

# MENTAL HEALTH REVIEW TRIBUNAL

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A REVIEW IN RESPECT  
OF FORENSIC PATIENTS



Health



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# REVIEWER'S FOREWORD

From the outset, this Review has been confronted by two parallel systems – criminal justice and forensic mental health – that in many respects are irreconcilable with each other.

In dealing with those who have committed serious or violent offences, the criminal justice system imposes custodial sentences of some severity. This removal of convicted criminals from society is intended as a punishment, a retribution and a denunciation of abhorrent behaviour, while also protecting the community.

The severity of the sentence is intended as both a personal and a general deterrent. The rehabilitation of a prisoner and his or her safe return to the community, although an intended consequence of a humane custodial system, is not the primary purpose of the law's response, which is to ensure that the punishment properly reflects the gravity of the offending.

By contrast, the forensic mental health system largely removes a person who has committed a violent crime from the criminal justice system, given the finding of the court in New South Wales that the person is 'not guilty by reason of mental illness'. Despite the fact the person has carried out an 'unlawful act', the primary purpose of detention in a forensic facility is the safe care, treatment and possible rehabilitation of the patient with a view to his or her ultimate return to the community.

This clash of two ideologies, each perfectly justified in its own humanistic terms, is most keenly felt by the victims of violent crimes. Why, asks the victim, should this person who has taken the life of my child, sibling or parent be treated as the patient, a person whose suffering, illness and recovery is the prime focus of the benevolent institution which detains him?

There are many reasonable answers to this question, but in the minds of the survivors and victims of violent crimes, they can have a hollow ring. Understandably, none of the answers, no matter how reasonable, can assuage or diminish the grief, anger and sorrow of those wounded and traumatised by violent criminal behaviour.

This Review was confronted by these irreconcilable difficulties, and in that context it has had to recognise that improvements can be made in NSW in the dealings between victims and the forensic mental health system. The Review is determined to make practical improvements and advances in its recommendations that are beneficial to victims and the system generally.

The Review, however, recognises that no matter how thorough the changes, no matter how well intentioned and successfully implemented, they will not altogether remove the anguish and continued suffering of those whose loved ones have been snatched away or harmed by people in the grip of severe and serious mental illness. Nonetheless, changes must be made and the present system must be improved in order that the voices of victims of crime are heard and that the mental health system is not indifferent to their needs.

The Hon. Anthony Whealy QC  
Reviewer

# ACKNOWLEDGEMENTS

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This report on the Review of the Mental Health Review Tribunal in respect of forensic patients is the result of the advice and input from over 120 people who participated in the roundtable meetings, site visits, written submissions, and contributed to the report.

I acknowledge the many stakeholder organisations and individuals who contributed to the Review, including mental health consumer and carer organisations, clinicians, government departments, other tribunals and law and academic professions. I would particularly like to express appreciation to:

- victims and their families
- patients, their carers and representatives

who provided their valuable insights and advice on the current system and opportunities for improvement, which were often difficult to recount.

The review undertook several site visits, and I would like to thank the staff at the Justice Health and Forensic Mental Health Network and NSW Health facilities who hosted these visits:

- Bunya Unit, Cumberland Hospital, North Parramatta
- Metropolitan Remand and Reception Centre, Silverwater
- Forensic Hospital, Malabar
- Long Bay Hospital, Malabar

The Review Steering Group, who provided oversight and expertise, included:

- Dr Karin Lines, Executive Director, Mental Health Branch, Ministry of Health
- Paul McKnight, Executive Director, Strategy and Policy Branch, Department of Justice (and his colleagues Sandra Crawford, Hooma Mishra, Kavitha Selvakumar and Amanda Duvall)

- The Hon. Judge Richard Cogswell SC, President, Mental Health Review Tribunal
- Damien Eggleton, Co-Director Forensic Mental Health, Justice Health and Forensic Mental Health Network
- Gemma Broderick, Senior Legal Officer, Legal and Regulatory Services, Ministry of Health

The review commissioned two pieces of expert advice:

- Associate Professor Kimberlie Dean provided the review with an analysis of academic literature and evidence
- Grace Hur provided an audit of relevant legislation from other jurisdictions in Australia and the UK

I would also like to acknowledge the dedicated staff at the Mental Health Review Tribunal, particularly

- Richard Cogswell SC, President
- Anina Johnson, Deputy President
- Rodney Brabin, Registrar

The review team working with the Ministry of Health:

- Chris Leffers, who provided early support and expertise
- Paul Janmaat, who replaced Chris Leffers on the team during the review
- Bernie Frankin, who provided administrative support to the extensive consultation process.

I would like to give particular thanks to Claire McKendrick, consultant to the Ministry of Health. Her professionalism and strategic experience has guided each and every step of this Review.



# EXECUTIVE SUMMARY

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The Minister for Mental Health, the Hon. Tanya Davies MP, requested a review of the Mental Health Review Tribunal (the Tribunal) in respect of forensic patients, and appointed former Supreme Court Judge, the Hon. Anthony Whealy QC, to lead the Review in July 2017.

The Tribunal makes decisions on the management and treatment of forensic patients, who are people found not guilty by reason of mental illness; found unfit to be tried; or found, on the limited evidence, to have committed the offence after being found unfit to be tried, and given a limiting term.

The Review was commissioned in response to community concerns over the level of consideration given by the Tribunal to public safety and the victims affected by the offence, and the ‘transparency’ of Tribunal decisions.

## The Review’s **Terms of Reference**

(Appendix 1) set out four key objectives:

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

The Review undertook broad consultation. This included an eight-week call for public submissions, a review of current law and practice across Australia and internationally, an academic review of literature, and stakeholder workshops in tandem with targeted communication to inform and encourage participation.

Overall, the Review received 74 written submissions from victims, forensic patients and a broad range of other stakeholders, and spoke to over 120 people through eight one-to-one consultations, eight roundtable meetings with key stakeholders, and five site visits.

The Review makes 30 recommendations across the four key areas. These will improve Tribunal processes and decision making to better reflect and support the needs of victims.



### Leave and release

The Review considers the legislative test for leave and release is appropriate, and that the Tribunal applies a rigorous approach to assessing risk and safety, making decisions on leave and release conservatively and responsibly. However, the Review found that in the process of applying the leave and release test, the system is weighted too heavily towards the interests of patients, without adequate consideration for the safety and interests of victims.

Most of the Review recommendations apply to this issue. They cover recommendations for balancing the legislation and Tribunal practice to better reflect the victim experience, allowing victim impact statements at Tribunal or court hearings, clarifying provisions for victims to have their say in Tribunal hearings, updating Tribunal language as well as improved Tribunal access and communication.

There are also two recommendations to strengthen supervision mechanisms of patients while on leave or conditional release.



### Publication of names

The Review found strong support for the current provisions in relation to the publication of names to remain in place. The Review supported that approach but makes one recommendation that further information and education be provided to victims, patients and the community about those provisions.



### Appointment of members

The Review found general support for the current criteria used to recruit members and the composition of Tribunal panels and did not propose any recommendations for change.



### Victim support and engagement

The Review found that there is a gap in services available to victims of forensic patients, who do not receive the same level of support as victims where the offenders were tried under regular criminal proceedings and found guilty. There is currently no service in NSW providing targeted, specialised and holistic support by qualified people with knowledge of the forensic mental health system.

The Review recommends establishing a specialist support service to provide early intervention, crisis referral, case management, advice, information and advocacy, counselling and other support services for victims and their families in dealing with all forensic Tribunal processes.

### This report

The Review report was provided to the Minister for Mental Health and the Attorney General in December 2017, for consideration by Government.

# RECOMMENDATIONS

## 1. Re-balancing the process for determining leave and release by expanding victim input

### Bringing the legislative framework into balance

1. Amend section 40 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) (Forensic Provisions Act) to include an object to acknowledge the harm that has been done to victims, and an object to specifically protect the safety of victims.
2. Similar to section 68 of the *Mental Health Act 2007* (NSW), which provides principles for the care and treatment of people with a mental illness, a Charter should be developed as a Schedule to the Forensic Provisions Act to provide a statement of principles for the participation of victims of a patient in the Tribunal's review of patients' cases.

This should include:

3. It is the intention that the following principles are, so far as practicable, to be given effect with respect to the participation by any victim of a patient in the Tribunal's review of any patient's case:
  - 3.1. that the review may touch on painful or tragic events in the life of any victim of the patient should be recognised, and that the physical, psychological and emotional harm caused to the victim by the unlawful act be recognised with compassion
  - 3.2. that any victim of the patient may continue to experience grief and distress as a result of an event that is the subject of the review should be recognised with compassion, along with the possibility of exacerbation of that grief and distress by regular reviews and the variability of the forensic patient's pathway
  - 3.3. the benefits of counselling, advice on the nature of proceedings under the Forensic Provisions Act, and other support services, to the recovery of the victim from the harm caused by the unlawful act must be recognised
  - 3.4. the benefits to the victim of being advised in a timely way of Tribunal proceedings must be recognised
  - 3.5. the benefits to the victim of being advised in a timely way of any proposal before the Tribunal to allow leave or release must be recognised
  - 3.6. the benefits to the victim of being advised in a timely way of any decision to allow a patient leave or release must be recognised
  - 3.7. evidence and submissions from any victim of a patient should be listened to and considered respectfully, acknowledging the benefits to the victim, when appropriate, of being given the opportunity to further express the victim's views on the impact of the unlawful act. The Tribunal retains discretion as to how this principle is exercised (noting the need to balance consideration between the interests of the victim and the patient).

### Court proceedings — allowing victim impact statements

4. Legislative amendment should provide opportunity for victim impact statements in special verdict situations (findings of not guilty by reason of mental illness [NGMI] and unfitness) after a special hearing has determined, on the limited evidence, that the person committed the offence (sections 22 and 23, Forensic Provisions Act). The court must acknowledge the victim impact statement and, when appropriate, take into account its contents in determining conditions in relation to any release decision.
5. The court has the discretion to prohibit the disclosure of the victim impact statement if the victim requests that it not be disclosed. The court must provide a copy of the victim impact statement by forwarding it to the Tribunal.

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6. The legislation or regulations should provide for the delivery of each victim impact statement to the Tribunal and for it to be kept on the relevant file. The Tribunal is required to acknowledge the victim impact statement at each review of the patient's order and, when appropriate, consider its contents if relevant to any leave or release application. The same discretion in relation to confidentiality provisions should apply to the Tribunal as to the court. Once the victim impact statement is given to the Tribunal by the court, another victim impact statement is not required. However, an up-to-date submission may be made by the victim to the Tribunal at any time if the person wishes to do so (modelled on section 164 of the *Mental Health Act 2016* [Qld]).
  7. Practice notes or guidelines should make it clear that there is to be no cross examination of a victim by the patient or their representative in relation to the victim impact statement. This is to extend to any part of a victim submission that addresses the issue of geographical restriction, non-association order, or in that context, addresses the harm experienced by the victim. (It is acknowledged that, in considering the victim impact statement, the Tribunal may wish to clarify certain matters by asking the victim questions. However, consistently with the non-adversarial nature of Tribunal proceedings, this should not amount to cross examination.)
  8. Regulations should be made or guidelines issued to provide for the content of any victim impact statement. They should also deal with other matters of detail necessary for the implementation of this recommendation.

#### Updating language

9. That NSW Health policy and Tribunal guidelines and practice be amended to cease using the language 'index event' to refer to the offence, or alleged offence, giving rise to the patient's current detention or conditional release. 'Unlawful act' should be used to refer to the act or omissions, or alleged act or omissions of the person constituting an offence with which the person is charged.
10. That the intent and language of the forensic guidelines and related practice directives, policies, and other documents be revised in line with the above legislative and language changes, providing an enhanced role for victims in Tribunal processes, and more sympathetic and inclusive language.

#### Enhancing victims' ability to make submissions

11. In addition to victim impact statements, victims are also to be given the right to make broad submissions on Tribunal decisions on leave and release. This right is to be set out in legislation, and the legislation should provide the Tribunal with the discretion not to disclose the victim's submission, should the victim request this and the Tribunal consider it a reasonable request.
12. Practice notices, guidelines or regulations should set out the scope of submissions, and should set out how victims may make submissions. This should include both written and oral submissions, the victim's right to have a representative (non-legal) appear on the victim's behalf, and the matters above which may be discussed at Tribunal hearings, including victim's opportunity to ask questions when appropriate, and to give an oral statement.
13. Submissions from victims are to be allowed in relation to:
  - 13.1. the impact of the unlawful act on the victim
  - 13.2. views of the victim about the risk the patient poses to the victim, any other person or the community, and in this regard any relevant clinical history known to the victim
  - 13.3. the existing non-association and place-restriction conditions should continue to apply.

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## Proposed changes to policy and practice

### Improving the accessibility of venues and hearings

14. In consultation with Corrective Services, NSW Health and Victims Services, the Tribunal to review access to hearings to ensure that the legislative intent of open hearings is actively supported, and that hearings are as accessible as possible to registered victims, their representatives and members of the public, should they wish to attend.
15. This should include a review of technological options that would facilitate improved teleconferencing or videoconferencing, and give consideration to provisions to enable victims to attend in person at the facility should they wish, including provisions to ensure the security of victims.
16. The Tribunal Forensic Guidelines should be revised to align with this, and actively support participation by victims. These improved facilities should be adequately resourced.
17. Once these improvements have been made, communications should be provided to registered victims and other stakeholders to inform them of the changes.

### Issuing hearing notices

18. The Tribunal, in consultation with NSW Health, should review the process for issuing the Notices of Intent to allow advice to be provided to registered victims in a more timely fashion than it is currently. This process should be revised in consultation with NSW Health, and should also ensure that sufficient time is given for each relevant Minister to consider the case and prepare submissions, thus allowing sufficient response time for clinicians. (See Forensic Guidelines, page 7.)

### Closing hearings

19. That the forensic guidelines and related procedures and communications:
  - 19.1. be updated to reflect the circumstances in which a hearing may be closed or the victims may be excluded from the hearing (or part of the hearing)
  - 19.2. state clearly and sympathetically the circumstances in which victims may be asked to retire, and explanations given for the closed hearing.

### Supervision of patients on leave

20. NSW Health to amend the Forensic Mental Health Services Policy to recognise advances in technology and the readily available non-obtrusive technological solutions, including potential for the use of mobile phone apps, which enable supervision of patients via GPS.
21. That additional GPS mechanisms for supervising patients, and other technological options as may be appropriate, be considered by treating teams and the Tribunal for use in developing the risk-management plan for supervising patients on leave or conditional release; and that the Tribunal have the power and discretion to direct the use of GPS monitoring through mobile apps. These options are intended to enhance community and victim confidence in the supervision of patients on leave.

## 2. Enhancing victims' support and engagement through Tribunal process

22. Establishment of a specialist Victim Support Service (modelled generally on the Queensland Health Victim Support Service). This should provide holistic wrap-around services including:
  - 22.1. early intervention – to identify potential victims of forensic patients as early as possible
  - 22.2. crisis referral – to provide triage and referral to crisis support
  - 22.3. case management and counselling – case management, therapeutic and trauma informed treatment, care and support, and counselling for victims (when needed). This may include intensive case management to address the multiple needs of the victims (not limited to their trauma) such as mental illness
  - 22.4. communication and education – advice on the rights and entitlements of victims, educational information to victims about the forensic mental health system and Tribunal processes; a tailored approach to communication, including notification of hearings and decisions
  - 22.5. representation and advocacy – advice and support in preparing victim impact statements, support for victims to attend and participate in Tribunal hearings (to act as a mediator between the victim and the Tribunal, and to assist in preparing written or oral submissions) and representation at hearings.

