REVIEW OF THE NEW SOUTH WALES FORENSIC MENTAL HEALTH LEGISLATION

August 2007

Hon GREG JAMES QC

The Hon John Hatzistergos MLC
Attorney General

The Hon Reba Meagher MP
Minister for Health

The Hon Paul Lynch MP
Minister Assisting the Minister for Health (Mental Health)

1 August 2007

Dear Ministers

In 2006, your predecessors required me to conduct a review of Chapter 5 of the *Mental Health Act 1990* (NSW) as it relates to forensic patients, and related matters arising under the *Mental Health (Criminal Procedure) Act 1990* (NSW). The terms of reference for the review required me to consider specific issues which had remained unresolved after the lengthy review of the *Mental Health Act 1990* which produced the *Mental Health Act 2007*. I was asked to convene and chair a Taskforce in relation to those matters and to examine options for reform and to consult stakeholders and the public on those options. I was also asked by the Minister Assisting the Minister for Health (Mental Health) to conduct an Administrative Review of the Mental Health Review Tribunal in accordance with terms of reference then provided. Those reviews have complemented each other. I have conducted both reviews and will forward my report on the Administrative Review under separate cover.

In conducting this review, I issued a Consultation Paper which built on earlier consultations on the proposals for the 2007 Act. That Paper outlined current law and practice, and options for reform, in relation to the matters under review. It was released in December 2006 and widely circulated. Some fifty formal submissions were received in response, (the content of two of which was confidential), further I have conducted scores of consultation meetings with doctors, staff, patients and

others involved in all aspects of the forensic mental health systems in New South Wales and elsewhere receiving both open and confidential submissions. I am deeply grateful for their contributions.

I would also like to thank the Hon Dr Brian Pezzutti and those who participated in the Legislative Council Select Committee on Mental Health's inquiry into mental health services in NSW (2002) and the NSW Law Reform Commission's Inquiry on People with an Intellectual Disability in the Criminal Justice System (1996), as well as those who provided assistance and submissions to the review of the *Mental Health Act 1990*. In preparing this report I was able to build on all of that work.

I have also convened the Taskforce which comprised 25 members, appointed by the former Minister Assisting the Minister for Health (Mental Health) to represent a number of important stakeholders, agencies and organisations and I have considered the issues raised by the Terms of Reference and the content of the submissions with each participating member. I am most grateful for the contributions made by those members and the agencies they have represented.

The central issue considered in this review is the appropriate authority to make decisions as to the terms and conditions of detention and release of forensic patients. This Report recommends that the resource intensive and lengthy process of control of patients by executive discretion (which NSW adopted from English law), supported by six monthly cycles of review and recommendation to the Minister or the Governor-in-Council, be replaced with a more continuous monitoring and less cumbersome structured system operating through a Special Forensic Division of the Mental Health Review Tribunal, presided over by a judge or former judge making determinations subject to appeal to the NSW Supreme Court in the public interest. The report also makes various other recommendations regarding the detention, care, treatment and release of forensic patients, including as to the role of victims in the process.

I am grateful for the assistance of many people in preparing this Report, including Mr John Feneley, recently appointed as a Deputy President of the Tribunal (formerly Assistant Director-General, Attorney General's Department). Dr Richard Matthews (Deputy Director-General, NSW Health), Deputy President Maria Bisogni, the other Deputy Presidents, The Registrar Rodney Brabin, the Forensic

Team Leader Ms Sarah Hanson, the Forensic Assistant Ms Pauline Brady and other members of staff at the Tribunal, and all of those who provided submissions and participated in consultations for this Review.

I particularly wish to acknowledge the dedication and skill of my Executive Assistant Ms Margaret Lawrence and the invaluable contribution of Ms Gaby Carney, Principal Policy Officer, who was seconded from the Department of Premier and Cabinet for some weeks to produce the Consultation Paper and later to assist in the research, drafting and writing of the Report. Ms Lawrence undertook the production of the final report and did so with marked ability and conscientiousness. Ms Carney worked with me as an assistant and a colleague and shouldered much of the burden of the preparation of the Consultation Paper and the Report. My gratitude for her assistances reflects the skill and conscientiousness she brought to assisting me which allowed me to undertake the extensive consultation process, the review and the writing of the Report and to continue to fulfil my duties as President of the Mental Health Review Tribunal while doing so.

I enclose my report.

Yours faithfully

The Hon Greg James QC

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Executive Summary

The Review

This Review arose out of a broader review of the *Mental Health Act 1990* (NSW), which commenced in 2004. Due to the complexity of issues involved in the area of forensic mental health, and the range of reform options available, the NSW Government considered that further work was necessary to determine the appropriate way forward. Accordingly, the Hon Greg James QC was required to conduct a review of Chapter 5 of the *Mental Health Act 1990* (NSW) as it relates to 'forensic patients', and any related matters arising under the *Mental Health (Criminal Procedure) Act 1990* (NSW) and furnish this report.

In December 2006, the Review released a Consultation Paper which outlined the current law and practice, and options for reform, in relation to the matters under review. The Review received 50 submissions in response to the Paper, and conducted scores of consultation meetings with stakeholders involved in all aspects of the forensic mental health framework. Mr James was also required to convene and consult a Taskforce comprising 25 members, representing various agencies and organisations which has provided input at various stages of the Review process.

In early 2007, the NSW Parliament passed the Mental Health Bill 2007 (NSW), which is the culmination of the broader review. When it commences operation, the Mental Health Act 2007 (NSW) will repeal the *Mental Health Act 1990* (NSW), and will transfer the Chapter 5 provisions dealing with the detention, care, treatment and release of forensic patients into the *Mental Health (Criminal Procedure) Act 1990* (NSW), with some amendments.

Overview of the Report

The core issue for the Review was whether the existing system requiring executive decision for the care, detention, treatment, leave and release of prisoners transferred into hospital as mentally ill and of persons found not guilty by reason of mental illness or unfit for trial should be replaced. The Review was also asked to

examine the appropriateness of structures for the determination of such matters and for appeals from those determinations. In particular, the Review was to consider public safety and the role of victims in the forensic review process.

Executive Discretion

The present system of exercise of Executive discretion for decisions on the care, detention, treatment, leave of absence and release of forensic patients:

- Results in the detention of unconvicted patients in gaol so long that in many cases that detention extends longer than public safety would require and also longer than any sentence which would have been imposed had the patient been convicted and sentenced.
- Such detention often extends longer than required by any clinical necessity for treatment which can often be safely and effectively given by existing Health Department agencies in the community.
- The system is cumbersome, lengthy, overly bureaucratic, resource intensive, operates without transparency or accountability, without conformity to the general principles of mental health legislation, and is liable to administrative challenge. It has been the subject of widespread criticism. It is out of accord with other systems for care and treatment of forensic patients in Australia and elsewhere.
- It is counterproductive to appropriate detection and treatment of those with mental illness coming into the justice system.
- The system presents difficulties for patients, families, carers and victims who need a formal transparent process in which to express their views and concerns. The present process can be anti therapeutic for patients and distressing for other affected persons.

The appropriate authority

Consistently with the amendments to the Mental Health (Criminal Procedure) Act 2005 which conferred power on the courts to release forensic patients and to ensure safety and public accountability, the Executive discretion should be replaced by a specially constituted division of the Mental Health Review Tribunal

holding public hearings, presided over by a judge or former judge, and including members with particular qualifications in forensic mental health.

That Division of the Tribunal should conduct regular reviews and monitor forensic patients in detention and in the community. It should determine care, detention, treatment, leave and release according to clinical requirements and public safety considerations. It should have wide powers to obtain information and should be required to have regard to independent risk assessments as well as specified statutory criteria when determining release. It should have power to call up patients for non-compliance with conditions of release and be provided with wide powers to impose conditions requiring treatment or hospitalisation. It should be able to release patients on condition that they are treated in the civil mental health system.

Criteria for Release

The Review also recommends a more formal framework for making decisions to conditionally or unconditionally release forensic patients, which would more comprehensively address the public safety and other issues concerned. This includes an expanded legislative test that would require the Forensic Division to be satisfied, on the available evidence, that:

- The safety of the patient or any members of the public will not be seriously endangered by the person's release;
- Effective care and treatment of a less restrictive kind (if any is needed) is reasonably available to the patient within the community; and
- Reasonable arrangements have been made to ensure that any necessary care and treatment will be given within the community.

The legislation should also include a list of matters to which the Forensic Division must have regard when making these decisions, including the report of at least one qualified forensic psychiatrist or psychologist (as appropriate) who is independent of the treating team and has recently examined the forensic patient to determine as to whether the safety of the patient or that of any members of the public will be seriously endangered by the persons release.

Appeal

Having regard to the public interest, the Attorney-General and the Minister for Health should have the right to appear and make submissions to the Tribunal and to appeal its decisions to the Supreme Court.

The Law Reform Commission

The Review noted the discriminatory and adverse treatment in the criminal law of those suffering from mental illness and other conditions not justified by clinical or safety considerations. The application of laws and procedures which may have drastic effects on liberty, but no value for treatment, presently turn on classifications of mental states derived from nineteenth century jurisprudence, long criticised and widely thought to be completely outmoded.

The Law Reform Commission is already concerned with inquiring in to part of the relevant law. It should be given a reference or expanded reference to consider the concepts of mental illness, mental condition, intellectual disability and unfitness as they impact on the Court process, to review the subsequent treatment of persons in the justice system, and to conduct a comprehensive review of the criminal law and procedure, applying to those with cognitive and mental health impairments.

The Review concluded that the present system of indefinite detention of those found not guilty by reason of mental illness and the quasi-trial and quasi-sentencing of those found unfit but found on limited evidence to have committed the acts in question is entirely unsatisfactory, and makes indicative reform proposals to the Commission.

Intellectual Disability, Women and Children

Certain special needs patients including persons with intellectual disability, women and children, clearly require their specific needs addressed by appropriate legislative and administrative programs which should be developed by the Human Services and Criminal Justice Chief Executive Officers.

The Legislation

The present legislation is unclear, complicated, difficult to apply and contains flaws and inconsistencies. In consequence, agencies frequently fail to comply with it and forensic patients are adversely, sometimes wrongly, treated under it. Under the present legislative processes there is a disconformity between the treatment of forensic patients in the courts and in the Tribunal and their treatment in correctional facilities.

The drafting of the legislation and of the definitions, particularly that of "forensic patient", should be improved. Consistently the legislation dealing with forensic patients should include the general principles expressed in the *Mental Health Act 2007* applicable to other mental illness patients. The legislation should clearly define how a person becomes a forensic patient and how that status terminates. The legislation should specify the power to detain, treat, make Community Treatment Orders and supervise patients in the community and when detained. The legislation should provide for prisoners transferred to a hospital as mentally ill to remain subject to their sentences but unconvicted patients should be subject to medical treatment and not treated as prisoners. When a prisoner requires treatment both the correctional facilities and treatment regimes should apply.

Under the present legislation, although provision has been made for agreements for inter-jurisdictional transfers and inter-jurisdictional implementation of orders the requisite mechanisms are ineffective for forensic patients to be returned to their state or territory of origin or to allow for out-of-state treatment in most cases. Usually many years go by before release on conditions that permit travel or return, nor is there an ability to ensure that patients are treated in accordance with New South Wales orders outside New South Wales. The legislation should provide for effective inter-jurisdictional arrangements and recognition of and compliance with Tribunal orders in other jurisdictions.

Victims

Victims have a clearly recognisable interest in issues of release and conditions of release so far as their own safety and welfare are concerned and should be entitled to put their concerns before the Tribunal. The Tribunal should have power to make orders as little as possible restrictive of the liberty of the patient but which allow safe and effective care in the community.

The Tribunal should maintain the Victims' Register and victims should be allowed to choose to be placed on the register. They should have the option of deciding whether to be notified or not to be notified of the Tribunal's proceedings. The Tribunal should have a process to notify those victims that wish of its hearings and to receive submissions from victims, who should be entitled to attend hearings if they wish. There should be power to include non-contact and place restriction orders in conditions of release.

The Administrative Review

In conjunction with this Report, an additional report examining the present administration of the Tribunal and the probable impact on that administration of the recommendations made here for reform has been prepared and will be provided with this report to the Minister Assisting the Minister for Health (Mental Health).

Terms of Reference

Under the Terms of Reference, the review has been asked to:

1. Review and make recommendations in relation to the legislative provisions of Chapter 5 of the *Mental Health Act 1990* (NSW) relating to forensic patients, and in particular, to consider:

    - The appropriate authority or person to make decisions in relation to the terms and conditions of detention, release and conditional release of forensic patients;

    - Mechanisms for ensuring issues of public safety are properly considered and addressed in reviews of forensic patients;

    - The role of victims of crime, and in particular means by which their views and concerns can be addressed in the forensic review process;

    - The appropriate structure for review and decision making process, having regard to the 4 Options;

    - The current definition of forensic patient, and in particular whether there should be two categories of patients, namely ‘forensic patients’ and ‘security patients’, the latter to cover persons who are transferees from a correctional centre;

    - The ability of the Mental Health Review Tribunal to make Community Treatment Orders for people who are in prison and who are mentally ill;

    - How those recommendations relate to the work of the review of the Mental Health Review Tribunal administrative practices and procedures and its role within the forensic system;

2. Review and make recommendations on the provisions of the *Mental Health (Criminal Procedure) Act 1990* (NSW) as may arise out of clause 1; and

3. Report to the Minister for Health and Attorney General within 12 months.

List of Recommendations

General Principles and Powers

1. Amend the forensic mental health legislation to insert the objects and principles set out in the *Mental Health Act 2007* (NSW) suitably drafted to ensure that these provisions continue to apply to forensic patients and accommodate their special needs and public safety principles.

2. Amend the legislation to provide a narrative definition of a 'forensic patient' that expressly and comprehensively defines the circumstances in which a person becomes a forensic patient.

3. Amend the legislation to define expressly and specifically the powers to detain, treat, and release a forensic patient, as well as the termination of forensic patient status.

Special Needs Patients

4. The NSW Government should:

- Refer to the Human Services and Criminal Justice Chief Executive Officers the development of specific legislative and administrative proposals dealing with the detention, care, treatment, release and co-ordinated community support of forensic patients and transferees with intellectual disability or who are women or children;

- Request that they provide a report to the Premier on these legislative and administrative proposals within 12 months of this report; and

- Implement approved reforms arising out of this process within 12 months of the Human Services and Criminal Justice Chief Executive Officers' report.

Jurisdictional Issues

5. The NSW Government should consider the need for specific provisions in relation to forensic patients (including transferees) detained in NSW on behalf of other jurisdictions, and liaise with relevant jurisdictions to develop and implement such provisions.

6. The Minister for Health should take the legislative and administrative action necessary to ensure an effective framework for the inter-jurisdictional transfer of forensic patients (including those conditionally released into the community) and the inter-jurisdictional application of the legislative provisions, and consider the need for arrangements in relation to forensic patients who may wish to move overseas.

Concepts of Mental Illness

7. The NSW Law Reform Commission should review the concepts of mental illness, mental condition, intellectual disability and unfitness for trial used in the law generally and in forensic mental health legislation.

Transferee Patients

8. Amend the legislation to create a new category of patient known as 'transferee patients', which includes people who are on remand or serving a sentence of imprisonment and transferred to a mental health facility for treatment, and provide:

- To the extent possible, that transferee patients should be subject to the civil provisions of the *Mental Health Act 2007* (NSW) in relation to their admission to a mental health facility, and their care and treatment while accommodated in the facility; and
- Specific provisions for transferee patients in relation to the commencement and termination of their transferee status, their management in terms of security, access to leave and release arrangements, initial and periodic reviews by the Tribunal, and provisions for transfer to other jurisdictions. These provisions should reflect the existing legislative provisions for this category of patient, subject to the reforms outlined in this report.

9. Amend the legislation to include specific provisions for forensic patients including those detained in Corrective Services facilities that reflect the existing legislative provisions for this category (subject to the reforms outlined in this report), and provide that they override any administrative arrangements that apply by virtue of the patient's detention in the prison system.

Community Treatment Orders

10. Amend the legislation to:

- Provide a detailed legislative framework for the making and implementation of Community Treatment Orders in the correctional context; and
- Require the Tribunal to review the case of any person who is subject to a Community Treatment Order and detained in a correctional centre, at least once every three months.

Transferee's Sentences

11. Amend the legislation to provide that a transferee patient is detained pursuant to his or her sentence of imprisonment, rather than the order transferring him or her to a mental health facility for mental health treatment, and, that the Tribunal should retain the power to make a forensic patient a Continued Treatment Patient but that power should be capable of being exercised within six months prior to the expiry of the minimum term or non parole period or thereafter.

Executive Discretion

12. Replace the present system of executive decision-making in relation to forensic patients with a legislative framework in which a special Forensic Division of the Mental Health Review Tribunal is responsible for decision-making in relation to the detention, care, treatment, leave and release of forensic and transferee patients.

Forensic Division of the Mental Health Review Tribunal

13. Amend the legislation to:

- Establish a Forensic Division of the Mental Health Review Tribunal to conduct reviews and make decisions in relation to forensic and transferee

patients and provide that the President should have power to make Rules and give Practice Directions for the conduct of its business.

- Provide that a Panel of the Forensic Division will be constituted by three members, being:
    - a legal member (being the President or a Deputy President and who, in the case of any hearing involving the possibility of a forensic patient's release, is a current or former judge);
    - a current practising psychiatrist (for patients with a mental illness) or a current practising psychologist or other relevant expert (for patients with an intellectual disability); and
    - a member with qualifications or experience in the mental health or intellectual disability field (as appropriate).

- Require the Forensic Division to give notice of each forensic hearing to the forensic or transferee patient, his or her treating team and legal representative, any registered victims or family members who may wish to make submissions, and (for hearings involving the possibility of release) the Attorney General and Minister for Health. The relevant notice periods should be 14 days for release hearings, and 7 days for any other hearings, subject to exceptional circumstances, and the form of notice should be prescribed in the regulations.

- Require the Forensic Division to consider specified reports and other information when reviewing a patient, and give it the power to order the making and production of these reports and the supply of other information (powers and requirement may be set out in Practice Directions or regulations).

- Require the Forensic Division to give written reasons for all decisions involving the question of release, and for other decisions upon request by any person with a direct interest in the proceedings.

14. Amend the legislation to give the Minister for Health and Attorney General the right to make submissions at any hearing relating to the possible release of a forensic or transferee patient.

Appeals

15. Amend the legislation to provide for the following appeals framework in relation to Tribunal determinations:

- All decisions other than those involving conditional or unconditional release should be subject to appeal to a single judge of the Common Law Division of the NSW Supreme Court, while release decisions should be subject to appeal to the Court of Appeal.

- Appeals should be heard by way of rehearing for error of law or fact, determined on the evidence used in the Tribunal together with any additional evidence the Court thinks fit to receive. It should also be open to the Court hearing the appeal to have the benefit of assessors if it considers it appropriate generally, or in the particular case.

- Given the public interest involved in such decisions, the Minister for Health and Attorney General should have the right to make submissions at any hearing dealing with the possible grant of conditional or unconditional release, and a right of appeal in relation to such decisions on the grounds of error of law or fact.

Compliance

16. Amend the legislation to provide that:

- If any public sector agency or official is not able to comply with a Tribunal order in relation to the detention, care, treatment and release of a forensic or transferee patient within one month of it being made (or the date specified in the order), the agency must forward a written report to the President of the Tribunal providing reasons for such non-compliance;

- If the President is satisfied that the non-compliance was not justified in the circumstances, he or she may report the matter to the Supreme Court; and the Supreme Court may deal with the matter as if it were a contempt of the Court, subject to a defence of reasonable excuse.

Law Reform Commission

17. In the inquiries it is already undertaking or in a further reference in addition to the review recommended in Recommendation 7 the NSW Law Reform Commission should conduct a comprehensive inquiry into the criminal law and procedure applying to people with cognitive and mental health impairments. This inquiry should cover the matters outlined in Chapter 6 of this report, and should give consideration to the indicative reform recommendations contained in it.

Notification of Jurisdiction

18. The Attorney General, Minister for Health, Minister for Justice and the Tribunal should develop a formal protocol for the Tribunal to be notified that it has acquired jurisdiction over a forensic patient within seven days of that event occurring.

Reviews

19. Amend the legislation to provide that:

- The Forensic Division of the Tribunal must review the case of each forensic patient and transferee patient at least once every six months but may, on a case-by-case basis, extend the period for a specific review to a maximum of 12 months from the conduct of the last review.

- The Forensic Division may only do so where:

- The patient has made a written request for an extension and a panel of the Forensic Division is satisfied that there are reasonable grounds for granting the extension; or

- A panel of the Forensic Division is satisfied on reasonable grounds that: (i) there has been no substantial change in the patient's condition; (ii) there is no reasonable basis for changing the patient's conditions of detention, care and treatment; and (iii) to hold a review at that time would be anti-therapeutic for the patient; and the patient (and legal representative) has been given a reasonable opportunity to make submissions in relation to its proposed extension, and the panel has considered any submissions made; and

- The Forensic Division's decision is subject to the same avenue of appeal as exist in relation to other decisions.

20 Amend the legislation to provide that, where a prison inmate has not been transferred to a mental health facility within a specified period:

- Justice Health and the Department of Corrective Services must provide the Tribunal with monthly written reports as to the person's condition and the reasons for the delay;

- A panel of the Forensic Division of the Tribunal must conduct a review on the papers, and may make such orders regarding the

- Detention, care and treatment of the person that are considered appropriate; and

- The Forensic Division must, in any case, conduct a review in the person's presence at least once in every three-month period.

21. Amend the legislation to provide that, where a forensic patient has not had a special hearing, or a transferee patient is on remand, the President (or a nominated member) must informally review the person's case every three months to determine whether the legal proceedings have been delayed, and if so, take such action as it considers appropriate.

Leave and Release

22. Forensic patients who are detained in correctional centres should be subject to a new classification system applying in lieu of the prisoner classification system contained in the *Crimes (Administration of Sentences) Act 1999* (NSW). The Minister for Health should develop the new classification system in consultation with the Attorney General, the Ministers for Justice and Juvenile Justice, and the Mental Health Review Tribunal.

23. The new classification system should include a protocol that addresses therapeutic and security matters such as a forensic patient's security conditions, and access to programs and courses, and leave and release arrangements, while detained in a correctional centre. In particular, the protocol should ensure that there is no impediment to a forensic patient's eligibility for leave, or for release once his or her detention is no longer justified on public safety grounds, and it should be given formal, enforceable status.

24. Amend the legislation to provide that:

- Forensic patients retain access to leaves of absence authorised directly by NSW Health (for mental health facilities), and the Department of Corrective Services (for correctional centres) in accordance with the protocol outlined in Rec 23; and
- The Forensic Division of the Tribunal should also have a statutory power to grant leaves of absence if satisfied, on the available evidence, that neither the safety of the patient nor that of any member of the public will be seriously endangered by the person's release. This power should apply to all forensic patients, whether detained in a mental health facility, correctional centre or other place of detention.

25. Amend the legislation to provide that an order for the conditional or unconditional release of a forensic patient is not to be made unless the Forensic Division is satisfied, on the available evidence, that:

- The safety of the patient or any members of the public will not be seriously endangered by the person's release;

- Effective care and treatment of a less restrictive kind (if any is needed) is reasonably available to the patient within the community; and

- Reasonable arrangements have been made to ensure that any necessary care and treatment will be given within the community.

26. Amend the legislation to provide that, for the purpose of making this determination, the Forensic Division must have regard to the following matters:

- The nature of the person's condition

- The likelihood of a relapse or deterioration in the person's condition once released into the community and whether serious public safety concerns are likely to arise as a result of this;

- The need to ensure that the person receives the best possible care and treatment in the least restrictive environment enabling the care and treatment to be effectively given;

- The need to ensure that any restriction on the liberty of person and any interference with his or her rights, dignity and self-respect are kept to the minimum necessary in the circumstances; and

- The report of at least one qualified forensic psychiatrist or psychologist (as appropriate) who is independent of the treating team and has recently examined the forensic patient to determine as to whether the safety of the patient or that of any members of the public will be seriously endangered by the persons release.

27. Amend the legislation to:

- provide a non-exhaustive list of conditions that may be applied when granting release back into the community.

28. Amend the legislation to:

- Remove the present limited Attorney General's power to object to the release of a forensic patient, and the requirement to notify the Minister for Police of a patient's release.

Agency Compliance

29. Amend the legislation to empower the Tribunal to require the agencies specified in a forensic or transferee patient's release plan to comply with their obligations under that plan in relation to the supervision, treatment and care of the patient, and to co-operate with other relevant agencies specified in the plan.

30. The Minister for Health should develop an agreement with each other Minister responsible for the agencies involved in the supervision, treatment and care of forensic patients, and the Mental Health Review Tribunal, to provide an administrative framework to facilitate agency and patient compliance with the conditions of release, and the release plan.

31. Amend the legislation to provide:

- That the President of the Tribunal has the power to call up a conditionally released forensic patient or transferee patient for an alleged breach of a release condition, or serious deterioration in the patient's condition, and refer the matter to a panel of the Forensic Division of the Tribunal;

- A hierarchy of options available to the Tribunal in determining an appropriate response, depending on safety and therapeutic considerations; and

- Any decision by the Forensic Division is subject to appeal.

Victim's Participation Process

32. Retain the recently introduced administrative arrangements as recently revised and supplemented by the Tribunal in relation to victims' involvement in Tribunal hearings.

33. Amend the legislation to provide that the Tribunal must keep and maintain the Victims Register, and provide that the Tribunal must notify those registered victims who wish to be notified of:

- Tribunal hearings (see also Rec 13);
- Tribunal decisions in relation to the granting of leave or release;
- Appeal proceedings in relation to a Tribunal decision;
- The proposed release of a forensic patient; and
- The termination of a person's forensic patient status.

34. Amend the legislation to provide a framework for the Forensic Division of the Tribunal to make notification, non-contact and place restriction orders in relation to a forensic patient. This should include a framework for a registered victim, immediately family member of a deceased victim, and/or immediate family member of the forensic patient to make applications for such orders; and an enforcement framework.

1. Introduction

History of the Review

1.1 The NSW Parliament passed the *Mental Health Act 1990* (NSW) ('1990 Act') and the *Mental Health (Criminal Procedure) Act 1990* (NSW) ('MHCP Act') in 1990.

1.2 At that time, the 1990 Act 'was considered by some to be a high water mark in Australian mental health legislation in relation to the recognition it gave to the rights and liberty of persons with a mental illness'. The Mental Health Act Implementation Monitoring Committee reviewed the Act shortly after its introduction, and its report provided the basis for a series of statutory amendments in 1994 and 1997.[1]

1.3 In 2002, the Legislative Council Select Committee on Mental Health released a report, *Inquiry into Mental Health Services in New South Wales.* The Committee made a number of substantial findings in relation to mental health services in the civil and forensic context, and a range of recommendations for reform.[2]

1.4 In 2004, the NSW Government commenced a substantial review of the 1990 Act. This review has arisen out of that broader review, which culminated in the enactment of the *Mental Health Act 2007* (NSW) ('2007 Act'). Once the 2007 Act commences, it will transfer the provisions currently contained in Chapter 5 of the 1990 Act into the MHCP Act, with some amendment.

1.5 In 2005, the MHCP Act was reviewed by a NSW Government Interdepartmental Committee, which made a series of recommendations to simplify procedures, improve operational efficiency and update the law in relation to people with a mental illness, mental condition or intellectual disability. The Committee's recommendations were based on the NSW Law Reform Commission's report on people with an intellectual disability in the criminal justice system (1996), and

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1 Review of the Mental Health Act 1990, *Discussion Paper 2: The Mental Health Act 1990* (2004) NSW Government, 3.

2 See Legislative Council Select Committee on Mental Health, *Inquiry into Mental Health Services in New South Wales* (2002), Sydney.

were implemented in the *Mental Health (Criminal Procedure) Amendment Act 2005* (NSW).[3]

Specific Issues under the Terms of Reference

1.6 The Terms of Reference ask the Hon Greg James QC, the current President of the Mental Health Review Tribunal and a former Supreme Court judge, to review and make recommendations in relation to the provisions of Chapter 5 of the 1990 Act relating to forensic patients, and any related matters arising in relation to the MHCP Act.

