Consultation Paper

Review of the forensic provisions of the *Mental Health Act 1990* and the *Mental Health (Criminal Procedure) Act 1990*

NSW HEALTH

NSW DEPARTMENT OF HEALTH
73 Miller Street
NORTH SYDNEY NSW 2060
Tel. (02) 9391 9000
Fax. (02) 9391 9101
TTY. (02) 9391 9900
www.health.nsw.gov.au

This work is copyright. It may be reproduced in whole or in part for study training purposes subject to the inclusion of an acknowledgement of the source. It may not be reproduced for commercial usage or sale. Reproduction for purposes other than those indicated above requires written permission from the NSW Department of Health.

© NSW Department of Health 2006

SHPN (MH) 060178
ISBN 1 7418 7020 8

Further copies of this document can be downloaded from the NSW Health website www.health.nsw.gov.au

December 2006

The Hon Bob Debus MP
Attorney General

The Hon John Hatzistergos MLC
Minister for Health

The Hon Cherie Burton MP
Minsiter Assisting the Minister for Health (Mental Health)

13 December 2006

Dear Ministers

You have issued terms of reference for the conduct of a review of Chapter 5 of the *Mental Health Act 1990 (NSW)* as it relates to forensic patients, and any related matters arising under the *Mental Health (Criminal Procedure) Act 1990 (NSW).* You have also asked me to convene and chair a Taskforce to examine options for reform and to consult stakeholders and the public on those options.

This Consultation Paper has been prepared for those purposes. It provides an outline of the current law and practice, and options for reform, in relation to the matters under review. As the review is to focus on Chapter 5 of the *Mental Health Act* and the *Mental Health (Criminal Procedure) Act* the proposals examined relate to the policies and practices informing that legislation in NSW rather than to those policies and practices underlying different mental health regimes operating in, for example, other states.

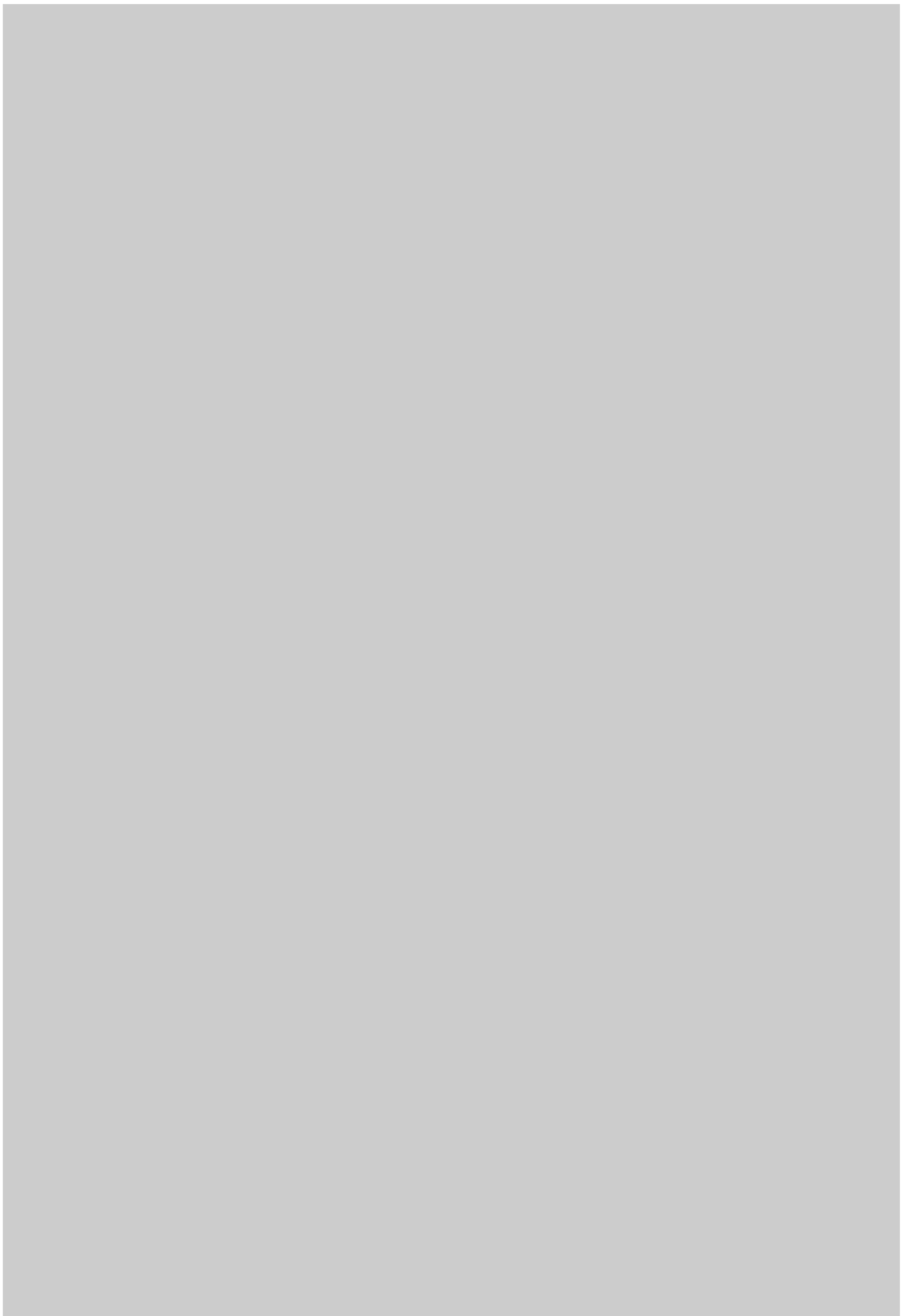
The central issue considered in this review is the appropriate authority or person to make decisions in relation to the terms and conditions of detention, release and conditional release of forensic patients. The Paper provides a discussion of various reform options in relation to such decision-making, including arguments for and against replacing the current system of executive discretion with a more structured system operating through the Mental Health Review Tribunal or the courts. The paper also examines the therapeutic and detention mechanisms for forensic patients and the inter relationship of the mental health and justice systems, as well as the role of victims in those systems, with a discussion of various options. Consequential and complementary options are also considered.

An Executive Summary is provided together with a call for submissions on the options set out in the Paper.

I am grateful for the assistance of several people in preparing this Consultation Paper, including Mr John Feneley, Assistant Director General, Attorney General's Department and Mr Adam Wand and Ms Sarah Conway, Policy Advisors to the Minister Assisting the Minister for Health (Mental Health). I particularly wish to acknowledge the invaluable contribution of Ms Gaby Carney, Principal Policy Officer, who was seconded from The Cabinet Office and worked with great skill with me on preparation of the Paper.

Yours faithfully

The Hon Greg James QC
President, Mental Health Review Tribunal



Contents

Executive Summary 1

Terms of Reference 3

1 Introduction 4

2 Context of the review 6

3 The forensic mental health system 9

4 Categories of forensic patient 13

5 Decision-making for forensic patients 17

6 Fitness to be tried 26

7 Special verdicts 31

8 Offenders and inmates 34

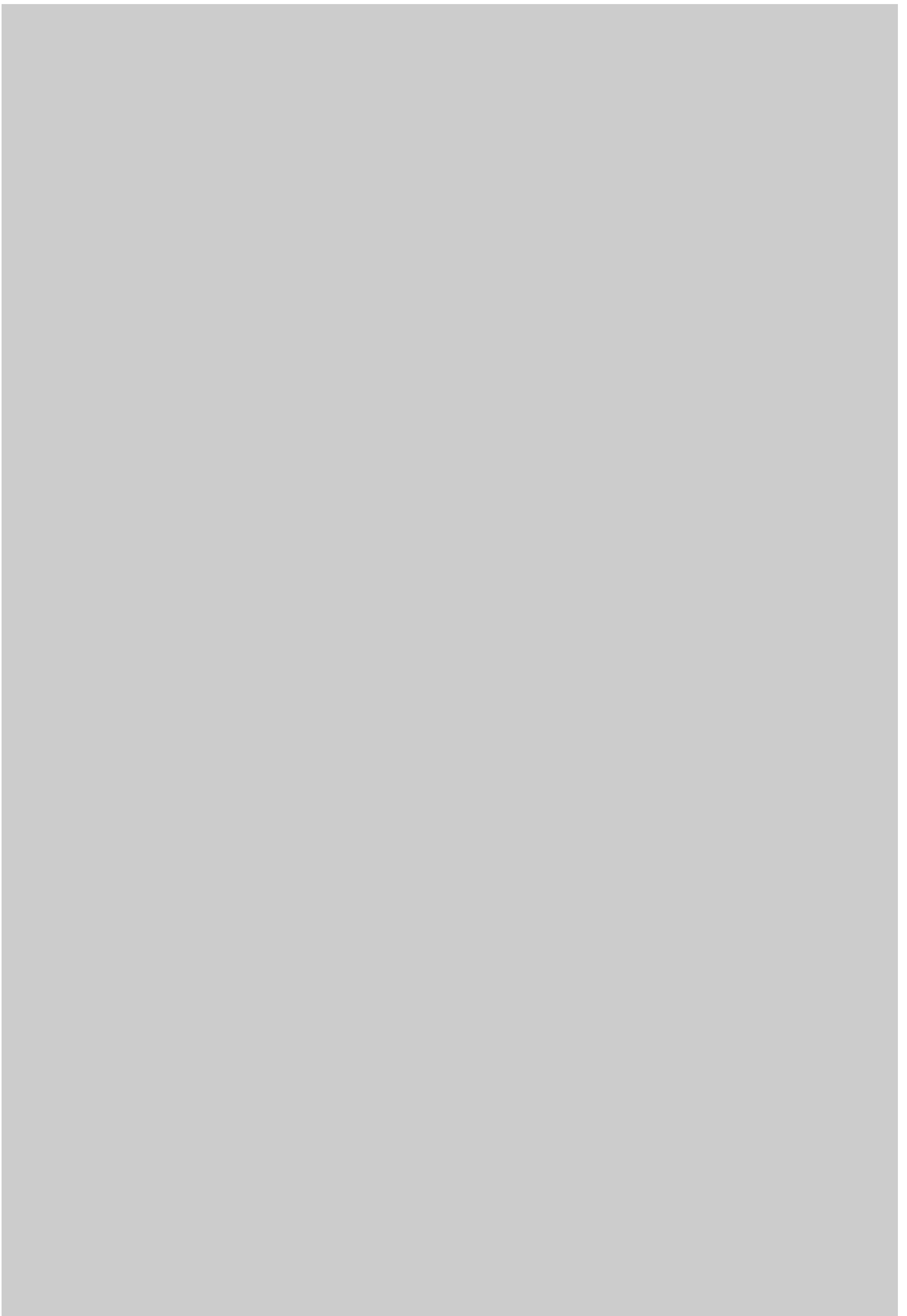
9 Review of forensic patients 38

10 Release of forensic patients 42

11 Victims of crime 51

12 Other issues 54

References 57



Executive summary

The review

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

Background

Generally, a person becomes a 'forensic patient' in NSW if, when charged on indictment, he or she is:

a found unfit to be tried or subject to a limiting term after a qualified finding of guilt, and detained in a hospital, prison or other place, or granted conditional release

b subject to a special verdict of not guilty due to mental illness, and detained in a hospital, prison or other place, or granted conditional release

c detained in a hospital for mental health treatment while on remand

d transferred to hospital for mental health treatment while serving a sentence of imprisonment or

e granted bail after being found unfit to be tried.

