

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

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**DISCUSSION PAPER**



Health



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# INTRODUCTION

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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.

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## 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 patients<sup>1</sup>, 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 private<sup>2</sup>. 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 Tribunal<sup>3</sup>.

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.

<sup>1</sup> 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>.

<sup>2</sup> *Mental Health Act 2007* (NSW), s 151.

<sup>3</sup> *Mental Health Act 2007* (NSW), s 162.

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## The NSW forensic mental health system

There were 425 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;
- 20 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	104
Community	149
<b>TOTAL</b>	<b>425</b>

# 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 Leave<sup>4</sup>.

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.

<sup>4</sup> 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	425

## 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 them<sup>5</sup>.
- **Unconditional Release** where the person is no longer a forensic patient and is no longer under the control of the Tribunal<sup>6</sup>.

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.

<sup>5</sup> 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).

<sup>6</sup> 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	425	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 office<sup>7</sup>.

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 release<sup>8</sup>. 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 care<sup>9</sup>.

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;

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

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

<sup>9</sup> *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 custody<sup>10</sup>.

## 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 patient<sup>11</sup>:

- 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 assessment<sup>12</sup> 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 plans<sup>13</sup>.

When making a decision about whether to release a patient, the Tribunal must also consider a report by a forensic psychiatrist or other expert<sup>14</sup> 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.

<sup>10</sup> *Mental Health (Forensic Provisions) Act 1990* (NSW), s 74.

<sup>11</sup> NSW Health Policy Directive (2012) *Forensic Mental Health Services*, PD\_2012\_050, s 7.2.3 and 7.3.3.

<sup>12</sup> 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.

<sup>13</sup> NSW Health Policy Directive (2012) *Forensic Mental Health Services*, PD2012\_050, Appendix 6 sample reports.

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

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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).<sup>15</sup>

## 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 following<sup>16</sup>:

- 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.

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

<sup>16</sup> NSW Health Policy Directive (2012) *Forensic Mental Health Services*, PD 2012\_50, s 7.2.4.

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## 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 community<sup>17</sup>.

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 themselves<sup>18</sup>.

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 leave<sup>19</sup>. 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 detail<sup>20</sup>.

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.

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

<sup>18</sup> 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.

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

<sup>20</sup> 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'<sup>21</sup>.

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<sup>22, 23</sup>.

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 patients<sup>24</sup>.

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 tests<sup>25</sup>. 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?

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

<sup>22</sup> James, G. (2007) *Review of the New South Wales Forensic Mental Health Legislation*, s 8.5.

<sup>23</sup> 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.

<sup>24</sup> 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.

<sup>25</sup> 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**')<sup>26</sup>.

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.

<sup>26</sup> *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 persons<sup>27</sup>.

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 applications<sup>28</sup>.

## 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 patient<sup>29</sup>.

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 Tribunal<sup>30</sup>. 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.

<sup>27</sup> *Mental Health (Forensic Provisions) Act 1990* (NSW), s 76(2).

<sup>28</sup> *Mental Health (Forensic Provisions) Act 1990* (NSW), s77A(3).

<sup>29</sup> 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.

<sup>30</sup> 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.

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## 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 Tribunal<sup>31</sup>.

<sup>31</sup> 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.



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## 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 decisions<sup>32</sup>. 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?

<sup>32</sup> 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 private<sup>33</sup>. 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 proceedings<sup>34</sup>. 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 reason<sup>35</sup>. However, hearings are still open to the public, though hearings may be closed in certain cases<sup>36</sup>;

- 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 public<sup>37</sup>;
- 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 Court<sup>38</sup>;
- certain proceedings under the *Public Health Act 2010* involving persons with a sexually transmitted infection are carried out in closed court<sup>39</sup>; and
- Courts hearing family law matters have the power to issue non-publication orders relating to the names of parties and witnesses<sup>40</sup>.

## 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?

<sup>33</sup> *Mental Health Act 2007* (NSW), sections 151(3) and 151(4).

<sup>34</sup> *Civil and Administrative Tribunal Act 2013* (NSW), s 65.

<sup>35</sup> *Civil and Administrative Tribunal Act 2013* (NSW), s64.

<sup>36</sup> *Civil and Administrative Tribunal Act 2013* (NSW), s 49.

<sup>37</sup> *Children (Criminal Proceedings) Act 1987* (NSW), sections 15A and 10.

<sup>38</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 105.

<sup>39</sup> *Public Health Act 2010* (NSW), s 80.

<sup>40</sup> *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 members<sup>41</sup>. 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 office<sup>42</sup>.

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.

<sup>41</sup> *Mental Health (Forensic Provisions) Act 1990* (NSW), s 73(2).

<sup>42</sup> *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
<b>President or Deputy President</b>	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"> <li>• 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.</li> <li>• Conducting the pre-hearing planning meeting with the other members.</li> </ul>
<b>Legal Practitioner Members</b>	Must be an Australian lawyer	
<b>Psychiatrist Members</b>	Must be a psychiatrist	<ul style="list-style-type: none"> <li>• Providing specialist expertise to engage appropriately with professional colleagues in order to obtain clinical information required by the Tribunal.</li> <li>• Taking an educative role with lay members of the Tribunal.</li> <li>• Does not provide a second opinion regarding the psychiatric treatment being provided.</li> <li>• Does not play any role in the supervision of mental health teams or quality assurance of the services provided.</li> </ul>
<b>Other Suitably Qualified Members</b>	Must have other suitable qualifications and/or experience	<ul style="list-style-type: none"> <li>• 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.</li> <li>• Applying their clinical or personal knowledge of mental illness, recovery and mental health services to consideration of the evidence.</li> <li>• 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.</li> </ul>

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## 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 General<sup>43</sup>.

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 time<sup>44</sup>.

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 Tribunal<sup>45</sup>. 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 Tribunal<sup>46</sup>.

## 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 time<sup>47</sup>.

### 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?

<sup>43</sup> Mental Health Review Tribunal, *Guidelines for the Nomination of Presidential Members*.

<sup>44</sup> Mental Health Review Tribunal, *Guidelines for the Appointment of Part Time Members and Guidelines for the Nomination of Presidential Members*.

<sup>45</sup> Mental Health Review Tribunal, *Guidelines for the Nomination of Presidential Members*.

<sup>46</sup> Mental Health Review Tribunal, *Guidelines for the Appointment of Part Time Members*.

<sup>47</sup> 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 victims<sup>50</sup>.

### Queensland Health Review 2006

Queensland Health undertook a review of its forensic mental health system in 2006<sup>51</sup>. 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.

<sup>48</sup> G James (2007), *Review of the NSW Forensic Mental Health Legislation*.

<sup>49</sup> NSW Law Reform Commission (2013), *People with cognitive and mental health impairments in the criminal justice system. Criminal responsibility and consequences*, Report 138.

<sup>50</sup> Mental Health Commission of NSW (2017), *Towards a just system: mental illness and cognitive impairment in the criminal justice system*, page 22.

<sup>51</sup> *Review of the Queensland Mental Health Act 2000, Final Report*, December 2016.