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23. For this purpose, to enhance the existing victim support under The Commissioner of Victims Rights, by adding a specialist team to focus on the needs of the victims in the forensic patient setting.
  24. Referral pathways should be established with relevant agencies (NSW Police Force, Office of the Director of Public Prosecutions, and staff at the District and Supreme courts) to ensure that these victims are identified as early as possible and that best support is provided through the process.
  25. Victims Services and the Tribunal should review all existing communication materials and mechanisms with registered victims. The Tribunal and Victims Services should agree on appropriate communication channels between Victims Services, the Tribunal and victims. This should include:
    - 25.1. development of a comprehensive resource for registered victims that provides a plain English overview of the forensic mental health system and mechanisms for victim engagement, and provides advice on victim rights and how to access all relevant Victims Services available
    - 25.2. review of the process of communication with victims, with communication about hearing dates and Tribunal decisions to be from Victims Services to the victim
    - 25.3. review content of Tribunal decisions, to consider the inclusion of a brief explanation of the reasons for a decision that increases a patient's access to the community. This would include a plain English explanation of the Tribunal decisions and a summary of the evidence that informed that decision, instead of simply advising of the outcome of the determination
    - 25.4. review of all standard correspondence (e.g. notice of hearings) to ensure that it provides victims with sufficient information, and that information is communicated clearly and compassionately.
  26. The Forensic Patient Victims Register should be reviewed, in consultation with victim advocacy groups, to determine whether the options for communication are appropriate, and whether a more tailored approach to individual victim needs is possible.
  27. The management of the Victims Register should be transferred to Victims Services.
  28. Provisions should be made to enable information sharing between Victims Services and the Tribunal to support effective operation of the Service. This sharing is to have due regard to the confidentiality of sensitive information about forensic patients.
  29. This information should include the timing and outcome of Tribunal reviews, information about appeals, and the nature of patient leave or release if it is relevant to the safety and welfare of the person. The amended Regulations should allow for this information sharing.

### **3. Retaining provisions relating to the publication of names**

30. NSW Health and Victims Services should provide communication and education to victims, patients and the community in relation to the requirements and operation of section 162 of the Mental Health Act (NSW).

### **4. Appointment of Tribunal members**

Nil recommendations.

# CHAPTER ONE: HOW THE REVIEW WAS UNDERTAKEN

The five-month review took a rigorous and consultative approach, providing a broad range of stakeholders and interested individuals with the chance to have their views considered.

Figure 1: Review Methodology



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## Figure 1: Review Methodology

The methodology included:

- site visits to forensic health facilities and Tribunal hearings
- release of discussion paper and public call for written submissions
- roundtable consultations with stakeholders including victims, clinicians and patients
- review of a random sample of Tribunal decisions
- review of legislation and practice in jurisdictions across Australia and the UK
- review of academic literature.

A Discussion Paper provided background on the Review, the Tribunal, the NSW forensic mental health system and the four key areas being examined under the Terms of Reference. It was published on NSW Health's review of the Tribunal webpage on 28 August 2017 (<http://www.health.nsw.gov.au/patients/mhrt/Pages/default.aspx>).

The Review was supported by a Steering Group with membership expertise from the Department of Justice, Justice Health and Forensic Mental Health Network, NSW Ministry of Health (the Ministry), and the Tribunal (when attendance did not compromise the Review). Details of the membership can be found in Appendix 2: Steering Group Terms of Reference.



## Stakeholder engagement

Community and stakeholder communication began in early July with the release of the Review Terms of Reference and a Fact Sheet about the Review and the consultation process.

The Review commenced with site visits to forensic mental health facilities, and included extensive stakeholder consultations with victims' groups, forensic patients, carers, the Mental Health Review Tribunal, the Department of Justice including Victims Services, the Justice Health and Forensic Mental Health Network (the Network), and Local Health Districts (particularly where mental health inpatient units provide care for forensic patients).

Registered victims were invited to participate in the Review, and a total of 65 registered victims advised if they wanted to be involved in consultation and/or receive information about the review and its outcomes. Full details of the stakeholder engagement process, including submissions received, are in Appendix 3: Consultation summary.



## Site visits

The Reviewer commenced with site visits to five NSW Health forensic mental health facilities and met with more than 45 clinical leads, health service managers and other frontline staff, as well as 29 patients, including some on conditional release. The facilities visited were located across metropolitan Sydney with varied security levels and models of care, servicing a diverse group of forensic patients.

In August 2017, the Reviewer undertook site visits, including observing two Tribunal hearings:

- 23 August 2017 — Bunya Unit, Cumberland Hospital, North Parramatta
- 23 August 2017 — Metropolitan Remand and Reception Centre, Silverwater
- 24 August 2017 — Mental Health Review Tribunal Hearings, The Forensic Hospital, Malabar
- 24 August 2017 — The Forensic Hospital, Malabar
- 24 August 2017 — Long Bay Hospital, Malabar





## Written submissions

The Ministry wrote to 123 stakeholders and 42 registered victims (who had indicated that they would like to provide input to the Review) inviting them to make a written submission. This correspondence included a copy of the Discussion Paper.

Seventy-four submissions were received during the eight-week public consultation period. The submissions were made up of the following stakeholders:

- 18 registered victims and their families
- 14 patients and their families and/or carers
- 13 clinicians and representatives of health service
- 5 representatives of NSW Government agencies
- 24 other stakeholders (individuals, academics, peak bodies, non-government organisations and victim representatives).

The submissions were considered by the Reviewer and a thematic analysis undertaken, which was considered by the Review Steering Group.



## Consultations

Over 120 people participated in face-to-face consultations. This included eight one-to-one consultations and eight roundtable consultations with key stakeholders, including representatives from victims' groups, forensic patient representatives and people with a lived experience of mental illness, carers, the medical profession and other health professions, law enforcement agencies, the legal profession and academics.

On 17 August 2017, the Ministry, on behalf of the Reviewer, wrote to key stakeholders inviting them to attend one of the eight roundtable consultations. The roundtable consultations were an opportunity to discuss the issues being considered by the Review and a chance to share views and insights, to help inform the Review outcomes.

Participants were provided with a copy of the Discussion Paper, and discussions were facilitated around these key questions. Participants were asked to share their experiences, insights and advice relating to the matters under Review. They were also encouraged to provide a written submission.

Two victim-specific roundtable consultations were conducted in Parramatta and Hornsby, providing valuable insight into the needs of victims and their interactions with the Tribunal and the forensic system more broadly. A total of 23 victims and/or their representatives attended and were supported by an approved counsellor from Victims Services.

## Roundtable consultation schedule

In September 2017, the Reviewer convened eight roundtable consultation sessions with the following participants:

- 6 September 2017 – victim representatives (3 participants)
- 6 September 2017 – clinicians (7 participants)
- 7 September 2017 – consumer, carer and advocacy groups (7 participants)
- 7 September 2017 – academics (5 participants)
- 8 September 2017 – legal sector representatives (5 participants)
- 27 September 2017 – Tribunal members (9 participants)
- 28 September 2017 – victim representatives (17 participants)
- 28 September 2017 – victim representatives (6 participants)

The Reviewer also convened eight consultation sessions with the following participants:

- 8 August 2017 – Minister for Mental Health (3 participants)
- 9 August 2017 – Mental Health Review Tribunal (4 participants)
- 7 September 2017 – Victim advocate (1 participant)
- 8 September 2017 – Local Health District Mental Health Directors (20 participants)
- 27 September 2017 – Victims Services (3 participants)
- 27 September 2017 – former President of the Tribunal (1 participant)
- 27 September 2017 – Attorney General of NSW (2 participants)
- 19 October 2017 – Queensland Health Victim Support Service (2 participants)



## Review of random sample of Tribunal decisions

As stated in the Terms of Reference, the Review was not to investigate or make findings in relation to individual forensic patient cases or Tribunal decisions. However, in order to assess and make recommendations for improvement in relation to broader forensic administration processes, the Reviewer considered a random sample of 58 decisions of individual cases made by the Tribunal between 2015 and 2017.



## Audit of legislative frameworks from other jurisdictions

An analysis of the legislative frameworks from other Australian jurisdictions and the UK was undertaken (appendix 6). This focused on the leave and release of forensic patients in comparable jurisdictions. It considered the various reviewing bodies, the legislative test for release, the criteria for release, and the review process.

The audit also included research and analysis of the various approaches to victim engagement across jurisdictions in Australia.



## Academic literature and evidence scan

The Review commissioned a review of academic literature in the field of forensic mental health to address the first two focus areas in the Terms of Reference — leave and release decisions, and opportunities for improving victim engagement.

This provided an overview of the relevant local, national and international published literature, as well as a summary of preliminary results from analysis of the NSW Forensic Patient Database. This report was not a formal systematic review of all relevant literature or a comprehensive review of the functioning and outcomes of the Tribunals in other jurisdictions, except when these had been the subject of formal and published research.

The international literature of relevance to the work of Mental Health Review Tribunals with regard to forensic patients is limited in both amount and scope, particularly in relation to the key questions addressed in the Report (leave and release decisions and victim engagement). Despite the limitations, useful findings were summarised and are referred to in this report, with the full report available at appendix 5.

# CHAPTER TWO: THE FORENSIC MENTAL HEALTH SYSTEM

The NSW forensic mental health system consists of specialist forensic inpatient facilities, as well as general inpatient mental health facilities and community mental health services that provide detention, treatment and community case management of forensic patients.

The system is operated by NSW Health through the Justice Health and Forensic Mental Health Network (the Network) and the 15 Local Health Districts across the state.

## Forensic patients

The NSW-based Forensic Patient Database project is currently under way, a collaboration between the University of New South Wales School of Psychiatry, the Mental Health Review Tribunal and the Mental Health Commission. The project is a potential future source of locally relevant information about forensic patients and their outcomes.

A preliminary analysis of data for almost 500 NGMI forensic patients, collected by the Tribunal over the past two decades, suggests that:

- Offenders with an Aboriginal and/or Torres Strait Islander background may be under-represented in the forensic patient population compared to the incarcerated population in NSW.
- NGMI patients typically come from disadvantaged backgrounds and have often experienced trauma earlier in life.
- Homicide is the most common offence leading to an NGMI finding, but the proportion of new NGMI patients who have committed homicide appears to have decreased over time.



**NGMI patients typically come from disadvantaged backgrounds and have often experienced trauma earlier in life.**

- At the time of the index offence, almost half of NGMI patients were living with family members, one-fifth were living alone and one-tenth were homeless.
- The two most common locations for the index offence to have occurred were in the home of the patient (42.1%) and in a public place (33.3%).
- Victims are typically known to NGMI patients and are often family members.
- NGMI patients are commonly diagnosed with a psychotic illness, and co-morbidity, particularly with substance use disorders, is common.
- Most NGMI patients had had contact with mental health services before the index offence.<sup>1</sup>

<sup>1</sup> Dean, K (2017) Review of the Operation of the Mental Health Review Tribunal in respect of Forensic Patients: An academic report to support the review

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## Management of forensic patients

There were 424 forensic patients in NSW on 30 June 2017. Of these, 63 were detained in correctional or juvenile justice centres (including the Long Bay Prison Hospital), 212 were detained in NSW Health inpatient facilities, and 149 were living in the community on conditional release. Most forensic patients are initially detained in a correctional or juvenile justice facility.

The Justice Health and Forensic Mental Health Network, part of NSW Health, provides mental health services at over 90 locations in correctional and juvenile justice centres across NSW. It operates the Long Bay Hospital within the Long Bay Correctional Centre that includes a 40-bed mental health unit where patients can receive involuntary care, a Mental Health Screening Unit in the Metropolitan Remand and Reception Centre at Silverwater, and the purpose-built 135-bed Forensic Hospital in Malabar.

## The Forensic Hospital

The Forensic Hospital is a high secure forensic mental health facility providing the highest standard of care for mentally ill people, while ensuring the safety of patients, staff and the community. It is not a prison, but a hospital with high levels of physical and procedural security, including a high perimeter wall, security and biometric screening on entry, restrictions on visitor entry and items that may be taken in, and restrictions on patient movement within and from the hospital.

The Forensic Hospital has five accommodation units covering the clinical spectrum from high dependency, acute care, continuing care to long stay and rehabilitation. There are specialised units within the Forensic Hospital for adolescents and women.

The Forensic Hospital accommodates:

- forensic patients (persons found NGMI or who are unfit to plead because of mental illness)
- correctional patients (sentenced and remanded inmates who become mentally ill while in custody and require treatment in a mental health facility)
- civil patients who require care in a high secure environment.

Most forensic patients are transferred from a correctional or juvenile justice centre into the Forensic Hospital when a bed becomes available. They are normally detained in the Forensic Hospital for an extended period, during which they are assessed, monitored and provided with intensive mental health care, treatment and rehabilitation. On 30 June 2017, there were 109 forensic patients (26% of forensic patients) detained in the Forensic Hospital.



There were **424 forensic patients** in NSW on 30 June 2017.

## Medium secure forensic units

Medium secure forensic units are locked units with physical security measures designed to prevent escape, staffed by highly skilled and experienced forensic clinicians, including psychiatrists, psychologists, nurses and allied health staff. As they provide step-down rehabilitation services from the Forensic Hospital, these units have the experience and capacity to provide a range of leave to forensic patients.

There are three designated medium secure forensic mental health units in NSW:

- Macquarie Unit, Bloomfield Hospital, Orange: a 20-bed unit operated by Western NSW Local Health District
- Kestrel Unit, Morisset Hospital, Morisset: a 30-bed unit operated by Hunter New England Local Health District
- Bunya Unit, Cumberland Hospital, North Parramatta: a 24-bed unit operated by Western Sydney Local Health District

Transfer from the Forensic Hospital to a medium secure unit is based on the Forensic Hospital team identifying that a patient's rehabilitation has progressed to a point where they can safely be managed in a less secure setting with leave. The treating team's referral includes detailed information about the patient's psychiatric history and diagnosis, the index offence and the circumstances surrounding it, the patient's progress to date, and risk factors for the patient in the future.

Senior staff from the medium secure unit will then visit the Forensic Hospital, interview the patient and speak with the treating team, then provide a written report and decision. In making their decision, they take into consideration the information provided by the treating team and from the patient interview, including whether they believe the patient's risk to themselves or the community can be effectively managed in their unit, the patient's rehabilitative prospects, and whether the unit has appropriate programs that would meet the patient's rehabilitative needs.

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## Other inpatient mental health facilities

A total of 103 forensic patients (24% of forensic patients) were detained in Local Health District facilities, including the three medium secure forensic units, on 30 June 2017. A minority of these patients are detained in generalist medium and low secure mental health facilities run by Local Health Districts.

The low secure facilities include unlocked rehabilitation 'cottages' on the Morisset and Cumberland Hospital campuses, which provide step-down mental health care and rehabilitation, including development of living skills to assist patients with the transition to community living. Forensic patients must have been granted unsupervised day leave to be able to live in low secure accommodation.

