ Id.

⁴¹⁰ Id.

9. However, recent changes in government policy and a change in funding for victim services to local Police and Crime Commissioners means that Victim Support may no longer necessarily be the main provider of services at the local level.⁴¹¹

Service feedback

10. Previous research suggests that receiving assistance from Victim Support and other services can increase levels of confidence and the perceived effectiveness of the criminal justice process, as well as providing victims with a voice and the perception of having their experiences taken seriously. This associated enhancement of victim trust in the procedural fairness of the criminal justice system represents a secondary benefit of engagement with support services, in addition to receiving help in coping with the psychological effects of victimisation.⁴¹²
11. Participants who did not engage with Victim Support after initial contact were reported to be still very positive about receiving an offer of emotional and practical support, and felt that this demonstrated concern by the criminal justice system for victims and their experiences.⁴¹³

⁴¹¹Id.

⁴¹²Id.

⁴¹³Id.

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76.

Appendix 1: Comparative table of leave and release criteria in Australia and the UK

	NSW	QLD	VIC	ACT	SA	WA	NT	Tas	UK
Governing legislation	<i>Mental Health (Forensic Provisions) Act 1990</i>	<i>Mental Health Act 2016 (Qld)</i>	<i>Crimes (Mental Impairment and Unfitness to be tried) Act 1997 (Vic) ('CMIA')</i>	<i>Mental Health Act 2015 (ACT)</i>	Criminal Law Consolidation Act 1935 (SA)	<i>Criminal Law (Mentally Impaired Accused) Act 1996 (WA)</i>	<i>Criminal Code Act</i>	<i>Criminal Justice (Mental Impairment) Act 1999 (Tas)</i>	<i>Mental Health Act 1983 (UK)</i>
Types of forensic orders	<ul style="list-style-type: none"> Forensic order for detention care or treatment in a mental health facility, correctional centre or other place; Forensic community treatment order 	<ul style="list-style-type: none"> Forensic order (mental health); Forensic order (disability) <p>The Tribunal must decide whether the orders falls in the inpatient category or the community category (allowing treatment in the community with active monitoring).</p>	<ul style="list-style-type: none"> a custodial supervision order for custody in prison; a custodial supervision order for custody in an 'appropriate place'; a non-custodial supervision order releasing the person into the community subject to supervision and on certain conditions. 	<ul style="list-style-type: none"> forensic psychiatric treatment order ('FPTO'); a forensic community care order ('FCCO') 	<ul style="list-style-type: none"> supervision order detaining the forensic patient; supervision order releasing the accused on licence under specific conditions 	Custody order detaining the accused in an authorised hospital, a declared place, a detention centre or a prison, as determined by the Mentally Impaired Accused Review Board.	<ul style="list-style-type: none"> custodial supervision order non-custodial supervision order with conditions. 	Restriction order requiring detention in a secure mental health unit	Hospital order with special restrictions.
Reviewing body	Mental Health Review Tribunal	Mental Health Review Tribunal	The Supreme Court of Victoria for variation/revocation of supervision orders and applications for extended leave Forensic Leave Panel for applications for on-ground and limited off-ground leave.	ACT Civil and Administrative Tribunal	The Supreme Court of South Australia	The Mentally Impaired Accused Review Board ('MIARB') makes recommendations to the Attorney-General, who then advises the Governor to adopt the recommended course.	The Supreme Court of the Northern Territory	The Mental Health Tribunal makes determinations which are issued in a certificate on which the forensic patient may apply immediately to the Supreme Court to give the determination effect.	The Secretary of State
Review body composition (if a Tribunal)	<ul style="list-style-type: none"> President; a psychiatrist or other mental health expert; and another member with 'suitable qualifications or experience' A judge or former judge must also sit on the panel when an application for release is being heard. 	<ul style="list-style-type: none"> The President (a lawyer with at least 7 years' experience); other part-time members; lawyers; a psychiatrist; and another person with relevant qualifications and experiences. 	The Forensic Leave Panel is made up of: <ul style="list-style-type: none"> Chief Psychiatrist or their nominee; an experienced forensic psychiatrist; a community member; and Supreme Court judge as the President. 	Proceedings regarding forensic mental health orders must be heard by: <ul style="list-style-type: none"> the President; and a member with a relevant interest, experience or qualification. 		MIARB comprises of the following: <ul style="list-style-type: none"> the person who is the chairperson of the Prisoners Review Board; a deputy chairperson, to be nominated by the Attorney-General and appointed by the Governor; a person who works for and is appointed by the Disability Services Commission; persons who are community members of the Prisoners Review Board; a psychiatrist appointed by the Governor; a psychologist appointed by the Governor. 		At least six persons, including: <ul style="list-style-type: none"> an Australian lawyer with at least five years' experience; a psychiatrist; and at least four other members. 	
Review	For forensic orders: <ul style="list-style-type: none"> Every 6 months; 	<ul style="list-style-type: none"> generally at intervals of 6 months; within 21 days of an 	<ul style="list-style-type: none"> As the court directs At a major review to take place 3 months 	<ul style="list-style-type: none"> on its own initiative; on application by the forensic patient or 	<ul style="list-style-type: none"> On application 	The MIARB must give the Attorney-General a report which recommends	<ul style="list-style-type: none"> Every 12 months At a major review – 3-6 months before expiry of 	<ul style="list-style-type: none"> Initially reviewed within 12 months of a restriction order being 	

	<ul style="list-style-type: none"> • Upon request; • At any time; <p>For community treatment orders:</p> <ul style="list-style-type: none"> • Every 3 months. 	<p>authorised doctor notifying the tribunal that the category of a forensic order has been changed from community to inpatient by an authorised doctor; and</p> <ul style="list-style-type: none"> • also on the Tribunal's own initiative. <p>NB: Forensic orders made in relation to prescribed offences are subject to a non-revocation period of 10 years</p>	<p>before the expiry of the nominal term of the supervision order as set by the court.</p>	<p>their representative that the order is no longer required;</p> <ul style="list-style-type: none"> • within 10 days of receiving notice that the Chief Psychiatrist considers that a FPTO or FCCO is no longer appropriate; • within 72 hours of receiving notice of a contravention; 		<p>whether or not the Governor should be advised to release the forensic patient:</p> <ul style="list-style-type: none"> • within 8 weeks of a custody order being made; • whenever it considers special circumstances exist • upon request by the Attorney-General; and • at least once a year. 	<p>the limiting term.</p>	<p>made; and</p> <ul style="list-style-type: none"> • every 12 months thereafter. 	
Legislative test for leave	<p>Will the safety of the patient or any member of the public be seriously endangered if the leave of absence is granted?</p>	<p>Will there be an unacceptable risk to the safety of the community, including the risk of serious harm to other people or property if leave is granted?</p>	<p>The safety of the person or members of the public will not be seriously endangered as a result of the person's leave.</p>	<p>The safety of the person, other people or the public will not be seriously endangered.</p>					
Legislative test for release	<ul style="list-style-type: none"> • Will the safety of the patient or any member of the public will not be seriously endangered by the patient's release; and • Is other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the patient or does the patient require care. 	<p>Is it necessary because of the person's mental condition, to protect the safety of the community, including from the risk of serious harm to other persons or property?</p>	<p>That safety of the person subject to the order or members of the public will not be seriously endangered.</p> <p>The court must not vary a custodial supervision order to a non-custodial supervision order unless the person has completed a period of at least 12 months extended leave.</p>	<p>Whether the person has seriously endangered, is seriously endangering, or is likely to seriously endanger, public safety.</p>	<p>Whether the accused is, or would if released, be likely to endanger another person, or other persons generally.</p>	<p>The degree of risk that the release of the forensic patient appears to present to the personal safety of people in the community or of any individual in the community.</p>	<p>The safety of the defendant or the public will be seriously at risk if the person is released.</p>	<p>Whether the accused is, or would if released, be likely to endanger another person or other persons generally.</p>	<p>The statutory test to be applied is</p> <p>"If the Secretary of State is satisfied that in the case of any patient a restriction order is no longer required for the protection of the public from serious harm, he may direct that the patient shall cease to be subject to the special restrictions set out in section 41(3) above; and where the Secretary of State so directs, the restriction order shall cease to have effect, and section 41(5) above shall apply accordingly."</p>
Types of leave (where specific reference is made in legislation or clinical guidelines)	<ul style="list-style-type: none"> • Ground leave (escorted, supervised or unsupervised) • Escorted day leave • Unsupervised day leave • Supervised overnight leave • Leave for special circumstances or medical emergencies 		<ul style="list-style-type: none"> • Special leave • On-ground leave • Limited off-ground leave • Extended Leave 						<ul style="list-style-type: none"> • Ground leave • Escorted Community Leave • Unescorted community day leave • Overnight leave • Holiday type leave • Compassionate Leave • Leave for the purposes of medical treatment