1.7 In particular, he has been asked to consider:

- The appropriate authority or person to make decisions in relation to the terms and conditions of detention, release and conditional release of forensic patients;
- Mechanisms for ensuring issues of public safety are properly considered and addressed in reviews of forensic patients;
- The role of victims of crime, and in particular means by which their views and concerns can be addressed in the forensic review process;
- The appropriate structure for review and decision making process;
- The current definition of forensic patient, and in particular whether there should be two categories of patients, namely 'forensic patients' and 'security patients', the latter to cover persons who are transferees from a correctional centre;
- The ability of the Tribunal to make Community Treatment Orders for people who are in prison and who are mentally ill; and
- How those recommendations relate to the work of the review of the Tribunal's administrative practices and procedures and its role within the forensic system.

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[3] Introduced by the Hon Bob Debus MP, Attorney General, *NSW Legislative Assembly Hansard*, 8 November 2005.

The Review Process

1.8 Mr James released a Consultation Paper in December 2006, which provided an overview of the existing law and practice in relation to the areas covered by the review, and outlined various options for reform.

1.9 The Consultation Paper was made available on the Mental Health Review Tribunal and NSW Health websites. In addition, Mr James circulated the paper widely to stakeholder groups, including mental health service providers and consumers, non-governmental organisations involved in the mental health field, government agencies and all local council libraries throughout New South Wales.

1.10 The Review received 50 formal submissions in response to the Consultation Paper from Government agencies, organisations and individuals working within the forensic mental health system, victims and members of the community (Appendix 1 contains a list of written submissions received). Numerous informal representations were also made to Mr James at Consultation meetings.

1.11 Mr James personally conducted a large number of consultation meetings with stakeholders, interested persons and groups—including patient groups, psychiatrists, judges, members of the NSW Bar, the Law Society of NSW, the Mental Health Advocacy Service, the Legal Aid Commission, the Australian Medical Association, the Mental Health Advisory Council, the Schizophrenia Fellowship, the Homicide Victims Support Group, the Victims of Crime Assistance League, Enough is Enough, ARAFMI NSW (Inc), the NSW Police Force, NSW Health (including Justice Health and the Forensic Executive Support Unit), the Attorney General's Department, the Department of Corrective Services, the Department of Juvenile Justice, the Serious Offenders Review Council, and members of the Mental Health Review Tribunal and others.

1.12 Finally, the Government asked Mr James to convene and chair a Taskforce to assist with the review. Some 25 representatives of stakeholders from a number of fields involved in the forensic mental health system were nominated by the Minister to take part in the Taskforce. These stakeholders were primarily

organisations for whom the options for reform would have resource or structural implications. They included victim's organisations. Mr James met with each nominee prepared to assist during the course of the review, and also sought the comments of all Taskforce members on the issues and options covered in the Consultation Paper, addressed in the submissions already received and on the final recommendations. All but one provided a representative, so that input was provided on behalf of all nominated organisations, other than the Department of Ageing, Disability and Home Care, which as at the date of this report had not participated in the Taskforce. (The members of the Taskforce are set out in Appendix 2). Some organisations provided submissions on the general issues of principle as well as participating in the Taskforce.

1.13 Many submissions raised matters additional to those set out in the Terms of Reference or raised matters of operational detail. Such matters can be considered during the drafting stage of any legislation implementing the reform recommendations outlined in this report.

The Administrative Review

1.14 The NSW Government has also asked Mr James to conduct a review in relation to the Mental Health Review Tribunal's administrative practices and procedures, with a view to enhancing the quality of decision-making and its efficient and economic operation. While this report makes reform recommendations that relate primarily to the legislative framework underlying the forensic mental health system, the administrative review focuses primarily on operational matters and reforms. Its conduct has been undertaken in the context of this review and the enactment of the *Mental Health Act 2007.* That review is currently being finalised, and Mr James has sought to ensure consistency between this report and the report he is preparing in consequence of the administrative review in terms of findings and reform recommendations.

The NSW Law Reform Commission

1.15 The NSW Law Reform Commission is currently reviewing the principles of sentencing applicable to people with cognitive or mental health impairments and is seeking a wider reference to examine the concepts of unfitness and mental illness in the curial context.

The Mental Health Policy Context

1.16 In conducting this review, it has been necessary to consider the broader context for mental health policy and its co-ordination within Australia.

1.17 The NSW mental health system operates within a national policy framework. In 1992, the Australian Health Ministers committed their governments to a National Mental Health Strategy, to ensure a national approach and framework for mental health reform. The National Strategy provides for the making of National Mental Health Plans, which outline the priorities for reform over a five-year period.[4]

1.18 In July 2006, the Council of Australian Governments also agreed to a National Action Plan on Mental Health, which includes a package of measures by all governments to be implemented over a five year period. As part of this package, NSW has agreed to implement a number of measures, including:

- Expansion of Community Forensic Mental Health Services—Community forensic mental health services will provide assessment, support court diversion, discharge planning from custody and case management of difficult adults and adolescents with a mental illness in contact with the criminal justice system.

- Supporting People with Mental Illness in the Prison System—this involves providing enhancement funding for programs to assist people with mental illness in correctional centres who are exhibiting challenging behaviours.

- Building and Operating a New Forensic Facility at Long Bay Prison.[5]

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[4] See e.g. Australian Health Ministers, *National Mental Health Plan 2003–2008* (2003) Australian Government.

[5] Council of Australian Governments, *National Action Plan on Mental Health 2006–2011* (2006).

1.19 In addition, the NSW Government has released a State Plan that sets the priorities for Government action over a ten-year period, and outlines how the Government will work to deliver the targets outlined in the Plan.[6] One of the priorities outlined in the Plan is improved outcomes in mental health. The Government has committed to:

> [P]rovide more community care and early intervention so that problems are identified and managed earlier instead of escalating into acute episodes that need treatment in hospital. As for those with disabilities, it is important that people with a mental illness are able to effectively engage in society and that their families and carers are supported. We will assist people with mental illness to sustain secure living environments and assist people to move into or maintain employment.[7]

1.20 The Plan commits the NSW Government to: various targets including; increasing the percentage of people with a mental illness aged 15-64 who are employed to 34% by 2016; and increasing the community participation rates of people with a mental illness by 40% by 2016.[8] To achieve these targets, the Government will implement the State's plan for improving mental health services, *NSW New Direction for Mental Health*, involving $940 million of additional funding over five years, including:

- an additional 234 packages under the Housing and Support Initiative to increase stable accommodation and support to assist
- people to maintain better mental health and re-engage with their communities, employment, education and other activities;
- enhanced community rehabilitation services to assist people with assessment, support and linkages into employment services.
- New Recovery and Resource Services to increase the social and leisure opportunities of people with mental illness through non-government organisations; and
- Expanding the NSW Mental Health Court Liaison Service to ensure the early referral of suitable defendants into mental health and drug and alcohol treatment.[9]

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6 NSW Government, *State Plan: A New Direction for NSW* (2006).
7 Ibid, 73.
8 Ibid.
9 Ibid.

1.21 The NSW Government has indicated that one of the ways in which it will meet these targets is to support the implementation of the NSW Interagency Action Plan for Better Mental Health, to improve the coordination of human service departments and other agencies involved in providing mental health services.[10]

The International Context

1.22 Australia is a party to a number of international human rights instruments that apply generally to people with mental illnesses, including the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.[11] There was wide support in the submissions for the reflection of these principles embodied in those instruments in the objects and content of the NSW legislation. Such reflection would avoid any inconsistency of treatment or discrimination on the ground of disability.

1.23 More recently, Australia has signed the new *Convention on the Rights of Persons with Disabilities (2006),* which outlines in detail the human rights of people with disabilities, and sets out a framework for their implementation. In particular, the Convention requires state parties to:

- Recognise that all people are equal before the law, prohibit discrimination on the basis of disability, guarantee equal legal protection against discrimination, and ensure equal and effective access to justice for people with disabilities;

- Ensure that people with disabilities enjoy the right to liberty and security and are not deprived of their liberty unlawfully or arbitrarily

- Protect people with disabilities from torture and from cruel, inhuman or degrading treatment or punishment, and recognise their right of respect for their physical and mental integrity; and

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10 NSW Health, *A New Direction for NSW*: S*tate Health Plan Towards 2010* (2007).

11 *International Covenant on Civil and Political Rights*, adopted 16 December 1966, entered into force on 23 March 1976, GA Res 2200A (XXI), UN Doc A/6316 (1966); and the *International Covenant on Economic, Social and Cultural Rig*hts, adopted 16 December 1966, entered into force on 3 January 1976, GA Res 2200A (XXI), UN Doc A/6316 (1966).

- Recognise the right of people with disabilities to live independently and be included in the community;[12]

1.24 The United Nations has also developed non-binding declarations and resolutions that apply human rights in the mental health context. For example, the *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care* (1991) ('MI Principles') outline the minimum human rights standards for people with mental illnesses.[13] As part of the National Strategy, the States and Territories have undertaken to develop legislation that is consistent with the MI Principles.[14] In addition, Australian health authorities have developed a draft National Statement of Principles for Forensic Mental Health, which states that:

> Legislation must recognise the special needs of people with a mental illness involved in the criminal justice system and comply with the International Covenant on Civil and Political Rights, the United Nations Principles on the Protection of People with a Mental Illness and the Improvement of Mental Health Care.[15]

1.25 The recommendations outlined in this report have been developed to ensure that NSW complies with Australia's international human rights obligations and to reflect consistency of treatment. The State Plan reflects the Governments' commitment to apply the values from which such obligations derive to the provision of mental health services in NSW.

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12 *Convention on the Rights of Persons with Disabilities,* adopted 13 December 2006, GA / RES / 61 / 106, and opened for signature on 30 March 2007. See (www.un.org/disabilities/convention/) accessed on 17 July 2007. Australia has signed the Convention, but has not yet ratified it.

13 UN General Assembly, *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care* A/RES/46/119, 17 December 1991. See also the *Standard Minimum Rules for the Treatment of Prisoners*

14 Australian Health Ministers, *National Mental Health Plan* (1992) Commonwealth of Australia.

15 *National Statement of Principles for Forensic Mental Health* (2002).

2. Underlying Principles

2.1 The present Forensic Mental Health system in New South Wales is derived from an historical context in which all persons found unfit for trial or not guilty by reason of mental illness were detained in strict custody. That system originated in times in which no or no useful treatment might be available for such persons, and where there was a perception that all such persons were dangerous no matter what their individual condition might be.

2.2 The modern attitudes to mental health, national and international standards reflected in international instruments to which Australia is a party, and the announcements of Federal and State Governments concerning the issue accept that detention for treatment for mental illness is appropriate in a context in which that detention is warranted as necessary on community safety grounds.

2.3 Where the detention is involuntary, it is liable to be reviewed at law so as to ensure that it is justified. Where a person who has not been convicted and the subject of sentence is detained on the ground of community safety, detention can only be justified so long as there is that appropriate necessity.

2.4 The Government has committed to a mental health system which is characterised by the least restrictive care consistent with safe and effective treatment. Where that treatment can be provided in the community it should be. The system should provide an alternative to the long-term detention of persons who have not been convicted and sentenced but who have been detained on unstated and indeterminate grounds.

2.5 The *Mental Health (Criminal Procedure) Act 1990* was amended following a Government initiative in 2005 which amendment took effect as and from 1 January 2006. The courts were empowered under section 39 to make such order in respect to persons found not guilty by reason of mental illness on such terms as to the court seems fit, to release a person from custody either unconditionally or subject to conditions but the court is not to make an order for the release of the person from custody unless it is satisfied on the balance of probabilities that the safety of the person or any member of the public will not be

seriously endangered by the person's release. The court is required to notify the Mental Health Review Tribunal of the terms of the Order.

2.6 Those amendments reflect the modern perception that detention must be justified on safety or treatment grounds. Similarly, the treatment of those unfit for trial yet not guilty by reason of mental illness, has been equated by the legislation inconsistency. A further inconsistency has occurred with that of those subject to a verdict of not guilty by reason of mental illness. The reforms proposed in this Report are designed to be consistent with those introduced in 2006 and to avoid the tensions between those reforms, as exemplified in the role of the courts and the exercise of Executive discretion.

2.7 Those found unfit for trial in respect of whom there is no verdict of that kind have been the subject of a limiting term fixed by the courts designed to ensure that they would not be detained indefinitely or longer than they would be if sentenced since that term has to because such people have been detained in Corrective Services establishments, where that limiting term has been equated to a term of imprisonment equivalent to the actual time that such a person is to spend in custody. That is inconsistent with the original purpose of the limiting term and has resulted in discrimination against such persons which itself is out of accord with Federal and State law otherwise and international instruments. These matters which if not rectified could result in successful challenges in individual cases where administrative review might be sought.

2.8 The Law Reform Commission has a substantive reference on the treatment of such persons within the criminal justice system when dealing with the sentencing of those suffering from cognitive deficits. The anomalous position of such people deserves an intensive examination of any justification for their being detained on any basis other than community safety.

Legislative Principles

2.9 Section 4 of the *Mental Health Act 1990* (NSW) ('1990 Act') outline the objects and general principles for the legislation. Section 4(1) provides that:

> The objects of this Act in relation to the care, treatment and control of persons who are mentally ill or mentally disordered are:
>
> (a) to provide for the care, treatment and control of those persons, and
> (b) to facilitate the care, treatment and control of those persons through community care facilities and hospital facilities, and
> (c) to facilitate the provision of hospital care for those persons on an informal and voluntary basis where appropriate and, in a limited number of situations, on an involuntary basis, and
> (d) while protecting the civil rights of those persons, to give an opportunity for those persons to have access to appropriate care.

2.10 In addition, s 4(2) provides that:

> It is the intention of Parliament that the provisions of this Act are to be interpreted and that every function, discretion and jurisdiction conferred or imposed by this Act is, as far as practicable, to be performed or exercised so that:
>
> (a) persons who are mentally ill or who are mentally disordered receive the best possible care and treatment in the least restrictive environment enabling the care and treatment to be effectively given, and
> (b) in providing for the care and treatment of persons who are mentally ill or who are mentally disordered, any restriction on the liberty of patients and other persons who are mentally ill or mentally disordered and any interference with their rights, dignity and self-respect are kept to the minimum necessary in the circumstances.

2.11 These objects and principles appear in a similar but expanded form in the *Mental Health Act 2007* (NSW) ('2007 Act'). Section 3 provides that:

> The objects of this Act are:
>
> (a) to provide for the care, treatment and control of persons who are mentally ill or mentally disordered, and

(b) to facilitate the care, treatment and control of those persons through community care facilities, and

(c) to facilitate the provision of hospital care for those persons on a voluntary basis where appropriate and, in a limited number of situations, on an involuntary basis, and

(d) while protecting the civil rights of those persons, to give an opportunity for those persons to have access to appropriate care, and

(e) to facilitate the involvement of those persons, and persons caring for them, in decisions involving appropriate care, treatment and control.

2.12 In addition, s 68 of the 2007 Act provides that:

It is the intention of Parliament that the following principles are, as far as practicable, to be given effect to with respect to the care and treatment of people with a mental illness or mental disorder:

(a) people with a mental illness or mental disorder should receive the best possible care and treatment in the least restrictive environment enabling the care and treatment to be effectively given,

(b) people with a mental illness or mental disorder should be provided with timely and high quality treatment and care in accordance with professionally accepted standards,

(c) the provision of care and treatment should be designed to assist people with a mental illness or mental disorder, wherever possible, to live, work and participate in the community,

(d) the prescription of medicine to a person with a mental illness or mental disorder should meet the health needs of the person and should be given only for therapeutic or diagnostic needs and not as a punishment or for the convenience of others,

(e) people with a mental illness or mental disorder should be provided with appropriate information about treatment, treatment alternatives and the effects of treatment,

(f) any restriction on the liberty of patients and other people with a mental illness or mental disorder and any interference with their rights, dignity and self-respect is to be kept to the minimum necessary in the circumstances,

(g) the age-related, gender-related, religious, cultural, language and other special needs of people with a mental illness or mental disorder should be recognised,

(h) every effort that is reasonably practicable should be made to involve persons with a mental illness or mental disorder in the development of treatment plans and plans for ongoing care,

(i) people with a mental illness or mental disorder should be informed of their legal rights and other entitlements under this Act and all reasonable efforts should be made to ensure the information is given in the language, mode of communication or terms that they are most likely to understand,

(j) the role of carers for people with a mental illness or mental disorder and their rights to be kept informed should be given effect.

2.13 As the provisions dealing with the detention, care and treatment of forensic patients were located within the 1990 Act, the principles outlined above directly applied to them. By contrast, the 2007 Act will transfer those provisions into the *Mental Health (Criminal Procedure) Act 1990* without the objects provisions.

2.14 There is no reason of principle why the objects and principles—which provide important procedural and substantive safeguards for forensic patients—should be removed from forensic mental health legislation. The Review considers that this may have been a drafting error, and strongly recommends that the objects and principles be inserted into the new forensic mental health legislative framework.

Recommendation 1

Amend the forensic mental health legislation to insert the objects and principles set out in the *Mental Health Act 2007* (NSW) suitably drafted to ensure that these provisions continue to apply to forensic patients and accommodate their special needs and public safety principles.

3. Forensic Patients

The Definition of a Forensic Patient

3.1 The *Mental Health Act 1990* (NSW) ('1990 Act') defines a 'forensic patient' as a person who:

(a) is detained in a hospital, prison or other place, or released from custody subject to conditions, pursuant to an order under section 10(3)(c), 14, 17(3), 25, 27 or 39 of the *Mental Health (Criminal Procedure) Act 1990* or section 7(4) of the *Criminal Appeal Act 1912* (including that subsection as applied by section 5AA(5) of that Act), or

(b) is detained in a hospital pending the person's committal for trial for an offence or pending the person's trial for an offence, or

(c) has been transferred to a hospital while serving a sentence of imprisonment and who has not been classified by the Tribunal as a continued treatment patient, or

(d) is granted bail pursuant to section 14(b)(ii) or 17(2) of the *Mental Health (Criminal Procedure) Act 1990*.[16]

3.2 Generally, this means that a 'forensic patient' is a person who is: (a) found unfit to be tried or subject to a limiting term after a qualified finding of guilt, and either detained or granted conditional release; (b) subject to a special verdict of not guilty due to mental illness, and either detained or granted conditional release; (c) detained in a mental health facility for mental health treatment while on remand or serving a sentence of imprisonment; or (d) granted bail after being found unfit to be tried.

3.3 However, the definition is not all embracing and gaps have arisen in practice. For example, a person who has been found unfit to be tried may not be a 'forensic patient' if he or she is detained under an order other than those specified in the definition.

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[16] *Mental Health Act 1990* (NSW) ('1990 Act') Sch 1. The definition contained in the *Mental Health Act 2007* (NSW) ('2007 Act') is substantially similar with some updated terminology.

3.4 For example, in *Mailes v DPP*,[17] the plaintiff had been found unfit to be tried, and a special hearing had resulted in a qualified finding of guilt. The judge had nominated a limiting term, referred the plaintiff to the Mental Health Review Tribunal ('Tribunal') for a determination pursuant to s 24 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) ('MHCP Act'), and ordered that he be detained in custody pending notification of the Tribunal's determination and the court's further order.

3.5 The Tribunal subsequently notified the court of its determination, in which case the court had the discretion to order the plaintiff's detention under s 27 of the Act. As no such order was made, the plaintiff remained in custody but the Tribunal declined to review him on the basis that he was not a 'forensic patient' (as the statutory definition does not include a person detained pursuant to an order under s 24 of the Act). The court agreed that the plaintiff did not fall within the definition of a 'forensic patient', but noted that he would have become one once an order was made under s 27 of the Act.[18]

3.6 The Consultation Paper noted that a narrative definition of 'forensic patient' would provide greater clarity and consistency regarding the operation of the forensic mental health system and those who are covered by it; and would protect against technical gaps in coverage. Accordingly, it suggested amending the legislation to provide a simplified definition of a 'forensic patient' (and consistency in the references to them), and the submissions overwhelmingly supported this option.

3.7 Therefore, the Review recommends that the legislation be amended to provide a narrative definition of a 'forensic patient' that expressly and comprehensively outlines the circumstances in which a person becomes a forensic patient. Under a narrative definition, a 'forensic patient' should include a person detained or conditionally released (including on bail) pending a fitness inquiry, after being found unfit to be tried, after a qualified finding of guilt (eg where subject to a limiting term), or after a special verdict of not guilty due to mental illness. (See chapter 4 in relation to transferees from the prison system).

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17 *Mailes v DPP* [2006] NSWSC 267.

18 Ibid; see also *R v Adams* (2003) 58 NSWLR 1.

Recommendation 2

Amend the legislation to provide a narrative definition of a 'forensic patient' that expressly and comprehensively defines the circumstances in which a person becomes a forensic patient.

Powers to Detain, Treat and Release

3.8 The Consultation Paper noted that the power to detain a forensic patient in hospital is implicit but linked to forensic status, and that the provisions for release and the termination of that status are detailed (but may not be exhaustive) and are unclear in their operation.[19] Accordingly, the Consultation Paper suggested an option of amending the legislation to define expressly the power to detain, the power to release, and the commencement and termination of forensic status.

3.9 The submissions overwhelmingly supported this option, and the Review recommends that it be implemented (however the commencement of forensic status, which is addressed in Recommendation 2). The Review also considers that it would be appropriate to provide an express legislative power for the involuntary treatment of a forensic patient, given that such a power is already implied within the legislation. That power should expressly state the scope of the existing implied power to treat a forensic patient.

Recommendation 3

Amend the legislation to define expressly and specifically the powers to detain, treat, and release a forensic patient, as well as the termination of forensic patient status.

[19] See, eg, *Commissioner of Corrective Services v Wedge* [2006] NSWCA 271.

Intellectual Disability

3.10 The Consultation Paper noted that, under the existing legislative framework, a person with an intellectual disability who is charged with an offence may be:

- Diverted from the criminal justice system under Part 3 of the MHCP Act (for summary matters);[20]

- Found unfit to be tried (on indictment), in which case the person may be released, subjected to a normal trial (if he or she becomes fit within a specified period) or subjected to a special hearing (which may result in a finding of not guilty, a special verdict of not guilty due to mental illness, or a qualified finding of guilt; or

- Subject to a normal trial, which may result in an acquittal, conviction or a special verdict of not guilty due to mental illness (if the M'Naghten criteria are satisfied).

3.11 In NSW, forensic patients with intellectual disabilities are often detained in correctional centres, rather than hospitals or other appropriate institutions. Although with the exception of transferees they are not convicted offenders, they are subject to the same controls and discipline in correctional centres as other inmates. In addition, their detention may be longer and the circumstances of it more onerous than that of convicted prisoners.

3.12 In *R v Mailes*, Dunford J cited the Tribunal's advice regarding the practical operation of the limiting term regime for persons with intellectual disabilities:

> [G]enerally persons serving limiting terms have an intellectual disability … and not a mental illness, and usually such persons are detained in the correctional system, subject to the same security classifications as other inmates but, because they do not have non-parole periods, they are not eligible for early release ... The Tribunal advised that it was particularly difficult for persons with intellectual disability

[20] The NSW Law Reform Commission is currently reviewing the operation of these provisions under its Community Law Reform Program, including the question whether similar provisions should be available in the District and Supreme Courts. See generally the Law Reform Commission's website (www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cref117), accessed on 9 July 2007.

> serving limiting terms to obtain conditional early release because such applications are seldom made on their behalf and there is a severe lack of support services in the community to manage such persons post release. It was therefore unlikely the Tribunal would be able to satisfy itself on the question of management of risk to the patient or the community. The Tribunal also advised that there is in fact no one currently under its jurisdiction, serving a limiting term who has been released prior to the expiry of their limiting term.[21]

3.13 Similar concerns appear to arise in relation to forensic patients with intellectual disabilities who are subject to the special verdict of not guilty due to mental illness, except that—as they are subject to indefinite detention—there is no maximum term set for their period of detention.

3.14 The position of people with intellectual disabilities within the criminal justice system has been the subject of several inquiries in the recent past.[22] The Review is aware of various recent and ongoing initiatives in this area, including:

- The Criminal Justice Support Network, which provides support for people with intellectual disabilities in court and police interviews.

- The Criminal Justice Program, which includes recurrent funding for the Department of Ageing, Disability and Home Care to provide accommodation and related supported for people with significant intellectual disabilities who are exiting correctional and juvenile justice centres.[23]

- The Department of Corrective Services has a multidisciplinary Disability Services Unit, and several support units to provide assessment and programs for certain prisoners with intellectual disabilities within correctional centres.

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21 *R v Mailes* (2004) 150 A Crim R 365, 373-374.

22 See, eg, NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Report 80* (1996), Sydney; and J Simpson, M Martin & J Green, *The Framework Report: Appropriate community services in NSW for offenders with intellectual disabilities and those at risk of offending* (2001) Intellectual Disability Rights Service and the NSW Council for Intellectual Disability. In relation to federal offenders, see Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (2006) Sydney.

23 Department of Ageing, Disability and Home Care, *Stronger Together: A New Direction in Disability Services 2006/07, Progress Report* (2007) NSW Government. As at January 2007, the Department reported that 19 supported accommodation places were available for people with a demonstrated high risk of recidivism, and 90 places would be created by June 2008.

- A Senior Officers Group on Intellectual Disability and the Criminal Justice System has been established.[24]

3.15 The Review has been told that the Human Services and Criminal Justice Chief Executive Officers are considering the provision of alternative secure options to prison and reviewing the process of decision-making as to the treatment in detention facilities, of people with an intellectual disability. The Review has been informed that cross-agency projects are being considered but no more detailed information has been able to be obtained. The Department of Ageing, Disability and Home Care was unable to participate in the Taskforce or provide a submission.

3.16 The Consultation Paper outlined various reform options in this area, including making specific provision for people with intellectual disabilities within the forensic mental health legislation, and conducting a further inquiry into the need for specific provision in such legislation. The submissions generally supported either one, or both, of these options. Particular concerns were raised about the inappropriateness of the existing system of incarceration for people who are not under conviction, and the practical difficulties flowing from this system for forensic patients in gaining access to educational and other programs, leave entitlements, and conditional and unconditional release.

3.17 Various submissions supported the Government providing alternative forms of accommodation within the community (including secure accommodation) that is more appropriate for people with intellectual disabilities; appropriate community accommodation and support services after the person's release; and effective mechanisms to divert such people from the criminal justice system. While a number of submissions supported the option of a further inquiry into the need for specific provision for people with intellectual disabilities, others suggested that, given the number of inquiries and review conducted to date, there may be little gained from another inquiry at this time.

3.18 As discussed elsewhere in this report, the Review considers that the NSW system of detaining people who are not fit to be tried as criminals or criminally

[24] NSW Council for Intellectual Disability submission.

responsible for their actions in prison is inappropriate, and offends against human rights and criminal justice principles. Nor is it conducive to proper clinical care or rehabilitation. If such people should be detained because of their vulnerability or because they present at risk in the community they present entirely different issues to those presented by convicted criminals. The mode of their detention should reflect that. Many of these forensic patients have intellectual disabilities, and the Review has found that the administrative arrangements operating in this context tend to present significant barriers to their effective care and eventual release back into the community.

3.19 While the NSW Law Reform Commission conducted a comprehensive inquiry into people with an intellectual disability in the criminal justice system in 1996, many of its recommendations have yet to be implemented.[25] The Review considers that the Commission's recommendations generally remain appropriate in relation to forensic patients with an intellectual disability and, if implemented, should improve the forensic mental health system.[26]

3.20 To avoid the further delays that would result from another inquiry in this area, the Review instead recommends that the Human Services and Criminal Justice Chief Executive Officers be given responsibility for developing and reporting to the Premier within 12 months on specific legislative and administrative proposals dealing with the detention, care, treatment, release and co-ordinated community support of forensic patients with an intellectual disability. In conducting this work, they should be asked to consider the recommendations of previous inquiries, and to consult with both the Law Reform Commission and relevant bodies in the intellectual disability field. In addition, the NSW Government should implement reforms arising out of this process within 12 months of that report.

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[25] NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Report 80* (1996), Sydney.

[26] For example, in Rec 57 the Commission recommended that secure units outside the prison system be established and administered by the Department of Community Services for those people with an intellectual disability found unfit to be tried or not guilty by reason of mental illness who cannot be managed within the community.