As at 30 June 2006, there were 310 forensic patients in NSW, of whom 203 had been found not guilty by reason of mental illness; of these, 33 had been found unfit to be tried; 15 were subject to limiting terms; and 59 were transferees from the general prison population. Although this population and the numbers of patients in the particular classes comprising it fluctuates, it is not expected that any substantial increase or decrease in the number of forensic patients will occur in the immediate future. Persons sentenced by the Local Court only become forensic patients if they are transferred to a hospital for treatment while serving their sentence.

Ambit of the paper

This Consultation Paper provides an overview of the existing law and practice in relation to the forensic mental health system, and outlines various options for reform.

The central issue being considered in the review is who is the appropriate authority or person for making decisions as to a forensic patient's detention, care, treatment, and release. New South Wales is one of the few Australian jurisdictions that has retained the system of Executive discretion, by which such decisions are made by the Minister for Health or, in some circumstances, the Governor. By contrast, most of the other States and Territories have transferred this decision-making role to courts or tribunals. The Consultation Paper discusses the arguments for and against the system of executive discretion, and suggests the following five options for reform:

1 Retain the current system of executive decision-making in relation to forensic patients.

2 Transfer all decision-making in relation to forensic patients to a court, such as the Supreme Court.

3 Transfer decision-making regarding the release of forensic patients to a court, and all other decision-making to the Mental Health Review Tribunal (subject to appeal to the Supreme Court).

4 Transfer all decision-making in relation to forensic patients to the Mental Health Review Tribunal (subject to appeal to the Supreme Court).

5 Transfer all decision-making to the Mental Health Review Tribunal, but establish a right of veto for the executive, through the Minister for Health.

The Consultation Paper discusses issues of public safety in relation to leave and release arrangements for forensic patients. Currently, the Tribunal cannot recommend a person's release unless it is satisfied, on the available evidence, that the safety of the patient or any member of the public will not be seriously endangered by the patient's release. The legislation does not, however, provide any criteria for the executive to apply in making leave and release conditions.

The Paper discusses the possible reform options for making these determinations, including if the system of Executive discretion were to be replaced. Possible options would be to specify in legislation the grounds upon which a person may be released, and the criteria that must be considered before making any such decision. This could provide greater transparency to such decision-making, guidance for those who may wish to make submissions for or against the release of a forensic patient, and a basis for judicial review of such decision-making.

Victims

The review has been asked to consider the role of victims of crime, and in particular, means by which their views and concerns can be addressed in the forensic review process. Several other Australian jurisdictions make legislative provision for victims of crime, and NSW already has an administrative process for incorporating them into the review and release process. Therefore, the Paper notes that possible options would be to formalise the existing provisions in legislation or, alternatively, introduce specific orders that would be available to registered victims upon application.

Nature and length of detention

Finally, the matters considered by the review give rise to a more significant question this, being the adequacy of the frameworks for dealing with questions of an accused's fitness to be tried, and the defence of mental illness, and the length of time for which a person may be detained or supervised as a forensic patient under these provisions. In particular, while the 'fitness to be tried' framework has, in the past, been reformed to provide for the setting of a maximum period of detention following a qualified finding of guilt, a person subject to a special verdict of not guilty due to mental illness still faces the prospect of indeterminate detention pending an executive order for his or her release.
The Paper discusses the fitness and special verdict frameworks, and outlines options to improve their operation.

The Hon Greg James QC

Terms of Reference

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

1 Review and make recommendations in relation to the legislative provisions of Chapter 5 of the *Mental Health Act 1990 (NSW)* relating to forensic patients, and in particular, to consider:
   - the appropriate authority or person to make decisions in relation to the terms and conditions of detention, release and conditional release of forensic patients
   - mechanisms for ensuring issues of public safety are properly considered and addressed in reviews of forensic patients
   - the role of victims of crime, and in particular, means by which their views and concerns can be addressed in the forensic review process
   - the appropriate structure for review and decision-making process, having regard to the four Options
   - the current definition of forensic patient, and in particular whether there should be two categories of patients, namely 'forensic patients' and 'security patients', the latter to cover persons who are transferees from a correctional centre
   - the ability of the Mental Health Review Tribunal to make Community Treatment Orders for people who are in prison and who are mentally ill
   - how those recommendations relate to the work of the review of the Mental Health Review Tribunal administrative practices and procedures and its role within the forensic system.

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

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

Introduction

Background to the review

This review has arisen out of a broader review of the *Mental Health Act 1990 (NSW) ('Mental Health Act')*, which commenced in 2004. The Government recently released an *Exposure Draft Mental Health Bill 2006* for consultation in relation to proposed amendments to the civil provisions of the *Act.*

Due to the complexity of issues involved in the area of forensic mental health, and the range of reform options available, the NSW Government considered that further work should be done prior to determining the desired reform approach in this area. Accordingly, the Government approved the conduct of a separate review of the forensic mental health legislation. The Government appointed the Hon Greg James QC, former Supreme Court Judge, former Royal Commissioner and currently the President of the Mental Health Review Tribunal ('Tribunal') to conduct the review in tandem with a second review of the conduct and procedures of the Tribunal itself.

Terms of Reference

The Terms of Reference asked Mr James to review and make recommendations in relation to the provisions of Chapter 5 of the *Mental Health Act* relating to forensic patients, and any related matters arising in relation to the *Mental Health (Criminal Procedure) Act 1990 (NSW) ('MHCP Act')*.

In particular, he has been asked to consider:

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

Given that the second review, that (of the Tribunal's administrative practices and procedures), is currently ongoing, this final matter will be addressed when developing the final reform recommendations.

The conduct of the review

The Government has asked Mr James to convene and chair a Taskforce to assist with the review. Stakeholders from a number of fields involved in the forensic mental health system will be requested to join the taskforce.

This Consultation Paper provides an overview of the existing law and practice in relation to the areas covered by the review, and outlines various options for reform. Individuals, organisations and agencies are invited to make written submissions on the options identified in the Paper, or any matters that are considered to fall within the Terms of Reference. Mr James will conduct community consultations after the Paper has been released, and the views expressed in these consultations and written submissions will be evaluated in developing final reform recommendations. The review will also consider the large number of submissions previously forwarded to the Government's more general review of the *Mental Health Act.*

Mr James will report back to the Minister for Health and Attorney General by August 2007.

Making a submission

If you provide a written submission to the review, it will be treated as a public document unless you specifically request that it be treated confidentially.

Please provide your comments and submissions to:

Ms Margaret Lawrence
Review Secretary
Mental Health Review Tribunal
PO Box 2019
Boronia Park
NSW 2111

Or by email to mhrt@mhrt.nsw.gov.au.

The closing date for submissions is 31 March 2007.

For further information about the *Mental Health Act* and the role of the Tribunal, please see the Tribunal's website, at http://www.mhrt.nsw.gov.au

SECTION 2

Context of the review

The legislative context

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

At that time, the *Mental Health Act* 'was considered by some to be a high water mark in Australian mental health legislation in relation to the recognition it gave to the rights and liberty of persons with a mental illness'. The *Mental Health Act* Implementation Monitoring Committee reviewed the Act shortly after its introduction, and its report provided the basis for a series of statutory amendments in 1994 and 1997. The *Act* has not been substantially amended since that time.[1]

In 2004, the NSW Government commenced a substantial review of the *Mental Health Act*, which has resulted in the release of two discussion papers, *Carers and Information Sharing* and *The Mental Health Act 1990,* and the release of an *Exposure Draft Mental Health Bill 2006*. The *Exposure Draft Bill* and accompanying report outline the proposed amendments to the civil provisions of the *Mental Health Act*. The proposed amendments to provide for the constitution and procedures of the Mental Health Review Tribunal are set out in that *Bill.*

In 2005, the *MHCP Act* was reviewed by a NSW Government Interdepartmental Committee, which made a series of recommendations to simplify procedures, improve operational efficiency and update the law in relation to people with a mental illness, mental condition or intellectual disability. The Committee's recommendations were based on earlier recommendations made by the NSW Law Reform Commission, and were implemented in the *Mental Health (Criminal Procedure) Amendment Act 2005 (NSW)*.[2]

Previous reviews

New South Wales' mental health laws have been subjected to a number of reviews over the past two centuries. Early inquiries included the Legislative Council Select Committee on the Lunatic Asylum, Tarban Creek (1846), the Commission of Inquiry on the Lunatic Asylums of NSW (1855), and two Royal Commissions in 1923 and 1961.[3]

More recent reviews have included the Inquiry into the Provision of Mental Health Services for the Psychiatrically Ill and the Developmentally Disabled (chaired by David Richmond) (1983); the Ministerial Implementation Committee on Mental Health and Development Disability (chaired by Dr William Barclay) (1988); the Mental Health Act Implementation Monitoring Committee's statutory review of the *Mental Health Act (1992)*; the NSW Law Reform Commission's report on people with an intellectual disability in the criminal justice system (1996); and the NSW Legislative Council Select Committee on Mental Health's inquiry into mental health services in NSW (2002).[4]

In addition, several reviews have considered mental health laws and systems at the federal and national level. These include the Human Rights and Equal Opportunity Commission's national inquiry into the human rights of people with mental illness (1993); the Mental Health Council of Australia and the Brain and Mind Research Institute's report, *Not For Service: Experiences of Injustice and Despair in Mental Health Care in Australia (2005)*; the Australian Law Reform Commission's inquiry into the sentencing of federal offenders, which considered offenders with a mental illness or intellectual disability (2006); and, most recently, the Senate Select Committee on Mental Health's inquiry into mental health (2006).[5]

The administrative review

The NSW Government has also asked Mr James to conduct a review in relation to the Mental Health Review Tribunal's administrative practices and procedures, with a view to enhancing the quality of decision-making and its efficient and economic operation. As part of that review, Mr James will consider the interaction between the Tribunal and each other body and agency (eg the courts, Justice Health, the Department of Corrective Services, the Department of Juvenile Justice, and the Department of Ageing, Disability and Home Care) involved in the detention, care and treatment of forensic patients, and the policy matters arising from them.