## Community mental health services

Forensic patients on conditional release are normally managed by community mental health services operated by Local Health Districts. On 30 June 2017, 149 forensic patients (35% of forensic patients) were on conditional release in the community.

Conditionally released forensic patients have a qualified mental health worker as a case manager, as well as a treating psychiatrist attached to the mental health service. Patients are required to attend regular reviews with the service as well as six-monthly reviews with the Tribunal.

## The forensic patient pathway

Entry to the forensic mental health system occurs when a court makes an order designating the person a 'forensic patient'. This happens either when a person is found unfit to be tried, or following a special hearing when a person is either found NGMI or unfit to be tried and not acquitted.

Once the order has been made, the patient is usually returned to custody to await a placement in the forensic mental health system. However, there is a small number of low risk patients (approximately 10 people each year) released from the court directly back to the community.

Some forensic patients returned to custody do not have a pathway into the forensic mental health system. Those with cognitive impairment or older patients, for example, may enter other specialist services such as disability services or suitable aged care facilities.

This leaves a core of forensic patients who can be transferred to the high secure Forensic Hospital when space becomes available. After treatment here, patients may progress to one of the medium secure forensic units.

From the medium secure units, forensic patients may step down into low secure units (in NSW these are not specialist forensic mental health facilities) or directly to the community on conditional release into supported accommodation or a private residence.

After a period being supervised on conditional release in the community, a patient may be given unconditional release, at which point they cease to be a forensic patient – the exit point from the forensic mental health system. Unconditionally released patients will usually require ongoing mental health care from general mental health services and, in these cases, they continue to receive treatment not as a forensic patient but as a civil patient.

In the current system, patients nearly always enter at a high security level and then transfer to medium and then low levels due to limited capacity at the lower levels of the system.

## Trends in forensic patient numbers

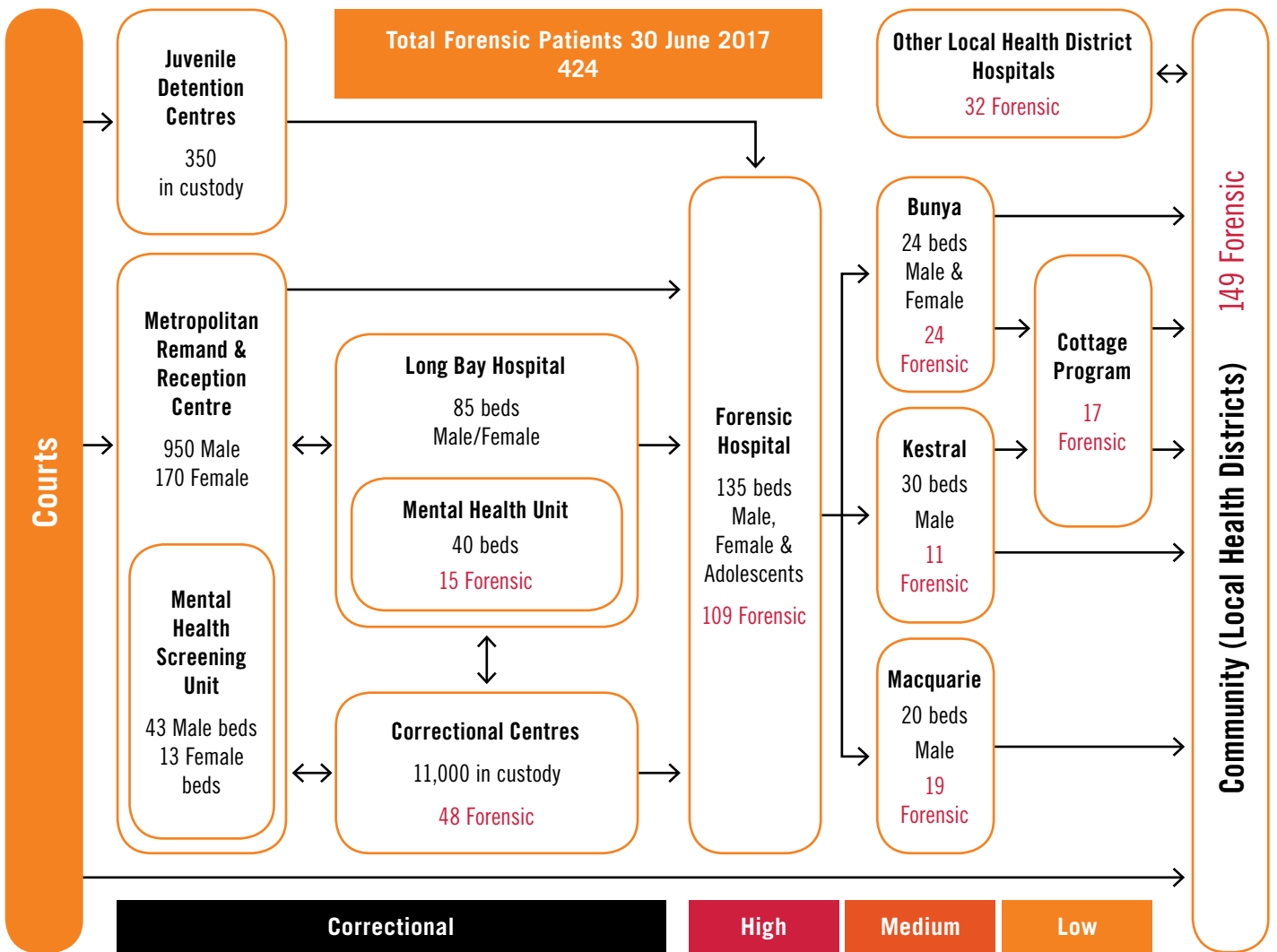
The Tribunal advises that the number of forensic hearings is increasing, with 1,340 occurring in 2016–17, compared with 1,186 in 2015–16, an average of three hearings per patient. In 2016–17, 28 patients were granted conditional release and three were unconditionally released. Trends in forensic patient numbers can be found in the Review Discussion Paper (Appendix 7).

Given the increase in the number of forensic patients, it follows that the number of forensic patients provided conditional or unconditional leave each year is also increasing. As at 30 June 2017, 149 forensic patients were living in the community on conditional release (about 35% of the forensic patient population).



The Tribunal advises that the number of forensic hearings is increasing, with **1,340** occurring in 2016–17, compared with **1,186** in 2015–16, an average of three hearings per patient.

**Figure 2: Justice Health and Forensic Mental Health Network Pathway**



# CHAPTER THREE:

## THE OPERATION OF THE TRIBUNAL IN RESPECT OF FORENSIC PATIENTS

### Statutory background

The Tribunal is a specialist, quasi-judicial body constituted under the *Mental Health Act 2007 (NSW)*. It has a wide range of powers to conduct mental health inquiries, make and review orders, and hear some appeals on the care and treatment of people with a mental illness.

Forensic mental health services are predominantly administered under the Forensic Provisions Act. This Act deals with the care, treatment, control and release of forensic patients and patients transferred from correctional centres, and with the functions of the Tribunal.

The forensic division of the Tribunal has a statutory role in making decisions about people who are mentally ill or have some other form of mental impairment or cognitive impairment and who have been:

- accused of committing a crime and have been refused bail after having been found unfit to be tried; or
- found unfit to be tried, had a special hearing, found to have committed one or more offence(s) and been ordered to be detained for not longer than a 'limiting term' nominated by the court; or
- found NGMI of one or more offence(s) after a trial or special hearing and either detained or conditionally released.<sup>2</sup>



**The Tribunal is a specialist, quasi-judicial body constituted under the Mental Health Act (NSW). It has a wide range of powers to conduct mental health inquiries, make and review orders, and hear some appeals on the care and treatment of people with a mental illness.**

The Tribunal is required to conduct regular reviews of forensic patients, and to make orders about whether and where the patient should be detained, as well as the patient's care and treatment. A forensic patient's transfer between facilities and release into the community cannot occur without the Tribunal's approval.

The Tribunal makes their determination and issues orders based on:

- the patient's own hopes and aspirations
- whether the patient is receiving appropriate care and/or treatment
- whether the patient's placement is the least restrictive environment that is compatible with patient and public safety.<sup>3</sup>

<sup>2</sup> Mental Health Review Tribunal (2017) Forensic Guidelines, Version 4, page 2.

<sup>3</sup> Mental Health Review Tribunal (2017) Forensic Guidelines, Version 4, page 3.

## Forensic functions

The Tribunal has jurisdiction in relation to decisions regarding the treatment, care, detention and release of forensic patients. The jurisdiction to determine release was given in 2009. Before this legislative change, the power to order release had been with the Governor through the Minister. This was a major reform, which brought NSW into line with international standards and obligations.

The Tribunal, in its forensic division, has the authority to grant leave or release for a forensic patient into the community, but there are several detailed procedural steps before leave or release can be considered.

The Forensic Provisions Act provides for the matters that the Tribunal must consider in determining what order to make, the criteria for leave and release, and the conditions that the Tribunal may impose.

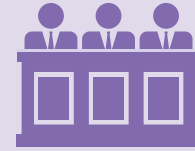
- Section 74 states the **Matters for consideration** by the Tribunal in determining what order to make:

Without limiting any other matters the Tribunal may consider, the Tribunal must have regard to the following matters when determining what order to make about a person under this Part:

- a) whether the person is suffering from a mental illness or other mental condition
- b) whether there are reasonable grounds for believing that care, treatment or control of the person is necessary for the person's own protection from serious harm or the protection of others from serious harm
- c) the continuing condition of the person, including any likely deterioration in the person's condition, and the likely effects of any such deterioration
- d) in the case of a proposed release, a report by a forensic psychiatrist or other person of a class prescribed by the regulations, who is not currently involved in treating the person, as to the condition of the person **and whether the safety of the person or any member of the public will be seriously endangered by the person's release**
- e) in the case of the proposed release of a forensic patient subject to a limiting term, whether or not the patient has spent sufficient time in custody.

<sup>4</sup> Mental Health Forensic Provisions Act 1990, S74 (d).

<sup>5</sup> Mental Health Forensic Provisions Act 1990, 43, 49(3), 74.



**The Tribunal has jurisdiction in relation to decisions regarding the treatment, care, detention and release of forensic patients.**

Release considerations require a report by a forensic psychiatrist (or other person of a class prescribed by regulations) who is not currently involved in treating the person, as to the condition of the person and whether the safety of the person or any member of the public will be seriously endangered by the person's release.<sup>4</sup> In practice, the Tribunal nearly always requests that a qualified person in the community Forensic Mental Health Service provide the report.

The **criteria for leave or release**<sup>5</sup> require that no orders be made unless the Tribunal is satisfied, on the evidence, that the safety of the patient, or any member of the public will not be seriously endangered by the patient's release, or the grant of leave of absence.

- Section 49 states that the **Tribunal may grant leave**:
  - 1) The Tribunal may make an order allowing a forensic patient to be absent from a mental health facility, correctional centre or other place for such period and subject to such terms and conditions, if any, as the Tribunal thinks fit.
  - 2) An order may be made on the application of the patient or on the motion of the Tribunal.
  - 3) The Tribunal must not make an order allowing a forensic patient to be absent from a mental health facility, correctional centre or other place unless it is satisfied, on the evidence available to it, that the safety of the patient or any member of the public will not be seriously endangered if the leave of absence is granted.
  - 4) This section does not prevent leave of absence being granted to a forensic patient detained in a correctional centre under any other Act or law.
  - 5) The section has effect despite the Crimes (Administration of Sentences) Act 1999 (NSW).



There is a range of conditions that can be imposed by the Tribunal on release or leave.

- Section 75 states the **Conditions that may be imposed by Tribunal on release or leave of absence**:
  - 1) The Tribunal may impose conditions relating to the following matters on orders for release or granting leave of absence made by it in relation to a forensic patient under this Part:
    - a) the appointment of a case manager, psychiatrist or other health care professional to assist in the care and treatment of the patient
    - b) the care, treatment and review of the patient by persons referred to in paragraph (a), including home visits to the patient
    - c) medication
    - d) accommodation and living conditions
    - e) enrolment and participation in educational, training, rehabilitation, recreational, therapeutic or other programs
    - f) the use or non-use of alcohol and other drugs
    - g) drug testing and other medical tests
    - h) agreements as to conduct
    - i) association or non-association with victims or members of victims' families
    - j) prohibitions or restrictions on frequenting or visiting places
    - k) overseas or interstate travel.
  - 2) This section does not limit the matters in relation to which a condition may be imposed.

## Tribunal practice

The **practice of the Forensic Division of the Tribunal** in relation to the conduct of hearings was described by the Tribunal in their detailed submission to the Review, and is briefly summarised here.



**The Guidelines and a related practice direction make clear that hearings are usually intended to be six months apart, but can be extended to 12 months.**

## Scheduling hearings

- The Mental Health Review Tribunal Forensic Guidelines and a related practice direction make clear that hearings are usually intended to be six months apart, but can be extended to 12 months.
- The Tribunal has developed a process of establishing what will be discussed at a hearing in advance of that hearing. It does this by asking the treating teams (or the forensic patient) to advise the Tribunal about the requests that they will ask the Tribunal to consider at the next hearing. The Tribunal is then able to advise the Ministers and registered victims if there are likely to be issues (such as an application for leave or release) which may concern them.
- The general practice is that a patient's treating team and/or lawyer must give advance notice of the orders that they will ask the Tribunal to consider at a review.
- This is done by completing a Notice of Intent. The Tribunal's staff notifies the Minister for Mental Health, the Attorney General and the registered victims of the intended orders. This enables those persons to consider whether they wish to exercise statutory rights to attend the review and/or make submissions.
- For reasons of procedural fairness, the Tribunal will not make orders which are broader than those that have been foreshadowed by the treating team or forensic patient in advance of the review.

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## Information available to the Tribunal

### Written reports

- The Tribunal has also issued a practice direction setting out the timeframe for reports to be provided prior to a hearing.<sup>6</sup> Tribunal staff obtain reports from treating teams, and try to ensure that all participants have the reports in a timely way.
- The *Forensic Mental Health Services Policy Directive (PD2012\_50)* details the types of reports and what should be included when a patient or treating team are considering leave and/or release (section 7.2.3). The types of reports need to include a plan for release inclusive of a risk-management plan, further information for patients who have a mental impairment or when there is a history of substance misuse.
- The Tribunal will also often have the independent written report of the Community Forensic Mental Health Team (the Community Team). The Community Team provides reports for forensic patients with a mental illness who are seeking conditional or unconditional release.
- For forensic patients who do not have a mental illness (such as those who have an intellectual disability, acquired brain injury or some other cognitive impairment) the Community Team is not available. An independent report is provided for all release decisions by an appropriate expert. If the Criminal Justice Program<sup>7</sup> is involved in a patient's care, their staff provide a report for the forensic patient while they are living in the community under their program.

### Oral evidence

- The written information provided to the Tribunal is supplemented by the oral evidence provided by the forensic patient, treating clinicians, family or friends and registered victims.
- If the Tribunal reviews a forensic patient detained in a mental health facility, most members of the treating team attend the review and will be available to answer questions (e.g. psychiatrist, registrar, nursing staff, psychologist social worker, occupational therapist, diversional therapist). If the patient is transitioning into the community, the Tribunal will also generally have a report from staff of the community clinical treating team or non-government organisation working with the patient. These people may also attend the hearing (in person or by telephone).