Women and Children

3.21 The Consultation Paper also noted that the forensic mental health legislation does not make any specific provision for forensic patients under the age of 18 years, and that there is a general lack of information regarding the position of juveniles within the forensic mental health system.

3.22 The Consultation Paper outlined various reform options in relation to children, including making specific provision for them within the forensic mental health system, and conducting a further inquiry into the need for specific provision in such legislation. The submissions generally supported either one, or both, of these options. Several submissions noted the need to take care in identifying the particular needs of children and the most appropriate arrangements and services for them, including non-custodial accommodation options.

3.23 Given the general lack of information in relation to children and young people in the forensic mental health system, the Review is not able to recommend any specific reforms in relation to them. The Review instead recommends that this matter be included in the work to be conducted by the Human Services and Criminal Justice Chief Executive Officers, in developing specific legislative and administrative proposals dealing with the detention, care, treatment, release and co-ordinated community support of forensic patients with an intellectual disability. As several submissions suggested that similar concerns arise in relation to forensic patients who are women, the Review recommends that they also be included within the scope of this work.

3.24 The submissions also raised concerns regarding issues such as mechanisms for diversion from the criminal justice system, the regime for determining criminal responsibility, and the detention of people found not criminally responsible for their actions. The Review considers that such issues could be considered by the NSW Law Reform Commission. These matters are discussed when considering recommendations 7 and 17.

Recommendation 4

The NSW Government should:

refer to the Human Services and Criminal Justice Chief Executive Officers the development of specific legislative

and administrative proposals dealing with the detention, care, treatment, release and co-ordinated community support of forensic patients and transferees with intellectual disability or who are women or children;

- request that they provide a report to the Premier on these legislative and administrative proposals within 12 months of this report; and
- implement approved reforms arising out of this process within 12 months of the Human Services and Criminal Justice Chief Executive Officers' report.

Federal Offenders

3.25 Section 120 of the *Australian Constitution* provides that each State must make provision for the detention in its prisons of persons accused or convicted of federal offences, and for the punishment of persons convicted of such offences. As at 1 March 2006, there were 672 federal prisoners in custody (ie less than 3% of the total Australian prison population), of which 57% were held in NSW.[27] The Review understands that NSW also houses prisoners and forensic patients from the Australian Capital Territory and Norfolk Island, by agreement with those jurisdictions.

3.26 The Consultation Paper noted that some federal offenders appear to be covered by the NSW forensic mental health system, while others are not. The NSW definition of a 'forensic patient' does not specifically include federal offenders found unfit to be tried or not guilty due to mental illness, but would appear to include an inmate who is on remand for, or convicted of, a federal offence and transferred from a correctional centre to a hospital under the 1990 Act.[28] If this is

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[27] Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (2006) Sydney, 98.

[28] Part IB of the *Crimes Act 1914* (Cth) makes specific provision for varying the hospital or other place of detention of a person for urgent medical or security reasons. The Act authorises a State or Territory officer to do so, but the officer must notify the Commonwealth Attorney-General of any such variation: ss 20BD(4), 20BJ(3).

the case, the former category would be subject to federal legislation for matters such as review and release, while federal offenders and remandees who become transferees would be subject to periodic review by the Tribunal, as well as other legislative provisions dealing with forensic patients, including leaves of absence. The position may become more complex where a person is dealt with on both state and federal charges.

3.27 The Consultation Paper outlined several reform options in relation to federal detainees, including making specific provision for them within the forensic mental health system, and conducting a further inquiry into the need for specific provision in such legislation. The submissions generally supported either one, or both, of these options and generally considered that the same framework should apply to all forensic patients detained or conditionally released in NSW. Several submissions suggested that a review consider the mechanisms adopted in other States and Territories, and other federal systems, to address this concern.

3.28 The Australian Law Reform Commission recently reviewed the operation of the federal forensic mental health provisions in its review of Part IB of the *Crimes Act 1914* (Cth). The ALRC made several reform recommendations, including that the Commonwealth initiate a comprehensive inquiry into issues concerning people in the federal criminal justice system who have a mental illness, intellectual disability or cognitive impairment; and that it work with State and Territory governments to substantially improve the provision of services to federal offenders with a mental illness or intellectual disability.[29]

3.29 Given the general lack of information in relation to forensic patients detained on behalf of other jurisdictions, the Review recommends that the NSW Government consider the need for specific provisions in relation to forensic patients (including transferees) detained in NSW on behalf of other jurisdictions, and liaise with relevant jurisdictions to develop and implement such provisions.

3.30 In addition, the Consultation Paper noted that Chapter 10A of the 1990 Act provides that the Minister for Health may enter into an agreement with a Minister

[29] Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (2006) Sydney, Recs 28-1, 28-2.

of another State or Territory in relation to the application of their mental health laws, and the transfer, detention and apprehension of patients within their mental health systems.

3.31 To date, the Minister for Health has only entered into agreements with a few other jurisdictions, and concerns have been raised that the agreements may not address all of the circumstances arising under the legislation. In addition, problems can arise in relation to those jurisdictions with whom NSW has not entered into agreements, and the lack of a framework to deal with forensic patients who wish to move overseas.

3.32 The Consultation Paper outlined several reform options, including that the Minister for Health take the legislative and administrative action necessary to ensure an effective framework for the inter-jurisdictional transfer of forensic patients and the inter-jurisdictional application of the legislative provisions, and consider the need for arrangements in relation to forensic patients who may wish to move overseas. The submissions generally supported these options, and the Review recommends accordingly.

Recommendation 5

The NSW Government should consider the need for specific provisions in relation to forensic patients (including transferees) detained in NSW on behalf of other jurisdictions, and liaise with relevant jurisdictions to develop and implement such provisions.

Recommendation 6

The Minister for Health should take the legislative and administrative action necessary to ensure an effective framework for the inter-jurisdictional transfer of forensic patients (including those conditionally released into the community) and the inter-jurisdictional application of the legislative provisions, and consider the need for arrangements in relation to forensic patients who may wish to move overseas.

References to Mental Illness and Mental Condition

3.33 The Consultation Paper noted that the MHCP Act and the 1990 Act both deal with mental illnesses and conditions, but operate under differing definitions of the terms. It noted that, in practice, these differing definitions could lead to quite different outcomes. For example, a person with the same mental condition might be diverted from the criminal justice system under one set of provisions, or subject to a trial and possible conviction and sentence under another set of provisions. A person could be found to be mentally ill at trial but not mentally ill for the purpose of treatment. The concepts of unfitness for plea or trial have long been the subject of criticism.

3.34 The Consultation Paper proposed a review of the concepts and terminology used in the law and forensic mental health legislation, including the terms 'mental illness' and 'mental condition', and most of the submissions supported this option. The NSW Law Reform Commission has commenced a review of the sentencing principles applying to people with cognitive or mental health impairments[30] and has sought a wider reference to consider these matters. The Review considers that that body should also undertake the proposed review of these concepts and this terminology in the interest of consistency and particularly because this review relates to the consequences of Courts' examining the curial process on such matters.

Recommendation 7

The NSW Law Reform Commission should review the concepts of a mental illness, mental condition, intellectual disability and unfitness for trial used in the law generally and in forensic mental health legislation.

[30] See the Commission's website (www.lawlink.nsw.gov.au/lawlink/lrc/ll lrc.nsf/pages/LRC index)

4. Prison Inmates

The Current Law

4.1 In NSW, all prison inmates are screened on reception to prison for medical and psychiatric illnesses, as well as substance abuse. If a psychiatric illness is identified at this or a later point, psychiatric care may be provided within the correctional centre. Alternatively, if specialist medical or more intensive psychiatric services are considered necessary—and beds are available—the person may be transferred to screening units within the correctional setting.[31]

4.2 The *Mental Health Act* 1990 (NSW) ('1990 Act') provides that a person may become a forensic patient if detained in a hospital while on remand for an offence, or if transferred to a hospital while serving a sentence of imprisonment or remanded in prison.[32] The Chief Health Officer may order that a prison inmate be transferred to a hospital if it appears, on the certificates of two medical practitioners (one being a psychiatrist) that he or she is a 'mentally ill person' (as defined in the Act);[33] or is suffering from a mental condition for which treatment is available in a hospital (and the person consents to the transfer).[34]

4.3 A forensic patient who has been transferred from a prison to hospital must be transferred back to a prison within seven days unless the Chief Health Officer (or an authorised person) considers that he or she is a mentally ill person, or is suffering from a mental condition for which treatment is available in a hospital—and that other care of an appropriate kind would not be reasonably available to the patient in prison. The Chief Health Officer or authorised person may, however, transfer a forensic patient back to a prison at any time if his or her condition changes. In addition, the patient may at any time ask the Mental Health

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31 See D Howard & B Westmore, *Crime and Mental Health Law in New South Wales* (2005) LexisNexis, Butterworths, 394-395.

32 *Mental Health Act 1990* (NSW) ('1990 Act'), Sch 1.

33 A person is a 'mentally ill person' if the person is suffering from mental illness (as defined) and, owing to that illness, there are reasonable grounds for believing that care, treatment or control of the person is necessary: (a) for the person's own protection from serious harm; or (b) for the protection of others from serious harm: 1990 Act, s 9.

34 1990 Act, ss 97, 98. The *Mental Health (Criminal Procedure) Act 1990* (NSW) ('MHCP Act') also provides a framework for a magistrate to order such examinations in relation to a person awaiting committal or trial for an offence, or summary disposal of the person's case.

Review Tribunal ('Tribunal') to recommend an order for his or her transfer back to prison.[35]

4.4 The Tribunal must review the person's case as soon as practicable after his or her transfer to a hospital, and make a recommendation to the Minister as to the person's continued detention, care or treatment in the hospital.[36] The Tribunal may also recommend that a transferee be transferred back to prison at any time.[37] If a patient asks to be moved back to prison, s 96 of the Act provides that the Tribunal must make the recommendation if satisfied that the person is not a 'mentally ill person' (as defined).

4.5 The *Mental Health Act 2007* (NSW) transfers these provisions into the *Mental Health (Criminal Procedure) Act 1990* (NSW) ('MHCP Act'), with some amendment.[38]

A New Category?

4.6 Currently, the definition of a 'forensic patient' includes a person who has been found unfit to be tried or not guilty of an offence by reason of mental illness, as well as members of the prison population who are transferred to a hospital for mental health treatment (ie 'transferees'). The 1990 Act deals with forensic patients as a whole in relation to matters such as security conditions, leave arrangements, breaches of conditional release, and dealing with escapes. However, the Act:

- Makes separate provision for each category of forensic patient in relation to the initial and periodic reviews of their cases, and the termination of their status as forensic patients; and

- Makes specific provision for transferees in relation to their transfer to and from hospital, certain Tribunal reviews, the effect of the transfer on their sentence, and the Tribunal's capacity to recommend their release.

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35 1990 Act, ss 96, 100A.
36 1990 Act, s 86(1).
37 1990 Act, s 86(3).
38 2007 Act, Sch 7. For example, the new provisions provide for the Director-General of NSW Health, rather than the Chief Health Officer, to make these orders.

4.7 The Terms of Reference ask the Review to consider the current definition of forensic patient, and in particular whether there should be two categories of patients—that is, 'forensic patients' and 'security patients', the latter to cover people who are transferees to a hospital from a correctional centre.

4.8 A NSW Health discussion paper (2004) suggested that establishing separate categories of forensic patient would allow differential approaches to be taken to the management and care of these groups in relation to security, leave, release, status as a prison inmate, and provisions for transfer to other jurisdictions.[39]

4.9 Several other Australian jurisdictions distinguish between forensic patients who have been convicted of offences and those who are not responsible at law. For example, Victoria classifies as 'forensic patients' those detained in a mental health service while on remand or under a supervision order (after being found unfit to be tried or not guilty due to mental illness);[40] and as 'security patients' those convicted offenders who are subject to a hospital security order (available as a sentencing option), or a restricted hospital transfer order.[41]

4.10 Generally, the Victorian legislation makes separate provision for forensic and security patients in relation to matters such as security conditions, transfer to other hospitals, leaves of absence, apprehension, and discharge. For example, forensic patients are eligible for leaves of absence, extended leave of up to 12 months, 'on-ground' or 'off-ground' leave or special leave. By contrast, security patients are eligible for leaves of absence for up to 6 months (which can be continued) or special leave. The provisions for granting and reviewing such leave also differ, in particular as the Forensic Leave Panel has jurisdiction over certain decisions relating to forensic patients, while the Mental Health Review Board has jurisdiction over security patients.

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39 Review of the Mental Health Act 1990, *Discussion Paper 2: The Mental Health Act 1990* (2004) NSW Government, 27-28.

40 *Mental Health Act 1986* (Vic) s 3(1).

41 See ibid, ss 3(1), 16; *Sentencing Act 1991* (Vic) s 93.

4.11 The Northern Territory also makes specific provision in relation to convicted offenders. Part 11 of the *Mental Health and Related Services Act* (NT) provides for the admission of prisoners to an approved treatment facility, as well as discharge, leaves of absence and the making of arrangements between the Director of Correctional Services and Chief Health Officer to ensure the security and good order of prisoners receiving treatment outside a prison. The Part also specifies that a prisoner who has been admitted to such a facility is to be taken to be in lawful custody while he or she remains in the facility.

4.12 The Consultation Paper suggested either retaining the existing legislative provisions (which include transferees within the definition of a 'forensic patient'), or amending the legislation to provide a new category of forensic patient for convicted offenders, and to make separate provision for their treatment, security, leave, release and inter-jurisdictional transfer.

4.13 The submissions were generally divided on this issue. Some submissions emphasised the legal distinction between those patients who are under conviction and those who are not, and noted that it is incompatible with the principles of criminal justice to categorise them together. In their view, removing the category of 'transferees' from the definition of a forensic patient would accord with principle and would facilitate the adoption of appropriate procedures for convicted offenders. On the other hand, other submissions emphasised that people should have the same access to treatment regardless of their convicted status, and expressed the concern that separate categories could discriminate against convicted offenders in terms of such access to treatment.

4.14 The Review has concluded that the legislation should be amended to create a new category of patient for members of the prison population who are on remand or serving sentences of imprisonment and transferred to a mental health facility for the following reasons.

4.15 First, it would greater reflect the important differences of legal principle between these categories of forensic patient. For example, people found not guilty of an offence due to mental illness, or unfit to be tried (but who have not yet had a special hearing) are not subject to any finding of guilt; and people detained after

a special hearing are subject to a 'qualified' finding of guilt, which does not equate to a conviction. By contrast, transferees are people who are on remand for, or have been found guilty of, an offence during normal criminal proceedings.

4.16 Second, while NSW continues the practice of detaining people who are unfit to be tried and not guilty by reason of mental illness in the prison system, the creation of the new category would facilitate the making of separate provisions regarding their management–including the security conditions under which they are detained, their access to leave, release and visiting privileges, and their transfer to other jurisdictions. The Review does not consider that there is any reason why people who are not criminally responsible for their actions should be subjected to the same administrative arrangements as convicted offenders (or remandees) merely because they are detained in the prison environment.

4.17 Third, the admission of a remandee or convicted offender to a mental health facility is analogous to the admission of any other member of the community to hospital for mental health treatment. This is already recognised in the *Mental Health Act 2007* (NSW), which provides for the making of community treatment orders for forensic patients prior to their transfer back to a correctional centre (ie, the correctional community). The Review considers that the creation of a separate category of patient could greater reflect this by providing that, to the extent possible, transferee patients will be subject to the civil mental health provisions subject to any specific provisions necessary in their circumstances.

4.18 Fourth, the creation of separate categories of forensic patient could assist in simplifying and clarifying the application of the existing provisions by re-organising them under the new categories.

4.19 Accordingly, the Review recommends that the legislation be amended to create a new category of patient known as 'transferee patients', which includes people who are on remand or serving a sentence of imprisonment and detained in or transferred to a mental health facility for treatment. To the extent possible, transferee patients should be subject to the civil provisions of the *Mental Health Act 2007* (NSW) in relation to the grounds of their admission to a mental health facility, and their care and treatment while detained in the facility. There is no

warrant to be found in setting up the new categories for any difference in clinical care. In addition, the legislation should include specific provisions for transferee patients in relation to the commencement and termination of their status, their management in terms of security, access to leave and release arrangements, initial and periodic reviews by the Tribunal, and provisions for transfer to other jurisdictions. These provisions should reflect the existing legislative provisions for this category of patient, subject to the reforms outlined in this report.

4.20 Finally, the Review recommends that the legislation should include specific provisions for forensic patients that reflect the existing legislative provisions for this category (subject to the reforms outlined in this report), and provide that they override any administrative arrangements that apply by virtue of the patient's detention in the prison system.

Recommendation 8

Amend the legislation to create a new category of patient known as 'transferee patients', which includes people who are on remand or serving a sentence of imprisonment and transferred to a mental health facility for treatment, and provide:

- To the extent possible, that transferee patients should be subject to the civil provisions of the *Mental Health Act 2007* (NSW) in relation to their admission to a mental health facility, and their care and treatment while accommodated in the facility; and
- Specific provisions for transferee patients in relation to the commencement and termination of their transferee status, their management in terms of security, access to leave and release arrangements, initial and periodic reviews by the Tribunal, and provisions for transfer to other jurisdictions. These provisions should reflect the existing legislative provisions for this category of patient, subject to the reforms outlined in this report.

Recommendation 9

Amend the legislation to include specific provisions for forensic patients including those detained in Corrective Services facilities that reflect the existing legislative provisions for this category (subject to the reforms outlined in this report), and provide that they override any administrative arrangements that apply by virtue of the patient's detention in the prison system.

Community Treatment Orders

4.21 The Terms of Reference ask the Review to consider the ability of the Tribunal to make community treatment orders ('CTO') for people who are in prison and who are mentally ill.

4.22 Generally, the 1990 Act provides a framework for making compulsory treatment orders for people detained in a hospital or living in the community on an existing order. The order requires the person to be present at a specified place, at reasonable times, to receive such medication, therapy, rehabilitation or other services, as are specified in a treatment plan. It operates for a period of up to six months (and may be renewed prior to its expiry).[42]

4.23 Since the Consultation Paper was released, the *Mental Health Act 2007* (NSW) ('2007 Act') has been enacted (but not yet commenced). The 2007 Act combines the two previous forms of compulsory order into a new form of CTO, which may authorise compulsory medication and therapy, counselling, management, rehabilitation and other services in accordance with a treatment plan, and may operate for up to 12 months.[43]

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[42] 1990 Act ss 131, 135. The 1990 Act also provides for community counselling orders, which are substantially similar to CTOs but may be made where a psychiatrist or medical practitioner considers that the person is likely to become a 'mentally ill person' (as defined) within three months, and (among other things) the person has previously refused to accept appropriate treatment and has relapsed into a mental illness that has led to the person becoming a 'mentally ill person': 1990 Act ss 118-120.

[43] *Mental Health Act 2007* (NSW) ('2007 Act') Ch 3.

4.24 A CTO may be made if a person is detained in a mental health facility or is in the community. An order may be made if the magistrate or Tribunal determines that: no other care of a less restrictive kind is appropriate and reasonably available to the person, and the person would benefit from the order as the least restrictive alternative consistent with safe and effective care; a declared mental health facility has an appropriate treatment plan for the person and is capable of implementing it; and, if the person has been previously diagnosed as suffering from a mental illness, the person has a previous history of refusing to accept appropriate treatment (as defined). While a magistrate may only make an order where the person is a 'mentally ill person' as defined, the Tribunal is not bound by this limitation.[44]

4.25 The Consultation paper noted that the provision for CTOs within the forensic mental health system could assist in the treatment, monitoring and management of an inmate's mental illness or condition. If a person is admitted to prison while subject to a CTO, or experiences a mental illness (or a relapse in an illness) while in prison, such an order could assist in the treatment and stabilisation of the condition on a short or longer-term basis. In addition, where an inmate has received mental health treatment while in prison, the making of a CTO may provide a framework to ensure his or her ongoing treatment once released back into the prison population or into the community.

4.26 Accordingly, the making of CTOs within the correctional context could have a number of therapeutic benefits for inmates with mental illnesses. However, the Consultation Paper noted that in light of the civil liberties concerns arising from any form of compulsory treatment, a framework for making such orders would need legislative safeguards regarding the making of orders and opportunities to challenge them, as well as their implementation, oversight and (where necessary) extension. For example, it noted that one issue that may need consideration is whether orders could be made as an alternative to transfer to a hospital for mental health treatment, or only once a person has been transferred to hospital and the condition has been stabilised.

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[44] 2007 Act, Ch 3.

4.27 The Consultation Paper suggested several options in this area, being retaining the current framework for providing mental health treatment to prison inmates, or amending the legislation to provide a framework for the making, implementing and monitoring of community treatment orders in the correctional context.

4.28 Several submissions supported retaining the current framework, generally on the basis that a person who is sufficiently mentally ill to require treatment should receive it in hospital rather than prison; and due to a concern that a CTO may become a substitute for proper medical care in hospital, for example by facilitating the transfer of a patient back into the ordinary prison system before clinically appropriate. Particular concerns were raised regarding the potential for abuses, such as the use of medication to control behaviour for administrative purposes, and the risk that prisons could become de facto psychiatric hospitals in a resource restricted environment.

4.29 On the other hand, several submissions supported the provision of a framework for making, implementing and monitoring CTOs in the correctional context. Such a regime was supported on the basis that it would be consistent with the principle that people with a mental illness (whether in the community or in prison) should be have equal access to care and treatment and should not be treated differently; and that such orders would make it easier to plan and implement programs for post release treatment. Several submissions suggested possible safeguards for such a regime, including providing that a CTO cannot be imposed until the person has received an initial mental health assessment, care and treatment in hospital and his or her condition had stabilised.

4.30 The 2007 Act gives the Tribunal the power to make a CTO in relation to a forensic patient recommended to be released conditionally or to be transferred to a correctional centre or other place (but such an order will only have effect if confirmed by the prescribed authority). The Act provides that the provisions for making CTOs in the civil context apply to the making of any such order, subject to any modifications prescribed in regulations.[45]

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[45] 2007 Act, Sch 7.

4.31 This provision accords with the Review's conclusion that a framework for the making and implementation of CTOs in the correctional context is desirable. The making of CTOs for transferee patients should be a useful mechanism to ensure that, once a patient's condition has been stabilised in hospital, his or her mental health will not be allowed to deteriorate upon release back into the community or prison environment. As with the compulsory orders operating in the community, this should assist in the long-term management of an offender's mental health.

4.32 The Review also notes that these provisions contain a number of important safeguards against abuse, including that only the Tribunal may make such orders, and only where it is recommending the person's conditional release or transfer to a correctional centre; and provisions for the person subject to the order to apply to vary or revoke it, or appeal against its making. In addition, the CTO must be administered in accordance with the treatment plan approved by the Tribunal when it makes the order.

4.33 However, the Review does have several concerns in this area. First, CTOs should not be used as a substitute for proper medical care in hospital, for example by facilitating the transfer of a patient into the prison system before it is clinically appropriate (eg, for a transferee patient), or where it is not appropriate at all (eg, for a patient who is unfit or not guilty due to mental illness). Accordingly, the Tribunal should not make a CTO *for the purpose of* facilitating the patient's transfer to a correctional centre.

4.34 Second, the procedural and other safeguards applying in the civil context should apply equally in the correctional context. While the 2007 Act provides that the civil provisions would apply, it allows for modifications outlined in regulations. The Review does not consider that such safeguards, such as an avenue of appeal, should be subject to removal in this way. The Review also considers that additional safeguards may be necessary, such as a legislative requirement that a CTO be implemented only by qualified health officers.

4.35 Third, given the particular concerns arising from the extension to such orders to the correctional context, the Review recommends that the legislation be amended to require the Tribunal to review the case of any person who is subject to a Community

Treatment Order and detained in a correctional centre, at least once every three months. This will ensure adequate independent oversight of the administration and implementation of the CTO framework in the prison context.

4.36 Finally, there should be a framework for implementing CTOs in correctional centres that were previously made in the community. This would ensure that a person whose condition had been stabilised before being taken into custody continues to receive treatment in accordance with his or her treatment plan while in detention.

Recommendation 10

Amend the legislation to:

- Provide a detailed legislative framework for the making and implementation of Community Treatment Orders in the correctional context; and
- Require the Tribunal to review the case of any person who is subject to a Community Treatment Order and detained in a correctional centre, at least once every three months.

Transferee Patients and Parole

4.37 The recent NSW Court of Appeal decision in *Commissioner of Corrective Services v Wedge* [2006] NSWCA 271 raises policy concerns regarding the interaction between the forensic mental health legislation and the framework for granting parole under the *Crimes (Administration of Sentences) Act 1999* (NSW).

4.38 Generally, a forensic patient is detained under an initial court order, and subsequently may be the subject of an executive order in relation to his or her detention, care, treatment or release. In *Wedge*, a transferee had been sentenced to a term of imprisonment for break, enter and steal and car theft, with an order that he be released at the end of his non-parole period. While in prison, he was transferred to hospital for mental health treatment, but had not been reviewed by the Tribunal or made the subject of an executive order in

relation to his detention when his non-parole period expired.

4.39 The Court of Appeal found that Mr Wedge was not entitled to be released at the expiry of his non-parole period, and was instead subject to an *implied* power of detention under the 1990 Act. Santow JA commented that:

> [T]his result preserves for Mr Wedge the most appropriate detention or release regime for the forensic patient, namely under Chapter 5 of the Act with its emphasis on community safety as well as the safety of Mr Wedge. It brings to bear the expertise of a specialised Tribunal for his and the community's benefit. It is not appropriate instead to bring to bear the parole regime applicable to the criminal process where mental illness is not centrally at issue and where revocation of parole lacks the civil rights afforded by Chapter 5.[46]

4.40 Justice Santow also considered the extent to which the civil provisions under Chapter 4 of the 1990 Act would or should have been available as an alternative to continued detention as a forensic patient. In His Honour's view:

> It would however be an unexpected and indeed irrational legislative result if the application of the stringent Chapter 5 regime, strongly protective of community safety with safeguards also for the forensic patient, were thereby to be displaced by the more liberal Chapter 4 regime. Chapter 4 lays greater emphasis on a person's civil rights, but with correspondingly greater risk to the public and indeed even to the individual himself …[47]

4.41 In practice, the Court of Appeal's decision could result in an offender being detained as a forensic patient[48] until the expiry of his or her full prison sentence (despite an initial court order that the person be released at the end of his or her non-parole period). Given that some offenders may not have a history of violence, it is not clear why they should be subject to the more stringent regime operating under the forensic provisions of the Act than the civil provisions that apply to the detention, care and treatment of any other member the community. This is particularly the case given that some offenders may be transferred to a hospital under s 98 of the 1990 Act,[49] in which case there may be no suggestion that the forensic patient has ever posed a risk of harm to any person as a result of his or her condition.

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46 *Commissioner of Corrective Services v Wedge* [2006] NSWCA 271 (Santow JA), [48].

47 Ibid, [23].

48 Or as a 'transferee patient', as recommended in this report.

49 Section 98 of the 1990 Act provides for transfer to hospital where a person has a mental condition for which treatment is available in a hospital, and consents to the transfer.

4.42 Rather than continue to imply a power to detain a forensic patient in these circumstances, the Review considers that there are sound policy grounds for instead clearly providing that a transferee is detained pursuant to his or her sentence of imprisonment. Accordingly, where the transferee is subject to the grant of or an order for release on parole under the *Crimes (Administration of Sentences) Act 1999* (NSW), he or she must be so released (the order may contain conditions requiring appropriate treatment) unless the Parole Authority revokes the parole order or an order is made for detention under the forensic mental health provisions.

Section 74(2) in Sch 7 of the 2007 Act provides:

> "For the purposes of Pt 6 of the Crimes (Administration of Sentences) Act 1999, a forensic patient who is detained in a mental health facility is taken to be serving a full time sentence of detention in a correctional centre"

Part 6 of the Crimes (Administration of Sentences) Act deals with parole but the effect of the legislation is obscure and requires clarification to ensure release on parole and appropriate treatment are available.

In those cases where concerns are held regarding the potential risk of serious harm to members of the community, or the patient, if he or she were released on parole there would be several options available, including:

- The Parole Authority could grant or revoke the parole order or impose parole conditions requiring ongoing treatment and supervision having regard to that risk;

- The Tribunal could hold an expedited review so that it may recommend (or, if the determining body, order) the person's continued detention; classify the person as an involuntary patient under the civil provisions of the Act; or make a Community Treatment Order for ongoing treatment within the community.