									<ul style="list-style-type: none"> • Leave for emergency medical treatment • Leave for court proceedings
Decision-making criteria for release	<ul style="list-style-type: none"> • whether the person is suffering from a mental illness or other mental condition; • whether there are reasonable grounds for believing that care, treatment or control of the person is necessary for the person's own protection from serious harm or the protection of others from serious harm; • the continuing condition of the person, including any likely deterioration in the person's condition, and the likely effects of any such deterioration; • 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 any member of the public will be seriously endangered by the person's release; and • in the case of the proposed release of a forensic patient subject to a limiting term, whether or not the patient has spent sufficient time in custody. 	<ul style="list-style-type: none"> • the relevant circumstances of the person; • the nature of the offence and the period of time that has passed since the offending act happened; • any victim impact statement given to the Tribunal relating to the relevant unlawful act; and • if the Mental Health Court made a recommendation about an intervention program for the person, the person's willingness to participate in the program if offered to the person. 	<ul style="list-style-type: none"> • the nature of the person's mental impairment or other condition or disability; • the relationship between the impairment, condition or disability and the offending conduct; • whether the person would, if released, be likely to endanger themselves, another person, or other people generally because of his or her mental impairment; • the need to protect people from such a risk; • the supervised person's recovery or progress in terms of treatment progression and personal improvement; • whether there are adequate resources available for treatment, support or services in the community; • any on-ground or off-ground leave the person has been granted and their compliance with the conditions of their leave; and • any other matters the court thinks relevant. <p>And also based on the VLRC's analysis of the relevant case law:</p> <ul style="list-style-type: none"> • the person's responsiveness to treatment; • control of any ongoing symptoms; • the person's compliance with medical treatment; 	<ul style="list-style-type: none"> • If the Chief Psychiatrist (for forensic psychiatric treatment orders) or Care Coordinator (for forensic community care orders) believes that a forensic order is no longer required and it is no longer necessary to detain the person, they must notify ACAT and give notice to 'notified people' (including carers, supervisors and director generals of facilities) stating the reasons why they believe the order is no longer required and seek their input. • Either the carer or nominated person can make a submission to ACAT if they believe that the order should not cease • If after hearing these submissions the Chief Psychiatrist or Care Coordinator, is still satisfied that a forensic order is no longer necessary, they must advise ACAT and provide any relevant information from notified people for ACAT to review within 10 days. 	<ul style="list-style-type: none"> • the nature of the accused's mental impairment; • whether the accused is, or would if released, be likely to endanger another person, or other persons generally; • whether there are adequate resources available for the treatment and support of the accused in the community; • whether the accused is likely to comply with the conditions of the licence; • other matters the court thinks relevant. • that the restrictions on the accused's freedom of personal autonomy should be kept to the minimum consistent with the safety of the community. 	<ul style="list-style-type: none"> • the likelihood that, if released on conditions, the forensic patient would comply with the conditions; • the extent to which the forensic patient's mental impairment, if any, might benefit from treatment, training or any other measure; • the likelihood that, if released, the forensic patient would be able to take care of his or her day to day needs, obtain any appropriate treatment and resist serious exploitation; • the objective of imposing the least restriction of the freedom of choice and movement of the forensic patient that is consistent with the need to protect the health or safety of the forensic patient or any other person; • any statement received from a victim of the alleged offence in respect of which the forensic patient is in custody. 	<ul style="list-style-type: none"> • the nature of the mental impairment, condition or disability; • whether the accused person or supervised person concerned is likely to, or would if released be likely to, endanger himself or herself or another person because of his or her mental impairment, condition or disability; • the relationship between the mental impairment, condition or disability and the offending conduct; • whether there are adequate resources available for the treatment and support of the supervised person in the community; • whether the accused person or supervised person is complying or is likely to comply with the conditions of the supervision order; and • the principle that restrictions on a supervised person's freedom and personal autonomy are to be kept to the minimum that is consistent with maintaining and protecting the safety of the community. 	<ul style="list-style-type: none"> • the nature of the accused's mental impairment or other condition or disability; and • whether there are adequate resources available for the treatment and support of the accused in the community; and • whether the accused is likely to comply with the conditions of a supervision order; and • the principle that restrictions on the accused's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community; 	

			<ul style="list-style-type: none"> the person's insight into their mental illness and into the circumstances of the offence.; the ability to monitor any re-emergence of symptoms for example, the ability of the treating team to apprehend the person or suspend leave if necessary; the views of psychiatrists; A previous downgrading of supervision; A willingness of the person to self-report to their area mental health service if they relapse; 						
Decision-making criteria for leave	Same as for release	<ul style="list-style-type: none"> the patient's relevant circumstances; the purpose of limited community treatment; the nature of the offence and the time that's passed. 	<p>The Forensic Leave Panel in applications for limited off-ground and on-ground leaves must consider:</p> <ul style="list-style-type: none"> a forensic patient's clinical history and social circumstances; a forensic patient's recovery or progress in terms of treatment progression and personal improvement; any on-ground or off-ground leave that has been granted and forensic patient's compliance with the conditions of their leave; and the applicant profile provided under section 54A of the CMIA and the leave plan or statement provided under section 54B of the CMIA which may propose conditions to leave including: <ul style="list-style-type: none"> any escorts that may be required; where the forensic 	<ul style="list-style-type: none"> in special circumstances; ACAT may refuse leave if it satisfied that the person unsuccessfully applied for leave for the same purpose within the last 6 months. 		<p>MIARB may at any time recommend to the Attorney-General that the Governor should grant a leave of absence to the forensic patient. To recommend leave, the MIARB must consider:</p> <ul style="list-style-type: none"> the degree of risk that the release of the forensic patient appears to present to the personal safety of people in the community or of any individual in the community; and the likelihood that, the forensic patient will comply with any conditions imposed on their leave. 	<ul style="list-style-type: none"> whether leave will seriously endanger the patient's health or safety; or place the safety of other persons at serious risk; by the Chief Forensic Psychiatrist for clinical or personal reasons; by the patient and a person with a genuine interest in the patient's welfare, with the Tribunal's leave, for personal reasons 		<ul style="list-style-type: none"> the aims of the proposal and the anticipated benefits for the patient's treatment and/or rehabilitation; the potential risk of harm to the public, taking into account the nature and adequacy of safeguards. Responsible clinicians must also consider any other risk factors which apply individually to the patient, particularly any risks to victims and their families, consulting with the Victim Liaison Office where appropriate; any potential public concerns or media attention, and any measures proposed in response to such concerns; any concerns which have been expressed, or are likely to be expressed, by victims of the offences committed by the

			<p>patient or forensic resident may go while on leave;</p> <ul style="list-style-type: none"> • who they may meet with; their travel arrangements or any requirement to undertake drug or alcohol testing following return from leave. <p>Extended leave: The court, for applications of extended leave, must consider:</p> <ul style="list-style-type: none"> • the nature of the person's mental impairment or other condition or disability; • the relationship between the impairment, condition or disability and the offending conduct; • whether the person poses an unacceptable risk of causing physical or psychological harm to another person or other people generally because of his or her mental impairment; • the need to protect people from such a risk; • the forensic patient's recovery or progress in terms of treatment progression and personal improvement; • whether there are adequate resources available for treatment, support or services in the community; • whether any on-ground or off-ground leave the person has been granted and their compliance with the conditions of their leave; 						<p>patient, or by families of the victims. In addition, any measures proposed in response to such concerns; and</p> <ul style="list-style-type: none"> • where leave for rehabilitation purposes is proposed, a plan of the periods of leave which are being requested for the patient, setting out: <ul style="list-style-type: none"> ○ the destinations of the leave; ○ length of absences from the hospital; ○ the escorting arrangements, where applicable, (including any written authority required under section 17(3) of the Mental Health Act); ○ the part which the individual leaves will play in the overall treatment plan; ○ what, specifically, each instance of leave will seek to achieve; ○ how the leave will be monitored, whether by escorting staff or through the patient's own report or both; and ○ how the success or otherwise of the leave will be assessed and measured. ○ any incidents of abscond or escape. • Generally leave in the community while detained under the Mental Health Act in
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									hospital will not be given where a restricted patient would not have been given such leave whilst in prison. However, the Secretary of State will consider requests for community leave on an individual basis.
Leave and release: clinical considerations	<p>Authorised medical officer should:</p> <ul style="list-style-type: none"> ensure that the forensic patient and any primary carer is consulted when planning leave and subsequent treatment; consult with agencies providing services in relation to the leave; provide the forensic patient information about follow up care. discuss the arrangements for the leave or ground access with the patient and satisfy themselves that the patient understands the arrangements and any conditions imposed. 	<p>The authorised doctor must provide the patient and the patient's support persons with an explanation and written information about the patient's limited community treatment, in particular:</p> <ul style="list-style-type: none"> any treatment and care to be provided to the patient (e.g. fortnightly home visit, monthly appointment with authorised doctor) and the patient's obligations while receiving limited community treatment (e.g. to take prescribed medication). <p>The requirement to provide information does not apply if the patient is only authorised to have escorted limited community treatment.</p>	<p>The court considers the following matters when making an order for the release of a person:</p> <ul style="list-style-type: none"> the report of at least one registered medical practitioner or registered psychologist who has examined the person's mental condition and the possible effect of unconditionally releasing the person on their behaviour; the leave plan filed in the case of an application for extended leave any other necessary reports. 		<p>The court cannot release the supervised person unless it has considered:</p> <ul style="list-style-type: none"> at least three different psychiatrist's or expert reports on the supervised person's mental condition and the possible effects of the proposed action on the forensic patient; and a recent report on the forensic patient's mental condition provided by the Minister for Health. 		<p>The court must not make an order releasing a supervised person from custody or significantly reducing supervision unless the court has considered a range of reports, including 2 reports from a psychiatrist or other expert.</p>		<p>Leave</p> <ul style="list-style-type: none"> The Secretary of State expects leave programmes to be designed and conducted in such a way as to preserve public safety and accordingly the responsible clinician should bear this in mind when making a careful risk assessment of the patient before each instance of leave. These leave programmes should also, where appropriate, respect the feelings and fears of victims and others who may have been affected by the offences. In order to consider any request for leave, the Secretary of State will require an up to date report on all previous leave taken. The relevant form for this report may also be used to report changes in the patient's circumstances such as: <ul style="list-style-type: none"> a change or cessation of medication; self harming; the involvement of the patient in an incident in, or outside, the hospital; abuse of

									<p>substances; or</p> <ul style="list-style-type: none"> ○ the added stress of bad news from outside or from another stressful occasion. <p>Lifting of restrictions</p> <ul style="list-style-type: none"> • It is desirable for responsible clinician to submit written request for the lifting of restrictions or release explaining: <ul style="list-style-type: none"> ○ why the request is being made; ○ how the level of risk posed by the patient has been reduced; ○ how any residual risks will be managed and/or mitigated; ○ what impact removal of restrictions will have on the patient; and • a long-term prognosis for the patient and clarification as to whether any ongoing need for treatment and support within the hospital setting would also be of assistance.
<p>Examples of conditions on leave and release</p>	<ul style="list-style-type: none"> • the appointment of a case manager, psychiatrist or other health care professional to assist in the care and treatment of the patient; • the care, treatment and review of the patient for example, including home visits to the patient; • medication; • accommodation and living conditions; • enrolment and participation in educational, training, rehabilitation, recreational, 			<ul style="list-style-type: none"> • accepting treatment, care or support as required; • enrolling and participating in educational, rehabilitation, recreational, therapeutic or training programs; • not using alcohol and other drugs; • undergoing drug testing and other medical tests; • the standard of conduct required; • prohibitions or limits on association with stated people or kinds of people; 	<ul style="list-style-type: none"> • The accused must not possess a firearm or ammunition; and • The accused must submit to reasonable testing for gunshot residue. <p>That the licensee:</p> <ul style="list-style-type: none"> • be housed in a certain location; • refrain from consuming drugs or non-prescribed medication; • must undergo drug and alcohol testing; • is under the care of a psychiatrist and must comply with recommended treatment; 				