- In addition, the Tribunal sits regularly at each forensic mental health facility, so has a good understanding of current issues at any venue and in particular regions.
- If a patient is living in the community on conditional release, then usually it is only the case manager (not the treating psychiatrist) who attends the review, although the treating psychiatrist will have provided a written report and may be available by telephone for the hearing.
- They also provide a report for forensic patients with a mental illness who have been conditionally released and are living in the community, at each Tribunal review. A member of this team is generally available by telephone to answer questions from the Tribunal, or representatives of the Ministers or patient.
- The Tribunal regularly receives detailed written and oral submissions from a Minister's legal representative opposing leave or release, or proposing certain conditions. This is a healthy and robust process for testing these leave and release cases.

### Powers to request information

- The Tribunal also has the power under section 76K of the Forensic Provisions Act to request information from Secretary of the Ministry of Health, the Commissioner of Corrective Services, the Secretary of the Department of Justice and any other government agency responsible for the detention, care or treatment of a forensic patient or correctional patient.
- The agency must use its best endeavours to comply with a request made to them under the Forensic Provisions Act. It is rare for the Tribunal to invoke this section, as it usually receives full cooperation from agencies involved in the care and treatment of forensic patients. If necessary, the Tribunal also has the power to issue a summons on its own motion under section 157 of the Mental Health Act.

<sup>6</sup> Practice Direction on Provision of material to the Tribunal prior to forensic review hearings – December 2013.

<sup>7</sup> This Program is a part of Family and Community Services, NSW.

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## Adjourning hearings

- If the Tribunal is not satisfied with the evidence available at a hearing, it can adjourn the hearing to another day to allow that evidence to be obtained. Of course, if the evidence does not satisfy the Tribunal that the statutory test for a grant of leave or release is met, then the order is not made.

## Open hearings and the publication of names

Unlike any other state in Australia, NSW conducts public hearings in forensic matters. The legislation protects the privacy and identify of people who come before the Tribunal by prohibiting anyone, except with the Tribunal's consent, from publishing or broadcasting their names.

- Section 162 Publication of names Mental Health Act:
  - 1) A person must not, except with the consent of the Tribunal, publish or broadcast the name of any person:
    - a) to whom a matter before the Tribunal relates, or
    - b) who appears as a witness before the Tribunal in any proceedings, or
    - c) who is mentioned or otherwise involved in any proceedings under this (Mental Health) Act or the Forensic Provisions Act,whether before or after the hearing is completed.

Maximum penalty:

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

## Tribunal members

For all forensic matters, the Tribunal panel must include the President or a Deputy President, along with a psychiatrist and other suitably qualified member. For release decisions for forensic patients, the President or Deputy President on the panel must be the holder or former holder of a judicial office.

The qualifications of the persons who may sit on the Tribunal in its Forensic Division found in section 73(2) and (3) of the Forensic Provisions Act state:

- Section 73(2):

The Forensic Division of the Tribunal is to consist of the following members:

- a) the President or a Deputy President
- b) a member who is a psychiatrist, a registered psychologist or other suitable expert in relation to a mental condition
- c) a member who has other suitable qualifications or experience.

Note. Under section 150(1) of the Mental Health Act, the Tribunal is to be constituted by members nominated by the President. See Chapter 6 of the Mental Health Act for other provisions applying generally to the Tribunal.

- Section 73(3):

The Tribunal must not order the release of a forensic patient under this (Forensic Provisions) Act unless it is constituted by at least one member, including the President or a Deputy President, who is the holder or former holder of a judicial office.

# CHAPTER FOUR:

## VICTIMS OF UNLAWFUL ACTS COMMITTED BY FORENSIC PATIENTS

### Australia's international obligations

The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (the Declaration) requires that victims of crime be treated with compassion, respect for their dignity, and provided with compensation, restitution and assistance. There is no justifiable basis in this declaration to discriminate against or overlook the victims of crime in the forensic system.



**The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (the Declaration) requires that victims of crime be treated with compassion, respect for their dignity, and provided with compensation, restitution and assistance.**

The Declaration does include the following on the responsiveness of judicial and administrative processes to the needs of victims:

- a) informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information
- b) allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system
- c) providing proper assistance to victims throughout the legal process
- d) taking measures to minimise inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation
- e) avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

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## Victims' involvement in court proceedings in NSW

There is no mention of any participation by victims before the Trial Court when a special verdict is returned, nor is there any provision for the giving of a victim impact statement to the court.

Section 39 of the Forensic Provisions Act contains a key provision for the functions of the trial court when a verdict of NGMI is returned.

Section 39 Effect of finding and declaration of mental illness:

- 1) If, on the trial of a person charged with an offence, the jury returns a special verdict that the accused person is NGMI, the Court may order that the person be detained in such place and in such manner as the Court thinks fit until released by due process of law or may make such other order (including an order releasing the person from custody, either unconditionally or subject to conditions) as the Court considers appropriate.
- 2) The Court is not to make an order under this section for the release of a 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.
- 3) As soon as practicable after the making of an order under this section, the Registrar of the Court is to notify the Minister for Health and the Tribunal of the terms of the order.

## NSW legislative provisions for victims of forensic patients

The requirements in section 3 of the Mental Health Act do not mention the victims of crimes committed by persons who are mentally ill. There is a peripheral mention of victims in the regulation making power in section 160 of the Mental Health Act (dealing with the procedures of the Mental Health Review Tribunal).

Section 3 Objects of the Act:

- 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.

There is no mention of the interests of victims in the Objects of the Forensic Provisions Act, (which deals with forensic patients) as set out in section 40:

- a) to protect the safety of members of the public,
- b) to provide for the care, treatment and control of persons subject to criminal proceedings who are suffering from a mental illness or mental condition,
- c) to facilitate the care, treatment and control of any of those persons in correctional centres through community treatment orders,
- d) to facilitate the provision of hospital care or care in the community through community treatment orders for any of those persons who require involuntary treatment,
- e) to give an opportunity for those persons to have access to appropriate care.

Note. Section 68 of the Mental Health Act sets out general principles with respect to the treatment of all people with a mental illness or mental disorder.

## Defining a victim

Section 41 of the Forensic Provisions Act defines a victim as follows:

- *victim* means a primary victim within the meaning of the Victims Rights and Support Act 2013 (NSW) and includes a member of the immediate family of a victim within the meaning of section 22 of that Act.
- *victim* of a patient means a victim who is a victim of an act of violence (within the meaning of the Victims Rights and Support Act) committed by a patient.

## Victim submissions

Victims' rights to make submissions in Tribunal hearings are limited to the important provisions in section 76(2) of the Forensic Provisions Act, which enables a victim to apply for an order:

A victim of the patient may apply to the Tribunal for an order:

- a) varying a non-association condition of an order to which this section applies or imposing a non-association condition on an order to which this section applies, or
- b) varying a place restriction condition of an order to which this section applies or imposing a place restriction order.

The section applies to an order of the Tribunal for the release of, or granting leave of absence to, a forensic patient. However, generally speaking, these are the only statutory rights conferred on victims in relation to the functions of the Tribunal.



**The Tribunal outlines its procedures in its Forensic Guidelines<sup>8</sup> (the Guidelines) so that all those who are involved in the lives of forensic patients 'understand their roles and responsibilities, as well as what they can expect from the Tribunal'.**

## Tribunal procedures

The Tribunal outlines its procedures in its Forensic Guidelines<sup>8</sup> (the Guidelines) so that all those who are involved in the lives of forensic patients 'understand their roles and responsibilities, as well as what they can expect from the Tribunal'.

The Guidelines provide information about the roles and responsibilities for the following people/agencies:

- the patient or their lawyer
- the mental health facility that detains a patient (via the treating team)
- Corrective Services NSW if the patient is detained in a correctional centre
- the Minister for Mental Health (for leave and conditional or unconditional release orders)
- the Attorney General (for conditional or unconditional release orders)
- The Minister for Police (for conditional or unconditional release orders only, not reasons).

<sup>8</sup> Mental Health Review Tribunal (2017) Forensic Guidelines, Version 4, page 22.

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## How victims can be involved in Tribunal hearings

The Tribunal manages the Forensic Patient Victims Register. Victims can choose their level of contact with the Tribunal and the level of information they wish to receive. Some registered victims choose to attend every review hearing. Hearings in NSW are open to the public unless specific reasons indicate this is not allowed, for example, the welfare of the patient, when a particular review maybe closed or closed in part.

Registered victims are notified if the Tribunal is considering leave or release, and have the right to make an application concerning non-association or a place restriction. If the registered victim knew the forensic patient before the offence occurred, they may give the Tribunal information relevant to the Tribunal's decision about the patient's care, treatment or detention which can be done at the hearing or, preferably, beforehand in writing. This information may be given by the Tribunal to the patient's lawyer and/or to the treating team, or if appropriate, the information can be de-identified at the registered victim's request.

The Guidelines, in the context of the foregoing, then state:

Otherwise, if the Tribunal is not considering a leave or release application, or the question of a non-association or place restriction does not need to be considered, then the registered victim is only an observer in the hearing and does not participate.<sup>9</sup>

Some victims find it easier if they are supported by a victims' support group or advocate. The Tribunal allows an advocate or representative to represent the registered victim at the hearing, who appears alongside the victim or instead of the victim attending. On occasions, an advocate has been solely responsible for making the argument about place restriction or non-association. There is nothing in the legislation that prohibits victims from having legal representation when making an application on a relevant matter.

Victims are advised of the outcome of a hearing, but not when a particular order is implemented. However, there is no provision for serving written reports or decisions on a registered victim in any circumstance.

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



**Some victims find it easier if they are supported by a victims' support group or advocate.**

## Apprehension or detention

The President or a Deputy President may issue an order for the apprehension and detention of a forensic patient where it appears that a person has breached a condition of their leave or release. The Tribunal may also issue a detention order when the patient is at risk of causing serious harm to himself or herself or to any member of the public as a result of a deteriorating mental condition (section 68 of Forensic Provisions Act). A patient named in the order must be detained at a place specified in the order and cannot be discharged from the facility except on the Tribunal's order.

The Tribunal noted that if a victim has elected to be told a) of every hearing, and b) if the forensic patient escapes or fails to return from leave, and the Tribunal has issued an apprehension order, then the victim would be advised:

- that the patient has failed to return from leave and an apprehension order has been issued
- that the patient has been apprehended and a hearing will be held on a specified date
- the outcome of that hearing.

The Guidelines do not provide for specific notification to the registered victim concerning breach, the issue of a detention order or the possibility of an application for future leave and subsequent review.

<sup>9</sup> The Tribunal Forensic Guidelines, Version 4 – August 2017, p20.

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## Information for victims

The Tribunal has also published an *Information for Victims* fact sheet (Appendix 4: The Mental Health Review Tribunal Information for victims – fact sheet) which contains the following:

- Information is included about procedures at a review hearing, the rights of the victim and advice about the type of leave that may be allowed and the methodology applied by the Tribunal in determining leave and release decisions.
- A registered victim can ask the Tribunal to tell him or her of the date of the next hearing, whether any changes to the arrangements for the patient are likely to be considered, if there is a request to release the patient, or if the patient has escaped or failed to return from leave and the Tribunal has issued an order for apprehension.
- A registered victim has the right to ask the Tribunal to put restrictions on the place where a patient can visit or live, and this is usually done because the victim or their family lives or works in that area. A victim can also ask the Tribunal to order that a patient not contact them. There is only a need for these restrictions if the Tribunal is considering a request to give a patient leave or release.
- Apart from these special rights, victims are entitled to attend hearings and listen to proceedings in the same way as other members of the public.
- The Tribunal is not able to tell the registered victim the location or address of a forensic patient or provide personal information about the patient. The information provided is limited to stating that the patient is being detained in a prison or a hospital and does not give any information about the patient's medical treatment or history.



**The Tribunal has also published an *Information for Victims* fact sheet, see Appendix 4.**



# CHAPTER FIVE: FINDINGS AND RECOMMENDATIONS

## 1. Re-balancing the process for determining leave and release by expanding victim input

### Bringing the legislative framework into balance

The Review considers that the legislative test for leave and release is appropriate and that the Tribunal applies a rigorous approach to assessing risk and safety, making decisions on leave and release conservatively and responsibly. There was strong support from clinicians, patients and others for the existing legislative test, with submissions noting that the effectiveness of the system is supported by low reoffending rates of forensic patients, a key measure of how the community is protected from future harm.

The Review commissioned a review of literature and evidence by Associate Professor Kimberlie Dean, Chair in Forensic Mental Health, UNSW (Appendix 5), which found that forensic patients had consistently lower reoffending rates after release than comparison groups of offenders. Australian reoffending studies, including in NSW, have reported findings consistent with the wider international literature.<sup>10</sup>

However, the Review found that in the process of applying the leave and release test, the system is weighted too heavily towards the interests of patients, without due consideration for the safety and interests of victims. The clear reasons are:

- The Forensic Provisions Act and Mental Health Act contain limited provisions dealing with the participation of victims in Tribunal proceedings, despite the fact that victims may have 'genuine and legitimate concerns' for their safety and the safety of others if the forensic patient were to be released.<sup>11</sup>

- The objects of the Forensic Provisions Act do not explicitly refer to the interests of victims as a factor in Tribunal decisions, and do not specifically recognise the harm done to the victims of crime. The objects of the current Forensic Provisions Act are focused on the safety of the public and the care, treatment and control of forensic patients.

Submissions to the Review expressed great distress that the safety and interests of victims are not considered separately to the safety of the community. They advocated for this to change, noting that the threat to victims and their mental anguish can be very different from the experience of members of the public.

Victims are typically known to patients and are often family members. Victims felt the threat to themselves was particular, and in some circumstances much higher than the threat to the general community. This circumstance, they argued, should be reflected in the legislation.

<sup>10</sup> Dean, K (2017) Review of the Mental Health Review Tribunal in respect of forensic patients: An academic report to support the re-view.

<sup>11</sup> NSW Law Reform Commission (2013) People with cognitive and mental health impairment in the criminal justice system. Criminal responsibility and consequences. Report 138, section 8.131; quoting M Barnett and R Hayes, "The Role of Victims in NSW Forensic Patient Proceedings" (2009) 13 University of Western Sydney Law Review 7, 17.