The Review notes that further consideration may need to be given to the respective roles of the Parole Authority and Tribunal to ensure that they operate in a complementary and co-ordinated manner in relation to such decisions. For

example, it may be desirable to provide a formal framework for the Parole Authority to request the Tribunal to conduct an expedited review of a forensic patient prior to the expiry of the non-parole period, so that the Tribunal's determination may be taken into consideration in the parole determination.

The submissions supported the Tribunal retaining the power presently available under section 89 of the 1990 Act to make a forensic patient the subject of a Continued Treatment Order so that person may be detained in a civil psychiatric hospital (and in an appropriate case to discharge that person on a Community Treatment Order) but considered that the power should be capable of being exercised within six months prior to the expiry of the minimum term or non parole period of a sentence. This would obviate the difficulties arising as a consequence of the decision in *Wedge*. In practice where there is no automatic parole order co-ordination with the parole authority will be necessary.

Recommendation 11

Amend the legislation to provide that:

- a transferee patient is detained pursuant to his or her sentence of imprisonment, rather than the order transferring him or her to a mental health facility for mental health treatment and
- that the Tribunal should retain the power to make a forensic patient a Continued Treatment Patient but that power should be capable of being exercised within six months prior to the expiry of the minimum term or non parole period or thereafter.

5. The Executive Discretion

Introduction

5.1 The Terms of Reference ask the review to consider the appropriate authority or person to make decisions in relation to the terms and conditions of detention, release and conditional release of forensic patients, as well as the appropriate structure for the decision-making process.

Historical Development

5.2 The modern form of the executive discretion in the forensic mental health context dates back to the *Criminal Lunatics Act 1800* (UK), which was introduced in response to the attempted assassination of King George III by James Hadfield, a delusional former soldier. The Act provided that, where a person was acquitted on the ground of insanity, the court must order that the person be kept in strict custody, 'until the King's Pleasure be known and the King may give such order for his safe custody as he shall think fit'.[50]

5.3 The Act was adopted in NSW, and was the original statutory source of the power to hold people acquitted due to mental illness at the 'Governor's Pleasure'.[51] In practice, it appears that the Governor of the NSW colony had the power to transfer an insanity acquittee to an asylum, and could order his or her release in all cases except murder (in which case, the Governor was required to seek the Home Government's approval).[52]

5.4 In 1843, the NSW Parliament passed the *Lunacy Act 1843* (NSW), which reaffirmed the system of detention at the Governor's Pleasure. A person acquitted on the ground of insanity was detained in prison at the Governor's Pleasure, and the Governor could issue any orders considered necessary for the person's detention in safe custody. The Act did not, however, specify any procedures for release. Leanne Craze

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50 See Sir Owen Dixon, 'A Legacy of Hadfield, M'Naghton and Maclean' (1957) 31 *Australian Law Journal* 255; *R v S* [1979] 2 NSWLR 1, 32 (O'Brien J).

51 L Craze, *The Care and Control of the Criminally Insane in New South Wales: 1788 to 1987* (1993), Phd Thesis, 394; see also *R v S* [1979] 2 NSWLR 1, 32 (O'Brien J).

52 L Craze, op cit, 394.

has commented that 'in effect, the first *Lunacy Act* and subsequent pieces of legislation all failed to provide clear directions for the review and release of persons deemed to be criminally insane'.[53]

The Current Framework

5.5 New South Wales has retained the system of executive discretion to the extent that only the Minister for Health or the Governor (acting on the advice of the Executive Council) are authorised to make orders as to a forensic patient's detention, care, treatment, or release.[54]

5.6 Under the NSW system, a person who is unfit to be tried may have a limiting term imposed where a special hearing results in a finding that that, on the limited evidence available, he or she committed the act forming the basis of the offence. A limiting term places an outer limit on the period for which a person may be detained, but the person can be released at any time before its expiry by an executive order. By contrast, a person who is found not guilty of an offence by reason of mental illness is subject to indeterminate detention and can only be released by executive order.

5.7 The Tribunal makes recommendations to the Minister for Health in relation to a forensic patient's detention, care, treatment, or and to the Governor in Council in respect of this law release after conducting periodic reviews of his or her case. The Tribunal cannot, however, recommend a person's release unless it is satisfied, on the available evidence, that the safety of the patient or any member of the public will not be seriously endangered by the patient's release. If the Attorney General objects to a patient's release on specified grounds, the person cannot be released. If no objection is made, the Minister or Governor may—or may not—order the person's release.[55]

5.8 During the 2006 calendar year, the Tribunal conducted 622 reviews 140 did not require a response, 482 recommendations to the Minister were made, of which 334 were approved, 47 were partly approved, 55 were not approved, 88 were

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53 Ibid, 494-496.

54 See *Mental Health Regulation 2000* (NSW) reg 19. Alternatively, the Governor-General is the prescribed authority for decision-making in relation to a person detained by order of the Governor-General.

55 1990 Act, Ch 5.

pending a decision and of these:

- 246 recommended no change in the conditions of detention (of which 192 were approved, 1 partially approved, 8 not approved and 45 remained pending);
- 82 recommended less restrictive conditions of detention (of which 31 were approved, 3 partially approved, 32 not approved and 15 remained pending);
- 6 recommended more restrictive conditions of detention (of which 3 were approved and 3 remained pending);
- 26 recommended conditional release (of which 6 were approved, 12 not approved, and 8 remained pending);
- 106 recommended no change in conditions of release (of which 90 were approved, 2 were not approved and 14 remained pending);
- 8 recommended less restrictive conditional release (of which 7 were approved and 1 was partially approved);
- 1 recommended more restrictive conditional release (and this remained pending);
- 6 recommended unconditional release (of which 5 were approved and 1 was not approved); and
- 2 recommended revocation of conditional release (of which both remained pending).[56]

5.9 As at 30 June 2007, there were 309 forensic patients in NSW, of whom 208 had been found not guilty by reason of mental illness ('NGMI'), 38 had been found unfit to be tried, 14 were subject to limiting terms, and 49 were transferees from the general prison population. Of these forensic patients, 86 were accommodated in the community, 51 where held in correctional centres, 98 were held in the Long Bay Prison Hospital, and 74 were held in hospitals in the community. [57]

5.10 At that date, the *average* number of months since being first referred to the Tribunal was 96 (NGMI), 20 (unfit), 63 (limiting terms) and 21 months (transferees); and the *median* number of months was 86 (NGMI), 14 (unfit), 59 (limiting terms) and 3 months (transferees). The number of years since the

[56] Mental Health Review Tribunal statistics.
[57] Ibid.

patient was first referred to the Tribunal was as follows:[58]

	0-1 years	2-3 years	4-5 years	6-10 years	Over 10 years	Total
Limiting term	1 (7%)	-	9 (64%)	4 (29%)	-	14
Fitness	27 (71%)	7 (19%)	2 (5%)	2 (5%)	-	38
Transferee	38 (78%)	4 (8%)	3 (6%)	1 (2%)	3 (6%)	49
NGMI	11 (5%)	20 (10%)	42 (20%)	92 (44%)	43 (21%)	208
Total	77 (25%)	31 (10%)	56 (18%)	99 (32%)	46 (15%)	309

Previous Reviews and Law Reform Initiatives

5.11 The removal of the executive discretion in decision-making for forensic patients has been recommended by:

- The Mental Health Act Implementation Monitoring Committee (1992);[59]
- The Human Rights and Equal Opportunity Commission (1993) (ie the 'Burdekin inquiry');[60]
- The NSW Law Reform Commission (1996);[61] and
- The Senate Select Committee on Mental Health (2006).[62]

58 Ibid.

59 Mental Health Act Implementation Monitoring Committee, *Report to the Honourable R A Phillips MP, Minister for Health, on the NSW Mental Health Act 1990* (1992) Parliament of NSW, 32. The Committee expressed a preference for the Tribunal having responsibility for making decisions in relation to forensic patients.

60 Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993), 942-943. The HREOC recommended that courts or independent specialist tribunals should make such decisions.

61 NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Report 80* (1996), Sydney, Rec 19. The Commission recommended that the Tribunal should have responsibility for making decisions in relation to forensic patients, but recommended partially retaining the executive power of objection to release.

62 Senate Select Committee on Mental Health, *A National Approach to Mental Health – From Crisis to Community: Final Report* (2006), Rec 58. The Committee recommended that responsibility for release decisions should be routinely placed with mental health courts or mental health tribunals.

5.12 In 1994, the University of Newcastle Centre for Health Law, Ethics and Policy released its Model Mental Health Legislation. The Model Legislation provides for a Special Forensic Division of the Tribunal to make determinations regarding the release of forensic patients. The Division would consist of a current or former Supreme Court judge; a psychiatrist with experience in forensic psychiatry; a psychologist with experience in forensic psychology; a legal practitioner with experience in criminal law; and one other suitably qualified or experienced person.[63]

5.13 Generally, if a person were found unfit, he or she would be admitted to a mental health facility and reviewed by the Special Forensic Division. If the Division found the person unfit, it must order his or her continued detention. After a specified period the person must be released, subject to the Tribunal ordering his or her involuntary admission as a civil patient). If a person were found not guilty due to mental illness, the Tribunal could discharge the person with or without conditions, place the person on a community treatment order, or order his or her continuing admission as a forensic patient. In these cases, the maximum term of admission would be equal to the *average* term of imprisonment that a court could have imposed if the person had been convicted of the offence.[64]

5.14 In 1995, the Model Criminal Code Officers Committee released a Model Mental Impairment and Unfitness to be Tried (Criminal Procedure) Bill 1995. The Bill provides for all decisions to be made by courts, rather than the executive or a Tribunal; a statutory definition of fitness to be tried; the conduct of fitness inquiries and special hearings; the imposition of limiting terms after special hearings as well as special verdicts of not guilty due to mental illness; annual reviews of the case of each forensic patient; provisions for reporting on the attitudes and counselling of the next of kin and victims; and the application of these provisions in all courts, including local courts.[65]

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[63] University of Newcastle Centre for Health Law, Ethics and Policy, *Report to the Australian Health Ministers' Advisory Council National Working Group on Mental Health Policy on Model Mental Health Legislation* (1994).

[64] Ibid.

[65] See NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Report 80* (1996), Sydney, 172-173.

5.15 In 2004, the National Mental Health Working Group developed a draft National Statement of Principles for Forensic Mental Health which, among other things, provides that:

- Decisions to detain, release or transfer people found not guilty or unfit for trial because of a mental illness or intellectual impairment, should be made by courts or independent statutory bodies of competent jurisdiction, not by 'a political process or the Governor/Administrator in Council'; and
- Legislation dealing with people with a mental illness involved in the criminal justice system must comply with the *International Covenant on Civil and Political Rights* ('ICCPR').[66]

5.16 The National Mental Health Working Group of the Australian Health Ministers' Advisory Council has endorsed the Statement, and presented it to the Correction Service Administrators Conference in May 2003. In 2006, the Commonwealth advised the Select Committee on Mental Health that it was working with the State and Territory governments, and the corrections sector, 'to develop approaches to implementation of the principles'. Accordingly, the Senate Select Committee recommended that the Australian Health Ministers agree to establish a timeline and implementation plan for the Principles.[67]

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[66] *National Statement of Principles for Forensic Mental Health* (2002) Principle 12. The National Mental Health Working Group of the Australian Health Ministers' Advisory Council has endorsed the Statement, and presented it to the Correction Service Administrators Conference in May 2003. In 2006, the Commonwealth advised that it was working with the State and Territory governments, and the corrections sector, 'to develop approaches to implementation of the principles'. Accordingly, the Senate Select Committee recommended that the Australian Health Ministers agree to establish a timeline and implementation plan for the Principles: Select Committee on Mental Health. A *National Approach to Mental Health – From Crisis to Community: First Report (2006), 330, 343; Final Report (2006),* Rec 3. See also Australian Law Reform Commission, *Same Crime, Same Time; Sentencing of Federal Offenders (2006)*

[67] Select Committee on Mental Health, *A National Approach to Mental Health – From Crisis to Community: First Report* (2006), *330, 343; Final Report* (2006), Rec 3. See also the discussion in Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (2006) Sydney, Ch 28.

Overseas Jurisdictions

England and Wales

5.17 As noted above, England adopted the modern form of executive discretion in the *Criminal Lunatics Act 1800* (UK), which provided that, where a person was acquitted on the ground of insanity, the court must order that the person be kept in strict custody 'until the King's Pleasure be known and the King may give such order for his safe custody as he shall think fit'.[68] The system of executive discretion operated in relation to release decisions until 1983, when it was removed in response to an adverse decision by the European Court of Human Rights.[69]

5.18 Under the *Mental Health Act 1959* (UK), the Home Secretary was responsible for the control of 'restricted patients' including any decisions as to their detention and release. A person could become a restricted patient if he or she was made the subject of a hospital order by the criminal courts, and a further 'restriction order' where considered necessary for the protection for the public. The Home Secretary could discharge a restricted patient with or without conditions in his or her discretion, and could recall the patient to hospital at any time. While the Mental Health Review Tribunal could review the case of a restricted patient, its role was advisory only.[70]

5.19 In *X v United Kingdom* (1981), the European Court of Human Rights found that the legislation breached art 5(4) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms.*[71] In that case, the Home Secretary had exercised his discretion to recall to hospital a restricted patient who was subject to conditional release. The Court held that art 5(4) required an appropriate procedure that enabled a court to determine the lawfulness of a patient's detention and, if not lawful, to order his or her release. In that case, this

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[68] See Sir Owen Dixon, 'A Legacy of Hadfield, M'Naghton and Maclean' (1957) 31 *Australian Law Journal* 255; see also *R v S* [1979] 2 NSWLR 1, 32 (O'Brien J).

[69] See the discussion in Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993) AGPS, 801.

[70] See *X v United Kingdom* [1981] ECHR 6 (5 November 1981).

[71] Art 5(4) provides that 'everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'.

required 'an appropriate procedure allowing a court to examine whether the patient's disorder still persisted and whether the Home Secretary was entitled to think that a continuation of the compulsory confinement was necessary in the interest of public safety'.[72]

5.20 The European Court commented that, for the purposes of art 5(4) a 'court' need not be a court of law, but must be a body that is independent of the executive and the parties to the case, and that guarantees the procedural safeguards appropriate to the kind of deprivation of liberty involved. In particular, a mental health review tribunal could be considered a 'court' if it satisfied these criteria. However, as the Tribunal only had advisory functions at that time, it could not be considered a 'court' because it lacked the competence to decide on the lawfulness of detention or to order a patient's release if the detention was unlawful.[73]

5.21 The United Kingdom responded to the Court's decision by giving the Mental Health Review Tribunal the power to order the discharge of restricted patients under the *Mental Health Act 1983* (UK). Generally, the Tribunal's role in relation to restricted patient is to determine whether or not the statutory criteria for detention in hospital continue to be met, and if not, whether to grant conditional or unconditional release.[74] The Review notes that, after a long period of review, a new Mental Health Act 2007 (UK) has been enacted.

Canada

5.22 Until 1992, Canada had a form of executive discretion that it had adopted from English law, known as the Lieutenant-Governor Warrant scheme. Under the scheme, courts had no discretion but to detain in 'strict custody' people found not guilty by reason of insanity or unfit to stand trial under such a warrant, and the person remained in detention until the Lieutenant Governor's pleasure was known.[75]

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72 See *X v United Kingdom* [1981] ECHR 6 (5 November 1981), [58].

73 Ibid, [61].

74 *Mental Health Review Tribunal website* (www.mhrt.org.uk), accessed on 15 July 2007.

75 See House of Commons Standing Committee on Justice and Human Rights, *Review of the Mental Health Disorder Provisions of the Criminal Code* (2002), Canada; and Ontario Review Board, *About Us* (www.orb.on.ca), accessed 10 July 2007.

5.23 In 1976, the Law Reform Commission of Canada released a report that raised concerns with the scheme on the basis that it focused on custody rather than treatment, and resulted in many people being detained for longer periods than if they had been convicted. The Commission recommended that the system be abolished, citing concerns regarding the lack of any legal obligation to follow Review Board recommendations; the possibility of release decisions being made on political grounds; and the lack of an appeal process. Instead, the Commission considered that 'dispositions should be made openly, according to known criteria, be reviewable and of determinate length'.[76]

5.24 The Canadian Department of Justice subsequently conducted another review, which made a number of reform recommendations including imposing limits on the length of time for which a mentally disordered person could be detained. While consultations were being conducted on a draft bill, the Supreme Court of Canada handed down its decision in *R v Swain* [1991] 1 SCR 933, which struck down the legislation dealing with people found not guilty by reason of insanity on the basis that it violated sections 7 (right to liberty) and 9 (protection against arbitrary detention or imprisonment) of the *Canadian Charter of Rights and Freedoms*.[77]

5.25 The Canadian Parliament subsequently amended the *Criminal Code* to abolish the Lieutenant-Governor warrant scheme. Under the current system, a person charged with an offence may be found unfit to be tried, or 'not criminally responsible' on the basis of a mental disorder. In these cases, the court can make an appropriate disposition order or defer the decision to a provincial review board. The review board must review any court order other than absolute discharge within a specified period, and any review board disposition other than an absolute discharge must be reviewed annually. Courts and review boards must impose the least restrictive disposition necessary, having regard to public

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[76] House of Commons Standing Committee on Justice and Human Rights, op cit, citing the Law Reform Commission of Canada, *Mental Disorder in the Criminal Process* (1976).

[77] See House of Commons Standing Committee on Justice and Human Rights, *Review of the Mental Health Disorder Provisions of the Criminal Code* (2002), Canada; and Ontario Review Board, *About Us* (www.orb.on.ca), accessed 10 July 2007. Section 7 of the Charter provides that 'everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'; and s 9 provides that 'everyone has the right not to be arbitrarily detained or imprisoned'.

safety, the accused's mental condition, the accused's reintegration into society, and the accused's other needs. If a person has been found not criminally responsible, a review board must order the person's absolute discharge if it consider that the person 'is not a significant threat to the safety of the public'.[78]

Other Australian Jurisdictions

5.26 The Commonwealth and Western Australia are the only other Australian jurisdictions to have retained the executive discretion for decision-making in relation to forensic patients.[79] Other jurisdictions have removed the executive discretion as follows: South Australia (1992), the Australian Capital Territory (1994), Victoria (1997), Tasmania (1999), Queensland (2000), and the Northern Territory (2002).[80]

5.27 Several jurisdictions provide for the courts to order a forensic patient's release. In Victoria, a court may make a supervision order in relation to a person who is unfit to be tried but subject to a qualified finding of guilt, or who is subject to a special verdict of not guilty due to mental impairment. The supervision order is for an indefinite term, but the court must set a nominal term in accordance with a statutory table. Applications can be made to the court to vary or revoke an order. If the person has not already been released, the court must conduct a major review at least three months before the expiry of the nominal term, and at least every five years thereafter, to determine whether the person should be released.[81]

5.28 South Australia and the Northern Territory both provide for a court to conduct periodic reviews (however, these appear to be discretionary in the Northern Territory), and order the release of a person subject to a supervision order at any time before the expiry of the relevant limiting term.[82] In Tasmania, the court that made the finding may make a restriction order detaining a person in a special facility. Applications for release from such a restriction order may be made to the Supreme Court two years after the order was made and every two years

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78 Ibid.

79 *Crimes Act 1914* (Cth), Pt IB; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), Pts 5, 6.

80 NSW Bar Association Submission.

81 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic); *Mental Health Act 1986* (Vic).

82 *Criminal Law Consolidation Act 1935* (SA) Pt 8A; *Criminal Code Act* (NT), Pt IIA.

thereafter, unless the Tribunal issues a certificate that an order is no longer warranted. The person may then apply to the Supreme Court for discharge, revocation or variation of the order.[83]

5.29 Several jurisdictions provide for a tribunal to order a forensic patient's release. For example, in the Australian Capital Territory, the Mental Health Tribunal conducts periodic reviews of detained persons and may order their release after considering several matters, including public safety.[84] In Queensland, when there is no factual dispute, issues of mental illness and fitness are dealt with outside the trial process by the Mental Health Court. The Court may make forensic orders, after which the Mental Health Review Tribunal reviews the patient, and may revoke the order on the basis of a public safety test.[85]

Justification for the Current System

5.30 Those who advocate the retention of the executive discretion argue that:

- It offers greater flexibility to deal with the varying circumstances of each forensic patient, given that it is unrestricted by precise criteria for such decision-making.

- The lack of transparency and accountability permit the executive to take into account matters that it might be difficult to debate adequately in the public arena.

- The executive may be considered the best placed to gauge, and make decisions about, broader community issues in relation to forensic patients.

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83 *Criminal Justice (Mental Impairment) Act 1999* (Tas). A 'forensic order' means a restriction order (requiring the person to be admitted to and detained in a secure mental health unit until the order is discharged by the Supreme Court), or a supervision order (releasing the person under the supervision of the Chief Forensic Psychiatrist on the conditions that the court considers appropriate).

84 *Mental Health (Treatment and Care) Act 1994* (ACT).

85 *Mental Health Act 2000* (Qld).

Criticisms of the Current System

5.31 On the other hand, the system of executive discretion has been criticised on the following grounds.

- It does not accord with the underlying philosophy of the forensic mental health system, being that a person who is not criminally responsible for his or her actions should only be detained where necessary for community protection.

- The involvement of the executive in decisions about the detention, care, treatment and release of forensic patients involves inevitable delays. By the time an executive decision is made in relation to a person's place of detention, or access to leave arrangements, it may no longer be necessary or appropriate for the person concerned. These delays can lead to frustration among forensic patients and staff, and can be detrimental to recovery and rehabilitation.

- Detention can be prolonged well beyond the period necessary for the purpose of community protection, and in some cases may exceed the sentence the person would have served if convicted of the offence.

- It constitutes a denial of natural justice for forensic patients who do not have an opportunity to give their evidence directly to the decision-maker; do not have the opportunity to address any concerns raised directly with the Minister by third parties (eg advisers or victims groups) or correct any misapprehensions of fact; are not entitled to reasons for the executive decision; and do not have a specific avenue of appeal against the decision.

- The possible breach of international human rights obligations, including art 9(4) of the ICCPR, which provides that 'anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'.[86]

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[86] See, generally, the discussion in NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Report 80* (1996), Sydney, 184-186; Mental Health Act Implementation Monitoring Committee, *Report to the Honourable R A Phillips MP, Minister for Health, on the NSW Mental Health Act 1990* (1992) Parliament of NSW, 32-34;

- Forensic patients may have to resort to independent review of their ongoing detention, or to challenge the exercise of the executive discretion in courts or other bodies alleging a breach of the law or of Australia's international human rights obligations, which could lead to criticism of the NSW Government.

- Political considerations may enter into decisions, in particular in relation to the release of a forensic patient. For example, submissions suggested that the decision to detain is often inconsistent with expert clinical opinion, and that there are a number of forensic patients who are very low risk but remain detained—usually due to the high profile of their cases or the pressure applied on politicians—while higher risk but lower profile patients may be released.

- The potential for indefinite detention can deter the defence from raising mental illness in criminal proceedings. As a result, a number of accused may be convicted of offences for which they are not legally responsible. This leads to the person inappropriately carrying the stigma of conviction, and can mean that the community loses the opportunity of ensuring that the person receives comprehensive treatment, post-release care and ongoing monitoring. This could have potential implications for community safety.

Consultations and Submissions

5.32 The Consultation Paper outlined a number of reform options in relation to decision-making for forensic patients, including retaining the current system of executive discretion, or transferring all decisions to the Tribunal, the courts, or a hybrid system involving both the courts and the Tribunal. None of the submissions supported retaining the current system, and many of them cited the concerns outlined above in their reasoning. The overwhelming majority of submissions supported transferring decision-making to the Tribunal or courts (see the discussion below).

Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993) AGPS, 799-801.

5.33 Several submissions made specific comments on the practical operation of the system of executive discretion. The Public Interest Advocacy Centre ('PIAC') commented that:

> The regime of executive discretion in NSW creates a number of problems, most markedly the fact that people become trapped within the system well beyond any period that could be considered reasonable, or necessary. PIAC is aware of numerous examples of forensic patients who have been (and remain) mentally healthy without recourse to medication for a number of years, and for whom the Tribunal may have recommended release many times, and yet their release is not authorised by the Executive. The result is inevitably unjust.

5.34 The Legal Aid Commission of NSW strongly supported replacing the system of executive discretion with a system of independent decision-making. In its view, this would ensure that the system conforms with human rights obligations, consistency and fairness for forensic patients; recognise the importance of making reasonably predictable decisions based on precise criteria; and would avoid the imputation of politically motivated decision-making, while balancing the rights of forensic patients with the interests and safety of the community in an open and accountable way.

5.35 The Public Defenders expressed the strong view that decisions concerning mentally ill or intellectually disabled people should be made in a manner that is transparent, accountable, and in accordance with the rules of natural justice, and that regimes of legal disposition and management should reflect the underlying fact that non-convicted forensic patients are patients, and not offenders. It submitted that:

> the use of the executive veto on every occasion in recent times to prevent release, raises a reasonable apprehension that political pragmatism has displaced the expertise and judgement that the Tribunal was able to bring to its task of assessment. It is difficult to see what additional relevant material the executive could have had regard to in exercising the veto beyond that which was before the [Tribunal], unless of course the executive made its decision on an entirely different basis.

5.36 The Mental Health Coordinating Council suggested that maintaining the system of executive discretion:

> reflects Government's interest in maintaining control of the law and order agenda, with an eye on the negative impact to electoral outcomes generated by the victims' lobby, media hype and community perceptions of an association

between mental illness and criminal violence.

5.37 The Social Issues Executive of the Anglican Church Diocese of Sydney called for moral leadership from the Government on the issue. It noted that the NSW State Plan gives priority to crime prevention and the promotion of fairness and justice, and commented that the system of executive discretion 'is neither fair nor an adequate mean of dealing with the complexity of preventing crime and re-offending'.

Discussion

5.38 Generally, the Review has found that although people serving limiting terms in NSW can be released at any time prior to the expiry of the term, in general they are not. As a result, forensic patients serving limiting terms are detained within the forensic mental health system for longer periods than if they had been convicted of the relevant offence. In addition, people serving indeterminate detention following a special verdict of not guilty by reason of mental illness are routinely detained for periods as long as, or longer than, the term they would have served if convicted of the offence. This does not appear to be related to clinical or safety assessments.

5.39 The Government has already made inroads into the universality of that system, committing to a regime based on detention for public safety. Since the coming into effect of the *Mental Health (Criminal Procedure) Amendment Act 2005* (NSW), judges—subject to public safety considerations—have the power to order release both conditionally and unconditionally. Conditional release only operates pending Executive decision but there is clear potential for disconformity between the two systems. There is no requirement that consideration need be given to any matter other than safety.

5.40 The Review notes that the current system can result in a forensic patient remaining in detention against the advice of the patient's clinical team, and the Tribunal, that the person's release would not seriously endanger the safety of the patient or any other member of the public. This does not accord with the principles underlying the justice and forensic mental health systems—being that a person who is not criminally responsible for his or her actions should only be

detained where necessary for community protection[87]—nor the human rights of those forensic patients detained within the system.

5.41 The Review considers that the system of executive discretion should be replaced for several reasons. First, the system can result in forensic patients being detained long after the period that is necessary on public safety or clinical grounds. In practice, the absence of any statutory criteria for Executive decision-making, and any requirement to give reasons for decisions made, can result in a person's continued detention despite the expert opinion of the treating team and Tribunal that such detention is not necessary on the grounds of public safety.

5.42 Second, the system adversely discriminates against forensic patients by reason of their illness but without clinical justification when compared to the treatment of convicted offenders because patients tend to be subject to longer periods of detention despite the fact that they have not been found criminally responsible for any offence. Often, forensic patients who are serving limiting terms (following a qualified finding of guilt) are not released prior to the expiry of that term. As a limiting term represents the *total* period for which the person could have been detained if convicted of the offence, a forensic patient faces a longer period of detention than a convicted offender (who may be released at the expiry of his or her non-parole period). In addition, the system of indeterminate detention (following a special verdict of not guilty due to mental illness) is not subject to judicial review and may be terminated only by executive order.