The national context

The NSW mental health system operates within a national policy framework. In 1992, the Australian Health Ministers committed their governments to a National Mental Health Strategy, to ensure a national approach and framework for mental health reform. The National Strategy provides for the making of National Mental Health Plans, which outline the priorities for reform over a five-year period.[6]

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

- expansion of Community Forensic Mental Health Services – specialist community forensic mental health services will provide assessment, support, court diversion, discharge planning from custody and case management of difficult adults and adolescents with a mental illness in contact with the criminal justice system
- supporting People with Mental Illness in the Prison System – this involves providing enhancement funding for programs to assist people with mental illness in correctional centres who are exhibiting challenging behaviours
- building and operating a New Forensic Facility at Long Bay Prison.[7]

Like New South Wales, several other States and Territories have also conducted reviews of their mental health systems in recent years, or are currently in the process of doing so.

The international context

Australia is a party to a number of international human rights instruments that apply generally to people with mental illnesses, including the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.[8] The United Nations has also developed non-binding declarations and resolutions that apply these more general rights in the mental health context. For example, the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (1991) ('MI Principles') outline the minimum human rights standards for people with mental illnesses.[9]

As part of the National Strategy, the States and Territories have undertaken to develop legislation that is consistent with the MI Principles.[10] In addition, Australian health authorities have developed a draft National Statement of Principles for Forensic Mental Health, which states that:

> Legislation must recognise the special needs of people with a mental illness involved in the criminal justice system and comply with the International Covenant on Civil and Political Rights, the United Nations Principles on the Protection of People with a Mental Illness and the Improvement of Mental Health Care.[11]

Therefore, any reform proposals arising from this review should be consistent with the MI Principles and Australia's international human rights obligations more generally.

Objects of the *Mental Health Act 1990*

The objects of the *Mental Health Act* are set out in Chapter 2 of the *Act*. The relevant sections are sections 4, 5 and 6 and they are reproduced in the *Exposure Draft Bill* with some additions and amendments. Nevertheless, given that they apply to all civil and forensic patients, and that they are substantially reproduced in the *Exposure Draft Bill,* they are particularly relevant to this Review. They provide:

4 Care, treatment and control of mentally ill and mentally disordered persons

1 The objects of this *Act* in relation to the care, treatment and control of persons who are mentally ill or mentally disordered are:

  a to provide for the care, treatment and control of those persons

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

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

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

2 It is the intention of Parliament that the provisions of this *Act* are to be interpreted and that every function, discretion and jurisdiction conferred or imposed by this *Act* is, as far as practicable, to be performed or exercised so that:

  a persons who are mentally ill or who are mentally disordered receive the best possible care and treatment in the least restrictive environment enabling the care and treatment to be effectively given

  b in providing for the care and treatment of persons who are mentally ill or who are mentally disordered, any restriction on the liberty of patients and other persons who are mentally ill or mentally disordered and any interference with their rights, dignity and self-respect are kept to the minimum necessary in the circumstances.

5 Additional administrative objects of the *Act*

In addition to the objects set out in section 4, the objects of this *Act* are:

a to establish the Mental Health Review Tribunal

b to provide for the appointment and functions of official visitors, authorised officers and welfare officers

c to complement the operation of the *Guardianship Act 1987 (NSW),* but not, except as provided by that *Act,* to affect the operation of that *Act*

d to ensure that persons who are mentally ill or mentally disordered are informed of the provisions of this *Act*

e to provide, as far as practicable, for proceedings under this *Act* before the Tribunal, a Magistrate or the Psychosurgery Review Board to be conducted with as little formality and legal technicality and form as the circumstances of the case permit.

6 Objectives of the Department

1 The objectives of the Department of Health under this *Act* in relation to mental health services are to establish, develop, promote, assist and encourage mental health services which:

  a develop, as far as practicable, standards and conditions of care and treatment for persons who are mentally ill or mentally disordered which are in all possible respects at least as beneficial as those provided for persons suffering from other forms of illness

  b take into account the various religious, cultural and language needs of those persons

  c are comprehensive and accessible

  d permit appropriate intervention at an early stage of mental illness

  e support the patient in the community and liaise with other providers of community services.

2 It is also an objective of the Department of Health under this *Act* to ensure that patients and other persons who are mentally ill or mentally disordered are, in accordance with this *Act,* informed of their legal rights and other entitlements under this *Act* and, in so doing, to make all reasonable efforts to ensure that the relevant provisions of this *Act* are explained to those persons in the language, mode of communication or terms that they are most likely to understand.

The forensic mental health system

Introduction

The NSW forensic mental health system is primarily regulated by the *Mental Health (Criminal Procedure) Act 1990 (NSW) ('MHCP Act'),* which deals with criminal proceedings involving persons with a mental illness, mental condition or intellectual disability; and Chapter 5 of the *Mental Health Act 1990 (NSW) ('Mental Health Act')*, which provides for the management, review and release of forensic patients.

Generally, a person becomes a 'forensic patient' in NSW if he or she is:

a found unfit to be tried or subject to a limiting term after a qualified finding of guilt, and detained in a hospital, prison or other place, or granted conditional release

b subject to a special verdict of not guilty due to mental illness, and detained in a hospital, prison or other place, or granted conditional release

c detained in a hospital for mental health treatment while on remand

d transferred to hospital for mental health treatment while serving a sentence of imprisonment; or

e granted bail after being found unfit to be tried.
As at 30 June 2006, there were 310 forensic patients in NSW, of which 203 had been found not guilty by reason of mental illness; 33 had been found unfit to be tried; 15 were subject to limiting terms; and 59 were transferees from the general prison population.[12]

Mental health in the criminal justice system

Traditionally, if a person with a mental illness or intellectual disability was charged with a criminal offence, he or she could be found unfit to be tried, or could be subject to the special verdict of not guilty due to mental illness. In either case, the person would be subject to indeterminate detention at the 'Governor's pleasure'. These provisions were reformed over time in response to concerns that they could lead to detention for periods long after the maximum penalty applying to the particular offence involved, beyond what was necessary for appropriate treatment and in conditions not justified by therapeutic or safety considerations.

The *MHCP Act* presently contains several mechanisms for dealing with a defendant who has, or may have, a mental illness, mental condition or intellectual disability. These were devised to meet the concerns about detention.

Diversionary provisions

Part 3 of the *MHCP Act* provides a framework for diverting people from the criminal justice system on the grounds of a mental illness, mental condition or intellectual disability. However, these provisions only apply in relation to criminal proceedings in the local courts.

Special hearings

The common law rule regarding the fitness of an accused to stand trial has a long history, dating back to the medieval courts of law.[13] The rule is based on the principle of a fair trial. That is, for a trial to be fair, the accused must understand the nature of the proceedings against him or her and be capable of participating in them sufficiently to be able to mount a defence.[14]

The criteria for determining fitness are that the accused must be able to understand and plead to the charge; exercise his or her right to challenge jurors; generally understand the nature of the proceedings; follow the proceedings in a general sense; understand the substantial effect of any adverse evidence; and decide upon a defence, and make this and his or her version of facts known to the court and his or her counsel.[15] A person may be unfit to be tried for various reasons, including mental illness, intellectual disability or even language difficulties.[16]

The *MHCP Act* provides a framework for determining a person's fitness to be tried in superior courts, and for resolving criminal proceedings where a person is not expected to become fit within a 12 month period (by holding a 'special hearing'). Where a special hearing results in a qualified finding that the person committed an offence, the court may nominate a term (known as a 'limiting term'), being the best estimate of the sentence that it would have ordered if the special hearing had been a normal trial. The person may be detained in a hospital or other place (for example, a correctional centre) for a period up to the expiry of the limiting term. However, the Minister for Health may order the person's release at any time where the Mental Health Review Tribunal ('Tribunal') is satisfied that the person does not constitute a risk of serious danger to him or herself or any member of the public.

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

> At present, if an accused person is found unfit to plead, the trial judge, in virtually all cases, will order that the accused be kept in strict custody in such place and manner as the judge thinks fit. This means detention in a mental hospital or prison. The major weakness in the present system is that a person may be detained indefinitely without having had an opportunity to present a defence case. In particular, if a person is mentally retarded, he or she may never become fit in the future so as to come before a court for trial. He or she may never get out, in effect...
>
> Under the proposed procedure when it is found that a person will not become fit during the next twelve months a special inquiry must be held... to determine whether the person committed the offence or whether the person is not guilty of the offence. This will allow the mentally retarded accused person his day in court and at least the opportunity to have the charges against him dismissed... where he is found to have committed the offence alleged, the court must state the sentence or disposition it would have considered appropriate had the special inquiry been a normal criminal trial and the person been found guilty. It is intended by this provision that person should not be detained for an offence because of his unfitness for any period in excess of that which he would have been detained had he been of sound mind and found guilty of a similar offence.[17]

The imposition of a limiting term appears to serve several purposes, including providing a greater degree of certainty as to the maximum period for which a person may be detained; ensuring that a person is not detained for a longer period than would have been the case if convicted at a normal criminal trial; and, it seems, ensuring that a person who is subject to a qualified finding of guilt is subject to a form of punishment.[18] The provision for release prior to the end of the limiting term reflects the fact that the person is not subject to a legal finding of guilt, and that the primary reason for detention is for community protection and treatment.

Special verdicts

The *MHCP Act* also provides a framework for dealing with a person whose trial or special hearing results in a 'special verdict' of not guilty due to mental illness. The *Act* does not seek to define the nature of this defence, but relies on the common law definition outlined in *M'Naghton's case*; that is, where the person was – at the time of the offence-'labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong'.[19]

In the case of a special verdict, the court may order that the person be detained in a place and manner that it thinks fit until released by due process of law, or make any order it considers appropriate, including releasing the person with or without conditions. As the person has not been found guilty of an offence, no sentence of imprisonment or limiting term is imposed. Instead, unless released unconditionally in the exercise of the executive discretion, the person may be detained indefinitely and will remain a forensic patient indefinitely. This discretion to release is most carefully and sparingly exercised by order of the Governor, acting on the advice of the Executive Council. The Executive Council will have received advice based on the recommendations made by the Mental Health Review Tribunal which reviews the care, treatment and detention of the patient.

Given that a person subject to a special verdict is not guilty in law for the commission of an offence, the main purpose for his or her detention is not punitive, but for community protection.[20] As with a person subject to a limiting term, the Tribunal may recommend release at any time if it is satisfied that the person does not constitute a risk of serious danger to him or herself or any member of the public.