The existing legislative framework underpins the current practice of giving victims a very limited role in Tribunal processes. As one victim described:

*As a victim I feel I am redundant to the goals of the Tribunal. Engaging victims in the Tribunal would require a foundational shift that allows for at least some recognition of the victims of crime rather than the sole focus on forensic patient wellness.*

(Individual, redacted)

Many submissions suggested that the objects of the Forensic Provisions Act be amended to bring this into better balance, and to facilitate better understanding and relationships between the Tribunal and victims, given:

*The bewilderment, disbelief, and eventual anger felt at how victims are perceived to be treated in many of these formal hearings.*

(Individual, redacted)

A review of legislation and practice in other Australian jurisdictions and the UK can be found in Appendix six. Queensland was considered to have the most developed and comprehensive practices in relation to supporting victims. The Mental Health Act (Qld) sets out the following set of principles:

- the physical, psychological and emotional harm caused to the victim by the unlawful act must be recognised with compassion
- the benefits of counselling, advice on the nature of proceedings under this Act and other support services to the recovery of the victim from the harm caused by the unlawful act must be recognised
- the benefits to the victim of being advised in a timely way of proceedings under this Act against a person in relation to the unlawful act must be recognised
- the benefits to the victim of the timely completion of proceedings against a person in relation to the unlawful act must be recognised
- the benefits to the victim of being advised in a timely way of a decision to allow a person to be treated in the community must be recognised
- the benefits to the victim of being given the opportunity to express the victim's views on the impact of the unlawful act to decision-making entities under this Act must be recognised.<sup>12</sup>

In NSW, principles in relation to the care and treatment of forensic patients are outlined under section 68 of the Mental Health Act, but there are no similar principles for victims of forensic patients.

To bring the NSW Tribunal into a more appropriate balance, particularly to recognise and include the needs and interests of victims, it is proposed that the objects of the Forensic Provisions Act be amended to recognise victims, and a Charter of principles be developed as a Schedule to the Forensic Provisions Act, to support the realisation of this object. These principles complement the general Charter of Victims' Rights under Division 2 of the *Victims Rights and Support Act (NSW) 2013*.

<sup>12</sup> Mental Health Act 2016 (Qld), section 6.



## Recommendations

1. Amend section 40 of the Forensic Provisions Act to include an object to acknowledge the harm that has been done to victims, and an object to specifically protect the safety of victims.
2. Similar to section 68 of the Mental Health Act (NSW), which provides principles for the care and treatment of people with a mental illness, a Charter should be developed as a Schedule to the Forensic Provisions Act to provide a statement of principles for the participation of victims of a patient in the Tribunal's review of patients' cases.

This should include:

3. It is the intention that the following principles are so far as practicable, to be given effect with respect to the participation by any victim of a patient in the Tribunal's review of any patient's case:
  - 3.1. that the review may touch on painful or tragic events in the life of any victim of the patient should be recognised, and that the physical, psychological and emotional harm caused to the victim by the unlawful act be recognised with compassion
  - 3.2. that any victim of the patient may continue to experience grief and distress as a result of an event that is the subject of the review should be recognised with compassion, along with the possibility of exacerbation of that grief and distress by regular reviews and the variability of the forensic patient's pathway
  - 3.3. the benefits of counselling, advice on the nature of proceedings under the Forensic Provisions Act, and other support services, to the recovery of the victim from the harm caused by the unlawful act must be recognised
  - 3.4. the benefits to the victim of being advised in a timely way of Tribunal proceedings must be recognised
  - 3.5. the benefits to the victim of being advised in a timely way of any proposal before the Tribunal to allow leave or release must be recognised
  - 3.6. the benefits to the victim of being advised in a timely way of any decision to allow a patient leave or release must be recognised
  - 3.7. evidence and submissions from any victim of a patient should be listened to and considered respectfully, acknowledging the benefits to the victim, when appropriate, of being given the opportunity to further express the victim's views on the impact of the unlawful act. The Tribunal retains discretion as to how this principle is exercised (noting the need to balance consideration between the interests of the victim and the patient).

## Court proceedings — allowing victim impact statements

Many stakeholders supported legislation to enable victims to make a victim impact statement as part of the court process, which could then be forwarded to the Tribunal for use in the review hearings.

While related court proceedings fall outside the Terms of Reference of this Review, given the consistency with which this issue was raised and its relevance to victim's engagement with the process and the Tribunal, it was considered appropriate to address the issue.

In normal criminal proceedings, the victim is entitled under the *Crimes (Sentencing Procedure) Act 1999* (NSW) to make a victim impact statement, with recent amendments allowing the sentencing court to take its content into account in certain circumstances.<sup>13</sup>

If the defendant is found NGMI, or found unfit to be tried and not acquitted of the offence at a special hearing, there is no ability under existing legislation to make a victim impact statement.

The Tribunal currently includes written submissions from victims in papers for the Tribunal hearing. However, victims told the Review that this did not give victims any assurances that their view has been heard or considered in Tribunal decision making.

The opportunity to make a victim impact statement at the time of a special verdict (an NGMI or unfitness finding) provides victims with the most appropriate time to be heard during the process. This could be then forwarded to the Tribunal for consideration.



**Many stakeholders supported legislation to enable victims to make a victim impact statement as part of the court process, which could then be forwarded to the Tribunal for use in the review hearings.**

## NSW Law Reform Commission considerations

This issue was recently considered by NSW Law Reform Commission (LRC) *Report 138: People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences* (the LRC Report)<sup>14</sup>, noting that, in ordinary criminal proceedings in NSW, a victim of an offence or alleged offence is entitled to provide a written impact statement to the court before sentencing takes place.

The LRC Report noted that when a defendant is found unfit to be tried or NGMI and then not convicted of the offence in question, the ability to provide a victim impact statement is less clear.

The Forensic Provisions Act, on the other hand, neither requires nor prohibits consideration by the court of the views of victims when determining what orders to make, with the exception of the two stipulated matters relevant to leave or release. There is no provision in the legislation for allowing victims to address more broadly the topics that are usually found in a victim impact statement.

The LRC Report noted that in several other Australian jurisdictions, specific legislative provisions are made for victims to be notified of, or informed about, and to participate in, proceedings (including by submitting a victim impact statement) when courts are making orders for people who are found unfit and not acquitted or NGMI.

In Queensland, victims can confidentially give statements to the specialist court and the Tribunal about a forensic patient's condition at the time of the unlawful act and can outline:

- the forensic patient's behaviour and the impact on the victim
- risks of harm to the victim, both past and present
- specific conditions on limited community treatment and the revocation of the forensic orders necessary to protect the victim
- a request for a non-contact order

The LRC Report is presently under consideration by Government.

<sup>13</sup> The amendment permits the sentencing court to take into account on sentence, for the purpose of section 3A(g) of the *Crimes (Sentencing Procedure) Act*, the harmful impact of the death on members of the immediate family as an aspect of harm done to the community, when the court considers it appropriate.

<sup>14</sup> [www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc\\_completed\\_projects/lrc\\_peoplewithcognitiveandmentalhealthimpairments-inthecriminaljusticesystem/lrc\\_peoplewithcognitiveandmentalhealthimpairmentsinthecriminaljusticesystem.aspx](http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_completed_projects/lrc_peoplewithcognitiveandmentalhealthimpairments-inthecriminaljusticesystem/lrc_peoplewithcognitiveandmentalhealthimpairmentsinthecriminaljusticesystem.aspx)

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## Proposed changes

Despite the difference in the legislative regimens (and the fact that Queensland holds closed hearings), the Review considers that similar provisions would be appropriate in NSW, particularly given the strong support of stakeholders throughout the Review and the clear need for consistency with the findings of the LRC Report.

Legislative or regulatory provision should be made in or under the Forensic Provisions Act to permit a victim impact statement to the court if the victim wishes to do so. The legislation should make it clear that the absence of a victim impact statement does not give rise to an inference that the unlawful act had little or no impact on the victim.

The permissible content of such a statement should be defined in the legislation or in regulation. The impact of the harm caused to victims should be given a wide meaning and the concept of impact should similarly be widely stated, including, for example, emotional, psychological or mental health impacts or financial, economic and social harm.

The court, if it considers it appropriate, should acknowledge the statement and, when relevant (for example, when a release order pursuant to section 39 of the Forensic Provisions Act is under consideration), should take into account the victim's submissions on matters relevant to any matters arising under the legislation. This means, in practical terms, that the victim's impact statement could legitimately pass beyond describing the impact on the family of the death of the primary victim and deal with geographical restrictions and non-association orders in the context of any leave or release application.

The legislation should provide that, on request of the victim, the court has a discretion not to disclose the victim impact statement and if the court so determines, this should apply when it is forwarded to the Tribunal.

This safeguard would allow the victim to openly discuss concerns without fear of repercussion from the forensic patient. Unlike the general criminal law, the statement would not be taken into account in relation to the imposition of a sentence to custodial confinement. Nor would it be taken into account in the setting of a limiting term. In these senses, the document is very different from a victim impact statement in the criminal justice setting.

The court should, in referring the matter to the Mental Health Review Tribunal, forward a copy of the victim impact statement.

The legislative or regulatory changes suggested in this Review should be expressly separated from the process of victim impact statements dealt with in the Crimes (Sentencing Procedure) Act. Essentially, they should be specific to the Forensic Provisions Act itself, and their content and the way in which they may be used should be specifically dealt with in the forensic legislation.

This is for three reasons. First, because the two systems are fundamentally different. Second, because, as has been explained, the consequence of making a victim impact statement in the forensic setting differs in important respects from the consequences of a victim statement in the criminal justice system. Third, the forensic legislation presently deals with specific verdicts, unfitness findings and the setting of limiting terms. It also deals with the work of the Tribunal in relation to forensic patients.

For these reasons, any legislative change should specifically recognise the rights of victims of a forensic patient in the forensic setting. Their position should be seen as special and not absorbed under the umbrella of victims' rights in the general criminal law.

For similar reasons as stated above, the legislation should provide that cross examination of victims by the patient (or the patient's representative) should not in any circumstance be permitted. As the statement is not to be taken into account for the purposes of criminal sentencing, the prospect of cross examination (which is essentially abhorrent to the rights of victims) should be negated altogether.



## Recommendations

4. Legislative amendment should provide opportunity for victim impact statements in special verdict situations (findings of NGMI and unfitness) after a special hearing has determined, on the limited evidence, that the person committed the offence [sections 22 and 23, Forensic Provisions Act]. The court must acknowledge the victim impact statement and, when appropriate, take into account its contents in determining conditions in relation to any release decision.
5. The court has the discretion to prohibit the disclosure of the victim impact statement if the victim requests that it not be disclosed. The court must provide a copy of the victim impact statement by forwarding it to the Tribunal.
6. The legislation or regulations should provide for the delivery of each victim impact statement to the Tribunal and for it to be kept on the relevant file. The Tribunal is required to acknowledge the victim impact statement at each review of the patient's order and, when appropriate, consider its contents if relevant to any leave or release application. The same discretion in relation to confidentiality provisions should apply to the Tribunal as to the court. Once the victim impact statement is given to the Tribunal by the court, another victim impact statement is not required. However, an up-to-date submission may be made by the victim to the Tribunal at any time if the person wishes to do so [modelled on section 164 of the Mental Health Act (Qld)].
7. Practice notes or guidelines should make it clear that there is to be no cross examination of a victim by the patient or their representative in relation to the victim impact statement. This is to extend to any part of a victim submission that addresses the issue of geographical restriction, non-association order, or in that context, addresses the harm experienced by the victim. (It is acknowledged that, in considering the victim impact statement, the Tribunal may wish to clarify certain matters by asking the victim questions. However, consistently with the non-adversarial nature of Tribunal proceedings, this should not amount to cross examination.)
8. Regulations should be made or guidelines issued to provide for the content of any victim impact statement. They should also deal with other matters of detail necessary for the implementation of this recommendation.

## Updating language

It is recognised that, while patients had been found NGMI or unfit, they had not been acquitted of the offence. Victims were of the view that the expression 'index event,' to describe the offence or alleged offence giving rise to the patient's current detention or conditional release, was an uncaring 'euphemism'. They felt it did not adequately recognise the impact of the offence, did not require patients to take responsibility for their actions, and was not supportive of the victim's recovery.

Submissions suggested that the language used by the Tribunal tended to reinforce a system in which victims felt negated and that their views were not recognised.

*The practice of using the euphemism the 'index event' reflects the Tribunal's fundamental and sole focus... it alienates the victim and can also inhibit a forensic patient's appreciation of what [they] have done.*

[Individual, redacted]

The Homicide Victim Support Group (HVSG) noted that:

*The use of this term compounds the impression that the fact that the patient has actually taken a life is not in the forefront of the Tribunal minds. The mental illness is the only factor they focus on...*

[HVSG]

Some victims also found the accused being referred to as a 'patient' difficult, with the view that this negated the responsibility the victims felt the accused should accept.

In Queensland, the offence or alleged offence is referred to as the 'unlawful act'.<sup>15</sup> The Queensland terminology was considered as more accurate and balanced language. It also appropriately recognises the gravity and impact of the offence or alleged offence, as well as victim and community expectations in relation to how this was communicated.

The use of the term 'unlawful act' does not do anything other than describe the act itself and it does not reflect a judgement on the issue of guilt or innocence of the offence, for example, murder.

Updating the language goes some way to bringing the criminal justice and forensic mental health systems closer together. Even though the patient is considered not criminally responsible, there can be no doubt that the act itself is unlawful and should be recognised as such.



## Recommendations

9. That NSW Health policy and Tribunal guidelines and practice be amended to cease using the language 'index event' to refer to the offence, or alleged offence, giving rise to the patient's current detention or conditional release. 'Unlawful act' should be used to refer to the act or omissions, or alleged act or omissions of the person constituting an offence with which the person is charged.
10. That the intent and language of the forensic guidelines and related practice directives, policies, and other documents be revised in line with the above legislative and language changes, providing an enhanced role for victims in Tribunal processes, and more sympathetic and inclusive language.

<sup>15</sup> Mental Health Act 2016 (Qld) Schedule 3 Dictionary.

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## Enhancing victims' ability to make submissions

### Extending the scope of victim submissions

Victim submissions are currently limited under legislation to geographical restrictions, for example, requesting restrictions prohibiting a patient going near where the victim lives or works, or non-association restrictions in which patients cannot associate with the victim or family.<sup>16</sup>

The Tribunal also exercises discretion in relation to what information a victim can provide in addition to these limited options. For example, if a registered victim knew the patient before the unlawful act, they may give the Tribunal relevant information to help make decisions about care, treatment and detention, and are encouraged to give this information in writing.

Victims strongly supported a more formal approach, enabling them to make submissions beyond the current scope.

The Review heard that the current system:

*...limits victims to applying for non-association and exclusion if the forensic patient is granted leave or release. There is no avenue to have any other input to the process of the review. This deprives the Tribunal and the treating team of information that may be relevant to the proceedings and the safety of the victims.*

[Individual, redacted]

Victims sought to clarify and strengthen their ability to provide submissions to the Tribunal about the clinical history of the patient when it affects their safety or the safety of the community more broadly.

The amendment to the objects of the Forensic Provisions Act provide an opportunity for greater consideration of the interests of victims. Broadening the scope of victim submissions would:

- ensure clarity and consistency of approach for all victims, and provide further therapeutic avenues for victims
- enhance victim and community confidence in the Tribunal's role in acknowledging victims in the context of proceedings
- ensure that the Tribunal receives information that may relate to questions of risk and potential release conditions.

The Department of Justice noted that allowing victims (or their families) submissions is consistent with the increased options for victim participation in other jurisdictions, specifically:

- their views or attitudes (section 269R(1) of the *Criminal Law Consolidation Act 1935* (SA) and section 33 of the *Criminal Justice (Mental Impairment) Act 1999* [Tas.]).
- their views on the patient's conduct, the impact of that conduct on the family member (section 42[2] of the *Crimes [Mental Impairment and Unfitness to be Tried] Act 1997* [Vic.]) and the impact of the potential release on the victim or their family (section 43ZL of the *Criminal Code Act 1983* [NT]).