	<p>therapeutic or other programs;</p> <ul style="list-style-type: none"> • the use or non-use of alcohol and other drugs; • drug testing and other medical tests; • association or non - association with victims or members of victims' families (on application of victims); • prohibitions or restrictions on frequenting or visiting places (on application of victims); • overseas or interstate travel. • limiting the belongings, like money, credit or debit cards and identity documents (such as a driver licence, passport, or birth certificate) that a person may take on leave with them; • requiring the patient to complete a detailed itinerary before going on leave; • random spot checks to verify that the patient is following the itinerary; • requiring the patient to carry a charged mobile phone, with credit, at all times; • requiring the patient to call at specified times, to answer the phone if called and if appropriate to pass the phone to another adult to verify location and activity; • verifying the patient's activities by contacting any sponsors of the leave; and • verifying the patient's activities on returning from leave, by detailed questions, checking receipts, 			<ul style="list-style-type: none"> • prohibitions or limits on visiting stated places, or kinds of places; • prohibitions or limits on travelling interstate or overseas; 	<ul style="list-style-type: none"> • is under the care of a mental health team; • must take the medication he or she has been prescribed; • must ensure that his or her blood alcohol concentration does not exceed 0.08%; • will be supervised by a community corrections officer; and • will be assessed for fitness to hold a driver's licence. 				
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	transport ticketing and direct proof of movement								
Does the review regime provide for victim engagement?	Victims may apply to the Tribunal to impose: <ul style="list-style-type: none"> • non-association condition; • place restriction condition. 	Victims may apply to the Tribunal for non-contact orders.	Court cannot order a person be released (with or without conditions) or significantly reduce the degree of supervision unless it has considered a report from victims of the offence. Victims can make submissions seeking a non-contact order	Victims may through the ACT Victims Commissioner, submit their views which the court must take into account when making a forensic mental health order.	The court must take into account the views of victims and communities when setting a limiting term for the supervision order.	The MIARB is required to consider any submission received from a victim when it determines the conditions of release for a forensic patient.	The court must consider a report from victims when reviewing supervision orders. The Court must also be satisfied that the victim (or next of kin) has been given reasonable notice of the proceedings.	<ul style="list-style-type: none"> • The court and Tribunal must consider a report on the attitudes of victims, if any, and next of kin when reviewing forensic orders. • When a leave application is made, the Tribunal notifies the Secretary of Corrections who must check the Eligible Persons Register to determine whether there are any eligible persons in relation to the patient who must be notified of the application and their right to make written submissions within 10 days of their notification. • The Tribunal considers these submissions in deciding leave applications. Leave cannot be taken before eligible persons are first notified unless circumstances render it impossible, impracticable or inappropriate to achieve notification. 	Victims of serious violent and sexual offences have the right to information on key developments in a restricted patient's progress and to make representations about discharge conditions.
Is there a victims register?	Yes – specifically for victims of forensic patients. 'Forensic Patients Victims Register'	Yes A victim can make an application to receive information under an information notice via the Queensland Health Victim Support Service to the Chief Psychiatrist.	Yes for all victims of crime 'Victims Register'	Yes Specific register for victims of forensic patients. 'Affected Persons Register'	Yes – for all victims of crime 'Victims Register'	Yes for all victims of crime 'Victim Notification Register'	Yes for all victims of crime 'Victims Register'	Yes specifically for victims of forensic patients 'Eligible Persons Register'	Yes for all victims of crime: 'Victim Contact Scheme'
What are they entitled to under the register?	Notification of: <ul style="list-style-type: none"> • the review of forensic patients including whether the Tribunal will be considering an application for leave or release; • the Tribunal's 	Notification of: <ul style="list-style-type: none"> • when a review by the Tribunal of the forensic patient is to take place; • the Tribunal's decisions in relation to 	Notification of: <ul style="list-style-type: none"> • the earliest possible release date of a prisoner/offender; • the prisoner's eligibility to apply for rehabilitation and 	Notification of: <ul style="list-style-type: none"> • a forensic mental health order; • the making of an application for an order • when the patient 	Notification of: <ul style="list-style-type: none"> • the correctional institution in which the prisoner is imprisoned; • details of any transfer from one correctional 	Notification of: <ul style="list-style-type: none"> • details about the offender's sentence; • any escapes from custody and recapture; • impending release 	Notification of: <ul style="list-style-type: none"> • details of a transfer to another prison in the Northern Territory; • the status of security ratings or any change in status; 	Notification of: <ul style="list-style-type: none"> • when a forensic patient seeks a leave of absence; and • when a decision is made to; <ul style="list-style-type: none"> ○ grant, extend, 	

	<p>determination including what orders were made;</p> <ul style="list-style-type: none"> the escape of a forensic patient from custody or their failure to return from leave and where the Tribunal has issued an order for the patient's apprehension and detention; the ceasing of the person's status as a forensic patient; administrative orders made by the Director-General of Health for forensic patients to: <ul style="list-style-type: none"> take a leave of absence for an emergency or due to special circumstances; or transfer between mental health facilities. a victim's entitlement to make submissions. 	<p>the forensic patient;</p> <ul style="list-style-type: none"> when a forensic order is confirmed or revoked; when approval for limited community treatment is approved or withdrawn with or without conditions; when a forensic patient goes absent without leave or returns from their absence; the transfer of a forensic patient from one mental health service to another, and the date of the transfer; variation and amendments to orders and any conditions imposed; and when the forensic patient is to be discharged, the reasons why and the effective date. 	<p>transition permits;</p> <ul style="list-style-type: none"> any transfer of the prisoner/offender interstate or overseas; any escape by the prisoner/offender; the prisoner's release on parole at least 14 days prior to the release date; cancellation of the prisoner's parole; where an application has been made for a Supervision or Detention Order; where the prisoner is subject to a supervision or detention order; 	<p>absconds, or fails to return after leave, from a mental health facility or community care facility;</p> <ul style="list-style-type: none"> when the patient is transferred to or from another jurisdiction; when the patient is released from a mental health facility or community care facility; and any other information about the forensic patient that the director-general considers necessary for the affected person's safety and well-being. 	<p>institution to another;</p> <ul style="list-style-type: none"> details of the sentence/s of imprisonment that the prisoner is liable to serve; the date on which and circumstances under which the prisoner was, is to be or is likely to be released from the correctional institution for any reason (for example, on bail, leave of absence, home detention, parole); and details of any escape from custody by the prisoner. 	<p>dates; and</p> <ul style="list-style-type: none"> the results of any appeals against the sentence. <p>Victims are notified in writing of any changes to the offender's circumstances, usually within 5 days of that change occurring.</p>	<ul style="list-style-type: none"> any courses or programs they are taking for their rehabilitation; if they have been approved for a leave of absence. 	<p>cancel or amend the conditions of a leave of absence; or</p> <ul style="list-style-type: none"> to release or transfer a forensic patient 	
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Appendix 2 Comparative table of leave and release decision statistics nationwide.

	NSW	QLD	VIC	ACT	SA	WA	NT	Tas
Period	2016-2017	(2015-2016)	2015		2015-2016	2015-2016	2016	2015-2016
Forensic patients	425 ⁱ		78 ⁱⁱ	Unknown		39 ⁱⁱⁱ	36 ^{iv}	
Forensic inpatients				Unknown	103 ^v		7 ^{vi}	
Forensic detention orders or equivalent review hearings		1922 ^{vii}	26 ^{viii}	Unknown				12 ^{ix}
Forensic detention orders made/confirmed		43 ^x		Unknown		2 ^{xi}		10 ^{xii}
Forensic order confirmed with Limited Community Treatment		1501 ^{xiii}		Unknown				
Forensic order Confirmed but Limited Community Treatment revoked		12 ^{xiv}		Unknown				
forensic detention order varied to community supervision				Unknown				2 ^{xv} (downgraded to supervision orders) See para 8
Forensic patients receiving care in the community				Unknown	383 (2014-2015) ^{xvi}			
Forensic orders revoked		70 ^{xvii}		Unknown				
Community Supervision orders conducted				Unknown				28 ^{xviii} (See para 8)
Community supervision order – variation/revocation				Unknown				11 ^{xix}
Leave applications made			180 ^{xx}	Unknown				12 ^{xxi}
Leave granted (total)	177 ^{xxii}		91% 5% modified and granted ^{xxiii}	Unknown		2 ^{xxiv}		10 ^{xxv}
Total on conditional release	149 ^{xxvi}			Unknown		16 ^{xxvii}		
Number unconditionally released	3 ^{xxviii}			Unknown	4 (2015) ^{xxix}	3 ^{xxx}		
Number conditionally released	26 ^{xxxii}			Unknown		3 ^{xxxii}		