Practical application of the provisions

If a person is charged with an offence, and appears to have a mental illness, mental condition or intellectual disability, there are various ways in which the matter may be dealt with by the criminal justice system.

Summary proceedings

If the person is charged with a summary offence, or an indictable offence that may be tried summarily, it may be dealt with under Part 3 of the *MHCP Act.* As noted above, this provides a framework for diverting defendants from the criminal justice system without conducting a hearing or delivering a verdict as to guilt.

If the defendant appears to be a 'mentally ill person', the magistrate may order that the defendant be taken to a hospital for an assessment; make a community treatment order under the *Mental Health Act;* or release the defendant, with or without conditions, into a responsible person's care. The charge is taken to have been dismissed on the expiry of six months from the date of the order, unless the defendant is brought back to be further dealt with in relation to the charge.[21]

Alternatively, if it appears that the defendant is (or was at the time of the offence) developmentally disabled, suffering from mental illness, or suffering from a mental condition for which treatment is available in a hospital – and, on an outline of the alleged facts or other evidence, the magistrate considers that it would be more appropriate to deal with the defendant under these diversionary provision – the magistrate may adjourn the proceedings, grant the defendant bail, or make any other order that appears appropriate.[22] This may include dismissing the charge and releasing the defendant unconditionally into the care of a responsible person with or without conditions, or on the condition that the defendant attend on a specified person or place for assessment or treatment, or both. The magistrate may order that the defendant be brought back to court at any time within six months of the order being made, if it appears that the defendant has failed to comply with a condition of release.[23]

If the defendant is brought back before the court under these provisions, the magistrate may choose to proceed with a hearing of the charges.[24] In that case, any concerns regarding the defendant's fitness to be tried could be raised in the hearing, and the defendant may raise a defence of not guilty due to mental illness.[25] If the defendant is convicted of the offence, there are no specific sentencing alternatives for persons with a mental illness or intellectual disability, but any such condition may be a relevant factor to be taken into account in mitigation of the sentence.[26] If the person is sentenced to a term of imprisonment, his or her condition may be diagnosed and treated in custody.

More serious matters

If the person is charged with an indictable offence, and the proceedings are heard in the District or Supreme Court, then the diversionary provisions outlined above are not available, nor are there any legislative provisions for equivalent diversionary options. In practice, this can mean that where a defendant is charged with an indictable offence that may be tried summarily, the options for diversion will depend on whether the prosecution or defence elects to have the matter heard in the Local Court or in a superior court.

As noted previously, the *MHCP Act* provides a framework for determining questions as to an accused's fitness to be tried. Any party to the proceedings, or the court, may raise a question as to a person's fitness to be tried for an offence at any time before or during the trial.[27] If the trial judge determines that a person is unfit to be tried, the person is referred to the Tribunal to determine whether he or she will become fit within 12 months. If yes, and the person becomes fit within this period, the proceedings will recommence as normal. If no, the court may either release the person (where the Director of Public Prosecutions does not intend to take further proceedings) or hold a special hearing.[28]

If a special hearing is held and results in a verdict of not guilty, the person will be released unconditionally. If the verdict is that, on the limited evidence available, the accused committed the offence charged (or an offence available as an alternative to that offence), the court may impose a limiting term.[29] Alternatively, if a trial or special hearing results in a special verdict that the person is not guilty due to mental illness, the court may order that the person be detained, or make any other order it considers appropriate (including ordering the person's conditional or unconditional release).[30]

Categories of forensic patient

Introduction

The Terms of Reference require the review to consider the current definition of forensic patient. Consideration of this issue includes the extent to which the legislation addresses the varying circumstances of the people who may become forensic patients within the forensic mental health system.

The definition of forensic patient

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

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

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

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

d) a person who is granted bail pursuant to section 14(b)(ii) or 17(2) of the *Mental Health (Criminal Procedure) Act 1990.*[31]

The definition turns on the consequences of various determinations that may be made concerning the custody of persons in the justice system, although the determinations themselves are not part of the definition. Generally, this means that a 'forensic patient' is a person who is:

a found unfit to be tried or subject to a limiting term after a qualified finding of guilt, and detained in a hospital, prison or other place, or granted conditional release

b subject to a special verdict of not guilty due to mental illness, and detained in a hospital, prison or other place, or granted conditional release

c detained in a hospital for mental health treatment while on remand

d transferred to hospital for mental health treatment while serving a sentence of imprisonment; or

e granted bail after being found unfit to be tried.

While this definition appears to be comprehensive, it may be desirable to provide a clearer, more narrative definition of a forensic patient that outlines the circumstances in which a person becomes a forensic patient under the *Mental Health Act*. This would aid understanding of the forensic mental health framework for those who implement the provisions, as well as those subject to them. There also appears to be a lack of consistency in the references to forensic patients in the *Mental Health (Criminal Procedure) Act 1990 (NSW) ('MHCP Act')* and the *Mental Health Act.* Forensic patients are variously referred to as a 'forensic patient,' 'person' or 'party'. Therefore, the legislation could be amended to ensure greater consistency in the references to them.

Option 1
Retain the current definition of a 'forensic patient' in the *Mental Health Act 1990 (NSW).*

Option 2
Amend the legislation to provide a simplified definition of a 'forensic patient', and consistency in the references to them.

Detention

The provision for detention of forensic patients is implicit but linked to forensic status.[32] Provisions for release and termination of that status are detailed but may not be exhaustive and are unclear in their operation.

Option 1
Retain the current system.

Option 2
Amend the forensic mental health legislation to define expressly:
i The power to detain.
ii The power to release.
iii Commencement and termination of forensic status.

Intellectual disability

If a person with an intellectual disability is charged with an offence, he or she may be diverted from the criminal justice system under Part 3 of the *MHCP Act* (for summary matters). In the higher courts, the person could be found unfit to be tried. If a special hearing is held, the person could be released as not guilty, have a 'limiting term' imposed (after a qualified finding of guilt), or be subject to a special verdict of not guilty due to mental illness (although an intellectual disability would only fall within the scope of this defence in those limited cases where the M'Naghton criteria are satisfied). Alternatively, the person may be fit to be tried, but the trial may result in such a special verdict. Finally, if the intellectual disability is not identified or raised during the criminal proceedings, the person may be subject to a normal trial and either acquitted or convicted of the offence.

Forensic patients with intellectual disabilities are commonly detained in correctional centres (rather than hospitals) after sentence, or while subject to limiting terms or detained after a special verdict. Although the latter are not convicted offenders, they are subject to the same controls and discipline in correctional centres as other inmates. The classification and parole systems under the *Crimes (Sentencing Procedure) Act* and the *Crimes (Administration of Sentences) Act* do not adapt well to such persons. In particular it is difficult for the Commissioner to make decisions about leave without knowing when it is likely the person will be considered for release. Consequently their detention may be longer and the circumstances of it more onerous than that of convicted prisoners. This raises a most serious concern about discrimination on the ground of disability.
In R v Mailes, Dunford J cited advice provided by the Mental Health Review Tribunal ('Tribunal') regarding the practical operation of the limiting term regime for persons with intellectual disabilities:

> [G]enerally persons serving limiting terms have an intellectual disability ... and not a mental illness, and usually such persons are detained in the correctional system, subject to the same security classifications as other inmates but, because they do not have non-parole periods, they are not eligible for early release... The Tribunal advised that it was particularly difficult for persons with intellectual disability serving limiting terms to obtain conditional early release because such applications are seldom made on their behalf and there is a severe lack of support services in the community to manage such persons post release. It was therefore unlikely the Tribunal would be able to satisfy itself on the question of management of risk to the patient or the community. The Tribunal also advised that there is in fact no one currently under its jurisdiction, serving a limiting term who has been released prior to the expiry of their limiting term.[33]

It would appear that similar concerns would arise in relation to forensic patients with intellectual disabilities who are subject to special verdicts, except that – as they are subject to indefinite detention – there is no maximum term set for their period of detention.

The position of people with intellectual disabilities within the criminal justice system has been the subject of several inquiries in the recent past.[34] Particular options that may be desirable include expanded mechanisms for diversion from the criminal justice system, and the provision of alternative forms of detention within the community. In this regard it should be noted that in 2005/06, the NSW Government allocated funding to the Department of Ageing, Disability and Home Care (DADHC) to establish a Criminal Justice Program designed to provide accommodation and support services for people with intellectual disabilities who are exiting adult and juvenile facilities. Over the next five years, 200 specialist accommodation and support places will be established across NSW to support this group at a total cost of $88.4 million.

The Human Services and Criminal Justice Chief Executive Officers have agreed to forward a proposal to the Human Services Committee of Cabinet for the development of the terms of reference for a feasibility study into secure accommodation options for prisoners with an intellectual disability.

The NSW Government may consider it appropriate to conduct a further inquiry into the need for specific provisions within the forensic mental health system to address the needs of people with an intellectual disability.

Option 1
Retain the current framework for dealing with intellectual disability among forensic patients.

Option 2
Amend the legislation to make specific provision in relation to people with an intellectual disability within the forensic mental health system.

Option 3
The NSW Government should conduct a further inquiry into the need for specific provision for people with an intellectual disability within forensic mental health legislation.

Children

The forensic mental health legislation does not make any specific provision for forensic patients under the age of 18 years. As with adults, a juvenile may become a forensic patient if he or she is found unfit to be tried, subject to a limiting term or special verdict, or transferred from a juvenile justice centre to a hospital for mental health treatment.

There is a general lack of information regarding the position of juveniles within the forensic mental health system. The *NSW Health discussion paper (2004)* noted that there are concerns that the special needs of juveniles may be overlooked or not properly met by the forensic mental health system, and that suggestions have been made that there should be specific legislative recognition of their special needs. The discussion paper asked whether there should be specific recognition of the situation of juveniles within the forensic system,[35] and the submissions generally supported special recognition being given.

Option 1
Retain the current framework for dealing with children within the NSW forensic mental health system.

Option 2
Amend the legislation to make specific provision for children within the forensic mental health system.

Option 3
The NSW Government should conduct a further inquiry into the need for specific provision for children within forensic mental health legislation.

