

Mental Health and Cognitive Impairment Forensic Provisions Act 2020

The *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (the Act) deals with people who have mental health or cognitive impairments who are in contact with the criminal justice system.

The main functions of the Act include:

- Governing the local court diversion scheme allowing people with less serious offences to be redirected to treatment and support
- Describing the process for conducting criminal trials for serious offences, including fitness for trial, and the defence of mental health or cognitive impairment
- Setting the procedures and principles for the care and treatment of forensic patients and correctional patients, including detention and release
- Outlining the structure and functions of the Mental Health Review Tribunal
- Establishing the Victims Register and providing rights to victims of forensic patients

“Mental health impairment” and “cognitive impairment” are defined in [sections 4 and 5](#) of the Act.

Please see this [Information Bulletin](#) for more details on how this Act changed from the previous one.

What is court diversion?

The aim of diversion in the local court is to redirect people charged with lower level offences into treatment and support. Diversion is used in less than 2% of all criminal cases in the local court.¹ It has been proven to work to reduce reoffending.²

There are broadly two types of diversion.

1. [Part 2 Division 2](#) can be used where a person has (or had at the time of the offence) a mental health or cognitive impairment. The magistrate can dismiss the charges and discharge the person:
 - into the care of a responsible person, or
 - on the condition that they seek assessment, treatment or support, or
 - unconditionally

If the person breaches their orders, they can be returned to court within 12 months to face their charges.

2. [Part 2 Division 3](#) can be used where a person appears mentally unwell and posing a risk of harm to self or others. A magistrate can order one or more of the following:
 - Take the person to a mental health facility for assessment (potentially resulting in admission); if they are not unwell/posing a risk, they may be brought back to court
 - Discharge the person into the care of a responsible person
 - Make a Community Treatment Order (CTO)³

¹ Bureau of Crimes Statistics and Research, NSW Criminal Court Statistics Jan 2016 – Dec 2020. https://www.bocsar.nsw.gov.au/Pages/bocsar_publication/Pub_Summary/CCS-Annual/Criminal-Court-Statistics-Dec-2020.aspx

² Albalawi et al. (2019). Court diversion for those with psychosis and its impact on re-offending rates: results from a longitudinal data-linkage study. *BJPsych Open*, 5(1), e9. <http://doi.org/10.1192/bjo.2018.71>

³ To read more about CTOs, click [here](#)

Fitness for trial and criminal responsibility

The below applies only to those who have been charged with serious offences that go before the district or supreme courts.

A person may receive a special verdict of “act proven but not criminally responsible” where they had a mental health and/or cognitive impairment such that they could not understand what they were doing, or that it was wrong. The court relies on evidence from experts in reaching its decision. Generally, only persons with severe mental health or cognitive impairment would meet such a threshold.

A person may be deemed “unfit for trial” if they have significant difficulty understanding and participating in court proceedings due to a mental health or cognitive impairment. A modified trial called a “special hearing” may be held instead.

At a special hearing, a person may receive one of the following verdicts:

- Committed the offence on the limited evidence available (a qualified finding of guilt)
- Act proven but not criminally responsible (due to mental health or cognitive impairment)
- Not guilty/acquitted

If a person receives a qualified finding of guilt, the court can impose a penalty, including a limiting term. A limiting term is the equivalent of a custodial (prison) sentence the person would have received if they had been convicted at a usual trial.

Who are forensic patients?

The following group of people are regarded as ‘forensic patients’:

1. Those found unfit to be tried and refused bail
2. Those given a limiting term
3. Those who received the special verdict of “act proven but not criminally responsible” due to mental health or cognitive impairment

Most forensic patients belong in the third group. While not all forensic patients in this group will have the same pathway in the system, the most common pathway for those who experience a mental health impairment is as follows:

- After their verdict they will usually be detained in a correctional facility until a bed becomes available in the high secure Forensic Hospital (located in Malabar).
- At the Forensic Hospital, they will receive treatment to reduce the severity of their symptoms.
- When they have stabilised, they may be transferred to a medium secure forensic facility where they can focus on rehabilitation and begin gradually accessing leave in the community.
- When their risk can be managed, they may be conditionally released to the community.
- If they demonstrate safe community living, they could be unconditionally released. This means they will no longer be a forensic patient.

This pathway is not set to any specific time periods, and the person will move to lesser or more restrictive care dependent on their mental state and level of risk to themselves and others.

People with limiting terms will serve at least part of their term in a correctional facility. They can be granted conditional release into the community once they have served sufficient time in custody and if their risk can be appropriately managed in the community. A limiting term can be extended by the Supreme Court if the person continues to pose an unacceptable risk of harm to the public. Once a limiting term finishes, the person is no longer a forensic patient.

The Mental Health Review Tribunal (the Tribunal) makes orders relating to the care, treatment and control of forensic patients. Forensic patients must be reviewed regularly by the Tribunal. See further information below in the section regarding the Tribunal.

Correctional patients and Forensic CTOs

There are dedicated mental health areas in the correctional setting that provide mental health care on a voluntary basis. When a prisoner requires involuntary inpatient treatment, they must be transferred to a declared mental health facility. This group is referred to as “correctional patients”.

In NSW, male correctional patients are usually sent to Long Bay Hospital (located within the Long Bay Correctional Complex); but they may sometimes be sent to the Forensic Hospital or other mental health facility. Female and adolescent correctional patients requiring involuntary treatment are transferred to the Forensic Hospital. When the person improves, they are discharged back to the correctional facility.