- ⁱ [New South Wales Ministry of Health 2017, Review of the Operation of the Mental Health Review Tribunal in respect of forensic patients: Discussion Paper](#), p9
- ⁱⁱ 1 October 2015, [Forensic Leave Panel, Forensic Leave Panel Annual Report 2015](#) p22
- Forensic patients: 74
- Forensic residents: 4
- Detention can be ordered in an 'approved mental health service' or a 'residential treatment facility' or a 'residential institution'.
- ⁱⁱⁱ [27 September 2016 Mentally Impaired Accused Review Board of Western Australia, Mentally Impaired Accused Review Board of Western Australia 2015/16 Annual Report](#) pp20, 25
- ^{iv} [November 2016, Community Affairs References Committee, Indefinite detention of people with cognitive and psychiatric impairment in Australia](#) p15, Table 2.1
- ^v [South Australian Chief Psychiatrist, Annual Report 2015-2016](#), p15
- ^{vi} [November 2016, Community Affairs References Committee, Indefinite detention of people with cognitive and psychiatric impairment in Australia](#) p15, Table 2.1
- ^{vii} [Mental Health Review Tribunal, Mental Health Review Tribunal Annual Report 2015-2016](#) p19:
- Forensic order (Mental Health): 1750
- Forensic order (Disability): 172
- ^{viii} 1 October 2015, [Forensic Leave Panel, Forensic Leave Panel Annual Report 2015](#) p22
- ^{ix} [Mental Health Tribunal 2016, Annual Report 2015-2016](#), p18
- ^x [Mental Health Review Tribunal, Mental Health Review Tribunal Annual Report 2015-2016](#) p19
- Forensic order (Disability): 2
- Forensic order (Mental Health): 41
- ^{xi} [27 September 2016 Mentally Impaired Accused Review Board of Western Australia, Mentally Impaired Accused Review Board of Western Australia 2015/16 Annual Report](#) p20
- ^{xii} [Mental Health Tribunal 2016, Annual Report 2015-2016](#), p18
- ^{xiii} [Mental Health Review Tribunal, Mental Health Review Tribunal Annual Report 2015-2016](#) p19
- Forensic order (Disability): 102
- Forensic order (Mental Health): 1399
- ^{xiv} [Mental Health Review Tribunal, Mental Health Review Tribunal Annual Report 2015-2016](#) p19
- Forensic order (Disability): 1
- Forensic order (Mental Health): 11
- ^{xv} [Mental Health Tribunal 2016, Annual Report 2015-2016](#), p18
- ^{xvi} [South Australian Chief Psychiatrist, Annual Report 2014-2015](#), p16
- ^{xvii} [Mental Health Review Tribunal, Mental Health Review Tribunal Annual Report 2015-2016](#) p19
- Forensic order (Disability): 3
- Forensic order (Mental Health): 67
- ^{xviii} [Mental Health Tribunal 2016, Annual Report 2015-2016](#), p18
- ^{xix} [Mental Health Tribunal 2016, Annual Report 2015-2016](#), p18
- ^{xx} 1 October 2015, [Forensic Leave Panel, Forensic Leave Panel Annual Report 2015](#) p22
- ^{xxi} [Mental Health Tribunal 2016, Annual Report 2015-2016](#), p18
- ^{xxii} [New South Wales Ministry of Health 2017, Review of the Operation of the Mental Health Review Tribunal in respect of forensic patients: Discussion Paper](#), p8
- Escorted day leave: 42;
- Supervised day leave: 22;
- Supervised overnight leave: 26;
- Unsupervised day leave: 44;
- Unsupervised overnight leave: 43;
- ^{xxiii} 1 October 2015, [Forensic Leave Panel, Forensic Leave Panel Annual Report 2015](#) p22
- ^{xxiv} [27 September 2016 Mentally Impaired Accused Review Board of Western Australia, Mentally Impaired Accused Review Board of Western Australia 2015/16 Annual Report](#) p22
- Leave of absence orders for emergency medical treatment or on compassionate grounds.
- ^{xxv} [Mental Health Tribunal 2016, Annual Report 2015-2016](#), p18
- ^{xxvi} [New South Wales Ministry of Health 2017, Review of the Operation of the Mental Health Review Tribunal in respect of forensic patients: Discussion Paper](#), p9
- ^{xxvii} [27 September 2016 Mentally Impaired Accused Review Board of Western Australia, Mentally Impaired Accused Review Board of Western Australia 2015/16 Annual Report](#) p23
- ^{xxviii} [New South Wales Ministry of Health 2017, Review of the Operation of the Mental Health Review Tribunal in respect of forensic patients: Discussion Paper](#), p9
- ^{xxix} [July 2015 E Heffernan, B Clugston, S Patchett, Review of the South Australian Forensic Mental Health Service](#) p37:4 unconditionally released from 59 declared liable to supervision.
- ^{xxx} [27 September 2016 Mentally Impaired Accused Review Board of Western Australia, Mentally Impaired Accused Review Board of Western Australia 2015/16 Annual Report](#) p25
- ^{xxxi} [New South Wales Ministry of Health 2017, Review of the Operation of the Mental Health Review Tribunal in respect of forensic patients: Discussion Paper](#), p9
- ^{xxxii} [27 September 2016 Mentally Impaired Accused Review Board of Western Australia, Mentally Impaired Accused Review Board of Western Australia 2015/16 Annual Report](#) p23

APPENDIX 7

Review of the operation of the Mental Health Review Tribunal
in respect of forensic patients - Discussion Paper

REVIEW OF THE OPERATION OF THE
MENTAL HEALTH REVIEW TRIBUNAL
IN RESPECT OF FORENSIC PATIENTS

DISCUSSION PAPER



Health

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INTRODUCTION

The Minister for Mental Health, the Hon Tanya Davies MP, has requested NSW Health review (the Review) the operation of the Mental Health Review Tribunal (the Tribunal) regarding forensic patients.

A forensic patient is a person who the Court has:

- Found unfit to be tried for an offence and ordered to be detained in a correctional centre, mental health facility or other place;
- Found on the limited evidence available to have committed an offence, after having been found unfit to be tried, and who has then been given a 'limiting term'. A limiting term is similar to a sentence, except that the person can be re-tried by the court if they become fit to be tried at any point, and it does not have a specified non-parole period; or
- Found not guilty by reason of mental illness and ordered to be detained in a prison, hospital or other place, or released into the community subject to conditions.

The Minister has appointed former Supreme Court Judge, the Hon Anthony Whealy QC, to lead the Review. The Reviewer is supported by a Steering Group, which includes representatives from the Ministry of Health, Department of Justice, Justice Health and Forensic Mental Health Network, and the Mental Health Review Tribunal (where their attendance does not compromise the integrity of the review).

The Review is designed to provide an understanding of current practice, ensure consistency with leading standards and best practice, and balance the needs, interests and expectations of the community, victims and forensic patients.

The Review's Terms of Reference focus on four key areas:

1. Do current law and operational processes and procedures of the Tribunal regarding leave and release decisions appropriately balance community safety, interests of victims, and the care and treatment needs of forensic patients?
2. Are there options that can improve victim engagement with the Tribunal?
3. Do the policy objectives prohibiting the publication of the name of any person in relation to a matter before the Tribunal remain valid?
4. Are the criteria used to recruit members of the Tribunal appropriate?

The Review will deliver a final report to the Minister for Mental Health and the Attorney General in December 2017 outlining recommendations to strengthen operations of the Tribunal concerning forensic patients.

This Discussion Paper (the Paper) is designed to raise awareness of the Review and support stakeholders and interested persons to participate through submissions and consultation workshops. The Paper provides background on the Review process, the Tribunal, the NSW Forensic Mental Health System and the four key areas being examined under the Terms of Reference.

The Review

This Discussion Paper outlines the current legislative and operational framework governing each of the Review's Terms of Reference.

NSW Health invites written submissions on issues raised in the Discussion Paper, to inform the final Review report and recommendations. Submissions can be made at <http://www.health.nsw.gov.au/patients/mhrt/Pages/default.aspx>.

Submissions will be considered by the Reviewer and the Steering Group, and will be used to inform the Review report.

The Review will draw on a range of information:

- a review of current legislation, policy, processes and procedures
- consideration of leading practice and the operation of similar Tribunals in other jurisdictions in Australia and internationally; and
- stakeholder consultation workshops, including victims, forensic patients and their carers, law enforcement agencies, legal and justice sector organisations, health and mental health organisations, and interested persons.

A number of reviews and reports have been undertaken in NSW and other jurisdictions in relation to forensic patients. A summary of these is at Appendix 1.

The Mental Health Review Tribunal

The Tribunal is an independent quasi-judicial specialist body established under the *Mental Health Act 2007*. Part of its responsibilities include making orders for the detention, leave and release of forensic patients under the *Mental Health (Forensic Provisions) Act 1990*.

Section 40 of the *Mental Health (Forensic Provisions) Act* sets out the objectives of the legislation regarding forensic patients¹, including:

- to protect the safety of members of the public;
- to provide for the care, treatment and control of persons subject to criminal proceedings who are suffering from a mental illness or mental condition; and
- to give an opportunity for those persons to have access to appropriate care.

The Tribunal usually reviews the case of a forensic patient every six months. The Tribunal's hearings are open to the public, although the Tribunal has the power to hold the hearing wholly or partly in private². The *Mental Health Act* also prohibits anyone, except with the Tribunal's consent, from publishing or broadcasting the names of people who come before the Tribunal³.

The Tribunal's decisions involve complex issues and can impact directly on people's lives, health and liberty. The Tribunal can only grant a patient leave or release where the Tribunal is satisfied that the safety of the patient or any member of the public will not be seriously endangered.

The Tribunal must also consider that patients should be subject to the least restrictive kind of care, recognising the principle that a person's liberty should not be impacted without appropriate justification.

The Minister for Mental Health and the Attorney General may appear before the Tribunal in leave, release and breach proceedings, and have the power to appeal a Tribunal decision to the Supreme Court (or in some cases to the Court of Appeal).

The *Mental Health (Forensic Provisions) Act* also recognises victims and allows the Tribunal to make orders limiting a forensic patient's contact with victims.

The Tribunal's considerations have to balance community safety; the rights of patients including their care, treatment and rehabilitation needs; and the interests of victims. These considerations are a key focus of this Review.

More information about the Tribunal is available on the [Tribunal website](#). The Tribunal's [Forensic Guidelines](#) are particularly relevant in the context of this Review.

¹ In addition, section 68 of the *Mental Health Act 2007* (NSW) sets out general principles for the care and treatment of all people with a mental illness or disorder, including forensic patients: <https://www.legislation.nsw.gov.au/#/view/act/2007/8/chap4/part1/div1/sec68>.

² *Mental Health Act 2007* (NSW), s 151.

³ *Mental Health Act 2007* (NSW), s 162.

The NSW forensic mental health system

There were 424 forensic patients in NSW on 30 June 2017. Of these:

- 372 patients had been found not guilty by reason of mental illness;
- 33 had been found unfit to be tried by a court, and then been found on the limited evidence available to have committed an offence, with a limiting term nominated or forensic patient status extended by the court;
- 19 persons had been found unfit by the court and referred to the Tribunal and remanded in custody.

The number of forensic patients has increased 32 per cent (102 patients) since 30 June 2011.

NSW Health provides care, treatment and case management to forensic patients who have a mental illness or other mental condition for which mental health treatment is available. Services are provided in inpatient and community settings, and in the correctional system.

Forensic patients who do not have such an illness or condition, but may have a cognitive impairment, normally receive care, rehabilitation and case management from Corrective Services or from the Department of Family and Community Services if they are living in the community.