Federal offenders

Section 120 of the Australian Constitution provides that each State must make provision for the detention in its prisons of persons accused or convicted of federal offences, and for the punishment of persons convicted of such offences. As at 1 March 2006, there were 672 federal prisoners in custody (ie less than 3% of the total Australian prison population), of which 57% were held in New South Wales.[36]

Part IB of the *Crimes Act 1914 (Cth)* deals with fitness to be tried, acquittals due to mental illness, and the summary disposition of, and sentencing alternatives for, persons with a mental illness or intellectual disability. The Part also outlines the procedures for the Commonwealth Attorney-General to conduct periodic reviews of each forensic patient's case, and order conditional or unconditional release. The Australian Law Reform Commission recently conducted a review of the sentencing of federal offenders, including those with mental illness and intellectual disability.[37]

Some federal offenders appear to be covered by the NSW forensic mental health system, while others are not. The NSW definition of a 'forensic patient' does not specifically include federal offenders found unfit to be tried or not guilty due to mental illness, but would appear to include a federal offender who is transferred from a correctional centre to a hospital under the *Mental Health Act*.[38] If this is the case, the former category would be subject to the federal provisions for matters such as review and release, while federal transferees would be subject to periodic review by the Tribunal, as well as other legislative provisions dealing with forensic patients, including leaves of absence.

Victoria recently amended its legislation to expand the definition of a 'forensic patient' to include a person acquitted of a federal offence due to mental illness but detained in a Victorian mental health service. The legislation was amended in response to concerns that Victorian mental health services did not have the power to provide mental health treatment to a federal patient who could not, or would not, consent; and that these patients would not have access to the same rights and leave as Victorian forensic patients.[39]

It may be desirable for the NSW Government to examine what provision should be made in NSW legislation for patients who are found unfit to be tried or not guilty due to mental illness under the federal provisions, or who are charged or convicted of federal offences and diagnosed with a mental illness while in custody.

Option 1
Retain the current framework for dealing with federal offenders within the NSW forensic mental health system.

Option 2
Amend the legislation to make specific provision for people detained under federal legislation.

Option 3
The NSW Government should conduct a further inquiry into the need for specific provision for people detained under federal legislation within NSW forensic mental health legislation.

References to mental illness and mental condition

The *MHCP Act* and the *Mental Health Act* both deal with mental illnesses and conditions, but operate under differing definitions of the term.

The *Mental Health Act* defines a mental illness as 'a condition which seriously impairs, either temporarily or permanently, the mental functioning of a person' and is characterised by the presence of at least one of the following symptoms: delusions; hallucinations; serious disorder of thought form; a severe disturbance of mood; or sustained or repeated irrational behaviour indicating the presence of any one or more of the other symptoms.[40] Chapter 5 of the *Act* contains references to a 'mentally ill person' (as defined), and a 'mental condition' (which is not defined).

Part 2 of the *MHCP Act* deals with special verdicts of not guilty due to mental illness. The *Act* does not seek to define the term or the nature of the defence, but relies on the common law definition outlined in M'Naghton's case; that is, where the person is 'labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong'.[41] Finally, Part 3 of the *MHCP Act* contains references to a 'mentally ill person' as defined in the *Mental Health Act;* a 'mental illness', which is not defined; and a 'mental condition', which is defined as 'a condition of disability of mind not including either mental illness or developmental disability of mind'.[42]

To some extent, these differing terms reflect the contexts in which they are used in the legislation. The *MHCP Act* is concerned with determining legal questions of guilt, and therefore focuses on the impact of the illness (or other 'disease of the mind') on the person's ability to reason in relation to his or her actions. As the *Mental Health Act* is primarily concerned with care and treatment, it focuses on the medical question as to whether a person has an identifiable psychiatric condition, and its impact on the person's mental functioning.

In practice, these differing definitions could lead to quite different outcomes. For example, a person might be considered to have a mental illness for the purpose of summary disposition of an offence, but might not satisfy the M'Naghton definition of 'mental illness' in order to obtain a special verdict of not guilty due to mental illness. Therefore, a person with the same mental condition might be diverted from the criminal justice system under one set of provisions, or subject to a trial and possible conviction and sentence under another set of provisions.

Option 1
Retain the existing terminology in forensic mental health legislation in relation to a 'mental illness' and 'mental condition'.

Option 2
Review the terminology used in forensic mental health legislation, including the terms 'mental illness' and 'mental condition'.

SECTION 5

Decision-making for forensic patients

Introduction

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

Historical development

Modern forensic mental health law has developed out of the raising of questions as to fitness and the defence of mental illness in trials for homicide – usually because the consequences of raising such questions are so severe in terms of the length of detention that the questions are not raised in relation to charges of less serious offences.

In Anglo-Saxon times, English law focused on maintaining public order by providing simple legal remedies as a substitute for self-help and the blood feud. Homicide was an offence of strict liability, and the person whose act led to the death was generally at least liable to pay compensation to the victim's family. In some cases, a fine was also payable to the King for breaching the King's peace. If the accused were insane, his or her relatives were responsible for paying the compensation and for protecting the person from similar conduct.[43]

By the fourteenth century, all homicide was categorised as a felony unless done in the execution of justice. While strict liability remained, the King had a discretionary power to pardon an offender if the homicide resulted from misadventure or self-defence.[44] An insane accused was occasionally dealt with by the Sheriff without trial, but was usually brought before a jury to certify the facts, and then the King to determine whether a pardon would be granted. The King was also responsible for keeping the lands and tenements of a person suffering from mental illness during the term of the illness, and ensuring that the person was maintained from these profits.[45]

The modern form of Executive discretion in the forensic mental health context dates back to the *Criminal Lunatics Act 1800 (UK)*, which was introduced in response to the attempted assassination of King George III by James Hadfield, a delusional former soldier. The *Act* provided that, where a person was acquitted on the ground of insanity, the court must order that the person be kept in strict custody, 'until the King's Pleasure be known and the King may give such order for his safe custody as he shall think fit'.[46]

The *Act* was adopted in NSW, and was the original statutory source of the power to hold people acquitted due to mental illness at the 'Governor's Pleasure'.[47] In practice, it appears that the Governor of the NSW colony had the power to transfer an insanity acquittee to an asylum, and could order his or her release in all cases except murder (in which case, the Governor was required to seek the Home Government's approval).[48]

In 1843, the NSW Parliament passed the *Lunacy Act 1843 (NSW)*, which reaffirmed the system of detention at the Governor's Pleasure. A person acquitted on the ground of insanity was detained in prison at the Governor's Pleasure, and the Governor could issue any orders considered necessary for the person's detention in safe custody. The *Act* did not, however, specify any procedures for release. Leanne Craze has commented that 'in effect, the first *Lunacy Act* and subsequent pieces of legislation all failed to provide clear directions for the review and release of persons deemed to be criminally insane'.[49]

In 1986, a new fitness to be tried framework came into operation in NSW, as a package of amendments to the *Crimes Act 1900 (NSW)* and the commencement of a part of the *Mental Health Act 1983 (NSW)*. The framework is now regulated under the *Mental Health (Criminal Procedure) Act 1990 (NSW) ('MHCP Act')* and the *Mental Health Act 1990 (NSW) ('Mental Health Act')*.[50]

The current framework

New South Wales has retained the system of executive discretion to the extent that only the Minister for Health or the Governor (acting on the advice of the Executive Council) are authorised to make orders as to a forensic patient's detention, care, treatment, or release.[51]

The Tribunal makes recommendations to the Minister for Health in relation to these matters after conducting periodic reviews of the forensic patient's case. The Tribunal cannot, however, recommend a person's release unless it is satisfied, on the available evidence, that the safety of the patient or any member of the public will not be seriously endangered by the patient's release.[52] If the Attorney General objects to a patient's release on specified grounds, the person cannot be released. If no objection is made, the Minister or Governor may order the person's release.[53]

Previous reviews and law reform initiatives

Various bodies have reviewed the system of executive discretion in relation to forensic mental health decision-making.

A number of review bodies have recommended the replacement of the executive discretion. The *Mental Health Act* Implementation Monitoring Committee (1992) expressed a preference for, and the NSW Law Reform Commission (1996) recommended that, the Tribunal should have responsibility for making decisions in relation to forensic patients.[54] The Human Rights and Equal Opportunity Commission (1993) recommended that courts or independent specialist tribunals should make such decisions.[55] More recently, the Senate Select Committee on Mental Health (2006) recommended that responsibility for release decisions should be routinely placed with mental health courts or mental health tribunals.[56]

On the other hand, the NSW Department of Health Steering Committee on Mental Health (1988) recommended that the executive discretion be retained, on the basis that if it were removed the executive would have 'no power to prevent implementation of decisions in matters which may be viewed as sensitive'. A *NSW Health Department Discussion Paper (1996)* did not support the removal of the executive discretion in favour of the Tribunal on the basis that although the Tribunal 'deals with issues of a clinical nature, it is not constituted to look at the broader community issues, which is really the province of the executive arm of government'.[57]

Model Mental Health Legislation

In 1994, the University of Newcastle Centre for Health Law, Ethics and Policy released its Model Mental Health Legislation.[58] The Model Legislation provides for a Special Forensic Division of the Tribunal to make determinations regarding the release of forensic patients. The Special Forensic Division would consist of a current or former Supreme Court judge; a psychiatrist with experience in forensic psychiatry; a psychologist with experience in forensic psychology; a legal practitioner with experience in criminal law; and one other suitably qualified or experienced person.[59]

The Model Legislation provides that a person who is found unfit to be tried may be admitted to a mental health facility and reviewed by the Special Forensic Division of the Tribunal. If the Division finds that the person is unfit, it must order that the person remain at the mental health facility as a person under supervision. Once a person has been detained for five years (for offences with indeterminate sentences) or three years (for other offences), the criminal proceedings must be discontinued, the Tribunal must order the person's discharge, and may order his or her involuntary admission under the civil provisions of the *Mental Health Act*.[60]

The Model Legislation provides that, if a person has been found not guilty due to mental illness, the Tribunal may discharge the person as a forensic patient, subject to any conditions it considers fit; place the person on a community treatment order; order the person's continuing admission as a forensic patient; transfer the person to another mental health facility; or allow the person a leave of absence, subject to any conditions it considers fit. The maximum term of admission is a term equal to the average term of imprisonment that a court could have imposed if the person had been convicted of the offence. The Tribunal must then discharge the forensic patient at the end of that term, unless it orders the person's involuntary admission under the civil provisions of the Act.[61]

Model Criminal Code Bill

In 1995, the Model Criminal Code Officers Committee ('MCCOC') released a Model Mental Impairment and Unfitness to be Tried (Criminal Procedure) Bill 1995. The Bill provides for: all decisions to be made by courts, rather than the executive or a Tribunal; a statutory definition of fitness to be tried; the conduct of fitness inquiries and special hearings; the imposition of limiting terms after special hearings as well as special verdicts of not guilty due to mental illness; annual reviews of the case of each forensic patient; provisions for reporting on the attitudes and counselling of the next of kin and victims; and the application of these provisions in all courts, including local courts.[62]

Draft National Statement of Principles

The draft National Statement of Principles for Forensic Mental Health provides that 'decisions to detain, release or transfer mentally ill individuals found not guilty or unfit for trial because of a mental illness or intellectual impairment, should be made by courts or independent statutory bodies of competent jurisdiction, not by a political process of the Governor/Administrator in Council'.[63]