It is also consistent with provisions under the *Crimes (Administration of Sentences) Act 1999* (NSW), which provides for submissions by registered victims when the Review Council recommends a low security classification for a serious offender (section 68) or when the Parole Authority considers releasing prisoners on parole or on reintegration home detention (sections 145 and 256A).

Victim submissions at the time of parole were also considered by the LRC in its *Report 142*<sup>17</sup>. The LRC noted that parole decision making was an important avenue for victims to contribute and express their feelings and concerns, and the LRC did not think that there should be any restriction on the content of victim submissions.

The Review considers that victims should be given the right to make broad submissions to the Tribunal on leave and release, and that this right should be established in legislation. The scope of submissions should be extended to allow submissions in relation to the impact of the unlawful act on the victim, and the views of the victim about any risk posed by the patient (including any relevant clinical history) and the threat to the community. This extended scope should be established as appropriate through practice notes, guidelines or regulations.

<sup>16</sup> Mental Health Forensic Provisions Act 1990, section 76.

<sup>17</sup> NSW Law Reform Commission (2015) Parole, Report 142



## Confidentiality of submissions

If a victim makes submissions relating to the patient's history, this information is provided to the patient's lawyer as a matter of procedural fairness, and the lawyer may disclose this to the treating team.<sup>18</sup> Information can be de-identified, but this often does not protect anonymity within families.

Many victims wanted submissions to remain confidential so that they could express views frankly, indicating that otherwise they were reluctant to share information.

*The last thing I wanted was to exacerbate the offender's hostility towards me, but felt I had important information to share with the Tribunal/treating team.*

*I have always kept a low profile — not comfortable with the belief that I am treated confidentially.*

*Sometimes what the patient tells the treating team is at odds with what they tell the family, and there is no safe way for these issues to be raised.*

[Individuals, redacted]

Many family members feel that they have pertinent information for both the treating team and the Tribunal, but have no confidence that there would not be ramifications for sharing it.

The HVSG noted that:

*There are cases where information has been shared, the source divulged, and it has irretrievably damaged the family relationships or led to threats of retribution from the patients. Victims felt that they couldn't provide the information that would be useful to the treating team, unless the information could be considered confidentially.*

[HVSG]



**Victims have an important perspective that is particularly relevant to issues of leave and release, and may have legitimate concerns about their safety or the safety of family members.**

**It is important that the Tribunal take these perspectives into consideration when making decisions about leave and release.**

Victims have an important perspective that is particularly relevant to issues of leave and release, and may have legitimate concerns about their safety or the safety of family members. It is important that the Tribunal take these perspectives into consideration when making decisions about leave and release.

As with the victim impact statement, the Review considers it appropriate that the Tribunal have a wide discretion, exercisable in a compassionate manner, not to disclose a victim's submission if requested by the victim. The rules of procedural fairness ought not to be exercised in such a manner as to effectively shut down or prevent a relevant and genuine submission when confidentiality is appropriate.

<sup>18</sup> Mental Health Review Tribunal (2017) Forensic Guidelines, Version 4, page 20.

## Oral submissions

There was confusion among victims about how they could participate in Tribunal hearings, with concern that this was inconsistently determined, depending on the presiding Tribunal member.

*Some judicial members make it clear that the victims have an observation role only and that they are not able to speak. Other judicial members will ask the victim's family members if they have any questions at the end of the hearing. This is confusing, as victim family members are unable to gauge ahead of time how things will run; should they prepare questions, should they comment?*

[HVSG]

The HVSG also noted that if victims ask questions in their submissions, it does not necessarily follow that they will be answered during the course of the hearing. If they hear something that concerns them in the hearing, victims have to wait to query this in the next submission and await a possible answer at the next hearing in six months.

The Guidelines note that the precise format of each hearing varies, depending on the patient, the issues to be decided and who is present. They note that:

If victims have requested non-association order or geographical restriction and there is an issue about whether the Tribunal should make that order, the victim(s) may be invited to speak about their request or to answer any questions from Tribunal members.<sup>19</sup>



**The Review considers it appropriate that victims be given the right to make oral submissions and ask questions of the Tribunal panel.**

This Review recommends that regulations or practice notes be made to bring consistency to how victims may engage with Tribunal hearings and to broaden the scope of their participation. The Review considers it appropriate that victims be given the right to make oral submissions and ask questions of the Tribunal panel.

However, Tribunal proceedings should continue to be conducted in a non-adversarial manner. This should provide victims with a voice in the proceedings, but does not give victims the status of contradictors or parties in Tribunal proceedings.

The Tribunal should retain discretion as to the way in which victims' oral submissions and questions are dealt with in Tribunal hearings. The suggested establishment of a specialist victim support service will help victims attending Tribunal hearings by providing support and advocacy services.

<sup>19</sup> Mental Health Review Tribunal (2017) Forensic Guidelines, Version 4, page 17.



## Recommendations

11. In addition to victim impact statements, victims are also to be given the right to make broad submissions on Tribunal decisions on leave and release. This right is to be set out in legislation, and the legislation should provide the Tribunal with the discretion not to disclose the victim's submission, should the victim request this and the Tribunal consider it a reasonable request.
12. Practice notices, guidelines or regulations should set out the scope of submissions, and should set out how victims may make submissions. This should include both written and oral submissions, the victim's right to have a representative (non-legal) appear on the victim's behalf, and the matters above which may be discussed at Tribunal hearings, including victim's opportunity to ask questions when appropriate, and to give an oral statement.
13. Submissions from victims are to be allowed in relation to:
  - 13.1. the impact of the unlawful act on the victim
  - 13.2. views of the victim about the risk the patient poses to the victim, any other person or the community, and any relevant clinical history known to the victim
  - 13.3. the existing non-association and place-restriction conditions should continue to apply.

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## Proposed changes to policy and practice

### Improving the accessibility of venues and hearings

The legislative intent is that hearings are open to victims and the public, but victims felt that, in practice, hearings are often challenging to access.

In the past, victims could attend hearings in person at the patient's facility. After some security incidents, facilities stopped this practice and, under current Forensic Guidelines, victims are not actively encouraged to attend.<sup>20</sup>

Victims are given the option to attend Tribunal hearings through a video link-up at Gladesville or by teleconference, a practice often undermined by technical issues. Current facilities vary, but may involve speakerphone or additional mobile phones placed on speakers that can impair sound. The system is clearly under-resourced.

The Review heard that the Tribunal has:

*...extremely rudimentary communication technology for victims participating remotely.*

*The ability to hear every speaker (or even who they are and what their role is) clearly is inadequate.*

[Individuals, redacted]

Some victims expressed a preference to attend Tribunal hearings in the health facility or correctional centre where the patient is located. This could allow them to experience first-hand the level of security surrounding the patient either for their own recovery or to better understand changes occurring for the patient.

There was a suggestion that these provisions are inconsistently applied, with victims who are regarded as 'supportive' of the patient's recovery being more readily able to attend a hearing in person at the relevant facility.

The Review considers that significant improvements can be made to the accessibility of hearings to better enable victims to participate. The Review recommends that the Tribunal consult with the relevant facilities and explore technological solutions to make this possible.



## Recommendations

14. In consultation with Corrective Services, NSW Health and Victims Services, the Tribunal to review access to hearings to ensure that the legislative intent of open hearings is actively supported, and that hearings are as accessible as possible to registered victims, their representatives and members of the public, should they wish to attend.
15. This should include a review of technological options that would facilitate improved teleconferencing or videoconferencing, and give consideration to provisions to enable victims to attend in person at the facility should they wish, including provisions to ensure the security of victims.
16. The Tribunal Forensic Guidelines should be revised to align with this, and actively support participation by victims. These improved facilities should be adequately resourced.
17. Once these improvements have been made, communications should be provided to registered victims and other stakeholders to inform them of the changes.

<sup>20</sup> Mental Health Review Tribunal (2017) Forensic Guidelines, Version 4, page 18.

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## Issuing hearing notices

Issues were raised by both victims and clinicians relating to the issuing of Notices of Intent.

Victims felt that notices do not always allow for sufficient timely advice to enable them to attend the hearing.

Clinicians also expressed frustration that short timeframes of 24 hours or less hindered their preparation, particularly when the Minister for Mental Health, represented by the Crown Solicitors Office, would be making a submission or cross examination was required.

It was discussed that there was a significant opportunity to review this process to allow for more time for both victims to be notified of a hearing, and for the Minister to receive the notification, make a decision and prepare a submission, thereby providing more time for clinicians to respond.

## Closing hearings

As the Tribunal's Guidelines note, the information considered in Tribunal hearings can be very personal and sensitive for the patient. The Tribunal is able to exclude people from part or all of a hearing if it is in the interests of the patient's welfare.

The Review heard that many victims feel they are closed out of a hearing with limited information or understanding as to why they are excluded. They often had no understanding of the discussion that took place while the hearing was closed.

This Review recommends that, despite the need to close hearings at times when information of a confidential nature is to be shared, the guidelines and Tribunal practice be revised to allow for greater communication with victims about closure. This should be communicated to victims in a sympathetic, respectful and understanding manner.



### Recommendations

18. The Tribunal, in consultation with NSW Health, should review the process for issuing the Notices of Intent to allow advice to be provided to registered victims in a more timely fashion than it is currently. This process should be revised in consultation with NSW Health, and should also ensure that sufficient time is given for each relevant Minister to consider the case and prepare submissions, thus allowing sufficient response time for clinicians. (See Forensic Guidelines, page 7.)



### Recommendations

19. That the Forensic Guidelines and related procedures and communications:
- 19.1. be updated to reflect the circumstances in which a hearing may be closed or the victims may be excluded from the hearing (or part of the hearing)
  - 19.2. state clearly and sympathetically the circumstances in which victims may be asked to retire and explanations given for the closed hearing.

## Supervision of patients on leave

The Review was asked to consider whether the methods available to supervise patients while on leave and release are appropriate, and whether they strike the right balance between the interests of community safety, victims (including their families) and the care and treatment needs of forensic patients.

Leave is an important aspect of a patient's recovery, and patients and clinicians generally felt that current mechanisms for patient supervision were appropriate.

The patient's treating team uses many methods to monitor a patient on leave, including limiting belongings, requiring the patient to complete a detailed itinerary, carry a mobile phone, to call at specific times, and verifying the patient's activities with a sponsor or receipts. On conditional release, supervision is usually through regular contact and monitoring by the patient's case manager and psychiatrist. One patient told the Review:

*Forensic patients must comply with a great deal of supervision. They are monitored meticulously on their whereabouts and activities. I believe the supervision in the community is currently undertaken at an appropriate level.*

[Individual, redacted]

However, victims were of the view that supervision was considered 'weak' and 'optional' and supported 'more rigid' monitoring processes. There was support in many submissions that the use of updated technologies could be given to the treating team to support monitoring of patients on leave.

*We were shocked that the perpetrator has so much unsupervised release with limited restrictions.*

*I was surprised to find the Tribunal does not use commonplace and affordable GPS technology...*

*More emphasis on the protection of the public over patients' rights would be comforting.*

[Individuals, redacted]



**There was support in many submissions for the use of updated technologies to support monitoring of patients on leave.**

The rehabilitative focus of the Tribunal is recognised. It is also recognised that community safety is best reflected in the recidivism rates, which for forensic patients in NSW are low (two forensic patients in NSW have committed and been convicted of a criminal offence while on leave or conditional release since January 2014, one for shoplifting and one for driving offences).

However, with the advances in technology and ready access to GPS and other technology through mobile phones, there are opportunities to consider the use of technological solutions including mobile phone applications with GPS monitoring. New technologies should be considered an option for use in developing the risk-management plan for supervising patients on leave and conditional release.

Notwithstanding the interest in the rehabilitation of the patient, there is broad community and victim concern when a forensic patient with a particularly violent history is given leave or release into the community. Enhanced supervision will not alleviate these concerns, but providing the power to the Tribunal to exercise this option, when appropriate, will go some way to addressing them.

These considerations are consistent with increasing legislation in NSW recognising that individual rights have to be subordinated to the broader risk of danger to the public.

However, the Review does not support the use of permanent ankle bracelets, as suggested in some submissions. As one submission noted, if these are considered necessary, then the risk of harm should be considered too high to allow for leave or release.

A range of electronic monitoring options involving ankle bracelets are currently available in the criminal justice system. These include monitoring under extended supervision orders made by the Supreme Court when an offender is monitored after sentence completion, and monitoring for offenders on home detention orders. These options are resource-intensive and compliance-focused, and involve Corrective Services monitoring and, if a breach is detected, often police action.

The Review is not suggesting this level of monitoring; rather, consideration could be given to the treatment teams using mobile technology to intermittently monitor patient whereabouts.

GPS monitoring is at an early stage of development and research in Australia and internationally, and review timeframes did not allow for a thorough analysis of evidence relating to the use of GPS monitoring in appropriate cases to support treatment team oversight of patients in the community.

However, it is noted that this has been trialled in other jurisdictions including the UK, Canada and Queensland. The lessons from these jurisdictions could usefully inform the approach in NSW.

On balance, the Review considers that the Tribunal should have the power to order the use of GPS monitoring of forensic patients on leave or conditional release to support their safe supervision, and that the Tribunal maintains the discretion as to when and how this is to be exercised.



## Recommendations

20. NSW Health to amend the Forensic Mental Health Services Policy to recognise advances in technology and the readily available non-obtrusive technological solutions, including potential for the use of mobile phone apps, which enable supervision of patients via GPS.
21. That additional GPS mechanisms for supervising patients, and other technological options as may be appropriate, be considered by treating teams and the Tribunal for use in developing the risk-management plan for supervising patients on leave or conditional release; and that the Tribunal have the power and discretion to direct the use of GPS monitoring through mobile apps. These options are intended to enhance community and victim confidence in the supervision of patients on leave.

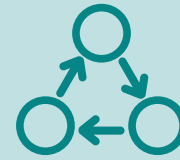
## Additional considerations

### Impact of resource constraints in the current system

Some respondents expressed concern about the pressures on the forensic mental health system, and the impact of these on patients' leave and release. It was noted that there are too few places currently available to support medium and low security placements, as well as too few beds at the Forensic Hospital, forcing a large number of forensic patients to be held in facilities not appropriate for their risk profile. This affects the care, treatment, recovery, mental health and wellbeing of the forensic patient, and can delay their access to leave provisions. This can also delay conditional release unreasonably.

Submissions supported a better resourced system, with strengthened integration between the forensic mental health system and community delivery of care for forensic patients. One practical implication of this resourcing issue is that it has seen the Tribunal making time-limited orders in the interests of a particular patient (e.g. that they be moved to a lower-security facility within a certain timeframe). These individual decisions have a broader impact on other patients (e.g. others that are also waiting for a lower-security bed) and the forensic mental health system.

Clinicians expressed concern at the flow-on impact of time-limited orders which cut across the work of the clinicians to make decisions in the interests of the system and the patient population as a whole. It was recognised by the Review that there are two inherently different interests and perspectives here, with the Tribunal focusing on the needs of the individual patient in their immediate jurisdiction, and the forensic mental health system more broadly focused on the interests of all patients.