Management and care

Forensic patients with a mental illness normally follow a structured rehabilitation program, allowing them to move to lower levels of supervision and care as their recovery progresses. Community safety is paramount and patients are only allowed to progress to less restrictive environments if the Tribunal considers it safe to do so based on all evidence.

Most forensic patients are initially detained in a correctional centre or the high-secure Forensic Hospital operated by NSW Health. If assessed as being suitable for a less restrictive environment, they normally progress to one of the three medium-secure specialist forensic units operated by NSW Health where they can be granted leave for rehabilitative purposes.

They continue to be reviewed by the Tribunal and, if deemed appropriate following a period with decreasing levels of security, patients may progress to living in the community subject to a range of conditions known as '**conditional release**'. The Court also has the power to order a patient's conditional release at the time of finding them not guilty by reason of mental illness and they are quickly reviewed by the Tribunal.

If the patient continues to progress well and the Tribunal is satisfied that they do not present a serious risk of harm to the community or themselves, they may be considered for '**unconditional release**'. If granted, the person is no longer a forensic patient and no longer subject to Tribunal review.

Rehabilitation for forensic patients who do not have a mental illness is more varied. They are likely to spend some time in custody and, if appropriate, may be released by the Tribunal to live in a nursing home or independent accommodation with support.

If there are concerns about a patient, or if the patient has breached their leave or release conditions, they may be taken to a hospital and detained pending review by the Tribunal.

The table below sets out the location of forensic patients as at 30 June 2017:

FORENSIC PATIENT LOCATION	Number of patients as at 30 June 2017
Correctional Centre (including Long Bay Prison Hospital) / Juvenile Justice Centre	63
Forensic Hospital - high-secure	109
Medium-secure hospital units and other hospital beds	103
Community	149
TOTAL	424

1 LEAVE AND RELEASE DECISIONS

As part of its Terms of Reference, the Review will consider:

whether decisions by the Tribunal on leave and release of forensic patients strike an appropriate balance between the interests of community safety, victims (including the families of victims) and the care and treatment needs of forensic patients, having regard to matters including, but not limited to:

- (a) the information available to the Tribunal and the method adopted to assess and determine questions of risk of harm (to victims and their families, to the community and to patients);*
- (b) the legislative test for leave and release in the Mental Health (Forensic Provisions) Act 1990, Tribunal interpretation of the test and similar tests relied on in comparable jurisdictions; and*
- (c) the methods available for supervising forensic patients while on leave or conditional release to the community.*

Leave for forensic patients

Approved leave is required for a forensic patient to go outside the boundaries of the facility where they are detained. The Tribunal usually takes a gradual 'stepwise' approach to granting leave and forensic patients are only granted less restrictive leave if they have successfully completed more restrictive forms of leave. An example of a Tribunal decision regarding leave for a forensic patient can be accessed through the Tribunal's website [here](#).

The Tribunal can set out terms and conditions for a patient's leave, including:

- Escorted Day Leave where the forensic patient is escorted at all times by at least one member of staff at the facility.
- Supervised Day or Overnight Leave where the forensic patient is supervised by a responsible adult who has been approved by the treating team.
- Unsupervised Day or Overnight Leave⁴.

Once the Tribunal has granted a type of leave, the medical superintendent of the mental health facility where the patient is detained has discretion over when the leave is used. Risk assessments are conducted by the treating team on forensic patients prior to any type of leave and they only allow leave to occur if satisfied that it is safe and appropriate to do so.

⁴ NSW Health Policy Directive (2012) *Forensic Mental Health Services*, PD2012_050, s 4.1.2.

Number of forensic patients granted leave by the Tribunal per financial year (2011/12 – 2016/17) by leave type

Financial Year	Number granted escorted day leave	Number granted supervised day leave	Number granted supervised overnight leave	Number granted unsupervised day leave	Number granted unsupervised overnight leave	Total number of forensic patients (as at 30 June of the latter year in each financial year)
2011 - 2012	26	17	7	26	10	349
2012 - 2013	31	11	6	37	9	364
2013 - 2014	19	23	19	51	17	389
2014 - 2015	28	18	26	41	34	408
2015 - 2016	34	28	26	50	27	410
2016 - 2017	42	22	26	44	43	424

Conditional and unconditional release

Two types of release granted by the Tribunal are:

- **Conditional Release** where a forensic patient is released to reside in the community but has strict conditions imposed on them⁵.
- **Unconditional Release** where the person is no longer a forensic patient and is no longer under the control of the Tribunal⁶.

Each forensic patient with a mental illness who is on conditional release has a designated case manager and psychiatrist from the treating mental health service and the patient is required to regularly attend appointments with these specialists. The Community Forensic Mental Health Service also provides expert assistance and advice to local mental health services in managing these patients.

The following table provides statistics on the number of forensic patients who the Tribunal conditionally or unconditionally released in each of the last six financial years. Such releases make up a small percentage of the overall number of forensic patients. As at 30 June 2017, 149 forensic patients were living in the community on conditional release, representing 35 percent of the forensic patient population.

⁵ Conditions generally relate to: medication; accommodation and living arrangements; the use or non-use of alcohol and other drugs; agreement as to conduct; and association, or non-association with victims or members of victims' families; and prohibitions or restrictions on frequenting or visiting places: *Section 75 Mental Health (Forensic Provisions) Act 1990* (NSW).

⁶ NSW Health Policy Directive (2012) *Forensic Mental Health Services*, PD2012_050, s 7.1.

Number of forensic patients conditionally and unconditionally released by the Tribunal per financial year (2011/12 – 2016/17)

Financial Year	Number of patients conditionally released	Number of patients unconditionally released*	Total number of forensic patients on conditional release (as at 30 June of the latter year in each financial year)**	Total number of forensic patients (as at 30 June of the latter year in each financial year)	Percentage of forensic patients on conditional release (as at 30 June of the latter year in each financial year)
2011 – 2012	8	7	92	349	26%
2012 – 2013	8	4	97	364	27%
2013 – 2014	11	5	120	389	31%
2014 – 2015	18	4	128	408	31%
2015 – 2016	20	10	132	410	32%
2016 – 2017	26	3	149	424	35%

* Note that a patient may be both conditionally released and unconditionally released in the same financial year, with conditional release following unconditional release.

** Note that those on conditional release include those who continue to be on conditional release following an order made in previous years.

Legislative requirements for leave or release

The Tribunal must have the following members when making any decisions on forensic patients:

- the President or a Deputy President;
- a member who is 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.

To ensure there is judicial input into any release decision, the Tribunal cannot release a patient unless it has at least one member, including the President or Deputy President, who is the holder or former holder of a judicial office⁷.

The Tribunal cannot grant leave or release to a forensic patient unless it is satisfied on the evidence available that the safety of the patient and any member of the public will not be seriously endangered by the patient’s leave or release⁸. The Tribunal must also be satisfied that other safe and effective care of a less restrictive kind is appropriate and reasonably available to the patient, or the patient does not require such care⁹.

When determining what order to make about a forensic patient, section 74 of the *Mental Health (Forensic Provisions) Act* requires the Tribunal to at least consider:

- whether the patient is suffering from a mental illness or other mental condition;
- whether there are reasonable grounds for believing that care, treatment or control of the patient is necessary for their own protection from serious harm or the protection of others from serious harm;

⁷ *Mental Health (Forensic Provisions) Act 1990* (NSW), s 73(3).

⁸ *Mental Health (Forensic Provisions) Act 1990* (NSW), s39, 43 and 49.

⁹ *Mental Health (Forensic Provisions) Act 1990* (NSW), s 43.

- the continuing condition of the patient, including likely deterioration in condition, and the likely effects of deterioration;
- a report by a forensic psychiatrist or other person of a class prescribed by the regulations who is not currently involved in treating the patient, on the condition of the patient and whether the safety of the patient or any member of the public will be seriously endangered by the patient's release; or
- in the case of the proposed release of a forensic patient subject to a limiting term, whether or not the patient has spent sufficient time in custody¹⁰.

Policy requirements

Before making an application for leave or release, the patient's treating team should consider if the patient is likely to meet the requirements for such release under the NSW Health Policy Directive, PD_2012_050, Forensic Mental Health Services. Namely if the patient¹¹:

- has been compliant with his or her forensic order, including, where appropriate, having had successful periods of ground access and leave without any significant incidents;
- has consistently demonstrated socially appropriate behaviour over a substantial period of time;
- is assessed as being a low risk of harm to themselves or others in the context of the proposed conditions of release;
- has been compliant with medication and the treating team's directions; and
- has been abstinent from illicit substances, as evidenced by at least two negative urine samples in the preceding six months.

Information for Tribunal decisions

As the Tribunal is an independent body, it is able to seek and weigh up the evidence presented to it by interested parties when making decisions about leave and release.

Tribunal decisions about leave and release are based upon assessment by the treating team of the patient's mental state, together with a clinical and evidence based assessment¹² of what risk the patient would pose to themselves or to the community. The Tribunal also considers the views of the patient and their lawyer, and any submissions from other interested parties when making its decision, including the Minister for Mental Health, the Attorney General, registered victims, or the patient's family.

It is the practice of the Tribunal to request that reports from treating clinicians have the following information:

- A summary of the patient's personal and medical background;
- Progress since the last Tribunal hearing (if relevant);
- Current mental state presentation;
- Current medications;
- Current risk assessment; and
- Recovery pathway and future plans¹³.

When making a decision about whether to release a patient, the Tribunal must also consider a report by a forensic psychiatrist or other expert¹⁴ who is not currently involved in treating the patient. This report must express an opinion about whether the safety of the patient or any member of the public will be seriously endangered if the patient is released.

A forensic patient or their lawyer can also ask the Tribunal to consider their own reports, documents or statements at a hearing. The Tribunal does not require such evidence to be in a formal statement.

¹⁰ *Mental Health (Forensic Provisions) Act 1990* (NSW), s 74.

¹¹ NSW Health Policy Directive (2012) *Forensic Mental Health Services*, PD_2012_050, s 7.2.3 and 7.3.3.

¹² For example:

HCR-20 assessment tool, which is a comprehensive set of professional guidelines for violence risk assessment and management based on the Structured Professional Judgment (SPJ) model; and

The DUNDRUM Quartet, which consists of DUNDRUM-1 triage security items, DUNDRUM-2 triage urgency items, DUNDRUM-3 programme completion items and DUNDRUM-4 recovery items. The DUNDRUM Quartet should be used with the HCR-20, as they measure complimentary domains.