Some persons may be placed on a Forensic Community Treatment Order (FCTO) to continue their care. FCTOs operate similarly to CTOs, requiring that the person adhere to a certain treatment plan.

FCTOs can also be made for any person (including a forensic patient) in a correctional facility that requires mandatory treatment, but does not necessarily need to be admitted as an inpatient. FCTOs are made by the Tribunal and reviewed regularly.

For more information on FCTOs, see this information kit from the Mental Health Review Tribunal.
<https://www.mhrt.nsw.gov.au/files/mhrt/MHCIFP/FCTOInformationKit-March2021.pdf>

The Mental Health Review Tribunal

The Mental Health Review Tribunal is composed of legal, psychiatric and other suitably qualified persons. The Tribunal is responsible for reviewing and making decisions about forensic patients and correctional patients.

The Tribunal reviews forensic patients usually every six months, and can make orders about where they should be detained, what leave they can access, and when they can be released.

The Tribunal is responsible for granting forensic patients’ leave and release. The Act requires that the Tribunal must not grant leave or release unless it is satisfied, based on evidence, that the safety of the person, a registered victim, or any other member of the public will not be seriously endangered (sections 84(2) and 94 (3)).

Before granting release, the Tribunal must be provided with an additional report from an independent expert, not involved in the person’s care. This report must address the question of public safety. These independent expert reports are typically provided by the Community Forensic Mental Health Service.

Forensic patients who are on conditional release continue to be reviewed by the Tribunal. If they breach a condition of their release, or if they deteriorate in mental state, the Tribunal can order that they be detained again.

Community safety and victims’ rights

The objectives of the legislation (as it relates for forensic and correctional patients) are outlined in section 69 of the Act. These include:

- protecting the safety of members of the public
- providing for the care, treatment and control of persons with mental health and cognitive impairments, including those subject to proceedings and those in the custodial settings
- protecting the safety of victims and acknowledging the harm done to them

Decisions made about forensic patients should aim to achieve these objectives as best as possible. Balancing these objectives can be difficult, which is why the Tribunal makes decisions based on expert evidence, and input from the consumers, carers and victims.

Studies show that forensic patients have very low rates of violent re-offending following release: 1.5% in the first year,⁴ and 3.1% over an average of 8.4 years.⁵

Although many forensic patients are found not to have been criminally responsible for their offences due to mental health or cognitive impairments, the harm suffered by victims and their families is real.

Victims going through the forensic system can access support from the Specialist Victims Support Service (SVSS), which is part of the Department of Communities and Justice. Further information on the SVSS can be found [here](#). The SVSS provides early intervention, crisis referral, planned support, communication, education, and Tribunal process support.

Victims can choose to be notified of Tribunal hearings, breaches and other events. Victims may also make submissions at hearings and can request non-association or geographical restriction orders be made.

More information and support

- **Mental Health Advocacy Service, Legal Aid**
 - If you are a forensic patient and not in prison:
 1. Call the Mental Health Advocacy Service on 9745 4277
 2. Press 2 to speak to someone at the Mental Health Advocacy Service
 - If you are a forensic patient in prison, or you are in a prison hospital because of a mental illness, call the Mental Health Advocacy Service using the inmate phone:
 1. Enter your MIN number
 2. Enter your PIN
 3. Press 11 for Legal Aid
 4. Ask for the Mental Health Advocacy Service
 5. Press 2 to speak to someone at the Mental Health Advocacy Service

- **Mental Health Review Tribunal**
 - If you have a question about a hearing at the Tribunal, you can contact them on: (02) 9816 5955
 - 1800 815 511 (free call)
 - MHRT-MHRT@health.nsw.gov.au
 - <https://www.mhrt.nsw.gov.au/forensic-patients/>

- **For families and carers**
 - If you need information about a person who is detained, you can contact the family and carer consultant at the Justice Health and Forensic Mental Health Network.
 - 02 9700 3229
 - JHFMHN-FamilyAndCarer@health.nsw.gov.au
 - If you have concerns about the mental health care of a person in custody, you can contact the Justice Health and Forensic Mental Health Helpline
 - 1800 222 471 (available 24/7)
 - If you need further support as a carer, you can contact Mental Health Carers NSW.
 - 1300 554 660 (free call)
 - MHCNadmin@mentalhealthcarersnsw.org

- **Mental Health Line**

If you, or another person are experiencing mental health distress, you can speak to mental health professionals via this 24/7 line.

 - 1800 011 511
 - Learn more here: <https://www.health.nsw.gov.au/mentalhealth/Pages/mental-health-line.aspx>

⁴ Dean, K., Singh, S., Kemp, R., Johnson, A. & Nielssen, O. (2020): Characteristics and Re-Offending Rates Amongst Individuals Found Not Guilty by Reason of Mental Illness (NGMI): A Comparison of Men and Women in a 25-Year Australian Cohort, *International Journal of Forensic Mental Health*. <https://doi.org/10.1080/14999013.2020.1795011>.

⁵ Hayes, H., Kemp, R. I., Large, M. M., & Nielssen, O. B. (2014, Mar). A 21-year retrospective outcome study of New South Wales forensic patients granted conditional and unconditional release. *The Australian and New Zealand Journal of Psychiatry*, 48(3), 259–282. <https://doi.org/10.1177/0004867413507610>