Other jurisdictions

The Commonwealth and Western Australia are the only other Australian jurisdictions to have retained the executive discretion for decision-making in relation to forensic patients. At the federal level, the Attorney-General conducts periodic reviews of persons detained after being found unfit to be tried, or found not guilty due to mental illness, and makes determinations regarding their release.[64] In Western Australia, the Mentally Impaired Defendants Review Board periodically reviews forensic patients and can be authorised to grant leaves of absence, but only the Governor may make a release order.[65]

Several jurisdictions provide for the courts to order a forensic patient's release. In Victoria, a court may make a supervision order in relation to a person found, at a special hearing, to have committed an offence, or who is subject to a special verdict of not guilty due to mental impairment. The supervision order is for an indefinite term, but the court must set a nominal term in accordance with a statutory table. The Mental Health Review Board reviews the patient periodically, and applications can be made to the court for variation or revocation of the order. If the person has not already been released, the court must conduct a major review at least three months before the expiry of the nominal term, and at least every five years thereafter, to determine whether the person should be released.[66]

South Australia and the Northern Territory both provide for a court to conduct periodic reviews (however, these appear to be discretionary in the Northern Territory), and order the release of a person subject to a supervision order at any time before the expiry of the relevant limiting term.[67] In Tasmania, applications may be made to the Supreme Court for the discharge of a forensic order. The Forensic Tribunal conducts periodic reviews of forensic orders, and may issue a certificate that an order is no longer warranted. The person may then apply to the Supreme Court for discharge, revocation or variation of the order.[68]

Several jurisdictions provide for a tribunal to order a forensic patient's release. For example, in the Australian Capital Territory, the Mental Health Tribunal conducts periodic reviews of detained persons and may order their release within the limiting term.[69] In Queensland, when there is no factual dispute, issues of mental illness and fitness are dealt with outside the trial process by the Mental Health Court, which is presided over by a Supreme Court judge assisted by two experienced psychiatrists.[70] The Court may make forensic orders and thereafter the Mental Health Review Tribunal reviews the patient, and may revoke a forensic order. The Queensland model is referred to later in the paper when considering options for decision making in relation to fitness (see Chapter 6).

Options for reform

Several reform options arise in relation to decision-making for forensic patients. The Minister Assisting the Minister for Health (Mental Health), the Hon Cherie Burton MP, outlined the following options when she announced this review:

- retain the executive discretion but update and clarify the existing provisions
- transfer decision-making in relation to the release of forensic patients to the Supreme Court, with the Tribunal making decisions in relation to leave and conditions
- transfer all decision-making to the Tribunal (and retain the Supreme Court's power of review of such decisions)
- transfer all decision-making to the Tribunal, but establish a right of veto for the executive, through the Minister for Health.

The executive discretion

Generally, the arguments for the retention of the executive discretion are:

- It is sufficiently flexible to deal with the varying circumstances of each forensic patient, given that it is unrestricted by precise criteria for such decision-making.
- While criticisms have been made about the apparent lack of transparency and accountability in the current framework, it is these factors that permit the executive to take into account matters that it might be difficult to debate adequately in the public arena.
- Decisions relating to forensic patients require the consideration of a number of issues, including the patient's clinical state, his or her dangerousness, and community attitudes and concerns, and the executive may be considered the best placed to gauge, and make decisions about, such broader community issues.
- The exercise of discretion is essentially an administrative, rather than judicial, matter.

On the other hand, the arguments against the current system are:

- The inevitable delays involved, which may affect the person's release or custodial conditions (if his or her mental condition changes).
- The denial of natural justice to forensic patients as the decision-maker does not hear the evidence on which the decision is based, and is not required to give reasons for the decision.
- Political considerations may enter into the decision to release, which would be an inappropriate basis for such decision-making.
- The possible breach of international human rights obligations, including article 9(4) of the International Covenant on Civil and Political Rights ('ICCPR'), which provides that 'anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'.[71]
- The potential for the Minister to be the subject of Court proceedings for administrative review of their decisions.

The United Kingdom amended its legislation after the European Court of Human Rights found that it breached article 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (which is substantially similar to article 9(4) of the ICCPR) on the basis that there was no 'appropriate procedure allowing a court to examine whether the patient's disorder still persisted and whether the Home Secretary was entitled to think that a continuation of the compulsory confinement was necessary in the interests of public safety'.[72]

Discussion

Generally, the modern clinical or therapeutic model requires that the detention of mentally ill persons, whether for treatment or punishment (although, in modern times, the latter is not accepted as an appropriate basis for detention) should be governed by appropriate clinical or treatment criteria, subject to issues of public safety. If mentally ill patients are to be treated differently from convicted offenders, or even if they are to be considered quasi-criminals, they should not be subject to more punitive arrangements than convicted offenders. Detention can only be justified on treatment and/or safety grounds.

The current system can place forensic patients at a disadvantage when compared with convicted offenders, because they lack a number of the procedural safeguards that apply within the criminal justice system. For example, when a person commits a crime, the length of his or her sentence is determined by the law and the criminal court, and is subject to appeal to a superior court. Courts operate with defined powers and subject to criteria determined by statute and common law. For example, if the person had been convicted of an offence, the criteria for sentencing set out in the *Crimes (Sentencing Procedure) Act 1999 (NSW)* provides for the imposition of a non-parole period, which may have regard to the principle of mitigation for mental illness.

By contrast, a person who is subject to a qualified finding of guilt (after a special hearing) may have a limiting term imposed which – as it does not include any non-parole period that might have been set upon conviction – can lead to a period of detention that is greater than any sentence he or she would have received if convicted. Alternatively, a person who is acquitted of an offence due to mental illness (that is, subject to a special verdict) faces the prospect of indefinite detention that is not subject to judicial review and may be terminated only upon the exercise of executive discretion.

In practice, lawyers and courts may be deterred from raising mental health issues at trial that might result in the client becoming a forensic patient because of the possible impact on the person's detention period. Therefore, persons who should be treated as forensic patients may be imprisoned, and come into the system as transferees. In this case, the person may be discharged at the end of the term of the sentence with no or limited opportunity for further treatment or follow up.

Apart from matters of release, it has been suggested that there is a strong case for decisions that are primarily clinical – for example, decisions as to which hospital, or which specific treatment or leave regime is appropriate to a forensic patient's circumstances as they change from time to time – to be determined by clinical authorities on therapeutic grounds, subject to appropriate procedural safeguards, and protections for the patient and community.

Medical superintendents at individual facilities currently have the power to make these decisions, subject to the recommendations of the Tribunal and the overriding discretion of the Minister or Governor. However, that exercise of discretion, which necessarily involves some delay, and the limitation of such decisions to the superintendent at the individual facility, produces a rigidity that can mitigate provisions of appropriate treatment in the appropriate facility at the appropriate time. The Deputy State Coroner recognised this concern in a recent recommendation to the Minister for Health that 'a review should be conducted as to whether the present system of Executive responsibility is best suited to ensure the placement and movement of inmates on clinical grounds...'[73]

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

The *NSW Health discussion paper (2004)* asked whether the executive discretion to determine the release of forensic patients should be replaced, and if so, how release decisions should be made.[74] The submissions to that review reflected considerable support for alternatives to the current framework (however, one submission supported its retention).

Court-based system

This option involves transferring all decision-making in relation to forensic patients to a court, such as a mental health court, or the District or Supreme Court. For example, Queensland has a Mental Health Court that determines an accused's fitness to be tried, and whether an accused was mentally ill when the offence was committed. The Court may then make a forensic order, under which a person may be detained for treatment or care, or made subject to a limited community treatment order.

The advantages of a court-based system is that this model is that it ensures the independence of decision-making hearings are generally heard in public; they are presided over by independent judicial officers who are accustomed to balancing various interests in their decision-making; there is a comprehensive framework of due process safeguards in place; and decisions are subject to formal avenues of appeal to superior courts. As noted above, several other Australian jurisdictions have adopted this model for decision-making in the forensic mental health context.

However, a court-based system may have certain disadvantages. Due to the large number of matters heard by the courts, it may be difficult to schedule hearings at short notice. The courts may also be reticent to take on what is essentially an administrative function to be exercised on clinical and protective grounds. In addition, if a court-based system were introduced, it would be necessary to consider whether any change were necessary to the Tribunal's current functions and powers.

Hybrid system

This option involves separating the decision-making powers between the Tribunal and the courts, so that the Tribunal would make decisions regarding a person's detention, care and treatment as a forensic patient, while the courts would make the more significant decisions regarding release.

The advantage of this system is that it would provide greater flexibility in the management of forensic patients, by transferring these decisions to the Tribunal (which would be able to schedule hearings at short notice, and monitor the implementation of the orders over time), while ensuring that decisions regarding release are made by independent judicial officers within the formal court system. However, the separation of decision-making between these bodies could lead to inconsistent results, and the Tribunal's role would need to be defined in relation to the court hearings.

Tribunal-based system

This option involves transferring all decision-making in relation to a forensic patient to the Tribunal, while retaining the existing avenue of appeal against such decisions to the Supreme Court.

While a court-based or hybrid system would appear attractive, it may also be less flexible, more adversarial, more formal, and involve different structures of appeal, to a tribunal-based system. In expressing its support for a tribunal-based system, the NSW Law Reform Commission noted that the varied expert membership of a tribunal allows for more expertise in the area of mental illness and dangerousness; the adversarial system is inappropriate for considering issues such as continuing fitness and dangerousness; the court does not have a continuing role after sentencing in the detention of 'fit' defendants; and a tribunal is generally quicker and less formal than the courts, which is a particular advantage amongst this category of defendants.[75]

Executive veto

This option is a variation on the system of executive discretion. Under this option, the Tribunal would be responsible for decision-making in relation to forensic patients, subject to a right of veto for the executive, through the Minister for Health. In practice, this would provide little material change to the existing system unless it were accompanied by legislative provisions outlining the grounds on which the veto could be exercised, a requirement for the Minister to provide reasons for a veto decision, and an effective avenue to appeal an exercise of the veto power.

Option 1
Retain the current system of executive decision-making in relation to forensic patients.

Option 2
Amend the legislation to transfer all decision-making in relation to forensic patients to a court, such as the Supreme Court.

Option 3
Amend the legislation to transfer decision-making regarding the release of forensic patients to a court, and all other decision-making to the Mental Health Review Tribunal (subject to appeal to the Supreme Court).

Option 4
Amend the legislation to transfer all decision-making in relation to forensic patients to the Tribunal (subject to appeal to the Supreme Court).

Option 5
Amend the legislation to transfer all decision-making to the Tribunal, but establish a right of veto for the executive, through the Minister for Health.