¹³ NSW Health Policy Directive (2012) *Forensic Mental Health Services*, PD2012_050, Appendix 6 sample reports.

¹⁴ Clause 5 of the *Mental Health (Forensic Provisions) Regulation 2009*—a registered psychologist and has appropriate experience or training in forensic psychology or neuropsychology.

The Minister for Health and the Attorney General have the right to make submissions or appear before the Tribunal where it is considering granting leave or release to a patient. The Minister for Health's powers are delegated to the Minister for Mental Health.

Registered victims may give relevant evidence and make submissions to the Tribunal, and may apply for a non-association condition (prohibits the patient from contacting victims or members of victims' families) or a place restriction condition (prohibits or restricts the patient on frequenting or visiting certain places or areas).¹⁵

Supervising forensic patients on leave or release

Leave

Different types of leave require a range of supervision levels.

Supervised day or overnight leave must be under the close supervision of at least one responsible adult who is not a member of staff of the facility, while unsupervised leave does not require supervision or an escort.

The treating team uses many methods to monitor a patient on leave, including:

- Limiting the belongings, like money, credit or debit cards and identity documents that a person may take on leave with them;
- Requiring the patient to complete a detailed itinerary before going on leave;
- Random spot checks to verify that the patient is following the itinerary;
- Requiring the patient to carry a charged mobile phone, with credit, at all times;
- Requiring the patient to call at specified times, to answer the phone if called and if appropriate to pass the phone to another adult to verify location and activity;
- Verifying the patient's activities by contacting any sponsors of the leave;
- Verifying the patient's activities on returning from leave, by detailed questions, checking receipts, transport ticketing and direct proof of movement.

Breaches of any leave conditions by a patient are grounds for the Tribunal to revoke their leave or increase the level of restrictions and supervision to which they are subject.

Release

A **Conditional Release** order usually requires a forensic patient to be linked to their local community mental health service for regular review by a case manager and psychiatrist attached to the service. The Tribunal ordinarily imposes a range of other conditions relating to the patient's accommodation, drug and alcohol use and testing, and engagement in therapeutic programs.

While dependent on the order, supervision is usually at the discretion of the case manager and treating psychiatrist but can include the following¹⁶:

- Initially weekly contact or more frequent visits as indicated by the case manager;
- Monthly face-to-face reviews by the responsible psychiatrist;
- Regular monitoring of the patient's mental state to ensure timely and early intervention;
- A requirement for the patient to undergo random drug and alcohol screens on a regular basis; and
- Immediately advising the Tribunal and the Community Forensic Mental Health Service of any non-compliance with the release order or any other serious concerns about the patient.

¹⁵ *Mental Health (Forensic Provisions) Act 1990* (NSW), s 76(2).

¹⁶ NSW Health Policy Directive (2012) *Forensic Mental Health Services*, PD 2012_50, s 7.2.4.

Discussion

Leave or release decisions

There has been some victim and media concern about a number of high profile cases where leave or release have been granted by the Tribunal. Questions have been raised about the 'transparency' of these decisions, and whether they strike the right balance of providing for community safety, and the interests of victims; and the care, treatment and rehabilitation needs of the patient.

A review of the Queensland forensic mental health system stated that public confidence is important to the integrity of the forensic mental health system, and to the peace of mind of victims, patients and the community. The Queensland review also stated that the public needs to be assured that their safety is a priority and that patient treatment has full regard for public safety in managing the risk of re-offending. This means striking the right balance between the individual rights of the patients and those of the community¹⁷.

A NSW Law Reform Commission report published in 2013 (Report 138) noted that current NSW legislation leans in favour of

detention when making decisions about the release or leave for forensic patients unless it can be positively established that their release or leave of absence will not present serious danger to the public or themselves¹⁸.

In order for a forensic patient to be released or granted a leave of absence, the Tribunal must be satisfied that 'the safety of the person or any member of the public will not be seriously endangered' by the person's release or leave¹⁹. However, the Law Reform Commission also noted that there is very little guidance on what this phrase means and there do not appear to be any NSW judicial decisions that have dealt with this framework in any detail²⁰.

However, since the Law Reform Commission's Report 138 was published, there has been judicial interpretation of the test for leave and release in Attorney General for the *State of New South Wales v XY* [2014] NSWCA 466. That case made clear that the Tribunal must, when assessing the risk of a patient being granted leave or release, consider both the gravity of potential harm as well as likelihood of harm. This means where the gravity of harm is higher, the likelihood of harm carries less weight.

¹⁷ *Review of the QLD Mental Health Act 2000 Final Report*, December 2006, p.5.

¹⁸ NSW Law Reform Commission (2013), *People with cognitive and mental health impairments in the criminal justice system. Criminal responsibility and consequences*, Report 138, s 8.73.

¹⁹ *Mental Health (Forensic Provisions) Act 1990*, sections 39(2), 43(a), 49 (3).

²⁰ NSW Law Reform Commission (2013) *People with cognitive and mental health impairments in the criminal justice system. Criminal responsibility and consequences*, Report 138, s 8.21.

Rehabilitation

A review of NSW forensic mental health legislation in 2007 stated that many forensic patients who have committed serious offences while mentally ill are able to recover over time and live as productive members of the community. By using leave and conditional release 'the forensic mental health system is able to assess, monitor and progress a forensic patient's capacity to be released back into the community'²¹.

Leave and release mechanisms are essential to successfully rehabilitating patients back into the community by improving their social skills, establishing ongoing support in the community and allowing for assessment of their capacity to manage in the community and of risk to community safety^{22, 23}.

A 21-year retrospective outcome study found that the treatment and rehabilitation of forensic patients in NSW, together with the decision-making procedures of the Tribunal, are effective in protecting the community from further offending by forensic patients²⁴.

The NSW Law Reform Commission in Report 138 noted that the test for leave and release varies considerably across jurisdictions in Australia, and the report describes the various legislative tests²⁵. The report stated that some jurisdictions contain a constraint on decision making involving release which is similar to section 43 of the *Mental Health (Forensic Provisions) Act*, i.e. that the safety of the patient and the public will not be seriously endangered by the patient's release. Other jurisdictions require the decision maker to order the release of a forensic patient unless satisfied that the risk posed by the release justifies ongoing detention. Yet other jurisdictions contain no constraint in either direction, with the decision maker being directed to make any order it considers appropriate having regard to a list of relevant considerations.

This Review will give consideration to the various approaches across jurisdictions, to ensure that in NSW the test provides the most useful guidance to the Tribunal in making these decisions.

Discussion questions

- Do the current legislative requirements for Tribunal decisions regarding leave and release sufficiently protect the public, including the needs of victims, whilst balancing the rights of forensic patients?
- Are there any improvements that could be made to the information provided to the Tribunal and the Tribunal's decision making processes?
- Is the current involvement of victims in the Tribunal decision making process appropriate?
- Are changes required to improve the supervision of forensic patients in the community, in order to protect the public?
- If so, how could the Tribunal's method for supervising forensic patients in the community be improved to increase community safety?

²¹ James, G. (2007) *Review of the New South Wales Forensic Mental Health Legislation*, s 8.5.

²² James, G. (2007) *Review of the New South Wales Forensic Mental Health Legislation*, s 8.5.

²³ NSW Law Reform Commission (2013) *People with cognitive and mental health impairments in the criminal justice system. Criminal responsibility and consequences*, Report 138, s 9.50.

²⁴ Hayes, H., et al, (2014) 'A 21-year retrospective outcome study of New South Wales forensic patients granted conditional and unconditional release', *Australian & New Zealand Journal of Psychiatry*, 48(3): 259-282.

²⁵ NSW Law Reform Commission (2013) *People with cognitive and mental health impairments in the criminal justice system. Criminal responsibility and consequences*, Report 138, s8.23-26.

2 ENGAGEMENT OF VICTIMS

This Review will consider:

options to improve the engagement of victims with the Mental Health Review Tribunal, including in relation to information available to victims, the mechanisms for victims to be heard by the Tribunal when considering the leave or release of a forensic patient, and support services.

Victims

The term 'victim' is defined in the *Mental Health (Forensic Provisions) Act* in line with the *Victims Rights and Support Act 2013*. A victim is a person who is injured or dies as a result of an act of violence committed by the patient ('**primary victim**'). A victim can also include a member of the immediate family of a primary victim who died as a result of the act of violence ('**family victim**')²⁶.

The Tribunal established the Forensic Patients Victim Register so people who meet the above definition can be acknowledged as a 'registered victim'. There are currently 243 registered victims on the Forensic Patients Victim Register, registered in relation to 117 forensic patients.

There are a sizeable number of people whom the Tribunal treats as registered victims, but who do not meet the statutory definition for 'victim' because they were registered as victims before the statutory definition was included with amendments to the *Mental Health (Forensic Provisions) Act* in 2009.

More information on the involvement of victims in Tribunal forensic matters can be found on the Tribunal website [here](#).

Engagement of victims

When a person registers as a victim with the Tribunal they are asked to nominate the kind of information they wish to receive from the Tribunal including:

- All Tribunal hearings for the patient;
- Tribunal hearings where leave or release is being applied for;
- Tribunal determinations relating to an application for leave or release;
- A forensic patient's escape from custody or where a patient fails to return from leave (and where the Tribunal has issued an order for the patient's apprehension and detention); and
- When the person's status as a forensic patient ends.

If a victim wishes to be told about Tribunal hearings, the Tribunal staff will write before hearings to let them know what will be considered at the hearing. The notification letter advises victims that they have an opportunity to attend the hearing if they wish. The letter also advises victims that they are able to seek a non-association or place restriction order.

The Tribunal also lets victims know what was decided at a hearing. Some registered victims choose to attend every review hearing, as is their right as members of the public, but many choose not to attend hearings. Some ask a support person from one of the victims support groups to attend the Tribunal hearing on their behalf.

Registered victims may provide a written statement to the Tribunal to be included in the papers considered at the forensic patient's hearing. In practice, the Tribunal particularly considers victim submissions regarding non-association or place restriction orders. If a registered victim is seeking an order that the forensic patient not be allowed to go to particular places or to not contact them, they will be asked to provide some reasons for their request. As part of a hearing on this issue, registered victims may be asked to give oral evidence, and if they do, the Tribunal may elect to close the hearing to the forensic patient and others.