**Submissions supported a better resourced system, with strengthened integration between the forensic mental health system and community delivery of care for forensic patients.**

The Tribunal provided assurances to the Review that the broader system impacts of time-limited orders are well understood by the Tribunal and that these orders are not made without appropriate consideration. The Tribunal's 2016-17 Annual Report noted that only one time-limited order was made in that financial year.<sup>21</sup>

It is beyond the Terms of Reference of this Review to make recommendations relating to the resourcing of the system, or how the tension between the cross-sectional view of the Tribunal and the wider longitudinal view of clinicians might be resolved. This Review supports the ongoing relationships between the Tribunal, health executive and clinicians, and other processes which are established to see that the most appropriate care and treatment is available to all patients.

However, this particular issue clearly warrants careful monitoring by all parties. An under-resourced system will not operate effectively and the public interest, including the welfare of forensic patients, will be poorly served.

The Ministry of Health have advised a state-wide capital planning process is underway which will include examination of existing forensic infrastructure.

<sup>21</sup> Mental Health Review Tribunal Annual Report 2016-17, page 7.



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## 2. Enhancing victims' support and engagement through the Tribunal process

Victims of forensic patients do not receive the same level of support as victims of offenders who were fit to be tried under normal criminal proceedings and found guilty. There is currently no service in NSW providing targeted, specialised, holistic support by qualified people with knowledge of the forensic mental health system. There is very little in the academic literature about victim engagement with the forensic mental health system.<sup>22</sup>

Victims expressed frustration that patients had the support of a full treating team overseeing their care, treatment and recovery, as well as the right to publicly funded legal representation at Tribunal hearings.

Victims reported feeling unsupported at Tribunal hearings and had a lack of understanding about the process. Tribunal communications were seen as confusing and, at times, insensitive. Victims may have unresolved psychological trauma arising from the impact of the offence committed, and may not have adequate therapeutic support.

The Review heard that the impact of the offence may be a real and painful current and ongoing experience for many victims. The lack of options for participation in Tribunal hearings, coupled with this lack of specialised support, can have serious anti-therapeutic consequences for these victims, who have legitimate concerns for their safety and security.

To address this, the Review is proposing the expansion of Victims Services (under the Commissioner for Victims Rights), Department of Justice, to include a specialised unit catering particularly to the needs of victims of forensic patients. The Specialised Victims Support Service (the Service) would provide holistic, trauma-informed support services to victims of serious indictable offences committed by people referred to the Mental Health Review Tribunal as forensic patients.

Queensland is currently the only jurisdiction in Australia that has established a support service specifically for victims of forensic patients, and this has been used as a model for the recommended approach in NSW.



**The Review is proposing the expansion of Victims Services (under the Commissioner for Victims Rights), Department of Justice, to include a specialised unit catering particularly to the needs of victims of forensic patients.**

The Tribunal itself has previously advocated for such a service to be established, and Victims Services has prepared a preliminary proposal to establish such a service. The Review acknowledges this work, which, together with the views of victims consulted in this Review, has informed the approach outlined here.

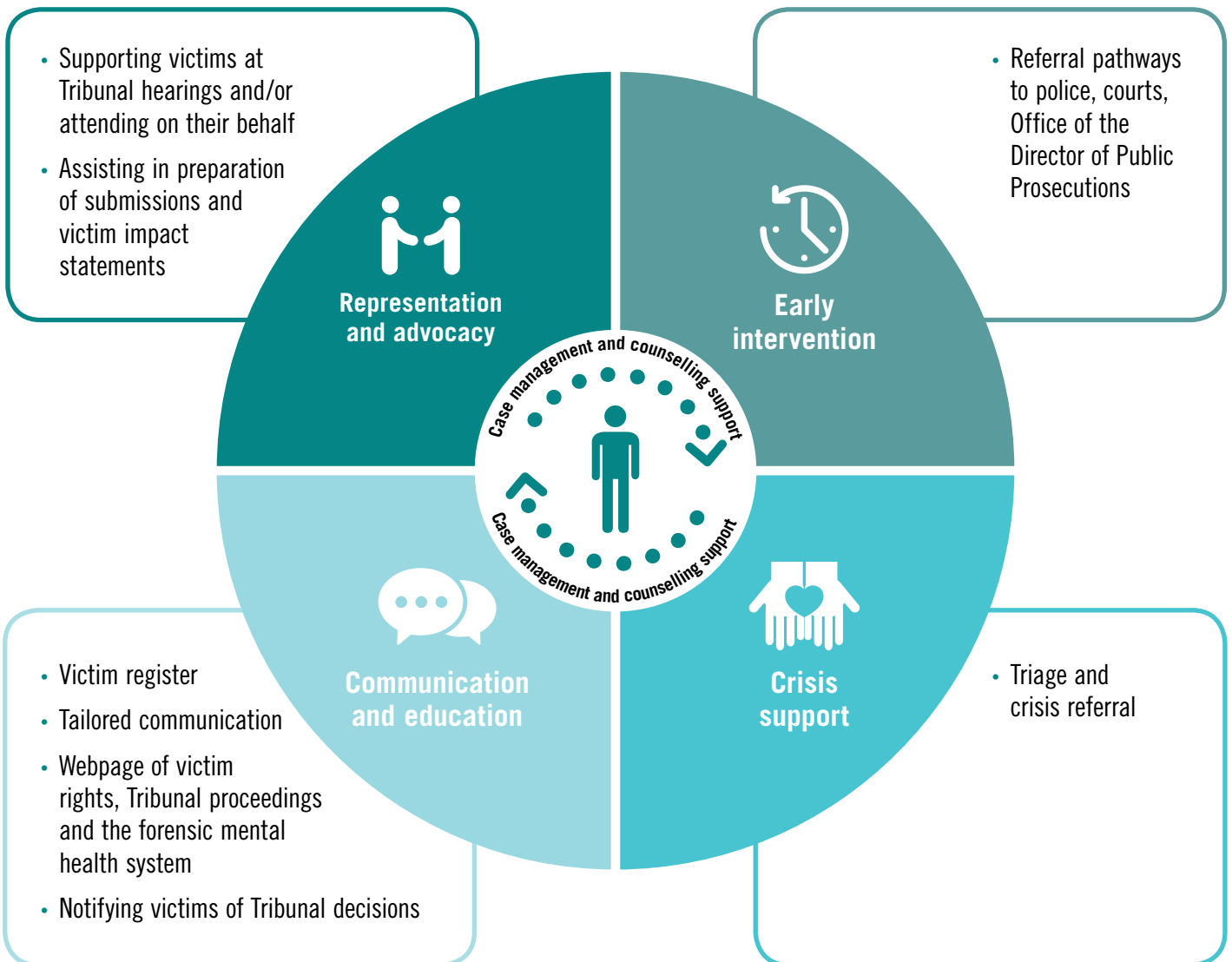
Victims Services has the existing infrastructure to implement and manage the unit, including support staff, links to approved counsellors, referral pathways, the physical premises and the complaints mechanisms.

It is proposed that a range of specialist services be provided with courtesy, compassion and respect, consistent with the NSW Charter of Victims' Rights (the Charter). The Charter aims to protect and promote the rights of victims of crime, and states how victims should be treated and assisted. The Charter is contained in the *Victims Rights and Support Act (2013)*, and falls under the mandate of Victims Services, Department of Justice.

Some of the functions of such a service, which were identified throughout the Review, include early intervention, crisis support, case management, communication and education, notifying victims of Tribunal decisions and hearing outcomes, and representation and advocacy at court and Tribunal hearings (see Figure 3).

<sup>22</sup> K Dean (2017, Review of the operation of the Mental Health Review Tribunal in respect of Forensic Patients: An academic report to support the review.

**Figure 3: Proposed model: specialised victims support service**



### Early intervention

The Service would need to establish referral pathways (such as the police, the Director of Public Prosecutions, and staff at the District and Supreme courts) to ensure victims are identified as early as possible (as soon as it is identified that an unfitness or NGMI plea may be made), and best support provided to them through the process.



### Crisis support

The Service should provide triage services and crisis referral for the victims when a serious offence has been committed by a person who appears to have a mental illness.



## Case management and counselling

As previously mentioned, many victims noted that patients had access to extensive treating teams, while they felt unsupported, had a lack of understanding of the forensic mental health system, and may have unresolved trauma resulting from the offence.

A case management approach would identify the potential needs of the victim early in the process, and offer initial (as appropriate) face-to-face meetings, home visits for initial assessment and counselling, and information about the forensic mental health system.

The service should provide counselling (phone and face-to-face counselling, as required), referrals and wrap-around support. It should include intensive case management to address the multiple needs of the victim (not limited to their trauma), such as mental illness. When additional counselling is required, the service would refer the victim to funded counselling and therapeutic and trauma-informed therapy.

Victims spoke of the impact of the offence on their family relationships. The service would also provide support to registered victims of forensic patients who are family members, including assistance with reconciliation and relationship-building when wanted and necessary. It should also provide follow-up support to victims with high-level needs.



## Communication and education

It is proposed that existing communication functions between the Tribunal and registered victims be transferred to the Service, and that the Service provide education to victims about the forensic mental health system generally, as well as information related to their case.

While some victims felt that the information from the Tribunal was generally adequate, with phone enquiries handled promptly and appropriately, many others felt this was an area requiring significant improvement. Communications were considered confusing, opaque and sometimes lacking a sense of compassion and understanding for the experience of the victim.

Victims in general:

*...had an overwhelming lack of confidence in the Tribunal processes, largely because of poor or insensitive communication, restrictions on the information they were allowed to present on matters to be considered in reviews, and poor decision making by the Tribunal.*

[Individual, redacted]

Information provided by the Tribunal to victims was described as 'generalised, opaque and at times completely useless'. Victims asked that information:

*...be more comprehensive and more personalised. Our lives have been traumatised and forever changed because of this person so we need to be fully informed.*

[Individual, redacted]

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Victims expressed concern about Tribunal communication, including:

- The use of 'standard letters' rather than more specific communication.
- The complexity of language being used rather than plain English, for example, victims may find it difficult to understand the differences in the types of leave which may be granted.
- More tailored, nuanced and trauma-informed communications with individual victims, for example, initial face-to-face meetings to explain the processes, follow-up telephone calls at the time of hearings, explanations of reasons and Tribunal decisions communicated verbally to victims.
- The Forensic Patient Victims Register is the primary mechanism for victims to indicate how they would like the Tribunal to communicate with them. It was suggested it be reviewed, in consultation with victim advocates and registered victims, to explore if a more tailored communication approach is appropriate.
- Many submissions called for more information for victims. This included the need for a handbook giving an overview for victims on their rights and responsibilities; participation in Tribunal hearings; the forensic mental health system; the recovery pathway for patients; the law governing the care, treatment and control of forensic patients; and processes involved in the law's enactment. This would help victims have a clearer idea of the illnesses being treated and the treatment process.



### **Notifying victims of Tribunal decisions and hearing outcomes**

Victims expressed frustration about Tribunal notifications, particularly those relating to hearing outcomes, which many found confusing. Victims also suggested that they did not always provide the level of information that would give them comfort in understanding the level of treatment and care the patient was receiving, and their progress to recovery.

There was support for victims receiving additional information in plain English about the patient, and there was particular interest in a brief explanation and summary of the reasons for a decision that increases a patient's likelihood to return to the community.

This would include a plain English explanation of the Tribunal decisions and the evidence that informed those decisions, as opposed to simply advising of the outcome of the determination.

It is proposed that the Service be the liaison between the Tribunal and registered victims, and communicate this information to victims in an appropriate manner.



## Representation and advocacy

Victims expressed frustration that patients had an automatic right to publicly funded legal representation, while they had a lack of understanding of the forensic mental health system and did not have access to this same level of support.

Victims wanted support to participate in forensic hearings. As discussed above, there was some confusion in understanding how victims may engage in hearings and this, arguably, has anti-therapeutic consequences for victims of crime who may feel unacknowledged, unsupported and unable to meaningfully contribute to the process.

It is proposed that the Service provide information to victims and support their engagement with Tribunal hearings. This may include support in the preparation of victim impact statements to the court and submissions to the Tribunal, including advice on what should be included and at which stages of the process it should be included.

The Service would also provide support for advocates to attend hearings and court proceedings with, or on behalf of, a victim, to explain the proceedings thoroughly. An advocate would also ensure that, when the victim wished to make a submission, they were provided with the appropriate information and that their submission was supported.

Many victims noted that their time dealing with the Tribunal, and attending hearings, was stressful and frustrating, with the potential to re-traumatise them at each hearing. The additional support from a specialised forensic victim support service aims to avoid this.

In all of these areas, the implementation of a specialist forensic victim support service would prove to be significantly effective.



## Recommendations

22. Establishment of a specialist Victim Support Service (modelled generally on the Queensland Health Victim Support Service). This should provide holistic wrap-around services including:
  - 22.1. early intervention — to identify potential victims of forensic patients as early as possible
  - 22.2. crisis referral — to provide triage and referral to crisis support
  - 22.3. case management and counselling — case management, therapeutic and trauma informed treatment, care and support, and counselling for victims (when needed). This may include intensive case management to address the multiple needs of the victims (not limited to their trauma) such as mental illness.
  - 22.4. communication and education — advice on the rights and entitlements of victims, educational information to victims about the forensic mental health system and Tribunal processes; a tailored approach to communication, including notification of hearings and decisions
  - 22.5. representation and advocacy — advice and support in preparing victim impact statements, support for victims to attend and participate in Tribunal hearings (to act as a mediator between the victim and the Tribunal, and to assist in preparing written or oral submissions) and representation at hearings
23. For this purpose, to enhance the existing victim support under The Commissioner of Victims Rights, by adding a specialist team to focus on the needs of the victims in the forensic patient setting.



## Recommendations

24. Referral pathways should be established with relevant agencies (NSW Police Force, Office of the Director of Public Prosecutions, and staff at the District and Supreme courts) to ensure that these victims are identified as early as possible and that best support is provided through the process.
25. Victims Services and the Tribunal should review all existing communication materials and mechanisms with registered victims. The Tribunal and Victims Services should agree on appropriate communication channels between Victims Services, the Tribunal and victims. This should include:
  - 25.1. development of a comprehensive resource for registered victims that provides a plain English overview of the forensic mental health system and mechanisms for victim engagement, and provides advice on victim rights and how to access all relevant Victims Services available
  - 25.2. review of the process of communication with victims, with communication about hearing dates and Tribunal decisions to be from Victims Services to the victim
  - 25.3. review content of Tribunal decisions, to consider the inclusion of a brief explanation of the reasons for a decision that increases a patient's access to the community. This would include a plain English explanation of the Tribunal decisions and a summary of the evidence that informed that decision, instead of simply advising of the outcome of the determination
  - 25.4. review of all standard correspondence (e.g. notice of hearings), to ensure that it provides victims with sufficient information, and that information is communicated clearly and compassionately.
26. The Forensic Patient Victims Register should be reviewed, in consultation with victim advocacy groups, to determine whether the options for communication are appropriate, and whether a more tailored approach to individual victim needs is possible.
27. The management of the Victims Register should be transferred to Victim Services.
28. Provisions should be made to enable information sharing between Victims Services and the Tribunal to support effective operation of the Service. This sharing is to have due regard to the confidentiality of sensitive information about forensic patients.
29. This information should include the timing and outcome of Tribunal reviews, information about appeals, and the nature of patient leave or release if it is relevant to the safety and welfare of the person. The amended Regulations should allow for this information sharing.