Practical matters arising from any change in decision-making

If the executive discretion in decision-making were to be replaced, it would be necessary to consider the framework in which a new determining body would operate. Several of these practical matters are outlined below.

Review of decisions

The *Mental Health Act* currently provides that a person who is dissatisfied with a Tribunal determination, or the Tribunal's failure or refusal to make a determination, may appeal to the Supreme Court, and that such appeals are to be heard by way of a new hearing of the matter.[76] As this provision only applies to Tribunal determinations (rather than the exercise of executive discretion in decision-making), it currently has limited application.

If the system of executive discretion were to be replaced, it would be necessary to ensure that sufficient safeguards were built into the system to ensure that any concerns regarding the interests of the forensic patient, the safety of the community, and broader public interest matters were given proper consideration.

Given the executive's role in protecting the public interest, the Minister for Health and the Attorney General could be given the right to make submissions at any hearing relating to the possible granting of leave, or conditional or unconditional release of a forensic patient. At the same time, the existing avenue of appeal to the Supreme Court could be structured so that it applies more generally in relation to such decision-making. In addition to appeals by forensic patients, the Minister for Health and Attorney General could give given the right to appeal against decisions of the determining body in relation to matters of the public interest.

These provisions would ensure that the NSW Government has an adequate opportunity to raise any concerns regarding the potential release of a forensic patient both at the decision-making stage, and after a decision has been made. Given that the Attorney General would be given these opportunities to be heard, it may not be necessary to retain the existing provisions for objection to a proposed release (see Chapter 10 for more discussion).

If the current system of decision-making is reformed, provide that:

Option 1
A forensic patient has a right of appeal in relation to any decision of the determining body.

Option 2
A forensic patient has a right of appeal in relation to any decision of the determining body, and the Minister for Health and the Attorney General have a right of appearance before the determining body, and a right of appeal on public interest grounds.

If the Mental Health Review Tribunal is given the power to make some, or all, decisions in relation to forensic patients:

Option 1
Retain the current administrative framework for the Tribunal.

Option 2
Amend the legislation to provide that the President may establish a division of the Tribunal for matters relating to forensic patients.

The Tribunal's constitution

If the Tribunal were to be given the power to make some, or all, decisions in relation to forensic patients, it may be desirable to establish a Forensic Division within the Tribunal to facilitate the development of specific expertise in this area. For example, section 184 of the *Crimes (Administration of Sentences) Act 1999 (NSW)* provides that the Chairperson of the NSW Parole Authority may, from time to time, constitute Divisions of the Authority, and the exercise of any function delegated to the Division is taken to have been exercised by the Authority.

Therefore, the President of the Tribunal could be given the power to create a Forensic Division of the Tribunal. To ensure the accuracy and consistency of decision-making-particularly in relation to matters of release – the Forensic Division could be presided over by a former judicial officer (who would have expertise in relation to legal matters and the application of statutory criteria for determinations), and include a member who is a current practising psychiatrist (who would therefore have current knowledge in the field of psychiatry), and a member with other suitable qualifications or experience.

The President or Deputy President of the Tribunal currently presides as chairperson over forensic review hearings, and his or her decision on any question of law or procedure is the decision of the Tribunal. Any other questions arising during a meeting are determined by a majority of votes among the members. If the votes are equal, the chairperson has the deliberative vote as well as a second or casting vote.[77] If the Tribunal were to have a decision-making role in relation to forensic patients, and a Forensic Division is established, it may be desirable to provide that the former judicial officer who presides over the forensic hearings should have the deciding vote in relation to any determination involving the release of a forensic patient.

Notice of hearings

The forensic mental health legislation does not make any provision for giving notice of the review of a forensic patient's case. In practice, the Tribunal organises hearings for forensic patients, and prepares a list of patients to be reviewed which outlines the date and place of review, the names of the patients to be reviewed, the section of the legislation under which the person will be reviewed, and includes a request for reports by members of the treating team. The Tribunal liaises with the hearing venue, the treating team and the patient's legal representatives prior to the hearing. As discussed in Chapter 11, victims may register with the Forensic Patient Victims Register to receive information about Tribunal hearings.[78]

If the Tribunal or a court were to become the determining body in relation to forensic patients, the review and other hearings would gain more significance in providing the basis for any decision made regarding the management or release of a forensic patient. Given the various persons with an interest in such decision-making, one option would be to provide a statutory requirement for notice of these hearings. Such notice could be given to the relevant forensic patient, his or her treating team and legal representative; any registered victims or family members who may wish to make submissions in relation to the release of a forensic patient; and the Attorney General and Minister for Health, who may wish to make submissions on matters relating to the public interest.

Option 1
Retain the current framework, which does not make statutory provision for notice of hearings.

Option 2
Amend the legislation to provide that the Mental Health Review Tribunal and the determining body must give a specified amount of notice of any hearing in relation to a forensic patient to:

- the forensic patient (and his or her legal representative)
- the person responsible for the detention, care and treatment of the patient
- the Attorney General and Minister for Health
- registered victims and family members of the patient who have given notice of their desire to be informed.

Production of reports

If a new determining body were to have responsibility for making determinations in relation to forensic patients, it would be important that it have sufficient information on which to base its decisions.

The *Mental Health Act* provides that the Tribunal may, of its own motion or on an application by any person with a matter before the Tribunal, issue a summons requiring a person to attend as a witness at a Tribunal meeting and/or attend the meeting and produce any specified documents in the person's possession or under his or her control that relates to any matter before the Tribunal. A person must not, without cause, fail or refuse to obey a summons, and the maximum penalty for non-compliance is 50 penalty units.[79]

Apart from these provisions, the legislation does not give the Tribunal or executive any formal powers to require the production of information for the purpose of a review or decision in relation to a forensic patient. In practice, the Tribunal requests reports from anyone involved in the care, treatment and detention of a forensic patient (including psychiatrists, psychologists, nursing staff, case managers, custodial staff, social workers and occupational therapists). The Tribunal does not prescribe the specific format of these reports, but provides guidance as to the type of information that should be included. The Tribunal requests that the reports be provided at least four working days before a hearing, but in practice may accept a report up to the day of the hearing. In some cases, oral evidence may be accepted, but the Tribunal may request a written report confirming that evidence after the hearing has been completed. The Tribunal also requests that progress notes be put before the Tribunal at the time of the hearing.[80]

As there is no statutory requirement to produce this information, the Tribunal has limited power to enforce these guidelines. In practice, however, the Tribunal could consider that it has insufficient information before it to make a recommendation to the Minister. Alternatively, the Minister (or Governor) could consider that he or she has insufficient information to make a decision in relation to a forensic patient.

Several other Australian jurisdictions make statutory provision for the type of information that must be produced and considered prior to making decisions in relation to forensic patients. For example, Victoria provides that the court cannot order a person's release, or significantly reduce the degree of supervision to which a person is subject, unless it has obtained and considered various specified reports, including those provided by a medical practitioner (or psychologist) or who has examined the person, a report by the person responsible for supervision, a report of the family members or victims, and any other report the court considers necessary.[81] South Australia and Tasmania also require courts to consider specified reports prior to any decision to release a person or significantly reduce his or her degree of supervision.[82]

Therefore, one option would be to specify in legislation the information that must be considered at any hearing involving a forensic patient (whether by way of review of the person's case, or for the purpose of a determination). The legislation could, for example, provide that a decision may only be made after considering reports from the treating team and a consultant psychiatrist or psychologist (in the case of intellectual disability); a risk assessment by NSW Health (where the Tribunal is considering the question of release); any other reports considered necessary or desirable; any representations made by the patient or his or her representative; and any victim impact statement provided by a registered victim.

Option 1
Retain the current framework, which does not make statutory provision for the production of information for reviews or decisions in relation to forensic patients.

Option 2
Amend the legislation to provide that the review and determining body may only make a recommendation or determination after considering certain prescribed information, and may require the production of reports or other information from any relevant person or public official involved in the detention, care, treatment, or supervision of a forensic patient.

Reasons for decisions

The *Mental Health Act* does not make any provision for the Minister or Governor to provide reasons for their decisions in relation to the detention, care, treatment or release of forensic patients.

By contrast, the *Act* also provides that the Tribunal must record in writing every determination and recommendation in relation to any matter before it at any meeting. The Tribunal must also include the reasons for the determinations or recommendations of each member, if requested to do so by any party to the proceedings. The Registrar of the Tribunal must give a copy of the written record to the relevant person (or his or her representative) on payment of the prescribed fee. The *Act* prohibits the publication or broadcast of the name of any forensic patient appearing before the Tribunal, without the Tribunal's approval and the person's consent.[83]

If a new body were to be given responsibility for decision-making in relation to forensic patients, it may be desirable to provide a statutory requirement that it provide a copy of its reasons for decisions to the forensic patient (or his or her representative). This would assist in the ongoing management of the forensic patient, as well as in any subsequent appeals against the decision. It may also be desirable to consider whether any other persons should have access to these written determinations, and on what grounds.

Option 1
Retain the current framework, which does not make statutory provision for the giving of reasons for decisions regarding the detention, care, treatment or release of forensic patients.

Option 2
Amend the legislation to provide that the determining body must provide a copy of any decision (and reasons for it) to the forensic patient concerned or his or her representative, and may provide a copy to any other person with sufficient legal interest in the proceedings.

Compliance with orders

When orders are made in relation to the detention, care, treatment and release of a forensic patient, it is important that they are implemented in practice. For example, if a new determining body were to make an order in relation to the place in which a forensic patient should be detained, it would be expected that the relevant agencies should comply with that order. In practice, there may be circumstances where it is not possible to do so, for example where there are insufficient places available in the hospital nominated in a particular order. One option for ensuring compliance with the determining body's orders is to provide it with a legislative power to order the subject of an order to comply with it, with sanctions for non-compliance.

Option 1
Retain the current provisions.

Option 2
Amend the legislation to provide a duty to comply with the orders of the determining body, and provide a sanction for non-compliance without reasonable excuse.

Fitness to be tried

Introduction

The Review has been asked to consider various aspects of the law relating to the management and release of forensic patients, including the appropriate authority or person to make decisions, and mechanisms for ensuring that issues of public safety are properly considered and addressed. These matters give rise to a more significant question, being the adequacy of the framework for dealing with questions of an accused's fitness to be tried, and the length of time for which a person may be detained or supervised as a forensic patient under these provisions.