²⁶ *Mental Health (Forensic Provisions) Act 1990* (NSW), s 41(1).

Registered victims have a legal right to apply to the Tribunal to make an order restricting the places that a forensic patient may go to or from contacting any named persons²⁷.

If the Tribunal is not considering a leave or release application, or the question of a non-association or place restriction, then the registered victim may attend the hearing as an observer. Registered victims do not have a right to legal representation before the Tribunal and cannot cross-examine any other person appearing before the Tribunal.

Sometimes the information that is discussed in a Tribunal hearing is particularly sensitive and the Tribunal may decide to hold some or all of a hearing in private. In that case, orders are made that may exclude people, including registered victims, from that part of a hearing.

Tribunal decisions can be appealed to the Supreme Court, however registered victims can only appeal the Tribunal's decision regarding non-association and place restriction applications²⁸.

Victim Services NSW

While there are no specialist services for victims of forensic patients, the NSW Department of Justice provides Victims Services NSW offering numerous support services for victims of crimes in NSW, including:

- Victims Access Line and Aboriginal Contact Line—a single entry point for victims of crime in NSW to access services.
- Counselling—a free counselling service for victims of violent crime that occurred in NSW.
- Financial support—a package of care to support and assist victims.
- Support Coordination Team—provide advice, support and information, referral to other services and assistance to build a package of care.
- Promotion of Victims Rights and the Charter of Victims Rights.

Victims of crime clearinghouse - an online database containing summaries of significant research into victims' issues.

Other non-government organisations exist to provide support for victims, such as:

- Victims Of Crime Assistance League Inc NSW (VOCAL) <http://www.vocal.org.au> (02) 4961 4755
- Homicide Victims' Support Group (HVSG) <http://www.hvsgnsw.org.au> (02) 8833 8400
- Enough is Enough—Anti-violence Movement Inc (EIE) <http://www.enoughisenough.org.au> (02) 9542 4029
- Police Assistance Line—131 444

Discussion

The NSW Law Reform Commission noted in Report 138 that section 160 of the *Mental Health Act* allows for regulations to be made about the role of victims and family members in Tribunal proceedings. No regulations have currently been made about these matters, but are addressed through practice outlined in the Tribunal's Forensic Guidelines. The Law Reform Commission noted that in most other jurisdictions, legislation allows victims to provide a report to the body responsible for reviewing the status of a forensic patient²⁹.

The NSW Law Reform Commission also noted a number of issues raised by stakeholders about victim participation in Tribunal hearings and recommended that these issues be dealt with on a case by case basis by the Tribunal³⁰. The Law Reform Commission did not recommend any changes to the laws relating to the role of victims in proceedings before the Tribunal.

It is noted that the objectives of the *Mental Health (Forensic Provisions) Act* in relation to forensic patients do not recognise harm done to the victim of crime or the interests of victims, but are predominately focused on the safety of members of the public as well as the care, treatment and control of such patients.

²⁷ *Mental Health (Forensic Provisions) Act 1990* (NSW), s 76(2).

²⁸ *Mental Health (Forensic Provisions) Act 1990* (NSW), s77A(3).

²⁹ NSW Law Reform Commission (2013) *People with cognitive and mental health impairments in the criminal justice system. Criminal responsibility and consequences*, Report 138, s 8.138.

³⁰ NSW Law Reform Commission (2013) *People with cognitive and mental health impairments in the criminal justice system. Criminal responsibility and consequences*, Report 138, s 8.148.

Victim support services

While generalist victim support services are provided in NSW, it could be argued that specific forensic victim services would be beneficial because the Tribunal has a unique function with forensic patients that is quite different to court and corrective services processes.

Following a review of the Queensland forensic mental health system in 2006, a Queensland Health Victim Support Service was established so victims have access to appropriate and timely information, their concerns are heard and the mental health system is responsive to their needs. That review recognised that access to information and support was crucial to a victim's recovery and wellbeing.

The Queensland Health Victim Support Service provides the following support to Queensland victims:

- Counselling;
- Advice on the rights and entitlements of victims;
- Psycho-education and education regarding the forensic mental health system;
- Assistance with navigating the criminal justice system and the forensic mental health system;
- Providing information and court support at the Queensland Mental Health Court;
- Providing advice and assistance in making statements and submissions to the Mental Health Court and the Mental Health Review Tribunal; and
- Creating referrals to services to assist in the recovery of victims.

The [Queensland Health Victim Support Service](#) also provides a detailed resource guide for the [victims of mentally ill offenders](#). This guide provides information on topics such as how to have a voice in the forensic mental health process and the rights and responsibilities of the victim. There is no similar specialist forensic victim support in NSW.

Victim involvement in Tribunal proceedings

The Law Reform Commission considered a range of different issues and views regarding the participation of victims in the Tribunal hearings. The Commission noted that there were a range of different issues and views including that victims can bring unique perspectives of safety issues that the Tribunal should consider, but that while hearings are open to the public and victims can attend, participation can impact on the privacy of patients or be detrimental to patients. Ultimately, the Commission found that balancing these issues and views should be determined on a case by case basis by the Tribunal³¹.

³¹ NSW Law Reform Commission (2013), *People with cognitive and mental health impairments in the criminal justice system. Criminal responsibility and consequences*, Report 138, s 8.145 8.149.

Information provided to victims

NSW forensic laws do not provide guidance on the information that may be sought or provided to victims of forensic patients. For example, registered victims do not have the automatic right to be informed if a patient is moved to a less secure facility.

By contrast, the Queensland *Mental Health Act 2016* sets out the type and level of information that can be provided to victims about Queensland Tribunal hearings and decisions³². This includes a requirement to provide victims (who have sought and been granted the right to receive certain information) with a brief explanation of the reasons for a Tribunal decision that increases a patient's access to the community.

Discussion questions

- Are there opportunities to improve the current practices and processes for engaging victims in Tribunal hearings? If so, how can they be improved?
- Are the mechanisms for victims to be heard by the Tribunal appropriate? If not, how could they be improved?
- Is the information available from the Tribunal to victims appropriate? If not, how could this be improved?
- Are support services available to victims appropriate? If not, how could they be improved?

³² See Part 6 of Chapter 10 and Schedule 1, *Mental Health Act 2016* (QLD).

3 PROHIBITIONS ON PUBLICATION OF NAMES

This Review will consider:

whether the policy objectives for prohibiting the publication of the name of any person in relation to a forensic matter before the Tribunal remain valid.

Prohibitions on publishing names of persons involved in Tribunal hearings

Section 162 of the *Mental Health Act* protects the privacy and identity of people who come before the Tribunal by prohibiting anyone, except with the Tribunal's consent, from publishing or broadcasting their names. This includes publishing any information, picture or material that identifies them or is likely to lead to their identification. This restriction on publishing names applies to proceedings under the *Mental Health Act* or the *Mental Health (Forensic Provisions) Act*.

The restriction includes publishing the name of any person who has a matter before the Tribunal (including forensic and civil patients), any person who appears as a witness before the Tribunal in any proceedings, or who is mentioned or otherwise involved in any proceedings under either Act. However, the section does not prohibit the publication or broadcast of an official report of the Tribunal proceedings.

The restrictions only apply in relation to the Tribunal hearing itself. The section does not prevent persons from identifying themselves in publications as persons who live with mental illness or who have been detained in a mental health facility. Nor does it prevent persons from publishing information that a person is a forensic patient or details about the court case of a person who has been found not guilty by reason of mental illness, or a person who has been diverted from the court for a mental health assessment. Section 162 does not prevent a victim from publishing their account about the impact of the crime.

Consenting to publication

Under section 162 of the *Mental Health Act*, the decision as to whether or not to allow publication of the name of a person involved in a Tribunal hearing is for the Tribunal to decide. That the individual person concerned consents to the publication of the name is not determinative for the Tribunal. However a person's attitude towards the proposed publication and their capacity to give consent are both important things the Tribunal will generally need to consider.

A person who wishes to seek the Tribunal's consent to publish information can make the application in writing to the Registrar of the Tribunal and the process is outlined in the Tribunal's [Practice Direction: Publications of Names](#).

Discussion

Tribunal hearings, both for civil and forensic patients, will necessarily involve detailed discussions about a patient's personal and health information—their past and current mental health issues, the treatment received, compliance with treatment and orders, the patient's and clinicians' views on the patient's progress and risks to patient and the public.

Where a forensic patient's victim seeks non-association or place restriction orders, discussion may also take place regarding the details of victims, whose name might have been suppressed as part of the original court decision, and the details of the harm suffered by the victim.

Section 162 aids in ensuring that participants in Tribunal hearings, including patients, carers, victims, and health practitioners and other witnesses, can freely discuss all relevant matters without concern that their names and sensitive information will be published. If participants' names are able to be published, participants may be less likely to appear or freely exchange information at a Tribunal hearing.

This in turn may impact on the ability of the Tribunal to consider all relevant information before making its decision. Further, if details about a patient's leave or release plans are publically released, it may materially impact on the ability of the patient to reintegrate safely into the community. Section 162 therefore is a protective mechanism, aiming at protecting the privacy of all participants as well as ensuring an environment in which sensitive personal and health information can be freely exchanged in order to protect the public and the patient.

All other Australian jurisdictions have similar provisions to section 162:

- Queensland – Section 790 of the *Mental Health Act 2016 (QLD)* prohibits the publication of information that can identify parties to Tribunal proceedings.
- Tasmania – Section 133 of the *Mental Health Act 2013 (TAS)* prohibits the publication of information that can identify forensic patients.
- Victoria – Section 194 of the *Mental Health Act 2014 (VIC)* prohibits the publication of information that identifies parties to Tribunal proceedings.
- Western Australia – Section 468 of the *Mental Health Act 2014 (WA)* prohibits the publication of information that can identify parties to Tribunal proceedings.
- South Australia – Section 106 of the *Mental Health Act 2009 (SA)* prohibits the publication of personal information (including identity).
- Northern Territory – Section 138 of the *Mental Health & Related Services Act 2016 (NT)* prohibits the publication of information that identifies parties to Tribunal proceedings.
- Australian Capital Territory – Section 134 of the *Mental Health Act 2015 (ACT)* prohibits the publication of information on forensic patients that has been provided to affected people.