5.43 Third, the system places an impossible burden on the executive decision-maker, who may be subject to political and public criticism if a forensic patient commits an act of violence once released into the community. Given the executive decision-maker's distance from the forensic patient in question, and possible lack of personal expertise in the areas of mental health and risk assessment, this may lead to an overly conservative approach to leave and release decisions that attempts to eliminate the possibility of risk altogether.[88]

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[87] Generally, a forensic patient should only remain in the forensic system while he or she constitutes a risk of serious danger to the community, as the patient could otherwise be released into the civil mental health system for care and treatment, or released in the community with or without ongoing supervision and treatment.

[88] The Burdekin inquiry commented that 'perhaps mindful of how poorly equipped they

5.44 Fourth, the involvement of the executive in decisions regarding the detention, care and treatment of forensic patients can lead to significant delays in implementing certain decisions, which may have anti-therapeutic implications. For example, by the time an executive decision is made in relation to matters such as the place in which a forensic patient should be detained (eg the particular mental health facility), or the type of leave privileges to be granted to a patient, they may no longer be necessary or relevant.[89] The delay may also unnecessarily impede the forensic patient's progress toward eligibility for release (eg where it leads to significant delays in progressing through each step of leave privileges).

5.45 The present system requires, in almost every case, the provision to the Tribunal of the relevant material, a hearing of the Tribunal with oral evidence, the preparation and forwarding of detailed written recommendations, the briefing by Departmental officers of Ministerial officers on those recommendations, a decision by the Minister and in the case of release, a determination by the Governor on the advice of the Executive Council with all the attendant administrative steps and delays. It is resource intensive, cumbersome and usually delayed. A more responsive system is desirable. It shall be consistent with the system of judicial release under the *Mental Health (Criminal Procedure) Act 1990*.

5.46 Fifth, lawyers and courts may be deterred from raising mental health issues at trial that might result in the client becoming a forensic patient because of the possible impact on the person's detention period. Therefore, people who should be treated as forensic patients may be imprisoned, and come into the system as transferees. In this case, the person may be discharged at the end of the term of

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are for the task, decision-makers tend to make very conservative assessments … It seems improbable that such decisions are always based on a rational assessment of the prisoner's potential threat to the rights of the wider community. The prime criterion is sometimes the potential for political damage to a government perceived by the public as being soft on criminals': Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993), 797-798.

[89] The Deputy State Coroner recognised this concern in a recent coronial recommendation to the Minister for Health that 'a review should be conducted as to whether the present system of Executive responsibility is best suited to ensure the placement and movement of inmates on clinical grounds ...': Magistrate D Pinch, Deputy State Coroner, *Inquest into the Death of Scott Ashley Simpson*, 17 July 2006, Rec 3.

the sentence with no or limited opportunity for further treatment or follow up, which could have significant implications in terms of public safety.

5.47 Sixth, the current system can present difficulties for patients, their families, carers, those affected by their actions when ill, and members of the community, who may seek a formal structure or process to express their views or concerns. In practice, victims' organisations, patients and carer organisations have all sought a voice both before the Tribunal (in relation to its recommendations), and the Minister (in relation to determinations).

5.48 Seventh, the system of executive discretion leaves Australia (including the NSW Government) vulnerable to adverse findings and criticism by international human rights bodies on the basis of inconsistency with Australia's international human rights obligations.[90] This is a very real concern, given that art 9(4) of the ICCPR[91] is substantially similar to art 5(4) of the *European Convention on Human Rights*, with which the system of executive discretion was found to be inconsistent, resulting in the removal of the executive decision-making role in that jurisdiction.

5.49 Finally, executive decision-making (or the failure to make a decision) could be subject to administrative review.[92] Possible grounds for such review might include the Minister taking into account material outside the scope of the Tribunal review and recommendation regime, on which the patient has not had an opportunity to be fairly heard; taking into account extraneous matters such as political considerations; or failing to have regard to relevant matters (eg clinical considerations). As a result, the NSW Government could be put in the position of

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[90] See, eg, the *International Covenant on Civil and Political Rights*, adopted 16 December 1966, entered into force on 23 March 1976, GA Res 2200A (XXI), UN Doc A/6316 (1966); the *International Covenant on Economic, Social and Cultural Rig*hts, adopted 16 December 1966, entered into force on 3 January 1976, GA Res 2200A (XXI), UN Doc A/6316 (1966); the UN General Assembly, *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care* A/RES/46/119, 17 December 1991.

[91] Article 9(4) of the ICCPR provides that 'anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'.

[92] See *Commissioner of Corrective Services v Wedge* [2006] NSWCA 271 (Santow JA), [48]. His Honour commented that, 'if the Minister fails to consider within a reasonable time … whether or not to exercise the discretions conferred under s 84(2) and s 86(4), [it] would be amenable to administrative review'.

having to defend publicly any number of challenges to the executive decisions made under the forensic mental health framework. Such challenges have already been mooted.

The New Framework

5.50 The Consultation Paper outlined several options to replace the executive discretion, including transferring all decision-making in relation to a forensic patient to the courts, to the Tribunal (subject to appeal to the Supreme Court), to the Tribunal (subject to executive veto), or to a hybrid system in which the courts would make release decisions and the Tribunal would be responsible for all other decisions (subject to appeal to the higher courts).

5.51 A few submissions supported the option of a court making all decisions in relation to forensic patients, or otherwise making release decisions. One submission noted that referring release decisions to the court would be consistent with the courts' existing power to release a person (with or without conditions) following a special verdict of not guilty by reason of mental illness under s 39 of the MHCP Act. Another submission suggested that, given the doctrine of the separation of powers (which requires the separation of the judicial and executive branches of government), the courts would be better able to resist political and media manipulation than government-appointed tribunals.

5.52 By contrast, the overwhelming majority of submissions supported transferring all decision-making to the Tribunal, subject to an avenue of appeal to the Supreme Court. Generally, submissions supported this option on the following grounds:

- The Tribunal's membership (including both legal and medical experts) ensures that it has specialist expertise in making decisions regarding a person's mental health, care and treatment options, as well as matters of risk and community safety.[93]

[93] For example, the NSW Bar Association's submission suggested that 'any residual signs of mental illness which might pose a risk to community safety are more likely to be detected by an experienced forensic psychiatrist sitting on the Tribunal in an informal hearing (applying appropriate clinical and treatment criteria) than by a Supreme Court judge presiding over a more formal proceeding in a courtroom'.

- The system would provide transparency in decision-making, and would be clinically more viable as recommendations could be acted on speedily.

- The Tribunal can better facilitate ongoing monitoring of forensic patients' progress than a court.

- The system provides an appropriate safeguard in relation to decision-making through appeal to the Supreme Court.

- The relative informality and non-adversarial nature of proceedings would: (a) make the review process more user-friendly (which would help reduce anxiety and uncertainty for clients and their families); (b) avoid the costs and demands on the limited time of treating professionals that would result from court proceedings; and (c) avoid the revenue implications of requiring a court to approve the Tribunal's recommendations or to perform the entire decision-making process.

5.53 The Review recognises that a court-based system may have some benefits, including providing transparency and consistency in decision-making, and involving a comprehensive framework of procedural safeguards, and avenues of appeal to superior courts. However, it has certain disadvantages, including the formality and adversarial nature of proceedings, the inability to monitor continuously, a lack of flexibility in scheduling hearings at short notice, the necessity to have regard to other competing priorities and the lack of any specific expertise among judicial officers in relation to matters of care, treatment and community safety in the forensic mental health context.

5.54 On the other hand, the NSW Law Reform Commission (1996) and the submissions to this Review have outlined the benefits of a tribunal-based system, being that the expert membership of a tribunal allows for more expertise in the area of mental illness and dangerousness; the adversarial system is inappropriate for considering issues such as continuing fitness and dangerousness; courts do not have a continuing role after sentencing in the detention of 'fit' defendants; and a tribunal is generally quicker and less formal than the courts, which is a particular advantage amongst this category of

defendants.[94] Public Tribunal hearings conducted in accordance with regular procedures and the provision of reasons will provide transparency and ensure consistency should the Tribunal Panel be presided over by a senior former judge will ensure regard for the law, legal processes and the public interest in the protection of the community.

5.55 The Review notes that the NSW Supreme Court also prefers a tribunal-based system to a court based one. In a letter to the Review, the Hon Justice Peter McClellan, Chief Judge at Common Law of the Supreme Court, expressed support for a tribunal-based system (subject to appeal to the Supreme Court) on several grounds, including the specialist expertise of Tribunal members. His Honour noted that the Chief Justice agreed with his position.

5.56 After considering the various options, and the submissions made in relation to them, the Review considers that the Tribunal is the most appropriate body to make orders in relation to the detention, care, treatment and release of forensic patients, subject to appeal to the Supreme Court. This conclusion is based primarily on the Tribunal's special expertise and long experience in this area, and its relative informality and flexibility, which will allow it to manage the process efficiently and effectively which will enable the Tribunal to list hearings as needed so as to focus more on a continued monitory role more suitable for considering public safety concerns. The Review considers that an avenue of appeal to the Supreme Court will provide a useful safeguard on such a framework for decision-making.

Constitution of the Tribunal

5.57 The Consultation Paper outlined several options for the Tribunal if it were to become the determining body, including the option of giving the President the power to create a Forensic Division to ensure the accuracy and consistency of decision-making in this context. The submissions overwhelmingly supported this option, but several of them noted that their support was conditional on

[94] NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Report 80* (1996), Sydney, 187-188.

maintaining the 'tripartite' model in which tribunal hearings must be conducted, and decisions made, by three member panels (ie a legal, medical and lay member). Several submissions also noted the importance of including experts in intellectual disability as members of the Forensic Division to ensure appropriate expertise in relation to forensic patients with intellectual disability.

5.58 If the Tribunal is given the power to make decisions in relation to forensic patients, the Review considers that it would be desirable to establish a Forensic Division within the Tribunal to facilitate the development of specific expertise in this area. However, rather than giving the President the power to create a Forensic Division, the Review considers that it should be established on a permanent basis.

5.59 Given the need for interdisciplinary expertise, and the human rights issues involved in compulsory detention, and treatment the Review considers that all forensic hearings should be conducted by a panel of three members. In relation to release hearings, the legal member should be a current or former judge. There are several reasons for this, including that a judge of the Supreme Court, Court of Criminal Appeal, or District Court would have particular skills and experience in conducting hearings, deciding matters according to law, applying criminal and administrative law principles, and the ability to give reasons for decisions.

5.60 In addition, to better reflect the fact that some people become forensic patients by virtue of an intellectual disability (rather than a mental illness), hearings involving these patients should where possible be conducted by a panel that includes a member who is a current practising psychiatrist, psychologist or other relevant expert, and a member with qualifications or experience in the intellectual disability field.

5.61 Therefore, the Review recommends that a Forensic Division should be established to deal with all matters involving forensic patients. The President should have power to make Rules and Practice Directions to enable it to perform its statutory function at each hearing, the Forensic Division should be constituted by a panel of three members, being:

- a legal member (being the President or a Deputy President and who, in the

case of any hearing involving the possibility of a forensic patient's release is a current or former judge);

- a current practising psychiatrist (for patients with a mental illness) or a current practising psychologist or other relevant expert (for patients with an intellectual disability); and

- a member with qualifications or experience in the mental health or intellectual disability field.

5.62 As is currently the case in forensic matters, the legal member should preside as chairperson over forensic review hearings, and his or her decision on any question of law or procedure would be determinative. Any other questions arising during a hearing should be determined by a majority of votes among the members, but—given the important issues of community protection involved—the chair should have the deciding vote in relation to leave and release decisions.

Procedural Matters

5.63 The Consultation Paper outlined a number of procedural and other matters that would flow from the transfer of decision-making from the executive to the Tribunal, and outlined a range of options in relation to them. Generally, submissions supported those options that would result in greater flexibility, transparency, consistency and accountability in decision-making by replacing the existing broad discretion with a statutory framework in relation to procedural matters.

5.64 Once the Tribunal becomes the determining body in relation to forensic patients, the review and other hearings will gain more significance in providing the basis for any decision made regarding the management or release of a forensic patient. Given the various people with an interest in such decision-making, and the importance of such decisions, the Review considers that there should be a statutory requirement to give notice of these hearings. This notice should be given to the forensic patient, his or her treating team and legal representative, any registered victims or family members who may wish to make submissions,

and (in relation to hearings involving the possibility of release) the Attorney General and Minister for Health. The relevant notice periods should be 14 days for release hearings, and 7 days for any other hearings, subject to exceptional circumstances, and the form of notice should be prescribed in the regulations.

5.65 To ensure that the Tribunal has access to all relevant information in conducting its hearings and making its determinations—by analogy with other recent community protection legislation—the legislation should specify the information that must be considered in any review of a forensic patient. This should include reports from the treating team (and risk assessments from an independent consultant psychiatrist or psychologist where the Tribunal is considering the question of release); any other reports the Tribunal considers necessary or desirable (eg the proposed supervision plan if the patient is conditionally released); any representations by the patient or his or her representative; and any relevant statement provided by a registered victim. To avoid non-compliance, the Tribunal should have the statutory power to require the production of these reports and other relevant information.

5.66 This recommendation is consistent with the practice in several other jurisdictions, which make statutory provision for the type of information that must be produced and considered prior to making decisions regarding forensic patients. For example, Victoria provides that the court cannot order a person's release, or significantly reduce the degree of supervision to which a person is subject, unless it has obtained and considered various specified reports, including those provided by a medical practitioner (or psychologist) who has examined the person, a report by the person responsible for supervision, a report of the family members or victims, and any other report the court considers necessary.[95] South Australia and Tasmania also require courts to consider specified reports prior to any decision to release a person or significantly reduce his or her degree of supervision.[96]

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[95] *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 40.

[96] *Criminal Law Consolidation Act 1935* (SA) s 269T, *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 35(2).

5.67 The Tribunal should also be required to provide written reasons for its decisions in relation to forensic patients. While the Tribunal is currently required to give reasons for its decisions upon request,[97] the executive decision-maker is under no such requirement. If the Tribunal is given responsibility for making decisions in relation to a forensic patient's detention, care, treatment and release, a requirement to give written reasons would provide a level of transparency and accountability to the process that should facilitate better understanding among forensic patients and others working in the system, as well as the broader community. The provision of reasons would also facilitate the efficient operation of the system by providing a basis for an appeal against a Tribunal decision where it is considered to have been in error.

5.68 Generally, the Forensic Division should be required to give written reasons for all decisions involving the question of release, and for other decisions upon request by any person with a direct interest in the proceedings (being the forensic patient, his or her legal representative, any registered victims, the Attorney General and the Minister for Health). In the public interest, the legislation should continue to prohibit the publication or broadcast of the name of any forensic patient appearing before the Tribunal, without the Tribunal's approval and the person's consent.

Appeal Process

5.69 While decisions of the Tribunal are already subject to appeal to the Supreme Court,[98] there is no specific mechanism to appeal against an executive decision in relation to forensic patients. Accordingly, if the Tribunal were to be given the power to make these decisions the provision of a broad avenue of appeal would be an important safeguard on such decision-making. In this way, the Court

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97 Under the 1990 Act, the Tribunal must make a written record of its determinations and recommendations, and must include the reasons for the determinations or recommendations of each member if requested to do so by any party to the proceedings. The Registrar of the Tribunal must give a copy of the written record to the relevant person (or his or her representative) on payment of a prescribed fee: ss 273, 280.

98 Under the 1990 Act, a person who is dissatisfied with a Tribunal determination, or the Tribunal's failure or refusal to make a determination, may appeal to the Supreme Court, and such appeals are heard by way of a new hearing of the matter: ss 281, 284.

would have the capacity to review decisions to ensure that matters such as the interests of the forensic patient, the safety of the community, and public interest has been given proper consideration.

5.70 As noted above, most of the submissions supported a framework in which Tribunal decisions would be subject to appeal to the NSW Supreme Court. The Consultation Paper outlined several options for such appeals, including that a forensic patient should have a right of appeal in relation to any decision of the determining body, and the Minister for Health and the Attorney General have a right of appearance, and a right of appeal, on public interest grounds. Most of the submissions expressed general support for this option. , but several of them qualified their support in some way. One submission suggested that the right of appeal should be confined to issues of public safety, not the public interest. Another submission suggested that the NSW Government generally should have a right of appearance and appeal on public interest grounds.

5.71 In his letter, the Hon Justice McClellan, Chief Judge at Common Law, suggested that such appeals should be by way of rehearing in accordance with the framework operating for appeals to the Court of Appeal under s 75A of the *Supreme Court Act 1970* (NSW). His Honour recommended that a single judge of the Common Law Division should hear the appeal, and it would open to the court to receive further evidence. The appeal would be determined on the evidence used in the Tribunal, together with any additional evidence it thinks fit to receive. As the Court would decide the appeal in the light of circumstances existing at the time of the appeal, changes in the facts or law would be taken into account.

5.72 After considering various options for an appeal framework, the Review has decided to recommend that Tribunal decisions should be subject to the following appeal processes:

- All decisions other than those involving a forensic patient's conditional or unconditional release should be subject to appeal to a single judge of the Common Law Division of the NSW Supreme Court, while release decisions should be subject to appeal to the Court of Appeal.

- Appeals should be heard by way of rehearing for error of law or fact, determined on the evidence used in the Tribunal together with any additional evidence the Court thinks fit to receive. It should also be open to the Court hearing the appeal to have the benefit of assessors, as are presently provided for in the 1990 Act, if it considers it appropriate generally, or in the particular case.

- Given the public interest involved in such decisions, the Minister for Health and Attorney General should have the right to make submissions at any hearing dealing with the possible grant of conditional or unconditional release, and a right of appeal in relation to such decisions.

5.73 This would ensure that the NSW Government has an adequate opportunity to raise any concerns regarding the potential release of a forensic patient both at the decision-making stage, and after a decision has been made. Given that the Attorney General would be given these opportunities to be heard, it would not be necessary to retain the existing provisions for objection to a proposed release (see chapter 8 for more detail).

Compliance with Orders

5.74 When orders are made in relation to the detention, care, treatment and release of a forensic patient, it is important that they are implemented. For example, if the Forensic Division of the Tribunal were to make an order in relation to the place in which a forensic patient should be detained, or the type of leave to which the person should have access, it would be expected that the relevant agencies should comply with that order.

5.75 In practice, there may be circumstances where it is not possible to comply with these orders, for example where there are insufficient places available in the hospital nominated in a particular order. However, the Review is aware of several cases of non-compliance with court or executive orders that cannot be justified on such grounds. These include the unauthorised transfer of forensic patients from, or failure to transfer to, the facility specified in a particular order; or

the unauthorised segregation of a forensic patient in isolation for long periods for administrative purposes. This can have significant implications for the forensic patient in question—who may be denied access to appropriate treatment, care or other facilities—and undermines the operation of the forensic mental health framework more generally.

5.76 The Consultation Paper noted that one option for ensuring compliance with the determining body's orders is to provide it with a legislative power to order compliance. Most of the submissions supported this option, but several raised practical concerns regarding ways to enforce such compliance. One submission suggested giving an agency a specified period within which to comply with an order (eg a court placement order) or risk a financial penalty. Other submissions suggested requiring agencies that are unable to comply with an order to report back to the determining body within a specified period to explain the non-compliance. By contrast, a few submissions supported retaining the current framework on the basis that non-compliance may result from limited resources and capacity, and any powers to order compliance could interfere with operational security concerns (eg within correctional centres).

5.77 The Review considers that the legal enforceability of orders in relation to the detention, care, treatment and release of forensic patients is fundamental to the effective operation of the forensic mental health system. If a court or determining body (whether it is the executive, the Tribunal or some other body) makes a particular order it has a reasonable expectation that it will be implemented. If agencies responsible for the detention, care and treatment of patients are able to determine—at their own discretion—whether or not they will comply with an order, this would undermine the integrity and consistency of the framework, as well as the rule of law, and would infringe the human rights of those detained within it.

5.78 Accordingly, the Review strongly recommends the following compliance framework for Tribunal orders in relation to the detention, care, treatment and release of forensic patients. If any public sector agency or official is not able to comply with a Tribunal order within one month of it being made (or the date specified in the order), the agency must forward a written report to the President of the Tribunal providing reasons for such non-compliance. If the President is satisfied that the non-compliance was not justified in the circumstances, he or she may report the matter to the

Supreme Court; and the Supreme Court may deal with the matter as if it were a contempt of the Court, subject to a defence of reasonable excuse (see s 131 of the *Administrative Decisions Tribunal Act 1997* (NSW)).

5.79 The issue of patient compliance with the conditions placed on leave or release orders is discussed in more detail in chapter 8.

Recommendation 12

Replace the present system of executive decision-making in relation to forensic patients with a legislative framework in which a special Forensic Division of the Mental Health Review Tribunal is responsible for decision-making in relation to the detention, care, treatment, leave and release of forensic and transferee patients.

Recommendation 13

Amend the legislation to:

- Establish a Forensic Division of the Mental Health Review Tribunal to conduct reviews and make decisions in relation to forensic and transferee patients and provide that the President should have power to make Rules and give practical direction for the conduct of its business.
- Provide that a Panel of the Forensic Division will be constituted by three members, being a:
  - legal member (being the President or a Deputy President and who in the case of any hearing involving the possibility of a forensic patient's release is a current or former judge);
  - current practising psychiatrist (for patients with a mental illness) or a current practising psychologist or other relevant expert (for patients with an intellectual disability); and
  - member with qualifications or experience in the mental health or intellectual disability field (as appropriate).
- Require the Forensic Division to give notice of each forensic hearing to the forensic or transferee patient, his or her treating team and legal

representative, any registered victims or family members who may wish to make submissions, and (for hearings involving the possibility of release) the Attorney General and Minister for Health. The relevant notice periods should be 14 days for release hearings, and 7 days for any other hearings, subject to exceptional circumstances, and the form of notice should be prescribed in the regulations.

- Require the Forensic Division to consider specified reports and other information when reviewing a patient, and give it the power to order the making and production of these reports and the supply of other information (may be set out in Practice Directions or regulations).
- Require the Forensic Division to give written reasons for all decisions involving the question of release, and for other decisions upon request by any person with a direct interest in the proceedings.

Recommendation 14

Amend the legislation to give the Minister for Health and Attorney General the right to make submissions at any hearing relating to the possible release of a forensic or transferee patient.

Recommendation 15

Amend the legislation to provide for provide the following appeals framework in relation to Tribunal determinations:

- All decisions other than those involving conditional or unconditional release should be subject to appeal to a single judge of the Common Law Division of the NSW Supreme Court, while release decisions should be subject to appeal to the Court of Appeal.
- Appeals should be heard by way of rehearing for error of law or fact, determined on the evidence used in the Tribunal together with any additional evidence the Court thinks fit to receive. It should also be open to the Court hearing the appeal to have the benefit of assessors if it considers it appropriate generally, or in the particular case.
- Given the public interest involved in such decisions, the Minister for

Health and Attorney General should have the right to make submissions at any hearing dealing with the possible grant of conditional or unconditional release, and a right of appeal in relation to such decisions on the grounds of error of law or fact.

Recommendation 16

Amend the legislation to provide that:

- If any public sector agency or official is not able to comply with a Tribunal order in relation to the detention, care, treatment and release of a forensic or transferee patient within one month of it being made (or the date specified in the order), the agency must forward a written report to the President of the Tribunal providing reasons for such non-compliance;
- If the President is satisfied that the non-compliance was not justified in the circumstances, he or she may report the matter to the Supreme Court; and
- the Supreme Court may deal with the matter as if it were a contempt of the Court, subject to a defence of reasonable excuse.

6. The Fitness and Special Verdict Frameworks

Introduction

6.1 The Consultation Paper noted that issues regarding the management and release of forensic patients give rise to a most significant question, being the adequacy of the provisions for the court framework for dealing with questions of an accused's fitness to be tried, and the length of time for which a person may be detained or supervised as a forensic patient under these provisions.

Fitness: The Current Law

6.2 Part 2 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) ('MHCP Act') outlines the procedure for determining questions of fitness to be tried for criminal proceedings in the District and Supreme Courts. If any party, or the court, raises the question of a person's unfitness, and it appears that the question has been raised in good faith, the court must conduct an inquiry into the matter.[99] The question is to be determined by the judge alone, on the balance of probabilities.[100] If the court finds that the person is unfit, it must refer the matter to the Mental Health Review Tribunal ('Tribunal') to determine (on the balance of probabilities) whether the person will become fit to be tried within 12 months.[101]

6.3 If the Tribunal considers that the person will become fit within 12 months, it must also determine whether or not the person is suffering from a mental illness, or a mental condition for which treatment is available in a hospital and whether the person objects to being detained in one.[102] The person is then referred back to the court, which may order that the person be taken to and detained in a hospital,[103] detained in another place,[104] or released on bail— for a period of up to 12 months.[105]

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99 *Mental Health (Criminal Procedure) Act 1990* (NSW) ('MHCP Act') ss 5, 10(2).
100 MHCP Act ss 6, 11.
101 MHCP Act ss 14, 16(1).
102 MHCP Act s 16.
103 Where the person is suffering from a mental illness, or a mental condition for which treatment is available and he or she does not object to hospital detention.
104 Where the person does not have a mental illness or condition, or has a mental condition but objects to being detained in a hospital.
105 MHCP Act s 17.

6.4 If, on the other hand, the Tribunal considers that the person will not become fit within 12 months, and the DPP intends to take further proceedings in relation to the offence, the court holds a 'special hearing' to determine whether it can be proved that, on the limited evidence available, the person committed the offence (or another offence available as an alternative to the one charged).[106]

6.5 Special hearings are heard by a judge alone, unless an election is made for a jury.[107] Except as outlined in the MHCP Act, a special hearing must be conducted as nearly as possible as if it were a criminal trial. The verdicts available in a special hearing include: not guilty; not guilty on the ground of mental illness; or that, on the limited evidence available, the accused committed the offence charged (or an offence available as an alternative to the offence charged).[108]

6.6 If the accused is found, on the limited evidence available, to have committed an offence, the court must indicate whether it would have imposed a sentence of imprisonment if the person had been convicted in a normal trial. If so, the court must nominate a term (known as a 'limiting term'), being the best estimate of the sentence that it would have ordered if the special hearing had been a normal trial.[109] Alternatively, if the court would not have imposed a sentence of imprisonment, it may impose any other penalty or make any order that it could have made if the person had been convicted of the offence.[110]

6.7 If the court nominates a limiting term, the person is referred back to the Tribunal for a determination as to whether he or she is suffering from a mental illness, or a mental condition for which treatment is available in a hospital (and whether or not the person objects to being detained in one).[111] The person is then referred back to the court, which may order that the person be taken to and detained in a hospital, or another place.[112]

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106 MHCP Act ss 16(4), 19(1)-(2).
107 MHCP Act s 21A.
108 MHCP Act ss 21(1), 22.
109 MHCP Act s 23(1).
110 MHCP Act s 23(2).
111 MHCP Act s 24.
112 MHCP Act s 27.

6.8 The former Minister for Health, the Hon Laurie Brereton MP, outlined the policy behind the framework for special hearings and limiting terms in his Second Reading Speech for the Crimes (Mental Disorder) Amendment Bill 1982 (NSW):

> At present, if an accused person is found unfit to plead, the trial judge, in virtually all cases, will order that the accused be kept in strict custody in such place and manner as the judge thinks fit. This means detention in a mental hospital or prison. The major weakness in the present system is that a person may be detained indefinitely without having had an opportunity to present a defence case. In particular, if a person is mentally retarded, he or she may never become fit in the future so as to come before a court for trial. He or she may never get out, in effect. ...
>
> Under the proposed procedure when it is found that a person will not become fit during the next twelve months a special inquiry must be held … to determine whether the person committed the offence or whether the person is not guilty of the offence. This will allow the mentally retarded accused person his day in court and at least the opportunity to have the charges against him dismissed ... where he is found to have committed the offence alleged, the court must state the sentence or disposition it would have considered appropriate had the special inquiry been a normal criminal trial and the person been found guilty. It is intended by this provision that a person should not be detained for an offence because of his unfitness for any period in excess of that which he would have been detained had he been of sound mind and found guilty of a similar offence.[113]

The Fitness Framework

6.9 The Consultation Paper noted that the 'fitness to be tried' provisions of the MHCP Act represent a significant improvement on the previous framework (which at times resulted in indeterminate detention more often than is presently the case) but that certain problems have arisen in practice. For example, the framework can involve significant duplication and administrative delays, as the matter is moved back and forth between the court and Tribunal, both of which must conduct hearings and make determinations as to the person's fitness. This can cause inconvenience and distress to the people involved in the proceedings (in particular, the accused, the victim, and the accused's carers and family), which can also impact on the person's condition. The framework is considered particularly inappropriate for an accused whose unfitness results from an intellectual disability, where there may be little or no prospect of any significant improvement over time.