### 3. Retaining provisions relating to the publication of names

The Review was asked to consider whether the policy objectives prohibiting the publication of the name of any person in relation to a forensic matter before the Tribunal remain valid. These provisions are set out in section 162 of the Mental Health Act.

Section 162 of the Mental Health Act is designed to allow participants in Tribunal hearings, including patients, carers, victims, and health practitioners and other witnesses, to freely discuss all relevant matters without concern that their names and sensitive information will be published. If participants' names were published, participants may be less likely to appear or freely exchange information at a Tribunal hearing.

Section 162 is a protective mechanism aiming at protecting the privacy of all participants, as well as ensuring an environment in which sensitive personal and health information can be freely exchanged in order to protect the public and the patient.

It is consistent with article 20 of the Convention on the Rights of Persons with Disabilities, which requires the protection of the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others. All other Australian jurisdictions have similar provisions to section 162.

However, the need for privacy needs to be balanced by the need for transparency of Tribunal decision making. The Mental Health Act attempts to achieve this balance by restricting the publication of the names of Tribunal participants, while allowing hearings to be open to the public, unless the Tribunal considers it necessary that a hearing be conducted wholly or partly in private.<sup>23</sup> NSW is at the forefront of transparency in relation to forensic hearings. It is the only Australian state to hold public hearings.

Different areas have resolved the balance in slightly different ways. For example, courts hearing family law matters have the power to issue non-publication orders relating to the names of parties and witnesses,<sup>24</sup> and the NSW Civil and Administrative Tribunal has powers to restrict the disclosure of the name of any person appearing before that Tribunal, if it is satisfied that it is desirable to do so because of the confidential nature of the evidence or any other reason.<sup>25</sup>

### Review findings

Most submissions supported the current provisions on the publication of names.

Patients, clinicians and other stakeholders expressed significant concern at the suggestion that the names of patients could be published, including that it may:

- risk re-traumatising victims
- negatively affect the patient treatment process designed to rehabilitate and reintegrate a person with severe mental illness back into the community
- hinder the patient's ability to find employment, form relationships or more broadly engage in the community, which are key protections against a forensic patient lapsing into an unobserved and active phase of their mental illness
- increase social stigma (this was of particular concern in regional centres and smaller communities, with Aboriginal patients expressing concern that this would be amplified in their communities)
- potentially lead to the publication of confidential medical information
- affect clinical staff, who may become the subject of unnecessary risk should their names be published.



**Patients, clinicians and other stakeholders expressed significant concern at the suggestion that the names of patients could be published.**

<sup>23</sup> Mental Health Act 2007 (NSW), sections 151(3) and 151(4).

<sup>24</sup> Family Law Act 1975 (Commonwealth), section 102PE.

<sup>25</sup> Civil and Administrative Tribunal Act 2013 (NSW), section 64.

Opinions by victims were more mixed. Some victims saw this provision as providing unwarranted protections to the patient, while others recognised that it also provided protection to the identity of victims, many of whom were family members of patients.

There was confusion in relation to the rationale for the provisions. The HVSG noted that family victims felt prevented from using the name of their murdered loved ones in the media as it could identify the patient, but significant information was already publicly available and it was not clear why no steps had been taken to remove this, and why further dissemination was prevented.

Patients and others also noted that it was unclear how these provisions were enforced, and others noted that there was a lack of clarity in the distinction between 'publication', 'disclosure' and 'discussion'. It was not clear what could be discussed with whom and when.

Many stakeholders noted that it would be useful if there was an official explanation for the reasons and justification for this provision, and to acknowledge the issue of concern to many victims: feeling aggrieved at not being able to share their experience by the publication of names. Once established, the specialist victim support service would have a useful role in explaining the policy intent of section 162.

The Review recommends that the provisions remain and that further information and education be provided to victims, patients and the community in relation to the requirements and operation of section 162 of the Mental Health Act.



**The Review recommends that the provisions remain and that further information and education be provided to victims, patients and the community in relation to the requirements and operation of section 162 of the Mental Health Act (NSW).**



## Recommendations

30. NSW Health and Victims Services should provide communication and education to victims, patients and the community in relation to the requirements and operation of section 162 of the Mental Health Act (NSW).



## 4. Supporting existing Tribunal processes to appoint members

The Tribunal has three categories of members – Australian legal practitioners, psychiatrists, and other suitably qualified people. All members share responsibility for ensuring that the hearing is fair and appropriately conducted, by considering the evidence presented and the most appropriate order to be made. Each member brings particular skills and experience:

Member	Criteria	Role and Responsibility
President or Deputy President	Must have held office as a judge of the District, Supreme, Federal or High Court, or eligible to be appointed as a judge in those courts	<ul style="list-style-type: none"> <li>Chairing and managing the hearing in a manner conducive to achieving the required standards of informality, patient engagement in the process and optimal decision making while advising on points of law.</li> <li>Conducting the pre-hearing planning meeting with the other members.</li> </ul>
Legal Practitioner Members	Must be an Australian lawyer	<ul style="list-style-type: none"> <li>Deciding the order of evidence (patient first, or doctor).</li> <li>Making sure all members take part in decision making.</li> <li>Determine questions of law.</li> <li>Articulating the reasons for the decision.</li> <li>Where required, writing the decision, taking into account the contributions from the other members.</li> </ul>
Psychiatrist Members	Must be a psychiatrist	<ul style="list-style-type: none"> <li>Providing specialist expertise to engage appropriately with professional colleagues in order to obtain clinical information required by the Tribunal.</li> <li>Taking an educative role with lay members of the Tribunal.</li> <li>Does not provide a second opinion regarding the psychiatric treatment being provided.</li> <li>Does not play any role in the supervision of mental health teams or quality assurance of the services provided.</li> </ul>
Other Suitably Qualified Members	Must have other suitable qualifications and/or experience	<ul style="list-style-type: none"> <li>Contributing knowledge of mental illness, mental health services, patient rights, and community expectations to the consideration of a patient's mental state and psychiatric history, social circumstances, response to treatment and willingness to continue treatment.</li> <li>Applying their clinical or personal knowledge of mental illness, recovery and mental health services to consideration of the evidence.</li> <li>Bringing expertise of general community interest, including those associated with the rights of the patient and considerations to risk of harm to self or others.</li> </ul>

Members are generally appointed for four-year terms. Each term of appointment must not exceed seven years, but each member is eligible for re-appointment.

The Minister for Health has the power to remove, at any time, a person appointed to the Tribunal. The President of the Tribunal may make recommendations to the Minister for Mental Health for consideration of the Minister for Health to remove a part-time member at any time.<sup>26</sup>

## Review findings

Consultations generally supported the current criteria used to recruit members and the composition of Tribunal panels. It was considered that the current criteria, roles and responsibilities of the President, Deputy President, lawyer and psychiatrist member were appropriate, with no significant issues raised.

Discussion focused on the 'other suitably qualified member' category. Several stakeholders advocated that the position could more appropriately represent the specific needs of a patient, for example, an understanding of cognitive impairment, Aboriginal representation, child or youth psychiatry, and lived experience.

Victims generally supported the current composition of the Tribunal, but there was a view that the 'other suitably qualified member' was invariably a psychologist or social worker with mental health experience, and that they could more generally represent the community.

*To family victims, there is not really anyone actually representing the community (as on the State Parole Authority). The role and responsibilities of Tribunal members are heavily weighted to care of the forensic patient... we believe that there should be additional representation of the community on the Tribunal who do not work in the area of mental health. Examples: retired policy officers, sporting identities, teachers and lecturers, retired CEOs etc.... there should be a number of victims' representatives similar to the State Parole Authority.*

[HVSG]

It was noted that the Tribunal must be satisfied that all members reviewing the evidence and evaluating the material presented will ensure that the principles of procedural fairness and natural justice are upheld. Members also should not use their position to advocate for decisions that unfairly limit or deny human rights and the progress or recovery goals of forensic patients. As one respondent noted:

*It would be entirely inappropriate and would introduce a clear conflict of interest and actual or perceived bias for there to be victims' representatives on the Tribunal.*

[Individual, redacted]

There was some concern about the appropriateness of appointing victim representatives. For example, it was discussed that the applicant's skills, experience and ability to contribute should be clearly demonstrated in the context of their wider knowledge of mental illness, coexisting conditions and contemporary care and treatment principles.

The composition in NSW was generally consistent with other jurisdictions in Australia, although in Victoria, the Forensic Leave Panel includes a community member, and in WA, the Mentally Impaired Accused Review Board includes people who are community members of the Prisoners Review Board.

Given the general support among stakeholder groups for the current composition, the Review does not propose any recommendations for change in this aspect of the Terms of Reference.

<sup>26</sup> Mental Health Review Tribunal, Guidelines for the Appointment of Part Time Members and Guidelines for the Nomination of Presidential Members.

# CHAPTER SIX: NEXT STEPS

The report has been provided to Ministers for their consideration. The NSW Government will consider the findings and recommendations of this report. A formal response will be prepared and will detail if the NSW Government accepts the recommendations and, if so, what actions should be undertaken to respond to the findings of the report.

# ABBREVIATIONS

AFP	Australian Federal Police
CEO	Chief Executive Officer
Hon.	Honourable
GPS	Global Positioning System
HVSG	Homicide Victims Support Group
FACS	Family and Community Services in NSW
NGMI	Not guilty by reason of mental illness
LRC	NSW Law Reform Commission

# GLOSSARY OF TERMS

## **Carer**

A person who cares for or otherwise supports a person living with mental illness. A carer has a close relationship with the person living with mental illness and may be a family member, friend, neighbour or member of a broader community.

## **Charter of Rights of Victims of Crime**

A Charter to protect and promote the rights of victims of crime in NSW. The Charter obliges government agencies to ensure that a victim is at all times treated with courtesy and compassion, and that their rights and dignity are respected.<sup>27</sup>

## **Conditional release**

Release of a patient when a requirement for the deprivation of freedom of movement within and outside a place of detention has been removed and when the Tribunal has defined the terms on which the freedom will be continued.

## **Consumer**

A person living with mental illness who uses, has used or may use a mental health service.

## **Correctional patient**

An inmate (adult) or detainee (juvenile) who has been admitted into a mental health facility after being transferred from a correctional or detention centre.

## **Criminal justice system**

The system of laws and rulings which protect community members and their property.<sup>28</sup>

## **Cross examination**

When the lawyer for the accused (defence) asks questions of the witness about the evidence they have given and other matters.

## **Forensic mental health services**

The services in the health system and the justice system which respond to people with a mental illness who have been charged with an indictable offence.

## **Forensic patient**

A person who has a verdict from a court of not guilty by reason of mental illness; a person who has been found, on the basis of limited evidence, to have committed an offence and been given a 'limiting term' and who has been ordered to be detained or released subject to conditions; or a person who has been found unfit to be tried and has been ordered to be detained.

## **Forensic Patient Victims Register**

A register of victims of crime or members of their immediate family who elect to be registered, which is maintained by the Tribunal. Registered victims can ask to be notified by the Tribunal about upcoming hearings, be told about the outcome of hearings, make submissions about certain kinds of restrictions or be contacted if a forensic patient escapes or the Tribunal issues an order for the apprehension of a conditionally released patient.

## **Hearing**

Review hearings for forensic patients, held regularly by the Tribunal, usually sitting as a panel of three.

## **Index event**

The offence, or alleged offence, giving rise to the patient's current detention or conditional release.

## **Juvenile Justice**

A department of the NSW Department of Justice that supervises and cares for young offenders in the community and in juvenile justice centres.

## **Leave**

A period of absence from a place of detention when a forensic patient has an order from the appropriate authority allowing it.

## **Limiting term**

A Court's best estimate, following a special hearing for unfit patients, of the sentence the Court would have considered appropriate if the special hearing had been a normal trial and the person had been found guilty of an offence.

<sup>27</sup> *Victims Rights and Support Act 2013* (NSW).

<sup>28</sup> Sallmann P and Willis J, 1984, *Criminal Justice in Australia*, Oxford University Press, Melbourne.

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### **Local Health District**

A NSW Health organisation which manages public hospitals and provides health services to communities within a specific geographical area. Eight local health districts cover the Sydney metropolitan region, and seven cover rural and regional NSW.

### **Mental Health Review Tribunal**

A specialist quasi-judicial body constituted under the Mental Health Act (NSW) (section 140). The Tribunal has a wide range of powers that enable it to conduct mental health inquiries, make and review orders and to hear some appeals, about the detention, treatment and care of people with a mental illness.

### **Mental health**

The World Health Organization defines mental health as ‘a state of well-being in which every person realizes his or her own potential, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to her or his community’.

### **Mental illness**

A clinically diagnosable disorder that significantly interferes with a person’s cognitive, emotional or social abilities. Examples include anxiety disorders, depression, bipolar disorder, eating disorders and schizophrenia.

### **Notice of Intent**

A form giving notice to the Mental Health Review Tribunal that a hearing is required so that appropriate preparations can be made for the review of a patient.

### **NSW Law Reform Commission**

An independent statutory body constituted under the *Law Reform Commission Act 1967* (NSW) that provides expert law reform advice to Government.

### **Offence**

A breach of a law or rule; an illegal act.

### **Provision**

A legal clause or condition contained in legislation.

### **Risk**

The nature, severity, imminence, frequency and duration, and likelihood of harm to self or others. A hazard that is to be identified, measured and ultimately prevented.

### **Sentence**

A penalty ordered by a court. A range of penalties can be given during sentencing of a convicted offender, including imprisonment, community service orders, good behaviour bonds and fines.

### **Unconditional release**

Release of a patient when they are ready to safely live in the community without any restrictions. The person is no longer a forensic patient and is not required to obey any conditions imposed by the Tribunal. Tribunal hearings will no longer be held and the person resumes independent living. Before an order for unconditional release is made, an independent risk assessment is required and must be considered by the Tribunal. When a forensic patient is unconditionally released, victims are no longer registered.

### **Victim**

A primary victim of an act of violence is a person who is injured, or dies, as a direct result of that act and at the time that act is committed, or a member of the immediate family of a primary victim.

### **Victim of a patient**

A victim of an act of violence (an act or series of related acts, whether committed by one or more persons) committed by a [forensic] patient.

### **Victim impact statement**

A statement read or presented after conviction and before the sentencing of an offender that informs the court about the harm suffered by the victim arising from the offence.

### **Victims Services NSW**

An organisation providing support services, including free counselling and financial assistance, to victims of crime.

### **Violence**

Actual, attempted or threatened harm to another person that is deliberate and non-consenting.

# LIST OF FIGURES

**Figure 1:** Review Methodology

**Figure 2:** Justice Health and Forensic Mental Health Network Pathway

**Figure 3:** Proposed model: specialised victims support service

# APPENDICES

Appended separately

1. Review of the Mental Health Review Tribunal in respect of forensic patients - Terms of Reference
2. Steering Group Terms of Reference
3. Consultation Summary
4. Mental Health Review Tribunal Information for Victims - fact sheet
5. Academic report to support the review
6. Audit of legislative frameworks from other jurisdictions
7. Review of the operation of the Mental Health Review Tribunal in respect of forensic patients - Discussion Paper