The need to protect the identity of participants needs to be balanced against the need to ensure transparency of Tribunal decision making. The Tribunal is a quasi-judicial body that makes decisions and care, detention and release and general principles of justice would require transparency of their decision making. It is important to balance the public interests in transparency of decision making with the public interest in protecting the privacy of participants in a Tribunal hearing.

The *Mental Health Act* attempts to achieve this balance by restricting the publication of the names of Tribunal participants while providing that Tribunal hearings are to be open to the public, unless the Tribunal considers it necessary that a hearing be conducted wholly or partly in private³³. This ensures that generally members of the public are free to attend hearings but there cannot be a general public dissemination of the names of participants at Tribunal hearings.

The need to balance the needs of transparency of decision making against the need to protect privacy in certain legal proceedings is an issue in various other legislative regimes. Different areas have resolved the balance in slightly different ways, for example:

- where the Civil and Administrative Tribunal of NSW is hearing certain matters, such as guardianship matters, there are similar non-disclosure provisions preventing the publication or broadcasting of names of

persons involved in the proceedings³⁴. In addition, the Civil and Administrative Tribunal of NSW has powers to restrict the disclosure of the name of any person appearing before that Tribunal if it is satisfied that it is desirable to do so due to the confidential nature of the evidence or any other reason³⁵. However, hearings are still open to the public, though hearings may be closed in certain cases³⁶;

- where a child is being tried for an offence, the *Children (Criminal Proceedings) Act 1987* has a similar non-disclosure provision preventing the publication or broadcasting of names of persons involved in the proceedings. In addition, hearings are closed to the general public³⁷;
- the *Children and Young Persons (Care and Protection) Act 1998* sets out similar non-disclosure provisions preventing the publication or broadcasting of names of children or young people who appear, or are likely to appear, before the Children's Court³⁸;
- certain proceedings under the *Public Health Act 2010* involving persons with a sexually transmitted infection are carried out in closed court³⁹; and
- Courts hearing family law matters have the power to issue non-publication orders relating to the names of parties and witnesses⁴⁰.

Discussion questions

- Does section 162 appropriately balance the interests of participants involved in Tribunal hearings with the need to ensuring transparency of decision making? If not, what legislative or policy amendments could be made?

³³ *Mental Health Act 2007* (NSW), sections 151(3) and 151(4).

³⁴ *Civil and Administrative Tribunal Act 2013* (NSW), s 65.

³⁵ *Civil and Administrative Tribunal Act 2013* (NSW), s64.

³⁶ *Civil and Administrative Tribunal Act 2013* (NSW), s 49.

³⁷ *Children (Criminal Proceedings) Act 1987* (NSW), sections 15A and 10.

³⁸ *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 105.

³⁹ *Public Health Act 2010* (NSW), s 80.

⁴⁰ *Family Law Act 1975* (Commonwealth), s 102PE.

4 APPOINTMENT OF TRIBUNAL MEMBERS

This Review will consider:

whether the criteria used to recruit members of the Mental Health Review Tribunal are appropriate.

Tribunal members for forensic hearings

The Tribunal has three categories of members—Australian legal practitioners, psychiatrists, and other suitably qualified persons.

For all **forensic patient matters**, the Tribunal panel must include the President or a Deputy President, along with a psychiatrist and other suitably qualified members⁴¹. For **leave and release decisions** for forensic patients, the President or Deputy President on the panel must be the holder or former holder of a judicial office⁴².

All members of a Tribunal panel share the responsibility for ensuring that the hearing is fair and appropriately conducted, by considering the evidence presented and the most appropriate order to make that meets the legislative requirements. Each member of the panel will bring their particular skills and experience to the hearing process.

⁴¹ *Mental Health (Forensic Provisions) Act 1990* (NSW), s 73(2).

⁴² *Mental Health (Forensic Provisions) Act 1990* (NSW), s73(3).

Criteria to appoint Tribunal members, and roles and responsibilities of those members:

Member	Criteria	Role & Responsibility
President or Deputy President	Must have held office as a judge of the District, Supreme, Federal or High Court, or eligible to be appointed as a judge in those courts	<ul style="list-style-type: none"> • Chairing and managing the hearing in a manner conducive to achieving the required standards of informality, patient engagement in the process and optimal decision making while advising on points of law. • Conducting the pre-hearing planning meeting with the other members.
Legal Practitioner Members	Must be an Australian lawyer	
Psychiatrist Members	Must be a psychiatrist	<ul style="list-style-type: none"> • Providing specialist expertise to engage appropriately with professional colleagues in order to obtain clinical information required by the Tribunal. • Taking an educative role with lay members of the Tribunal. • Does not provide a second opinion regarding the psychiatric treatment being provided. • Does not play any role in the supervision of mental health teams or quality assurance of the services provided.
Other Suitably Qualified Members	Must have other suitable qualifications and/or experience	<ul style="list-style-type: none"> • Contributing knowledge of mental illness, mental health services, patient rights, and community expectations to the consideration of a patient's mental state and psychiatric history, social circumstances, response to treatment and willingness to continue treatment. • Applying their clinical or personal knowledge of mental illness, recovery and mental health services to consideration of the evidence. • Bringing expertise of general community interest, including those associated with the rights of the patient and considerations to risk of harm to self or others.

Recruitment process

All statutory appointments of part-time and Presidential Tribunal members must be approved by NSW Cabinet. Nominations of Tribunal members are generally made by the Minister for Health, based on the advice of the Minister for Mental Health and the President of the Tribunal. An appointment of a judicial member or President is only to be made after consultation with the Attorney General⁴³.

The Tribunal usually conducts a publicly advertised recruitment process at least every four years to encourage suitably qualified persons to express interest in appointment as a part time member of the Tribunal. The Tribunal may also receive expressions of interest from suitably qualified persons at any other time⁴⁴.

Where there is a vacancy in the role of a full-time Deputy President of the Tribunal, recruitment to this role is through public advertisement, with the suitability of all candidates generally determined by a selection panel including the President of the Tribunal and at least one person not employed in connection with the Tribunal⁴⁵. Part-time Deputy Presidents, who are usually former judicial officers, are generally recruited via expressions of interest received from time to time from suitably qualified persons.

The suitability of all candidates expressing interest for appointment to the Tribunal as part-time members is generally determined by a selection panel consisting of at least three members, including the President of the Tribunal or Deputy President, and at least one person not employed in connection with the Tribunal⁴⁶.

Tenure

Each term of appointment must not exceed seven years, but each member is eligible for re-appointment. Members are generally appointed for four year terms. The Tribunal most recently recruited for all categories of part-time members in January 2016. More than 300 expressions of interest were received, with 31 new members appointed from 1 September 2016, along with the reappointment of 38 current members through this process.

The Tribunal's next scheduled recruitment process for all categories of members is not scheduled to occur until 2020, however expressions of interest can still be submitted to the Tribunal's Registrar at any time via the Tribunal's website.

Removal of members

The Minister for Health has the power to remove, at any time, a person appointed to the Tribunal. Grounds for removal may include, for example, breaches of criminal law, bankruptcy, breaches of codes of conduct, persistent failure to attend meetings, and actions which affect the effectiveness of the Tribunal. The President of the Tribunal may make recommendations to the Minister for Mental Health for consideration of the Minister for Health to remove a part time member at any time⁴⁷.

Discussion questions

- Does the make up of the Tribunal meet the needs of the public, victims and forensic patients? If not, how could it be changed?
- Are the current rules and processes for appointing members of the Tribunal appropriate?

⁴³ Mental Health Review Tribunal, *Guidelines for the Nomination of Presidential Members*.

⁴⁴ Mental Health Review Tribunal, *Guidelines for the Appointment of Part Time Members and Guidelines for the Nomination of Presidential Members*.

⁴⁵ Mental Health Review Tribunal, *Guidelines for the Nomination of Presidential Members*.

⁴⁶ Mental Health Review Tribunal, *Guidelines for the Appointment of Part Time Members*.

⁴⁷ Mental Health Review Tribunal, *Guidelines for the Appointment of Part Time Members and Guidelines for the Nomination of Presidential Members*.

APPENDIX 1

Related reviews and reports

A number of reviews have been undertaken in NSW and other jurisdictions in relation to forensic patients.

Review of the NSW Forensic Mental Health Legislation 2007

In 2007, the then President of the Tribunal, the Hon Greg James QC, undertook an extensive review on behalf of the NSW Government of the legislation governing forensic patients. The Review recommended important changes to forensic legislation, including the transfer of decision making power over detention, leave and release of forensic patients from the Minister for Health and the Government Executive to the Tribunal.

The forensic review also considered the role of victims of crime and how their views and concerns could be addressed in the Tribunal's decision making process. It noted the legislation at the time did not make any specific reference to victims of crime and the Review recommended amending legislation to allow the Tribunal to make non-association and place restriction orders on forensic patients, and to allow victims to make applications for such orders.

These recommendations were implemented and came into force in 2009.

NSW Law Reform Commission 2013

The NSW Law Reform Commission published a report in 2013 on people with cognitive and mental health impairments in the criminal justice system (criminal responsibility and consequences). The Report made a broad range of recommendations in relation to the forensic system, including court and Tribunal processes. The Report and its recommendations are currently being considered by the Government.

Mental Health Commission of NSW 2017

The Mental Health Commission of NSW recently reviewed of the interaction of people with mental illness and cognitive impairment with the criminal justice system. The Commission report noted that supporting victims through the justice system contributes to their ongoing health and wellbeing. The Commission is in favour of victims with mental health or cognitive impairments being provided with support when giving evidence. It also supports consideration being given to expanding support services for such victims⁵⁰.

Queensland Health Review 2006

Queensland Health undertook a review of its forensic mental health system in 2006⁵¹. It recommended that victims in mental health matters should have access to a similar level of information as victims in criminal court matters. It also recommended that victims be heard in Tribunal matters and receive better support. As a result Queensland Health established a Victim Support Service staffed by professional officers with experience in forensic mental health.

⁴⁸ G James (2007), *Review of the NSW Forensic Mental Health Legislation*.

⁴⁹ NSW Law Reform Commission (2013), *People with cognitive and mental health impairments in the criminal justice system. Criminal responsibility and consequences*, Report 138.

⁵⁰ Mental Health Commission of NSW (2017), *Towards a just system: mental illness and cognitive impairment in the criminal justice system*, page 22.

⁵¹ *Review of the Queensland Mental Health Act 2000, Final Report*, December 2016.