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[113] The Hon L Brereton MP, *Second Reading Speech for the Crimes (Mental Disorder) Amendment Bill 1982* (NSW), *Legislative Assembly Hansard*, 24 November 1982, 3005-3007. The Bill was reintroduced into Parliament and passed in 1983.

6.10 The Consultation Paper outlined various options for reform in relation to these matters, including consolidating the fitness determination process so that a court or the Tribunal would be responsible for making all determinations, including the accused's fitness to be tried, holding special hearings, imposing limiting terms, and determining the person's place of detention (where relevant). The submissions generally supported either the court or the Tribunal making all these determinations, on the basis that this would expedite the process and reduce unnecessary duplication. However, they did not indicate clear support for one body over the other.

6.11 Those who supported the courts taking on this role noted that the existing court procedures for fitness hearings work well, and have been improved by the provision for a judge alone hearing of the issue. In addition, the DPP outlined several reasons why the courts should retain their role in conducting special hearings, including to maintain confidence in the system for victims and the community regarding the seriousness of the offence; courts have the facilities for witnesses, lawyers and juries (if requested) to conduct the special hearings; as fitness could arise during the course of a trial, it is administratively more convenient of the matter to continue in the same jurisdiction; and establishing a separate jurisdiction would have significant resource implications for the DPP.

6.12 Those who supported the Tribunal taking on this role noted its special expertise in the area of mental health and the protection of the community, which means that it would be best placed to understand the nature of a person's condition and the suitability of various care, treatment, support and rehabilitation options, and to consider those factors in reaching its determination. They also noted that this would be consistent with the general principle that people with mental illnesses should be treated outside the criminal justice system; and that the Tribunal it may be able to provide a more accessible and non-legalistic process, which would be better suited for a person with a disability.

Power to Order an Examination

6.13 The Consultation Paper noted that neither the court nor the Tribunal appears to have a clear statutory power to order the conduct of a medical or other assessment of a person for the purpose of determining his or her fitness, or to require the production of evidence on which to base such a determination. Therefore, if an assessment is not conducted, or the information is not otherwise put before the court or Tribunal, the determination may not reflect the person's actual fitness to be tried for the offence.

6.14 The Paper noted that one option would be to provide a statutory power for the body making a determination as to fitness to order that an assessment be conducted, and that an expert report be made available to assist with its determination. Most of the submissions supported this option, but several submissions suggested the need for further consultation on the issue.

Limiting Terms

6.15 The imposition of a limiting term appears to serve several purposes, including providing a greater degree of certainty as to the maximum period for which a person may be detained; and ensuring that a person is not detained for a longer period than would have been the case if convicted at a normal criminal trial. The provision for release prior to the end of the limiting term reflects the fact that the person is not subject to a legal finding of guilt, and that the primary reason for detention is for community protection.

6.16 The framework for imposing a limiting term is based on the principle that a person who is subject to a qualified finding of guilt should not be subject to detention for a period longer than would have been the case if he or she had been convicted of the offence. However, while a sentence of imprisonment would usually nominate a minimum and maximum term (the former being the non-parole period, after which the offender may be eligible for release), the limiting term represents the *total* sentence that would have been imposed if the

person had been convicted.[114] In addition, while the ordinary principles of sentencing apply to limiting terms, it has been held that there should be no presumption as to mitigating factors (eg, that, if fit, the accused would have pleaded guilty), and the court should only consider the subjective factors that existed at any time after the offence was committed and before sentence.[115]

6.17 As a result, a forensic patient will usually be detained for a longer period than a convicted offender and rarely will be released by the Minister much before the expiry of the limiting term. In practice, it appears that many forensic patients are not in fact released prior to the expiry of their limiting term. There appear to be several reasons for this, including:

- Where forensic patients are detained in a correctional centre (for example, because they have an intellectual disability, rather than a mental illness) or in the Long Bay Prison Hospital, they are subject to the system of security classifications operating within the NSW correctional context. These security classifications can, in practice, prevent a forensic patient becoming eligible for leave (and thus progressing towards conditional release) until a significant part of the limiting term has been served.

- Where there is a lack of available support services for a forensic patient within the community, it may not be considered appropriate for the Tribunal to recommend, or the executive to order, the person's release.

- While the Tribunal may recommend a forensic patient's release, the executive may decide against making such an order.

6.18 The Consultation Paper outlined a range of options to improve the framework for setting limiting terms, including providing that a limiting term represents the minimum sentence the court would have imposed if the person had been convicted of the offence; providing a presumption that the accused would have pleaded guilty if he or she had been fit to be tried, and requiring that a discount be given accordingly; providing that a limiting term represents the average term

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[114] See MHCP Act s 23(1); see also *R v Mitchell* (1999) 108 *A Crim R* 85.

[115] *R v Mitchell* (1999) 108 *A Crim R* 85.

of imprisonment for which a person convicted of the offence would be liable; and specifying the limiting term in legislation.

6.19 The submissions indicated general support for reforming the system to reduce the period for which a person may be detained on a limiting term, but there was little consensus as to which option would be the most desirable.

Alternative Orders

6.20 The Consultation Paper noted the lack of any statutory guidance as to the types of non-custodial orders available to the court where a special hearing results in a qualified finding of guilt. In these cases, the MHCP Act provides that the court must indicate whether it would have imposed a sentence of imprisonment if the person had been convicted of the offence at a normal criminal trial. If it would not have done so, the court may impose any other penalty or make any other order that it might have made if the person had been convicted of the offence.[116]

6.21 By contrast, Tasmania's forensic mental health legislation outlines specific sentencing alternatives where a person has been found not guilty due to mental illness, or where a finding cannot be made that he or she is not guilty of an offence. In these cases, the court may make a 'restriction order' (requiring the person to be admitted to and detained in a secure mental health unit); a 'supervision order' (releasing the person under the supervision of the Chief Forensic Psychiatrist on the conditions the court considers appropriate); a 'continuing care order' (detaining the defendant as an involuntary patient in a specified hospital for a specified period of up to six months); release the defendant and make a community treatment order (for a specified period of up to 12 months); release the defendant on such conditions as the court considers appropriate; or release the defendant unconditionally.[117]

6.22 The Consultation Paper suggested the option of providing a non-exhaustive statutory list of sentencing alternatives that are available in response to a qualified finding that the person committed an offence. The submissions generally supported this option.

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[116] MHCP Act s 23(2). See also *Smith v R* [2007] NSWCCA 39.

[117] *Criminal Justice (Mental Impairment) Act 1999* (Tas) ss 18, 24, 29A, 31B, 31C.

Special Verdicts: The Current Law

6.23 The MHCP Act provides for a 'special verdict' of not guilty by reason of mental illness where it appears that the person committed the offence but was mentally ill at the relevant time.[118] The Act does not define the defence of mental illness, but instead relies on the common law definition, which is based on *M'Naghten's case*:

> To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.[119]

6.24 A special verdict may be returned at trial, or at a special hearing. Once a person becomes subject to a special verdict, the court may order that he or she be detained in any place or manner it thinks fit until released by due process of law, or it may make any other order it considers appropriate. However, the court may not order the person's release unless it is satisfied, on the balance of probabilities, that the person's safety, or that of any member of the public, will not be seriously endangered.[120]

6.25 The Tribunal generally must review the person's case as soon as practicable after the order is made, and must make a recommendation to the Minister for Health as to the person's detention, care or treatment; the person's release (if satisfied that the person's safety, or that of any member of the public, will not be seriously endangered by such release); or the person's transfer to a hospital, prison or other place.[121]

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[118] 'MHCP Act' ss 22, 38. For an overview of the historical development of the defence of insanity, see *R v S* [1979] 2 NSWLR 1 (O'Brien J).

[119] *R v M'Naghten* (1843) 8 ER 718. See the discussion in NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Report 80* (1996), Sydney.

[120] MHCP Act ss 25, 38, 39.

[121] 1990 Act, ss 81, 85(2).

The Mental Illness Defence

6.26 The Consultation Paper noted that a practical concern that arises in relation to the defence of mental illness is the extent to which it applies to an accused with an intellectual disability. While some people with an intellectual disability have received a special verdict of not guilty due to mental illness, the NSW Law Reform Commission has noted the inappropriateness and confusion caused by the defence applying in these circumstances, given that intellectual disability is not an illness in itself. The Commission also commented that:

> [T]here are fundamental problems beyond those of terminology when intellectual disability is treated as a sub-set of mental illness. The channelling of people with an intellectual disability from the criminal justice system into the mental health system (which occurs when the mental illness defence is made out) may not reflect or adequately address their needs in terms of supervision and care. Additionally, the detention consequences of the defence … are more appropriate for people with an impairment which may be temporary and treatable than for people with a permanent disability such as intellectual disability.[122]

6.27 The Commission commented that it would be unjust if a person who does not understand the nature and quality of his or her conduct, or that the conduct was wrong, were convicted of an offence—whatever the nature of the person's impairment. After considering other options, the Commission recommended that the existing defence be retained and renamed the 'defence of mental impairment' (which could include senility, intellectual disability, mental illness, brain damage and severe personality disorder).[123] Alternatively, several Australian jurisdictions have, over time, introduced a statutory defence of 'mental impairment', which is defined to include intellectual disability.[124]

6.28 The Consultation Paper suggested an option of a further inquiry into the need to reform the defence of mental illness to better address intellectual disability. One submission opposed this option on the basis that there is sufficient case law on the issue, and the alternative tests formulated in other jurisdictions do not appear

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122 NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Report 80* (1996), Sydney, 224-225.

123 Ibid, 231-233, Rec 25.

124 See, eg, *Criminal Code Act 1995* (Cth) s 7.3; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 20.

to be significantly easier to apply or to produce significantly different results. By contrast, most of the submissions supported a further inquiry. Several submissions suggested that this is an example of the greater concerns regarding the treatment of people with an intellectual disability within the forensic mental health system, and several suggested the possibility of separating the concepts of mental illness from intellectual disability to better address the particular needs of each category in terms of support, supervision and care.

Indeterminate Detention

6.29 The Consultation Paper outlined concerns regarding the length of detention of forensic patients who are subject to a special verdict of not guilty due to mental illness. Unlike the fitness framework (where limiting terms are imposed), a person who is detained pursuant to this verdict is subject to indeterminate detention. The person only ceases to be a forensic patient if the Governor (acting on the advice of the Executive Council) orders his or her unconditional release, or on the expiry of any conditions of release. It is therefore possible, in practice, that a person could be detained for a period longer than the maximum penalty for the offence of which he or she has been found not responsible at law.

6.30 The NSW Law Reform Commission has previously acknowledged the artificiality of setting a limiting term for a person acquitted of an offence, but concluded that it was a pragmatic alternative to indeterminate detention. The Commission considered that the advantages of a limiting term were that the person would no longer serve more than the maximum penalty for the offence; the length of the limiting term given could be appealed in the same way as a normal sentence; and it might encourage more use of the defence of mental illness in appropriate cases. However, it also noted potential disadvantages, including the difficulty in setting a limiting term; the fact that the imposition of any sentence is inconsistent with the person's acquittal; and the possibility that the person might be automatically released at the end of the limiting term (despite constituting a risk to the community or him or herself).[125]

[125] NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Report 80* (1996), Sydney, 233-237, Rec 26.

6.31 The Consultation Paper outlined several options for reform in this area, including setting a statutory period of detention (for example, three years), and providing that the person *must* be released at the end of this period unless the release criteria have not been met (and if not released, a maximum period of detention could nonetheless apply); or setting a limiting period in relation to a person found not guilty due to mental illness. The Paper noted that, while imposing a limiting term raises obvious concerns of principle, notably that it provides for the detention in gaol of a person not convicted nor sentenced for an offence where neither public safety nor clinical consideration might support such a course, it provides a pragmatic solution to the problem of indefinite detention. It also noted that several other Australian jurisdictions impose limiting terms in these circumstances.[126]

6.32 Most of the submissions supported reforming the system of indeterminate detention, but there was no clear support for any one option. One submission supported a presumption for release after a specified period (as the best balance of a range of competing objectives in relation to community safety and the protection of forensic patients' rights), and a power to order that specified programs and other interventions be implemented by named entities and that their compliance with these orders be reviewed. Another submission emphasised the need to focus on the human rights of people with mental illness, which requires a recovery model that is removed from notions of detention and punishment. Several other submissions supported the imposition of a limiting term as the most pragmatic solution.

Alternative Orders

6.33 The Consultation Paper also noted that, as a special verdict represents a finding of *not guilty*, and the purpose of detaining a person is for the purpose of public safety and treatment (rather than punishment), it does not seem appropriate in principle to apply the sentencing options available under the *Crimes (Sentencing Procedure) Act 1999* (NSW) to this category of person. However, as with the

[126] See, eg, *Criminal Law Consolidation Act 1935* (SA); *Criminal Code Act* (NT); *Mental Health (Treatment and Care) Act 1994* (ACT).

unfit accused, the Paper noted that it may be desirable to provide an indicative list of orders that may be available to the court where a person is subject to a special verdict of not guilty due to mental illness. Such a list could guide the court as the types of orders that may be appropriate to the circumstance of the particular person to assist in managing or improving his or her medical condition.

6.34 The Paper suggested that a non-exhaustive list of alternative orders could be inserted into the legislation to provide guidance for the court where a person is subject to a special verdict. As with the fitness framework, most of the submissions supported this option.

Discussion

6.35 Many of the issues raised in relation to the fitness and special verdict frameworks have already been the subject of detailed consideration by the NSW Law Reform Commission in its report, *People with an Intellectual Disability and the Criminal Justice System* (1996). As a number of the Commission's recommendations have yet to be implemented, the Review highlighted several particular issues and concerns with the frameworks in its Consultation Paper and suggested some options for reform.

6.36 Since the Consultation Paper was released, the Law Reform Commission has commenced an inquiry into the of the sentencing of persons with a cognitive or mental health impairment (which includes a review of limiting terms and sentencing options in relation to special verdicts), and a review of the diversionary provisions operating in the local courts. The Review understands that the Commission has also asked the Attorney General for a reference to conduct a more comprehensive inquiry into the criminal law and procedure applying to people with cognitive and mental health impairments, with particular regard to the diversionary provisions under the MHCP Act (ie, ss 32 and 33), fitness to be tried, the defence of mental illness, and sentencing.

6.37 If the Commission's broader inquiry proceeds, the Review considers that it may be more appropriate for the issues raised in this chapter to be incorporated into that inquiry. Given that the forensic mental health system is grounded on the

fitness and special verdict frameworks, but that these matters are determined by the Justice system and Courts and the modification of that system involves important questions of principle wider in their effect that the matters with which the Terms of Reference deal. These matters would benefit from more detailed consideration than is possible within the timeframe allowed for this review. In the meantime, the Review provides the following indication of the types of recommendations it considers may be appropriate if the Tribunal becomes the determining body for forensic patients, and suggests that they be considered by the Commission when conducting its broader inquiry.

6.38 The Review considers that only one body, being the court or Tribunal, should determine questions of fitness to be tried. Under this proposal, either the court could hold an inquiry into fitness and then refer the person to the Tribunal, or the court could refer the person once a question as to fitness has been raised in good faith. The Tribunal could then make a determination as to the accused's fitness to be tried.

6.39 If the accused is fit, the Tribunal could refer him or her back to the court to continue the proceedings. Given that the accused's condition may change, or the court may still hold concerns regarding the accused's fitness, it may be necessary for the court to have the power to conduct its own inquiry if it considers that the Tribunal's decision is manifestly incorrect.

6.40 If the Tribunal finds that the accused is unfit to be tried, one option would be to retain the existing framework in which a court conducts a special hearing. Another option would be that the Tribunal conduct a hearing to determine whether the accused committed the acts that form the basis of the offence. Such a hearing could be conducted on a more informal basis than a special hearing, to provide a forum for establishing the facts rather than determining (even on a qualified basis) guilt or innocence. Alternatively, it may be that due to the seriousness of any allegation of criminal conduct, and the potential consequences of a finding that (on the limited evidence available) the person committed the act, the hearing should continue to be conducted as nearly as possible as if it were a criminal trial. In either case, such hearings could be presided over by a panel of the Forensic Division of the Tribunal whose legal member is a current or former judge.

6.41 If the court or Tribunal conducts the hearing and determines that the accused did not commit an offence, it should have the power to release the person unconditionally, or refer him or her for an examination within the civil mental health system (if further treatment is required). If, on the other hand, the Tribunal finds that the accused committed the offence, it should determine whether to release the person unconditionally, impose a limiting term, or impose any other orders that may be considered appropriate in this context (for example, as have been developed in other Australian jurisdictions). The legislation could provide guidance to the Tribunal in relation to non-custodial options.

6.42 The framework for setting limiting terms should be reformed to ensure that forensic patients are not detained beyond the period they would have served if convicted of the relevant offence. At this stage, the Review favours setting a limiting term that equates to the minimum term that would otherwise have been imposed or that is the equivalent of the average minimum term for the particular offence (eg based on statistical information), with a discretion to take into account any aggravating, mitigating or other factors, as well as a (rebuttable) presumption that the person would have entered a guilty plea if he or she had been fit to do so. While there may be cases where the accused might not in fact have entered such a plea if fit, the Review considers that forensic patients should not be disadvantaged due to their inability to do so.

6.43 If, prior to the expiry of the limiting term, the Tribunal considers that the person can be treated or supervised safely and effectively in the community, it should have the power to order the person's conditional or unconditional release in accordance with the procedures outlined in chapter 8 (including conditional release into the civil mental health system for appropriate treatment).

6.44 The Review considers that the defence of not guilty due to mental illness, and the implications flowing from such a special verdict, should be the subject of further review. In the meantime, the Review would support the adoption of a similar framework to that outlined above in relation to this category of forensic patient. In particular, following a verdict the court or Tribunal could determine whether to release the person unconditionally, or impose a limiting term or other appropriate order, and the legislation could provide guidance regarding the non-

custodial orders available in these circumstances.

Recommendation 17

In the inquiries it is already undertaking or in a further reference in addition to the review recommended in Recommendation 7 the NSW Law Reform Commission should conduct a comprehensive inquiry into the criminal law and procedure applying to people with cognitive and mental health impairments. This inquiry should cover the matters outlined in Chapter 6 of this report, and should give consideration to the indicative reform recommendations contained in it.

7. Review of Forensic Patients

Introduction

7.1 The Terms of Reference ask the Review to consider the appropriate structure for the review process. If the Mental Health Review Tribunal ('Tribunal') is given responsibility for decision-making in relation to forensic patients, the review hearing will play a more formal role in providing the structure for such decisions to be made.

The Current Law

7.2 The *Mental Health Act 1990* (NSW) ('1990 Act') provides for the Tribunal to conduct initial reviews of a forensic patient, and then ongoing periodic reviews. The Tribunal must review a person's case as soon as practicable after the person is: (a) ordered to be detained or released on bail after a finding that he or she is unfit to be tried, or after the imposition of a limiting term; (b) ordered to be to detained (or conditionally released) after being found not guilty due to mental illness; or (c) transferred from a correctional centre to a hospital for treatment for a mental illness or mental condition.[127] The Tribunal must also review the case of each forensic patient at least once every six months, and when requested by certain officials.[128]

7.3 After each review, the Tribunal must make a recommendation to the Minister for Health as to the patient's continued detention, care or treatment in a hospital, prison or other place; the fitness of the patient to be tried for an offence (where relevant);[129] or the patient's release (either with or without conditions).[130] Generally, the Tribunal's recommendation could stipulate where the patient is to be detained, under what kind of security, the range and kinds of leave privileges

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127 *Mental Health Act 1990* (NSW) ('1990 Act') ss 80, 81, 86.

128 1990 Act s 82. That is, the Minister for Health, the Attorney General, the Minister for Corrective Services, the Chief Health Officer or a medical superintendent.

129 The Tribunal must also notify the court and the DPP if it considers that a forensic patient has become fit to be tried, or has not become fit and will not do so within 12 months after the initial finding of unfitness: 1990 Act s 82(3)-(3A).

130 1990 Act s 82(1), but see s 82(5) of the Act.

(if any) that may be permitted, and the range and kinds of conditions that may apply in relation to a conditional release to allow the patient to remain within the community. However, only the prescribed authority, being the Minister for Health or Governor (acting on the advice of the Executive Council), may make orders as to these matters.

7.4 The review provisions of the *Mental Health Act 2007* (NSW) ('2007 Act') are substantially similar to these provisions, but are presented in a more consolidated form.

Notifying the Tribunal

7.5 Whether the Tribunal is making recommendations to the prescribed authority concerning a forensic patient's care, detention or treatment or deciding such things itself. Given that the Tribunal has either responsibility it should be reviewing that person's case as soon as practicable after the person becomes a forensic patient. So it is important that the Tribunal be notified immediately when it acquires jurisdiction over a person.

7.6 The forensic mental health legislation contains several provisions that seek to ensure that such notification is made, by requiring that:

- the court must refer a person to the Tribunal after finding that he or she is unfit to be tried for an offence, and after nominating a limiting term;[131]

- The registrar of the court must notify the Tribunal of the terms of any order made after a special verdict that a person is not guilty due to mental illness;[132] and

- The Chief Health Officer must notify the Tribunal in writing of any order made to transfer a prisoner to hospital for mental health treatment.[133]

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131 *Mental Health (Criminal Procedure) Act 1990* (NSW) ('MHCP Act') ss 14, 17 and 24(1).

132 MHCP Act s 39(3).

133 1990 Act ss 97(2), 98(2). The provision in the 2007 Act is substantially similar, but transfers this role to the Director-General of NSW Health: 2007 Act, Sch 7.

7.7 If the safeguard of Tribunal review is to operate effectively, it is essential that the Tribunal be notified when it acquires jurisdiction over a person and of any change in that person's circumstances. While duties to notify the Tribunal of these events exist, there can be practical delays in doing so. For example, a recent coronial inquest found that there had been a two-month delay in notifying the Tribunal that a man detained in a correctional centre had become a forensic patient by virtue of a special verdict. The Deputy State Coroner recommended that a protocol be developed between the referring courts and the Tribunal to ensure that notifications of such court decisions occurs at the earliest possible time and, at the outside, within seven days.[134]

7.8 The Consultation Paper noted that the courts already appear to have a protocol in place for notifying the Tribunal of these matters, but that it may be desirable to establish a comprehensive framework for such notification. It suggested an option in which the Attorney General, Ministers for Health and Justice, and the Tribunal develop a protocol to ensure that the Tribunal is notified that it has acquired jurisdiction over a forensic patient within a specified period. The submissions supported this proposal, and several submissions expressed support for the seven-day maximum notification period. The Department of Corrective Services noted that its Sentence Administration Unit has protocols for advising the Tribunal and Justice Health of such court orders, but supported the option nonetheless.

7.9 Given the potentially serious consequences of failing to notify the Tribunal that it has gained jurisdiction over a forensic patient, the Review considers that the existing administrative arrangements should be replaced by a formal protocol between the relevant Ministers that provides a framework for such notifications to take place within seven days of that event occurring.

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[134] Magistrate D Pinch, Deputy State Coroner, *Inquest into the Death of Scott Ashley Simpson,* 17 July 2006.

Recommendation 18

The Attorney General, Minister for Health, Minister for Justice and the Tribunal should develop a formal protocol for the Tribunal to be notified that it has acquired jurisdiction over a forensic patient or transferee patient within seven days of that event occurring.

Timing of Reviews

7.10 The Consultation Paper noted that the conduct of six monthly reviews can be resource intensive particularly for the treating team and may not always be necessary or useful for the particular forensic patient whose case is being reviewed (eg where a forensic patient's condition has little prospect of change in the short-term). It also noted that several Australian jurisdictions provide for annual reviews, while others provide that they be conducted on a six monthly basis.

7.11 The Paper suggested several options in this area, including:

- retaining the current provisions for reviews at least once every six months, and when requested by certain officials;

- providing for annual reviews (but giving the Tribunal the discretion to conduct a review at any time, and a duty to do so if requested by the forensic patient—or his or her representative—on reasonable grounds, or by various Ministers or health officials); and that the Tribunal must monitor the detention, care and treatment of each forensic patient on an ongoing basis; or

- adopting the latter option but providing that the Tribunal must obtain and consider reports from the forensic patient's treating team on a six monthly basis.

7.12 The majority of submissions supported retention of the current framework for reviews. Generally, they considered that six monthly review provide an important safeguard for forensic patients by ensuring that the 'least restrictive alternative' principle is given effect, and by providing the opportunity for an independent body to scrutinise the conditions of custody and care of forensic patients and respond when a person's condition has changed. However, some of these

submissions supported providing greater flexibility within the current framework, for example where the patient (or his or her representative) asks that a review be brought forward, or that a review be delayed because there has been no change, or where more time is needed to prepare an application.

7.13 On the other hand, several submissions supported the final option. However, one organisation suggested that this option could have resource implications as it could result in an increase in workload for the forensic patient's treating team.

7.14 The Review recognises the important safeguard that is provided by the conduct of a regular review, by an independent body, of the detention, care and treatment of each forensic patient particularly in the context of the Tribunal having power to review as often as and whenever needed. These reviews allow the Tribunal to monitor any changes in the patient's condition; consider whether the current arrangements for detention, care and treatment remain appropriate; and monitor the implementation of any orders arising from previous reviews. They also provide a level of transparency and accountability to the system by ensuring that the care, detention and treatment of a forensic patient is subject to ongoing external review and scrutiny, and by providing a patient with an opportunity to raise any concerns with an independent body. Accordingly, the reviews help to ensure that the rights and interests of forensic patients are protected, that their care and treatment remains appropriate, and that patients may be progressed towards release back into the community, when appropriate.

7.15 The Review notes the strong support expressed in submissions for retaining the existing framework in which reviews must be conducted at least every six months. On this basis, and given the important safeguard provided by regular review, it has decided against adopting annual reviews as a general course. However, the Review also recognises that there may be particular circumstances where flexibility may be desirable, for example where there is evidence that the review would be distressing or anti-therapeutic for a particular patient, or a patient requests further time to prepare for a particular review.

7.16 Accordingly, the Review recommends that the Forensic Division of the Tribunal be required to review the case of each forensic and transferee patient at least

once every six months but may, on a case by case basis, extend the period for a specific review to a maximum of 12 months from the conduct of the last review.

7.17 The Forensic Division would only be permitted to extend the period where the patient has made a written request for an extension and a panel of the Forensic Division is satisfied that there are reasonable grounds for granting the extension; or in the following circumstances: (a) a panel of the Forensic Division of the Tribunal is satisfied on reasonable grounds that: there has been no substantial change in the patient's condition; there is no reasonable basis for changing the patient's conditions of detention, care and treatment; and to hold a review at that time would be likely to be anti-therapeutic for the patient; (b) the patient (and his or her legal representative) has been given a reasonable opportunity to make submissions in relation to the proposed extension; and (c) the panel has considered any submissions made.

7.18 Obviously, these are very stringent requirements and it is not expected that there will be many cases in which they will apply. In addition, as with other Tribunal decisions, this decision would be subject to appeal.

Recommendation 19

Amend the legislation to provide that:

- The Forensic Division of the Tribunal must review the case of each forensic patient and transferee patient at least once every six months but may, on a case by case basis, extend the period for a specific review to a maximum of 12 months from the conduct of the last review. The Forensic Division may only do so where:
  - The patient has made a written request for an extension and a panel of the Forensic Division is satisfied that there are reasonable grounds for granting the extension; or
  - A panel of the Forensic Division is satisfied on reasonable grounds that: (i) there has been no substantial change in the patient's condition; (ii) there is no reasonable basis for changing the patient's conditions of detention, care and treatment; and (iii) to hold a review at that time

would be anti-therapeutic for the patient; and the patient (and legal representative) has been given a reasonable opportunity to make submissions in relation to its proposed extension, and the panel has considered any submissions made; and

- The Forensic Division's decision is subject to the same avenue of appeal as exist in relation to other decisions.

Informal Reviews

7.19 Under the 1990 Act, the Tribunal must conduct a monthly informal review of:

- Each prison inmate who has not been transferred to hospital within 14 days of a transfer order, until the person is transferred or the Tribunal recommends that the transfer not take place;[135] and

- Each transferee patient who has been transferred to hospital, but who is on remand or is awaiting a special hearing, to determine whether the legal proceedings have been delayed, and if so, it may take such action as it considers appropriate.[136]

7.20 The NSW Health discussion paper (2004) noted that the Tribunal had expressed concerns with this requirement on the basis that it is ill equipped to deal with these matters, and has had difficulty accessing information in sufficient time to perform its role meaningfully.[137] On the other hand, these informal reviews can provide a valuable safeguard by affording transparency and accountability to these processes.

7.21 The Paper outlined several options in relation to informal reviews, including retaining the existing provisions; providing the Tribunal with greater powers to address these concerns; and removing the requirement that the Tribunal conduct informal reviews of these matters. While few submissions supported retaining the provisions in their current form, none of the submissions supported

135 1990 Act s 87, *Mental Health Regulation 2000* (NSW) reg 20.

136 1990 Act s 86(2). The 2007 Act contains substantially similar provisions.

137 Review of the Mental Health Act 1990, *Discussion Paper 2: The Mental Health Act 1990* (2004) NSW Government, 32-33.

removing them completely. Most of the submissions supported giving the Tribunal greater powers, generally recognising that such independent oversight provides a useful safeguard, and is particularly useful where delayed transfers result from limited health resources.

7.22 Generally, the Review considers that informal reviews should be retained, but in an amended form. Where a prison inmate has not been transferred to a mental health facility within the specified period, Justice Health and the Department of Corrective Services should be required to provide the Tribunal with monthly written reports as to the patient's health condition and the reasons for the delay. A panel of the Forensic Division of the Tribunal should conduct an informal review on the papers, and may make such orders regarding the detention, care and treatment of the person as it considers appropriate. However, an informal review must be conducted in the patient's presence at least once in every three-month period.

7.23 Given that the Tribunal has no formal role in relation to the progress of legal proceedings, the Review considers that its role in informally reviewing a forensic patient who is on remand or who has been found unfit to be tried (but has not had a special hearing) to determine whether the legal proceedings have been delayed should be extended to three monthly reviews. The role remains of value to enable the Tribunal independently of the Courts to make recommendations or to take steps to ensure timely recognition of delays and to do what it can to ameliorate them.

Recommendation 20

Amend the legislation to provide that, where a prison inmate has not been transferred to a mental health facility within a specified period:

- Justice Health and the Department of Corrective Services must provide the Tribunal with monthly written reports as to the person's condition and the reasons for the delay;
- A panel of the Forensic Division of the Tribunal must conduct a review on the papers, and may make such orders regarding the detention, care and

treatment of the person that are considered appropriate; and

- The Forensic Division must, in any case, conduct a review in the person's presence at least once in every three-month period.

Recommendation 21

Amend the legislation to provide that, where a forensic patient has not had a special hearing, or a transferee patient is on remand, the President (or a nominated member) must informally review the person's case every three months to determine whether the legal proceedings have been delayed, and if so, take such action as it considers appropriate.

8. Release of Forensic Patients

Introduction

8.1 The Terms of Reference ask the Review to consider various issues in relation to the release of forensic patients, including mechanisms for ensuring issues of public safety are properly considered and addressed in reviews of forensic patients.

Overriding Principles

8.2 When considering the legislative provisions for the leave and release of forensic patients, it is necessary to note the context in which they arise. Section 4 of the *Mental Health Act 1990* (NSW) ('1990 Act') applied to civil and forensic patients alike. It provided for best possible effective care and treatment in the lease restrictive environment with minimum interference with rights or restriction on liberty. Section 68 of *the Mental Health Act 2007* is to similar effect.

8.3 Therefore, one of the overriding principles for decisions regarding the leave or release of a forensic patient is whether the person can receive the best possible care and treatment in a less restrictive environment (that still allows the care and treatment to be effectively given), and that any restriction on the person's liberty be kept to the minimum necessary in the circumstances.

8.4 In addition, the 1990 Act makes it clear that, in making any recommendation for the release of a forensic patient, the Mental Health Review Tribunal ('Tribunal') must consider the principle of community protection. The Act provides that the Tribunal may not recommend leave or release unless it is satisfied, on the available evidence, that the safety of the patient or any member of the public will not be seriously endangered by the patient's leave or release.

The Current Law and Practice

8.5 In practice, one of the mechanisms by which the forensic mental health system is able to assess, monitor and progress a forensic patient's capacity to be released back into the community is through the framework of allowing leave. The provision of progressively expanded forms of leave assists the forensic patient to gain the social skills necessary to operate independently within the

community, and assists in establishing a structure for ongoing support that may be provided by friends, relatives or community agencies. At the same time, a program of leave assists the treating team, Tribunal and executive to make realistic assessments as to the person's ability to manage within the community, and the level of risk the person may pose to public safety if released.

8.6 The *Mental Health Act 1990* (NSW) ('1990 Act') provides that:

- The Tribunal may recommend to the Minister that a forensic patient be given a leave of absence from a hospital for such period and subject to such terms and conditions as it thinks fit, if it considers that this will benefit the patient's health; and

- An 'authorised officer' (within NSW Health) may grant a leave of absence on the recommendation of the medical superintendent of a hospital.

8.7 However, such leave cannot be recommended or granted unless satisfied that the safety of the patient or any member of the public will not be seriously endangered by granting leave. The Act also provides for special leave of absence in emergencies.[138]

8.8 Over time, a hierarchy of leave (often referred to incorrectly as) "privileges" has been developed. The Act makes specific provision for care to be provided to forensic patients, and a patient will usually be required to move through each step in the hierarchy before the Executive will order his or her conditional or unconditional release. These stages of leave include:

- Escorted ground leave—this allows staff to evaluate the patient's social skills, behaviour and mental state, and facilitates attendance at hospital-based rehabilitation programs.

[138] 1990 ACT, ss 90-92. The *Mental Health Act 2007* (NSW) ('2007 Act') contains substantially similar provisions, except that it provides for the Director-General of NSW Health to authorise leave from a mental health facility (rather than an 'authorised officer'); In addition, the Act provides that a forensic patient may appeal to the Tribunal against a failure or refusal of the Director-General to grant the patient a leave of absence, in which case the Tribunal may order such leave: Sch 7.

- Escorted outside day leave—this involves leave outside facility under the direct supervision of a staff member.

- Supervised ground leave—this involves ground leave under the supervision of a staff member, or a relative, friend or some other responsible person.

- Supervised outside day leave—this involves leave outside the facility under the supervision of a staff member, or a relative, friend or other responsible person.

- Unsupervised outside day leave—this allows for further assessment of the person's ability to cope in normal settings, and is usually sought prior to the Tribunal considering conditional release.

- Overnight and/or weekend leave—this may be granted on a supervised or unsupervised basis.[139]

- Special leave—this may be granted for educational or other purposes.

8.9 However, the statutory provisions for leave only apply to forensic patients who are detained in a hospital (or mental health facility). Under current NSW arrangements, a forensic patient who is not under conviction may be held in a correctional centre if he or she does not have a mental illness (eg if the person has an intellectual disability), has a mental condition which may be treated within the correctional setting (eg a transitory psychotic episode), or has a mental illness but there are insufficient beds available at that time for transfer to a hospital. In addition, the 1990 Act deems those forensic patients accommodated in the Long Bay Prison Hospital to be detained within a 'correctional centre'.[140]

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[139] See Mental Health Review Tribunal, *Procedural Note 8/2000: Forensic Patients* (updated December 2005).

[140] *Mental Health Act 1990* (NSW) ('1990 Act') s 95(4). The Act provides that a forensic patient detained in a hospital, prison or other place (or on leave etc) is subject to such security conditions as an authorised officer may consider necessary. However, if the forensic patient is detained in any part of the Long Bay Prison Hospital that is a hospital for the purpose of the Act, the patient is to be subject to such security conditions as the Director-General of Corrective Services may consider necessary.

8.10 A forensic patient who is detained in a correctional centre (including the Long Bay Prison Hospital) is treated as an inmate for the purposes of the *Crimes (Administration of Sentences) Act 1999* (NSW). As such, the patient is subject to the prisoner classification system, which determines the patient's level of security, access to development programs and, ultimately, access to leave and release arrangements.[141]

8.11 In practice, where a patient is serving a limiting term, his or her security classification status may not be reduced to a level that would permit access to leave until a substantial part of that term has been 'served'. Alternatively, where a forensic patient is subject to indeterminate detention after a special verdict, the security classification system may preclude his or her access to leave or release indefinitely.[142] Therefore, it is possible that an authorised officer, or the executive, could approve leave arrangements for a forensic patient, but that such an order would not be implemented by the Department of Corrective Services unless the patient has an appropriate prisoner classification.[143] This, in turn, could prevent the person progressing to a point where he or she would be considered eligible for conditional (or unconditional) release.

8.12 Finally, the Tribunal cannot make a recommendation to the Minister for a forensic patient's release unless it is satisfied, on the available evidence, that the safety of the patient or any member of the public will not be seriously endangered by the patient's release.[144] If the Attorney General objects to a patient's release on specified grounds, the person cannot be released. If no objection is made, the Minister or Governor may order the person's release.[145]

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141 See *Crimes (Administration of Sentences) Regulation 2001* (NSW). For a discussion of the NSW prisoner classification system, see Legislative Council General Purpose Standing Committee No 3, Issues relating to the operations and management of the Department of Corrective Services (2006) NSW Parliament, Ch 3.

142 While the *Crimes (Administration of Sentences) Act 1999* (NSW) does not preclude this, the Review understands that the Department of Corrective Services' guidelines require inmates to be within a specified number of months prior to the expiry of their term before consideration can be given to external leave.

143 See, eg, Mental Health Review Tribunal, *Procedural Note 8/2000: Forensic Patients* (updated December 2005).

144 1990 Act, Ch 5, Pt 2.

145 1990 Act, ss 83, 84.

8.13 The Legislative Council Select Committee on Mental Health (2002) noted that NSW is one of only a few jurisdictions in the western world that hospitalises forensic patients within the precincts of a correctional facility, and under the authority of Corrective Services staff.[146] In the report, the Committee's chair, the Hon Dr Brian Pezzutti MLC, commented that:

> I am particularly concerned with the incarceration of forensic patients ... Unfortunately, in NSW there is no secure forensic hospital outside a prison. Consequently, many of those found not guilty or unfit to plead by reason of mental illness are sent to gaol anyway. They are subject to the terms and conditions of Corrective Services and locked in their cell for eleven hours a day. NSW is the only mainland State to incarcerate forensic patients and, as far as the Committee can determine, only one of a few in the Western World. Present and past Governments in NSW have neglected to address this issue, which is a breach of the *United Nations Declaration of Human Rights 1948* and the NSW *Mental Health Act 1990*.[147]

8.14 The Review notes that several independent reviews and inquiries have concluded that the system of detaining forensic patients who are not under conviction in correctional centres is inappropriate, and offends against human rights and criminal justice principles.[148] Most recently, the Commonwealth Senate Select Committee on Mental Health (2006) recommended that 'state and territory governments aim as far as possible for the treatment of all people with mental illness in the justice system to take place in forensic facilities that are physically and operationally separate from prisons'.[149]

8.15 In 2003, the NSW Government announced the development of a new facility for forensic patients, which will be located outside the grounds of the Long Bay Prison complex. The Review understands that the hospital will be funded by NSW Health and managed by Justice Health. It will have 135 beds for forensic patients, and civil patients whose management requires a high level of security. The hospital will accommodate male and female patients and young people. A

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146 See Legislative Council Select Committee on Mental Health, *Inquiry into Mental Health Services in New South Wales* (2002), Sydney, 250.

147 Ibid, xvi.

148 See, eg, NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Report 80* (1996), Sydney; Legislative Council Select Committee on Mental Health, *Inquiry into Mental Health Services in New South Wales* (2002), Sydney; Senate Select Committee on Mental Health, *A National Approach to Mental Health – From Crisis to Community: Final Report* (2006).

149 Senate Select Committee on Mental Health, *A National Approach to Mental Health – From Crisis to Community: Final Report* (2006), Rec 59.

new prison hospital is also being built within the grounds of Long Bay Prison, which will remain under the control of the Department of Corrective Services with health services provided by Justice Health. The hospital will cater for 'aged and infirm inmates with both physical and mental illnesses', and will have 40 beds for mentally ill inmates.[150]

8.16 While the construction of a new forensic hospital outside the corrective services context represents a significant improvement for those forensic patients who will be accommodated within it, the Review understands that forensic patients with intellectual disabilities may remain within the prison system.

The Need for Reform

8.17 The Review has found that forensic patients who have been found unfit or not guilty due to mental illness face substantial difficulties in obtaining approval for conditional or unconditional release back into the community, due to several factors:

- The delays experienced in progressing through the step by step system of leave arrangements, due to resource constraints within correctional centres and mental health facilities; the reluctance to date of authorised officers to exercise their power to grant leave privileges under the 1990 Act; and the operation of the executive discretion (which can lead to significant delays in approving each level of leave that the Tribunal recommends).

- The security classification system operating within correctional centres (where many forensic patients are detained), which can preclude a patient from access to leave arrangements and other programs that would progress the patient toward readiness for release back into the community until close to the expiry of the limiting term.

- The highly risk averse approach taken by executive decision-makers in recent years, which can result in forensic patients remaining in detention even though their clinicians and the Tribunal consider that the safety of the patient or any member of the public would not be seriously endangered by the patient's release.

[150] See *Justice Health website,* www.justicehealth.nsw.gov.au (accessed 5 July 2007).

8.18 As a result, the Review finds that people serving limiting terms can be detained until the expiry of those terms, at which time they may be released into the community without any formal supervision; and people serving indeterminate detention following a special verdict of not guilty due to mental illness are often detained for periods as long as, or longer than, the term they would have served if convicted of the offence. Given that the forensic mental health system justifies the detention of forensic patients primarily on public safety—rather than punitive—grounds, the current system is in need of reform.

Leaves of Absence

8.19 The Consultation Paper outlined several options in relation to leave, including retaining the current framework; amending the legislation to provide that leaves of absence could be granted by the Tribunal and provide criteria for granting such leave; and adopting the second option but also establishing a new security classification category for forensic patients in correctional centres that better facilitates access to leave and release arrangements.

8.20 While only one submission supported retaining the current provisions, several supported giving the Tribunal the power to grant leaves of absence. The majority of submissions, however, supported the final option, which included both the Tribunal granting leaves of absence and the creation of a new security classification category for forensic patients. Several of these submissions also emphasised the need for sufficient resources for agencies to supervise and manage leave.

8.21 The Department of Corrective Services supported the final option on the basis that it would allow forensic patients to progress through the classification system in line with mainstream inmates. However, the Department considered that only a new security designation (rather than a new classification) would be necessary. It also submitted that security responsibilities while a forensic patient is on leave should be clearly set out; and, if the Department is responsible for supervision, it should have the final say on leave and release arrangements.

8.22 Another submission suggested that leaves of absence should not progress one stage at a time as there may be some patients whose condition is so good, and risk

is so low, that it would be appropriate for them to progress more quickly towards release than others. The submission also emphasised the importance of developing a plan for rehabilitation and reintegration of forensic patients serving limiting terms before the expiry of the term to test their capacity to readapt.

The Prison Classification System

8.23 The Review considers that the NSW practice of detaining forensic patients who have been found unfit or not guilty by reason of mental illness in correctional centres, subject to prison rules and regulation, is inappropriate and raises significant concerns of principle regarding the possible violation of human rights. Where detention is necessary, forensic patients should be accommodated in mental health facilities (for those with a mental illness or condition) or other appropriate facilities (for those with an intellectual disability) within the community, which may reflect a range of maximum, medium and minimum security options.

8.24 As the Terms of Reference are limited to reviewing the legislative framework for forensic patients, the Review does not make any recommendation on this matter. However, until all forensic patients have been removed from correctional centres, the Review recommends that those who are detained after a finding of unfitness or a special verdict (ie all forensic patients other than transferee patients) should be removed from the general prisoner classification system, and instead managed pursuant to a protocol that addresses their specific circumstances, facilitates access to treatment and programs, and assists in their progression towards eligibility for release back into the community (where appropriate).

8.25 This protocol should be developed by the Minister for Health (in consultation with the Attorney General, the Minister for Justice and the Tribunal) and be given formal status, for example by insertion into regulations under the *Mental Health (Criminal Procedure) Act 1990* (NSW), to which the forensic mental health provisions are being transferred by the *Mental Health Act 2007* (NSW). The protocol should address matters such as a forensic patient's security status, and access to programs and courses, and leave and release arrangements, while detained in the correctional context. In particular, the protocol should ensure that

there is no impediment to the forensic patient's eligibility for leave, or for release from prison once his or her detention is no longer justified on public safety or treatment grounds.

Leave Arrangements

8.26 The Review considers that there is a need for greater consistency and transparency in decision-making in relation to leave arrangements, as well as a framework to ensure that all forensic patients have the opportunity to gain the skills necessary to re-enter the community, and demonstrate their capacity to do so. The Review notes that there is a public interest in such outcomes, given that all forensic patients will be released into the community at some point, and those in limiting terms generally would not be subject to ongoing supervision if released upon the expiry of that term.

8.27 Accordingly, the Review has concluded that forensic patients should retain access to leaves of absence authorised by NSW Health (for mental health facilities) and the Department of Corrective Services (for correctional centres). However, the Tribunal should also have a statutory power to grant leaves of absence subject to a public safety test, being that the safety of the patient, or any members of the public, will not be seriously endangered by the person's release (see below for more detail). This power should apply to all forensic patients, whether detained in a mental health facility, correctional centre or other place of detention, and compliance with the Tribunal's order should be required unless the public sector agency or official has a reasonable excuse for failure to do so.

Recommendation 22

Forensic patients who are detained in correctional centres should be subject to a new classification system applying in lieu of the prisoner classification system contained in the *Crimes (Administration of*

Sentences) Act 1999 (NSW). The Minister for Health should develop the new classification system in consultation with the Attorney General, the Ministers for Justice and Juvenile Justice, and the Mental Health Review Tribunal.

Recommendation 23

The new classification system should include a protocol that addresses therapeutic and security matters such as a forensic patient's security conditions, and access to programs and courses, and leave and release arrangements, while detained in a correctional centre. In particular, the protocol should ensure that there is no impediment to a forensic patient's eligibility for leave, or for release once his or her detention is no longer justified on public safety grounds, and it should be given formal, enforceable status.

Recommendation 24

Amend the legislation to provide that:

- forensic patients retain access to leaves of absence authorised directly by NSW Health (for mental health facilities), and the Department of Corrective Services (for correctional centres) in accordance with the protocol outlined in Rec 22; and
- The Forensic Division of the Tribunal should also have a statutory power to grant leaves of absence if satisfied, on the available evidence, that neither the safety of the patient nor that of any member of the public will be seriously endangered by the person's release. This power should apply to all forensic patients, whether detained in a mental health facility, correctional centre or other place of detention.

Release Decisions

8.28 Any decision as to whether a forensic patient should be granted leave, or released with or without conditions, involves striking an appropriate balance between at times competing interests. On the one hand, the forensic patient has a human (and statutory) right to receive the best possible effective care and treatment in the least restrictive environment enabling the care and treatment to be effectively given with minimum restriction on their liberty. On the other hand, the community has an important expectation that it will be protected from serious risk to the safety of its members.

8.29 The Consultation Paper noted that several other Australian jurisdictions have developed statutory criteria to guide the decision maker when making determinations as to the leave or release of forensic patients. For example, the Victorian legislation provides that the court must 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'. In addition, the court must have regard to specified matters, including 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, public safety concerns, and whether there are adequate resources available for the treatment and support as the person in the community.[151]

8.30 The Consultation Paper outlined several reform options, including:

- Providing that the determining body must order the leave or release of a forensic patient at any time if it is satisfied, on the available evidence, that the safety of the patient or any members of the public will not be seriously endangered by the patient's leave or release.
- Providing that the determining body must order the leave or release of a forensic patient at any time if it is satisfied, on the available evidence, that: care or treatment of a less restrictive kind (where necessary) is reasonably available to the patient within the community; reasonable arrangements have been made to ensure the person's continued care or treatment (where necessary) within the community; and the safety of the patient, or members of the public, will not be seriously endangered by the person's release.
- Adopting the second option, but also providing that, when making such decisions, the determining body must consider a list of specified criteria.

8.31 Several submissions supported the second option. Generally, they noted that it would have the advantage of greater clarity, transparency and consistency in relation to release decisions, and would provide an appropriate balance without being too prescriptive or overly complex. One submission also suggested that the decision to release a patient should only be made where care and treatment is available in the community. By contrast, several other submissions supported the third option.

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[151] Ibid, ss 39, 40.

8.32 Several submissions made general comments and suggestions in relation to release decisions. These included a suggestion that the public safety test should be expanded to include potential risks to identified members of the public who have either been victims or the focus of the person's delusions, and categories of the public who may have been the focus of delusions; and a suggestion that the test should not be expanded as it would become too difficult to apply; and. The Minister for Police commented that, regardless of the option chosen, the safety of the patient and risk of serious endangerment to a member of the public must be assessed before the patient's release.

8.33 The Review notes the significant importance of community protection in the forensic mental health context, particularly when a person has become a forensic patient by virtue of an act of violence. Generally, the underlying principle for the regime is that a person who is not subject to a formal finding of guilt should only be detained on the grounds of community protection (and treatment in order to stabilise the person's condition) so that he or she does not constitute a serious risk to the public. If a forensic patient does not constitute such a risk, there is no justification for his or her continued detention.

8.34 Obviously, this raises the question of the appropriate test to be applied to ensure adequate community protection. Currently, the Tribunal cannot recommend a person's leave or release unless it is satisfied, on the available evidence, that it will not seriously endanger the safety of the patient or any member of the public. However, there are presently no such statutory criteria for the executive's decision on whether to grant such leave or release.

8.35 An overly conservative approach would result in the continued detention of a person long after the experts consider that he or she constitutes a serious danger to the community. This would be a significant breach of the forensic patient's human rights, and would not accord with the underlying principles of the forensic mental health system. Nor would it be analogous to modern community protection legislation enacted to deal with serious repeat offenders.[152]

[152] See, eg, *Crimes (Serious Sex Offenders) Act 2006* (NSW).

8.36 The Review considers that the best mechanism for protection for the community is to confer decision-making on a multidisciplinary panel (ie, the Tribunal) assisted by the treating team and independent expert risk assessments (both clinical and structured), and the Tribunal's continuous monitoring role exercised through the frequent periodic reviews. In addition, to ensure consistency and transparency in decision-making, the criteria for release decisions should be given a statutory basis.

8.37 The Review has concluded that conditional or unconditional release should be permitted where the decision-maker is satisfied, on the available evidence, that:

- The safety of the patient, or any members of the public, will not be seriously endangered by the person's release;
- Care of a less restrictive kind (where necessary) is appropriate and reasonably available to the patient within the community; and
- Reasonable arrangements have been made to ensure the person's continued care or treatment (where necessary) within the community.

8.38 The Review also considers that the decision-maker should be required to have regard to certain matters when making a decision in relation to release. The Consultation Paper outlined a particular set of such criteria. While generally supported, there was some concern that may be overly prescriptive, and they have been amended accordingly.

8.39 Therefore, the decision-maker should have regard to the:

- nature of the person's condition;
- likelihood of a relapse or deterioration in the person's condition once released into the community and whether serious public safety concerns are likely to arise as a result;
- need to ensure that the person receives the best possible care and treatment in the least restrictive environment enabling the care and treatment to be effectively given;

- need to ensure that any restriction on the liberty of person and any interference with his or her rights, dignity and self-respect are kept to the minimum necessary in the circumstances; and
- report of at least one qualified forensic psychiatrist or psychologist (as appropriate) who is independent of the treating team and has recently examined the forensic patient assessing the risk of the person constituting a serious danger to him or herself, or any other members of the public if released.

8.40 The provision for the decision-maker to have regard to an expert risk assessment reflects current practice in Tribunal hearings involving questions of leave or release, as well as approaches taken in New South Wales, other States of Australia and in the United Kingdom and other jurisdictions in other recently enacted community protection legislation, the validity of which has been upheld by the High Court[153] It is also consistent with Recommendation 13, which provides that the Forensic Division should be required to consider specified reports and other information when reviewing a patient, and give it the power to order the making and production of these reports and other information (as set out in the Practice Directions and regulations).

8.41 The Review considers that the provision of legislative criteria for decision-making in relation to release will assist the decision-maker, forensic patients, and victims in preparing submissions in relation to an application for leave or release, and will assist superior courts in reviewing any such decisions made. It will also facilitate greater transparency and consistency in decision-making, which would assist in maintaining public confidence in the forensic mental health system.

8.42 In addition, the Review is recommending a broader public safety test that considers the safety of 'any members of the public'. This is based on the Victorian provisions, and should ensure that any decision maker considers the potential risks both to identified members of the public, and the public more generally.[154]

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[153] Before making a recommendation for conditional release, the Tribunal currently requests a comprehensive psychiatric report (or other appropriate expert report), and a NSW Health 'risk assessment' as to the safety and appropriateness of the person's release: see Mental Health Review Tribunal, *Procedural Note 8/2000: Forensic Patients* (updated December 2005).

[154] Under the Victorian provisions a court must not vary a custodial supervision order to a non-custodial supervision order during the nominal term unless 'satisfied on the evidence available

8.43 Finally, the Review also recommends that legislation should include a list of non-exhaustive conditions that may be applied when granting release back into the community. These conditions should be based on the conditions currently recommended by the Tribunal.

Recommendation 25

Amend the legislation to provide that an order for the conditional or unconditional release of a forensic patient or transferee patient is not to be made unless the Forensic Division is satisfied, on the available evidence, that:

- The safety of the patient or any members of the public will not be seriously endangered by the person's release;
- Effective care and treatment of a less restrictive kind (if any is needed) is reasonably available to the patient within the community; and
- Reasonable arrangements have been made to ensure that any necessary care and treatment will be given within the community.

Recommendation 26

Amend the legislation to provide that, for the purpose of making this determination, the Forensic Division must have regard to the following matters:

- The nature of the person's condition;
- The likelihood of a relapse or deterioration in the person's condition once released into the community and whether serious public safety concerns are likely to arise as a result of this;
- The need to ensure that the person receives the best possible care and treatment in the least restrictive environment enabling the care and treatment to be effectively given;
- The need to ensure that any restriction on the iberty of person and any interference with his or her rights, dignity and self-respect are kept to the minimum necessary in the circumstances; and

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that the safety of the person subject to the order or members of the public will not be seriously endangered as a result of the release of the person': *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 32(2)

. The report of at least one qualified forensic psychiatrist or psychologist (as appropriate) who is independent of the treating team and has recently examined the forensic patient to determine as to whether the safety of the patient or that of any members of the public will be seriously endangered by the persons release.

Recommendation 27

Amend the legislation to include a list of non-exhaustive conditions that may be applied when granting release back into the community.

Notification of Release

8.44 Under the 1990 Act, certain people must be notified of the proposed release of a forensic patient, whether conditionally or unconditionally. For example, the Minister for Health must notify the Attorney General and the Director of Public Prosecutions of a recommendation for release, in which case the Attorney General has 30 days to object on the ground that the person has not served sufficient time in custody or detention, or that the Attorney General or DPP intends to proceed with criminal proceedings against the person. The person cannot be released if the Attorney General raises an objection.[155]

8.45 The Mental Health Act Implementation Monitoring Committee (1992) recommended that the power of objection based on 'insufficient time in custody' be limited to forensic patients who are transferees from the prison system. The Committee noted that, as forensic patients who are subject to special verdicts are detained on public safety grounds, they are entitled to their liberty once this danger has passed. It also considered that the concept of 'insufficient time in custody' is inappropriate for the unfit accused, given that full criminal responsibility has not been found to apply to these patients.[156] The NSW Law Reform Commission agreed with this recommendation.[157]

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[155] 1990 Act, ss 83, 84. 2007 Act appears to have substantially similar provisions.

[156] Mental Health Act Implementation Monitoring Committee, *Report to the Honourable R A Phillips MP, Minister for Health, on the NSW Mental Health Act 1990* (1992) Parliament of NSW, 33-34.

[157] NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Report 80* (1996), Sydney, 190-191, Rec 20.

8.46 The Monitoring Committee also recommended that the power to object to release on the basis of pending criminal charges should be limited to people found unfit to be tried, or those on remand. By contrast, the NSW Law Reform Commission recommended that the provision be removed entirely (except in relation to transferees), on the basis that it discriminates against forensic patients (given that there is no corresponding power in relation to convicted offenders).[158]

8.47 The 1990 Act also provides that the Minister for Police must be informed of the proposed release of a forensic patient.[159] In that case, the NSW Police Handbook provides that the police will create a warning on COPS (the Police computer record system), create an information report, and forward it to the Local Area Command where the forensic patient intends to live. Where any victim wishes to be advised of the forensic patient's release, the police will notify him or her accordingly.[160]

8.48 Both the Monitoring Committee and the NSW Law Reform Commission recommended that this provision be removed. Particular concerns are that it: implies that the police would have some role in monitoring the person in the community, which is inappropriate;[161] is discriminatory and in breach of human rights; and appears unnecessary given that the person will have only been released where the Tribunal considers that he or she is not dangerous.[162] The NSW Health discussion paper (2004) noted that the need for the provision may have been overtaken by other developments in relation to victims rights.[163]

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158 Mental Health Act Implementation Monitoring Committee, *Report to the Honourable R A Phillips MP, Minister for Health, on the NSW Mental Health Act 1990* (1992) Parliament of NSW, 34; NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Report 80* (1996), Sydney, 191-192, Rec 20.

159 1990 Act, s 84(3).

160 Cited in D Howard & B Westmore, *Crime and Mental Health Law in New South Wales* (2005) LexisNexis, Butterworths, 505.

161 Mental Health Act Implementation Monitoring Committee, *Report to the Honourable R A Phillips MP, Minister for Health, on the NSW Mental Health Act 1990* (1992) Parliament of NSW, 35.

162 NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Report 80* (1996), Sydney, 193, Rec 20.

163 Review of the Mental Health Act 1990, *Discussion Paper 2: The Mental Health Act 1990* (2004) NSW Government, 31.

8.49 The Consultation Paper outlined several reform options, including retaining the current framework; providing that only the Minister for Police should be notified of the proposed release of a forensic patient; and removing all of the notification requirements regarding the possible or proposed release of a forensic patient. Agencies involved in the current framework (eg, the DPP, Department of Corrective Services, and NSW Police) supported retaining the current provisions, and the Minister for Police submitted that the system is working effectively. The majority of submissions, however, supported removing the notification requirements for the reasons outlined above. One submission suggested that only registered victims should be notified of a forensic patient's proposed release, where they have identified a wish to be so notified.

8.50 The Review agrees with the Monitoring Committee and the Law Reform Commission that it is inappropriate that the Attorney General have a power to veto the release of a forensic patient who is not under conviction on the basis of 'insufficient time in custody', and with their reasons for this position. On a practical note, as the Review has recommended that the Attorney have a right of appearance at Tribunal hearings in relation to the possible release of a forensic patient, and a right to appeal against an appeal decision, there is no need to provide a further right of objection.

8.51 The Review also agrees that the power to object to release on the basis of pending criminal charges should be removed entirely on the basis that it discriminates against forensic patients (as there is no corresponding power in relation to convicted offenders). In practice, if the DPP does intend to prosecute the forensic patient, it could arrange for the person's arrest for that offence directly upon his or her release from custody. In that case, the person would have the same opportunity to seek bail as any other person charged with an offence.

8.52 Finally, the Review is not convinced of the need to notify the Minister for Police of the release of a forensic patient in every case, given that the person will only be released if the decision-maker is satisfied that he or she does not constitute a risk of serious danger to the public, and that the significant majority of patients do not commit acts of violence after their release.

The Tribunal should, however, be required to notify any registered victims of the proposed release of a forensic patient so that they can apply for non-contact or place restriction orders or to take action for other orders such as Apprehended Violence Orders if they wish prior to the release date (see chapter 9 for more detail), and would have a discretion to notify the Minister for Police if considered appropriate in the circumstances.

Recommendation 28

Amend the legislation to:

- Remove the Attorney General's power to object to the release of a forensic patient, and the requirement to notify the Minister for Police of a patient's release; and
- Insert a requirement that the Tribunal notifyregistered victims of the proposed release of a forensic patient.

Supervision of Released Patients

8.53 Generally, before a forensic patient is discharged on conditional release, release plans and arrangements for treatment, care, management and review should be finalised. These plans nominate a treating psychiatrist and a case manager who would be jointly responsible for the management of the patient under the conditional release order.[164] In practice, several agencies are involved in supervising and managing a forensic patient's conditional release, including the Tribunal, Justice Health, NSW Health, and other agencies (such as the Department of Ageing, Disability and Home Care, the Department of Housing and the Department of Community Services).[165]

8.54 The NSW Health discussion paper (2004) commented on the lack of formal mechanisms requiring interagency cooperation, and noted that questions have been raised as to whether there should be a more formal mechanism to ensure

[164] Mental Health Review Tribunal, *Procedural Note 8/2000: Forensic Patients* (updated December 2005).

[165] Review of the Mental Health Act 1990, *Discussion Paper 2: The Mental Health Act 1990* (2004) NSW Government, 35.

that planning occurs, either through protocols or memoranda of understanding between the agencies involved, or through a mandatory legislative requirement. The discussion paper asked whether the 1990 Act should be amended to require or recognise the need for interagency cooperation in the planning for the future of forensic patient, and whether this should include mechanisms to ensure that exit and transition planning is provided.[166] While only a limited number of submissions addressed these issues, they generally supported this approach.

8.55 The Legislative Council Standing Committee on Mental Health (2002) recommended that the Minister for Health should implement a formal agreement with the Tribunal for the supervision and management of released forensic patients. The agreement should clarify clinical services' responsibilities in monitoring and reporting on clinical supervision (and the Tribunal's role in monitoring progress); and the formal procedures for managing breaches of release conditions.[167]

8.56 The Consultation Paper noted that, while this recommendation has merit, it may be preferable for the Minister for Health or the Tribunal (or both) to enter into an agreement with each of the relevant government agencies responsible for the supervision, care, treatment and monitoring of forensic patients on conditional release. This would ensure that each of the agencies involved would have input into the protocols contained in the agreement, and those parties to the agreement, would be bound by it.

8.57 The Paper outlined several options, including:

- Retaining the current framework;

- The Tribunal entering into a formal agreement with relevant government agencies to ensure that there is a consistent and complementary framework for the supervision, treatment and care of forensic patients who are subject to conditional release from detention; and

166 Ibid, 35, Q 55.

167 See Legislative Council Select Committee on Mental Health, *Inquiry into Mental Health Services in New South Wales* (2002), Sydney, Rec 108.

- Amending the legislation to require relevant government agencies to cooperate with each other for the supervision, treatment and care of forensic patients who are subject to conditional release from detention.

8.58 The majority of submissions supported the final option, while several submissions supported both the second and third options. The Council of Social Services of NSW noted the significant need for interagency work to reduce the ad hoc support system that currently operates, and the importance of a whole of Government approach that places patient care at the centre. The Department of Juvenile Justice noted that interagency cooperation is paramount in maintaining effective case management and successful outcomes for forensic patients generally, and particularly for children and young people. The Department of Corrective Services commented that this would enable the coordination of support services, but emphasised the need to distinguish between mental illness and intellectual disability in terms of services, to ensure that the most appropriate supervision, intervention and care is provided.

8.59 The 2007 Act includes a provision to be inserted into the MHCP Act regarding planning for a forensic patient's leave and release from a mental health facility (but not a correctional centre or other place). The provision requires the authorised medical officer of the relevant mental health facility to, among other things, ensure that the forensic patient and any primary carer are consulted in relation to planning the person's release and leave, and any subsequent treatment or other action considered, and take all reasonably practicable steps to consult with agencies involved in providing relevant services to the person, and any primary carer and dependents of the person.[168]

8.60 The Review considers that this provides an important procedural safeguard for forensic patients, by ensuring that appropriate planning and consultation occurs prior to their release back into the community. However, this provision would be strengthened by giving the Tribunal the necessary power to perform a close monitoring role in which it could require the agencies specified in a forensic patient's release plan to comply with their obligations under that plan in relation to the supervision, treatment and care of the forensic patient, and to co-operate

[168] 2007 Act, Sch 7.

with other relevant agencies specified in the plan. In addition, to facilitate compliance with such a duty among agencies and forensic patients, the NSW Government should develop a comprehensive agreement that provides an administrative framework for such cooperation.

Recommendation 29

Amend the legislation to empower the Tribunal to require the agencies specified in a forensic or transferee patient's release plan to comply with their obligations under that plan in relation to the supervision, treatment and care of the patient, and to co-operate with other relevant agencies specified in the plan.

Recommendation 30

The Minister for Health should develop an agreement with each other Minister responsible for the agencies involved in the supervision, treatment and care of forensic patients, and the Mental Health Review Tribunal, to provide an administrative framework to facilitate agency and patient compliance with the conditions of release, and the release plan.

Breach of Conditional Release

8.61 If a person is conditionally released, and it appears that he or she has breached the order or has suffered a deterioration of mental condition and become a serious danger to himself or herself or any member of the public, the Minister or Governor (whichever is the prescribed authority) may order the person's apprehension and detention, care or treatment in the place or manner specified.[169]

8.62 In practice, the treating psychiatrist or case manager would notify the Forensic Executive Support Unit within Justice Health regarding any suspected breach of

[169] 1990 Act, s 93(1). The 2007 Act contains a substantially similar provision.

a condition, or deterioration in a person's mental condition.[170] If an executive order is made for the person's apprehension and detention, the patient may ask the Tribunal to investigate the evidence on which the order was made, and the Tribunal may then make any recommendation it considers appropriate to the prescribed authority.[171] However, the forensic patient would continue to be detained until an order is made for his or her release.

8.63 The NSW Health discussion paper (2004) noted that confusion appears to have arisen in relation to these provisions, with some service providers being reluctant to seek an order for what are considered minor or technical breaches of release conditions, or where they consider the patient is only in need of a short-term hospital stay. It asserted that the alternative of admitting a person as an involuntary patient under the civil provisions may be legally questionable, and that it can lead to confusion over the patient's status and the conditions under which they are required to operate.[172]

8.64 The Consultation Paper outlined several reform options, including:

- Retaining the current framework;

- Amending the legislation to provide a hierarchy of responses according to the seriousness of an alleged breach of conditional release, and a clear mechanism for responding to a deterioration in a person's condition; and

- Adopting the second option, and amending the legislation to provide a framework for the determining body to order the apprehension and detention, care or treatment of a forensic patient if satisfied, on the balance of probabilities, that he or she has breached a condition of release; conduct a review of the person's case as soon as reasonably practicable after the person is apprehended; and make a determination as to the person's detention or release.

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[170] See Mental Health Review Tribunal, *Procedural Note 8/2000: Forensic Patients* (updated December 2005).

[171] 1990 Act, s 94. The 2007 Act contains a substantially similar provision.

[172] Review of the Mental Health Act 1990, *Discussion Paper 2: The Mental Health Act 1990* (2004) NSW Government, 35-36.

8.65 Several submissions supported the option of providing a statutory hierarchy of responses according to the seriousness of an alleged breach, and a clear mechanism for responding to deterioration in a person's condition. Most of these submissions recognised that a breach may be fairly minor, and could be inadvertent in some circumstances; and several of them suggested that the hierarchy be developed in consultation with stakeholders.

8.66 A similar number of submissions supported the third option. One submission noted that it would address some of the current problems, such as confusion over status, and that it offers options for minor breaches or deterioration in the person's condition. Another submission suggested that this would be similar to the framework for the State Parole Authority.

8.67 The Review considers that, in the case of minor breaches of release conditions, there should be appropriate alternatives to apprehending and detaining a person. For example, minor breaches could be dealt with by the agency supervising the forensic patient. In addition, a person should not face the possibility of long term detention if his or her condition deteriorates while conditionally released, when other options such as voluntary treatment, an application for a Community Treatment Order, or involuntary admission in the civil mental health system are available.

8.68 Accordingly, the Review recommends that the legislation be amended to provide:

- A framework for the Tribunal to call up a conditionally released forensic patient or transferee patient for an alleged breach of a release condition, or serious deterioration in the patient's condition, where this is considered appropriate; and

- A process for a panel of the Forensic Division to hear the matter and a hierarchy of available responses for it to apply, depending on safety and therapeutic considerations.

Recommendation 31

Amend the legislation to provide:

- That the President of the Tribunal has the power to call up a conditionally released forensic patient or transferee patient for an alleged breach of a release condition, or serious deterioration in the patient's condition, and refer the matter to a panel of the Forensic Division of the Tribunal;
- A hierarchy of options available to the Tribunal in determining an appropriate response, depending on safety and therapeutic considerations; and
- Any decision by the Forensic Division is subject to appeal.

9. Victims of Crime

Introduction

9.1 The Terms of Reference ask the Review to consider the role of victims of crime and, in particular, means by which their views and concerns can be addressed in the forensic review process.

The Current Law

9.2 The *Mental Health Act 1990* (NSW) ('1990 Act') does not make any specific reference to victims of crime, but does ensure that any risk to their safety be considered when determining whether the safety of any member of the public would be seriously endangered by the forensic patient's release. In addition, subject to limited exceptions, Tribunal hearings are held in public and any person with sufficient legal interest is not only entitled to be present, but also to make submissions or provide relevant evidence to the hearing.

9.3 Under the current administrative framework the Forensic Executive Support Unit ('FESU') of the Statewide Forensic Mental Health Directorate (within Justice Health) manages a Forensic Patient Victims Register. Registered victims can request to be notified of certain matters, including Tribunal hearings, each Tribunal recommendation to the Minister for Health, whether the recommendation is approved, and if the forensic patient has absconded. Information is also provided to registered victims about the types of leave privileges and release orders available, and the progress of recommendations. Registered victims also have the opportunity to make written submissions in relation to Tribunal hearings.

9.4 More recently, the Tribunal itself has adopted a new procedure in which registered victims are notified of upcoming hearings, provided with information as to the process and assisted in attending, being present (either in person or, if this is not possible, via videoconference or teleconference facilities), and participating in the hearings. Victims may submit a written statement to the

Tribunal for consideration at a hearing. The Tribunal requests that statements address the care, treatment, detention and release of the forensic patient. If the victim has any concerns about his or her safety if the forensic patient were to be released, those concerns can be outlined in the submission.[173] The Tribunal also conducts educational sessions through victims' organisations.

9.5 The Review notes that NSW has made extensive legislative provision for victims of crime within the criminal justice system, including:

- The *Victims Rights Act 1996* (NSW) provides a framework for recognising and promoting the rights of victims of crime through a Charter of Victims Rights. The Charter of Victims Rights provides that 'a victim should, 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'.[174]

- The *Crimes (Sentencing Procedure) Act 1999* (NSW) provides a mechanism for victims to give victim impact statements on the sentencing of a convicted offender.[175]

- The *Crimes (Administration of Sentences) Act 1999* (NSW) provides a framework for the Parole Authority to notify registered victims of its initial intention to grant parole in relation to a serious offender.

- The *Victims Support and Rehabilitation Act 1996* (NSW) provides for

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[173] See Mental Health Review Tribunal, *Procedural Note 8/2000: Forensic Patients* (updated December 2005).

[174] Section 5 of the Act defines a 'victim of crime' as 'a person who suffers harm as a direct result of an act committed, or apparently committed, by another person in the course of a criminal offence'. The term 'harm' includes actual physical bodily harm, mental illness or nervous shock, or the deliberate taking, destruction or damage of the person's property. If a victim dies as a result of the act concerned, a member of the person's immediate family is also a victim of crime.

[175] Section 26 of the Act defines a 'victim' as a primary victim or a family victim. A 'primary victim' is 'a person against whom the offence was committed, or a person who was a witness to the act of actual or threatened violence, the death or the infliction of the physical bodily harm concerned, being a person who has suffered personal harm as a direct result of the offence'. In relation to offences directly resulting in the death of a primary victim, a 'family victim' is 'a member of the primary victim's immediate family, and includes such a person whether or not the person has suffered personal harm as a result of the offence'.

compensation, support and rehabilitation for victims through financial compensation and counselling.

Other Jurisdictions

9.6 Several Australian jurisdictions have incorporated provisions for victims in their forensic mental health legislation. For example, Victoria provides for the notification of victims in relation to major reviews etc, and court hearings, and the making of victim reports. The Act states that the purposes of the reports are to assist counselling and treatment processes for people affected by the offence, and assist the court in determining any conditions for an order.[176]

9.7 Queensland provides for the making of notification orders for a person a with 'sufficient personal interest' to be notified of certain matters, such as patient reviews and the decisions arising out of them;[177] non-contact orders to protect victims or their relatives when a forensic patient is being released into the community; and victim impact statements in relation to the mental condition of the alleged offender when the offence was committed, or the risk the victim believes the person represents to the victim or the victim's family.[178]

9.8 Tasmania and South Australia have similar provisions in relation to victims. In Tasmania, where a court is making a determination in relation to forensic orders, the Attorney General must provide a court with a report outlining the views of the defendant's next of kin and any victims (as far as they can be reasonably ascertained). The court may not discharge a restriction order, release a defendant, or significantly reduce the degree of supervision unless it has considered this report, and is satisfied that the defendant's next of kin and any victims have been given reasonable notice of the proceedings.[179]

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

177 *Mental Health Act 2000* (Qld) ss 233, 224.

178 *Mental Health Act* (Qld). Before making a notification order, the Queensland Mental Health Review Tribunal must be satisfied that the applicant has a 'sufficient personal interest', which involves considering whether the patient represents a risk to the person's safety; whether it is likely the patient will come into contact with the person; and the nature and seriousness of the offence. The Tribunal must then consider the grounds of the application; whether the patient's treatment or rehabilitation is likely to be adversely affected by the order; the patient's views; and other matters it considers appropriate.

179 *Criminal Justice (Mental Impairment) Act 1999* (Tas) ss 33, 35; see also *Criminal Law*

The Reform Options

9.9 The Consultation Paper outlined several options, including:

- Retaining the current administrative framework;
- Making legislative provision for the courts to receive victim impact statements when considering the imposition of a limiting term or release, and at any hearing of the determining body which might result in an order for leave or release of the patient;
- Making legislative provision that registered victims may apply to the determining body for notification and non-contact orders in relation to a forensic patient; and
- Adopting these options but extending their application.

9.10 Several submissions supported each of the options other than the first (retain the current framework), and several submissions expressed support for all of the options, other than retaining the current framework. During the consultation process it became apparent that victims groups generally approved of the process recently adopted by the Tribunal although objecting strongly to its predecessor. Such groups also proposed reforms including to the form of the special verdict or to the curial process, which are better considered by the NSW Law Reform Commission. Several of the written and verbal submissions made by victims and victims support groups supported the option of making legislative provision for notification, and non-contact orders.

9.11 At consultations conducted by Mr James with victims groups it was clear that there was overwhelming support for the recent Tribunal initiatives supplementing the current arrangements.

9.12 In addition, a large number of submissions commented more generally on the appropriate role of victims in the forensic mental health system. One submission noted its concern that the current system is not supportive of the objects and principles of the 1990 Act, and is not meeting the needs of victims. It suggested that victims need accessible, appropriate support services, as well as education

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Consolidation Act 1935 (SA).

and information about the forensic system; and that avenues such as mediation may be of benefit to some forensic patients and the people affected by their conduct. Again, these proposals are worthy of consideration but in the wider context of the role of victims in the justice system.

9.13 Another submission suggested that victims should have the opportunity to appear once before the Tribunal to express their views and, if they have relevant evidence at any other time, that should also be allowed. It noted that victims may have reasonable requests regarding possible conditions of release, and should be given an opportunity to advise the Tribunal of these when release is being considered. These proposals in fact accord with current practice.

9.14 Another submission noted the tension regarding victim-related issues, and commented that many victims go to the Tribunal feeling angry and frustrated, and that their views have not been heard within the criminal justice system. It noted the possible benefits of education and information about the process for victims, and submitted that there is no need to make specific provision in the forensic mental health legislation for victims as the rights of victims of crime are dealt with through specific victims of crime legislation.

9.15 Several submissions raised concerns of perceived principle with the role of victims in the forensic mental health system, while others raised concerns regarding current practical arrangements. For example, one submission suggested that victims' involvement in release decisions is inconsistent with the notions of dispassionate judgment used in sentencing. While it recognised a community interest in making release conditional on assessments of recovery or management consistent with public safety, it noted that these principles should not be confused with a need for punishment.

9.16 In relation to practical arrangements, a submission suggested that a practice has emerged whereby victims are encouraged to attend and make submissions at every Tribunal review. It considered this practice inappropriate and exceeding the Charter of Victims Rights, and that there should be consistency in the way in which victims' rights are protected and applied across the criminal justice spectrum. Another submission commented that an asserted

role of victims in the decision-making process has resulted in inconsistent treatment of patients, depending on how forceful and influential victims have been on decision-makers. It noted the different philosophies behind victims' involvement in sentencing and the forensic context, and submitted that victims should not have a right to make submissions directly to decision-makers.

9.17 A consumer group submission suggested that forensic patients are too often victimised by family or victims, and that some mechanism is needed to protect forensic patients from vindictive victims who present false information and damage their position, reputation or estate. Another submission considered that the role of victims in decision-making should be confined to making written submissions to the Tribunal. Otherwise, the Attorney General can represent their interests in hearings.

9.18 One submission suggested bringing the forensic patient, victims and other stakeholders together within a restorative justice framework that seeks to enhance the rights of all present. They also noted that families and carers should not be considered 'victims' if they have not been offended against; and that the appropriate time for making victim impact statements is when the court makes its finding. Real support should be offered to the victim early, and at least at the release stage, to address the damage done as a result of the offence, and to meet their needs and improve their future with the guarantee of continuing support.

9.19 Finally, a submission commented that any model for community protection needs to properly balance legitimate concerns from victims with the rights of offenders or forensic patients to an objective evaluation of the risk factors associated with their release. It suggested that a registered victim should be able to request consideration of non-contact orders as a condition of release, and suggested that family representatives of primary victims who are deceased or otherwise incapacitated should be included in the framework.

9.20 The Review considers that victims should retain their entitlements to attend hearings and make submissions. They should receive proper notification. It would not be acceptable to discriminate against victims or people with sufficient legal interest in forensic hearings, when compared with treatment of members of

the public, in relation to matters such as being present or providing submissions to Tribunal hearings. The new procedure allows for presence and a high degree of participation by victims if they wish. No greater role should be permitted nor required of them. Nor should hearings be closed or access to them restricted other than in exceptional circumstances. Given that the presiding member has sufficient power to control hearings, including in relation to these matters, and the *Victim's Rights Act 1996* (NSW) makes provision for notification, the Review does not consider it necessary to recommend any changes to the legislation or in relation to hearing procedures.

9.21 However, the submissions demonstrated a clear need for the Tribunal to be able to make non contact and place restriction orders analogous to those under section 36B of the *Bail Act 1978* (NSW). Such orders will operate to prevent patients coming into contact with victims and to prevent them from being in closely defined areas such as the vicinities of victim's homes or places or work. The necessity in any particular case for such an order and the ambit of it will need to be carefully considered. A number of such orders have already been made on the Tribunal recommendations and have been most effective to reassure both victims and patients and to minimise patient's interference with liberty.

Recommendation 32

Retain the recently introduced administrative arrangements as recently revised and supplemented by the Tribunal in relation to victims' involvement in Tribunal hearings.

Recommendation 33

Amend the legislation to provide that the Tribunal must keep and maintain a victims register, and provide that the Tribunal must notify registered victims of:

- Tribunal hearings (see also Rec 13);
- Tribunal decisions in relation to the granting of leave or release;
- Appeal proceedings in relation to a Tribunal decision;
- The proposed release of a forensic patient (see also Rec 28); and
- The termination of a person's forensic patient status.

Recommendation 34

Amend the legislation to provide a framework for the Forensic Division of the Tribunal to make notification, non-contact and place restriction orders in relation to a forensic patient. This should include a framework for a registered victim, immediately family member of a deceased victim, and/or immediate family member of the forensic patient to make applications for such orders; and an enforcement framework.

APPENDIX 1

WRITTEN SUBMISSIONS

1 Mr Dennis Lionel Ryan

2 Mr Bob Davidson
Clinical Nurse Consultant
Accredited Person
Community Mental Health Services

3 Community Forensic Mental Health Service
Mr John McCallum
Clinical Nurse Consultant

4 Mr Bert Gray

5 Dr Stephen Allnutt
Forensic Psychiatrist
Community Forensic Mental Health Service

6 Mr Robert and Mrs Janice Johnston

7 Mr John Haigh
Mental Health Review Tribunal Member

8 Mr Dan Howard SC
Senior Crown Prosecutor

9 Assoc/Prof Brian Boettcher
Psychiatrist
Mental Health Review Tribunal Member

10 Dr Michael Giuffrida
Director of Forensic Psychiatry
Bunya Unit (Forensic Service)
Cumberland Hospital

11 Dr Andrew Ellis
Secretary
Royal Australian and New Zealand College of Psychiatrists
Consultant Forensic Psychiatrist
Community Forensic Mental Health Service

12 Royal Australian and New Zealand College of Psychiatrists
NSW Forensic Section

13 Ms Ailsa Gillett OAM

14 Legal Aid Commission of NSW

15 Dr Tony Santamaria

16 Anglican Church Sydney Diocese

17 Office of the Public Guardian

18 NSW Nurses Association

19 Dr Tony Richardson
Medical Superintendent
St Vincent's Hospital

20 Guardianship Tribunal of New South Wales

21 Intellectual Disability Rights Service

22 Multicultural Disability Advocacy Association of NSW

23 Public Defenders Office

24 NSW Council for Civil Liberties

25 International Commission of Jurists

26 Dr Elsa Bernardi
Medical Superintendent
Macquarie Hospital

27 Law Society of New South Wales

28 Public Interest Advocacy Centre

29 Mental Health Association of NSW Inc.

30 Mr Alan Hall
Director Clinical Governance
Area Mental Health Service
Rozelle Hospital

31 Mental Health Coordinating Council

32 Dr Anthony Llewellyn
Hunter New England Mental Health Service

33 NSW Council for Intellectual Disability

34 NSW Council for Social Services

35 NSW Consumer Advisory Group

36 New South Wales Bar Association

37 Office of the Director of Public Prosecutions (NSW)

38 Justice Action

39 NSW Department of Juvenile Justice

40 NSW Department of Corrective Services

41 Justice Health

42 NSW Police Force and Minister for Police

43 Official Visitors Programme

44 Dr Olav Nielssen
Forensic Psychiatrist
Mental Health Review Tribunal Member

45 Bunya Patients
Cumberland Hospital

46 Ms Carole Chambers

47 Ms Lynda Dodman

48 Ms Linda Steele, Solicitor
Intellectual Disability Rights Register

49 The Hon Justice peter McClellan
Chief Judge at Common Law
Supreme Court of NSW

50 Ms Ivy Redman

APPENDIX 2

PARTICIPATING TASKFORCE MEMBERS

Justice Health

Forensic Executive Support Unit

Mental Health Advocacy Service

Legal Aid Commission

Office of the Director of Public Prosecutions

The District Court

The Supreme Court

Attorney General's Department
(including the Legislation and Policy and Criminal Law Review Divisions)

Department of Corrective Services

Serious Offenders Review Council

NSW Police Force and Minister for Police

Chief Psychiatrist

Australian Medical Association

Department of Aging, Home Care and Disability

Department of Juvenile Justice

Mental Health Review Tribunal – other qualified members

Mental Health Review Tribunal – Psychiatrist members

New South Wales Health Department

Mental Health Advisory Council

The Hon Frank Walker QC – former NSW Attorney General,
former Commonwealth Minister for Administrative Services,
NSW District Court Dust Diseases Tribunal and
Compensation Court Judge.

Homicide Victims Support Group

Enough is Enough

Victims of Crime Assistance League