The current law

As discussed in Chapter 3, Part 2 of the *Mental Health (Criminal Procedure) Act 1990 (NSW) ('MHCP Act')* outlines the procedure for determining questions of fitness to be tried for criminal proceedings in the District and Supreme Courts. If any party, or the court, raises the question of a person's unfitness, and it appears that the question has been raised in good faith, the court must conduct an inquiry into the matter.[84] The question is to be determined by the judge alone, on the balance of probabilities.[85] If the court finds that the person is unfit, it must refer the matter to the Mental Health Review Tribunal ('Tribunal') to determine (on the balance of probabilities) whether the person will become fit to be tried within 12 months.[86]

If the Tribunal considers that the person **will become fit within 12 months**, it must also determine whether or not the person is suffering from a mental illness, or a mental condition for which treatment is available in a hospital and whether the person objects to being detained in one.[87] The court may then order that the person be taken to and detained in a hospital,[88] detained in a place other than a hospital,[89] or released on bail, for a period of up to 12 months.[90]

If, on the other hand, the Tribunal considers that the person **will not become fit within 12 months**, and the DPP intends to take further proceedings in relation to the offence, the court holds a 'special hearing' to determine whether it can be proved that, on the limited evidence available, the person committed the offence (or another offence available as an alternative to the one charged).[91]

Special hearings are heard by a judge alone, unless an election is made for a jury.[92] Except as specified in the *MHCP Act*, a special hearing must be conducted as nearly as possible as if it were a criminal trial. The verdicts available in a special hearing include: not guilty; not guilty on the ground of mental illness; or that, on the limited evidence available, the accused committed the offence charged (or an offence available as an alternative to the offence charged).[93]

If the verdict is that (on the evidence available) the accused committed an offence, the court may nominate a term (known as a 'limiting term'), being the best estimate of the sentence that it would have ordered if the special hearing had been a normal trial.[94] If the court nominates a limiting term, the person is referred back to the Tribunal for a determination as to whether he or she is suffering from a mental illness, or a mental condition for which treatment is available in a hospital (and whether or not the person objects to being detained in one).[95] On the basis of this determination, the court may order that the person be taken to and detained in a hospital, or detained in a place other than a hospital.[96]

However, once the Tribunal has made its determination the person's forensic patient status has been held to cease until such time as the judge actually sets the limiting term.[97] This situation gives rise to uncertainty about the person's status.

Option 1
Retain the existing system.

Option 2
Amend the legislation to declare that the forensic status continues after the Tribunal has made its determination and until the Court has made its order.

The fitness framework

The 'fitness to be tried' provisions of the *MHCP Act* represent a significant improvement on the previous framework, which at times resulted in the indeterminate detention of the unfit accused. However, the framework involves administrative delays as the matter is moved back and forth between the court and Tribunal, both of which must conduct hearings and make determinations. It also involves a degree of duplication as the court and Tribunal are both required to make determinations as to fitness. Finally, the movement back and forth between the two bodies may cause inconvenience or distress to the person who is the subject of the proceedings – as well as others involved, such as victims, carers, and the person's family.

It may be desirable to streamline these procedures by providing that the court that initially determines the person's fitness should also determine whether the person will become fit within 12 months, and whether he or she is suffering from a mental illness, or a mental condition for which treatment is available in a hospital. In that case, the court would make the initial determination of fitness, as well as any order for the person's release or detention pending the trial or special hearing. Where necessary, the court could then go on to hold a special hearing, impose a limiting term (where relevant) and make an order as to the person's detention or release. The Tribunal would not need to become involved in the process until it conducts its first review of the forensic patient's case under the *Mental Health Act.*

The advantage of this option would be the removal of any unnecessary duplication in roles, as well as any administrative delays that may result from the movement of the matter back and forth between the bodies. However, given the Tribunal's role to date in making fitness determinations, it may be considered to have particular expertise in this area.

Another option would be that, once the court has made the initial determination as to fitness, the accused would be referred to the Tribunal to make a determination as to whether the person will become fit to be tried within 12 months and the person's mental condition (as is currently the case). In addition, the Tribunal could be given responsibility for conducting the special hearing, imposing the limiting term (where relevant) and making determinations as to the person's detention or release. These responsibilities may be considered particularly appropriate if the Tribunal becomes the determining body for decisions in relation to forensic patients.

Again, the advantage of this approach is that it would remove unnecessary duplication and administrative delays. It would also ensure that a body with expertise in relation to matters of mental health and the protection of the community would be making detention decisions. However, given that the special hearing must be conducted as closely as possible to a normal criminal trial, and involves quasi-judicial determinations as to guilt and sentencing, it may not be considered appropriate to transfer these responsibilities to an administrative body.

Option 1
Retain the current framework for determining a person's 'fitness to be tried' for an offence.

Option 2
Amend the legislation to provide that the court is responsible for making all determinations regarding an accused's fitness to be tried and mental condition, holding special hearings, imposing limiting terms, and (where detained) determining whether the person should be detained in a hospital or other place.

Option 3
Amend the legislation to provide that the Mental Health Review Tribunal is responsible for making all determinations regarding an accused's fitness to be tried and mental condition, holding special hearings, imposing limiting terms, and (where detained) determining whether the person should be detained in a hospital or other place.

Power to order an examination

Regardless of the body involved in determining fitness, a practical issue arises in relation to the information on which a determination should be based. Currently, neither the court nor the Tribunal appears to have a statutory power to order the conduct of a medical or other assessment of a person for the purpose of determining his or her fitness, or to require the production of evidence on which to base such a determination. If an assessment is not conducted, or the information is not otherwise put before the court or Tribunal, the determination may not reflect the person's actual fitness to be tried for the offence.

One option would be to provide a statutory power for the body making a determination as to fitness to order that an assessment be conducted, and that an expert report be made available to assist with its determination. The advantage of this option is that any decision as to fitness would be based on expert advice, however it would be necessary to consider how such a provision would operate in practice.

Option 1
Retain the current procedures for determining fitness to be tried.

Option 2
Amend the legislation to provide that the body responsible for determining fitness may order the conduct of a medical or other assessment to assist in determining the person's fitness to be tried for an offence.

Alternative orders

The MHCP Act provides that, where a special hearing results in a qualified finding of guilt, the court must indicate whether it would have imposed a sentence of imprisonment if the person had been convicted of the offence at a normal criminal trial. If the court would not have imposed a sentence of imprisonment, it may impose any other penalty or make any other order that it might have made if the person had been convicted of the offence.[98]

The MHCP Act does not provide any guidance as to the types of non-custodial orders that are available to the court. Under the *Crimes (Sentencing Procedure) Act 1999 (NSW)*, the options that would be available include the deferral of sentence for a period not exceeding 12 months; dismissal of the charge despite the offence being proved; a good behaviour bond; a suspended sentence (for a sentence not exceeding two years imprisonment); the imposition of a fine; or the making of a community service order.

By contrast, Tasmania's forensic mental health legislation outlines specific sentencing alternatives where a person has been found not guilty due to mental illness, or where a finding cannot be made that he or she is not guilty of an offence. In these cases, the court may make a 'restriction order' (requiring the person to be admitted to and detained in a secure mental health unit); a 'supervision order' (releasing the person under the supervision of the Chief Forensic Psychiatrist on the conditions the court considers appropriate); a 'continuing care order' (detaining the defendant as an involuntary patient in a specified hospital for a specified period of up to six months); release the defendant and make a community treatment order (for a specified period of up to 12 months); release the defendant on such conditions as the court considers appropriate; or release the defendant unconditionally.[99]

Therefore, it may be desirable to outline specific orders that would be available to the court where it has indicated that it would not have imposed a sentence of imprisonment. While the provision of an exhaustive list of alternative orders could be too restrictive, the provision of an indicative list could guide the court as the types of orders that may be appropriate to the circumstance of the particular person before it.

Option 1
Retain the current provisions that state that the court may impose any other penalty or make any other order that it might have made if the person had been convicted of the offence.

Option 2
Amend the legislation to provide a non-exhaustive list of sentencing alternatives available to the court where a special hearing has resulted in a qualified finding that the person committed an offence.

Limiting terms

The imposition of any period of detention following a special hearing is a complex issue, in particular because the verdict represents only a qualified finding, on the available evidence, that the person committed the offence; and the unfit accused – by virtue of that unfitness – has not had the opportunity to mount a proper defence, as would be the case in a normal trial.

The current framework for imposing limiting terms is based on the principle that a person found to have committed an offence at a special hearing should not be subject to detention for a period longer than would have been the case if he or she had been convicted of

the offence. However, while a sentence of imprisonment would usually nominate a minimum and maximum term (the former being the non-parole period, after which the offender may be eligible for release), the limiting term represents the total sentence that would have been imposed if the person had been convicted.[100] Therefore, the forensic patient can actually be detained for a longer period than a convicted offender if not released by the Minister before the expiry of the limiting term.

In practice, it appears that many forensic patients are not in fact released prior to the expiry of their limiting term. There appear to be several reasons for this. As discussed in Chapter 10, where forensic patients are detained in a correctional centre (for example, because they have an intellectual disability, rather than a mental illness) or in the Long Bay Prison Hospital, they are subject to the system of security classifications operating within the NSW correctional context. These security classifications can, in practice, prevent a forensic patient becoming eligible for leave (and thus progressing towards conditional release) until a significant part of the limiting term has been served. Alternatively, where there is a lack of available support services for a forensic patient within the community, it may not be considered appropriate to recommend, or order, the person's release.

Other jurisdictions

Most of the Australian jurisdictions have adopted a framework for special hearings and setting limiting terms. The jurisdictions differ, however, in relation to the determination of a limiting term, and the process of review and release of persons subject to them.

Options for reform

There are several possible options for reform, including providing for the setting of a minimum and maximum period as part of the limiting term; providing that a limiting term represents the minimum sentence that would have been imposed if the person had been convicted; providing a presumption as to mitigating factors in setting the limiting term (eg to provide the benefit of a guilty plea); or the imposition of standard limiting terms specified in legislation.

Minimum and maximum periods

One option would be for the court to set a minimum and maximum period as part of the limiting term. The minimum period would operate similarly to the non-parole period that is set as part of a term of imprisonment upon conviction of an offence.

The advantage of this approach is that the limiting term would more closely approximate the term of detention to which the person would have been subjected if convicted at a normal trial. However, the NSW Court of Criminal Appeal has noted that such a system would not sit easily with the existing framework by which a forensic patient is subject to periodic review by the Tribunal, and may be released at any time prior to the expiry of the limiting term.[101] The NSW Law Reform Commission has also commented that this option would add an additional complication to what is already an artificial exercise, and could lead to longer sentences, on the basis that persons found unfit would be unlikely to be granted parole if there was no appropriate accommodation in the community.[102]

Minimum periods

Another option is to provide that a limiting term represents the minimum sentence that would have been imposed if a person had been convicted of the offence. This would require the court to consider whether it would have imposed a minimum and maximum period as part of the sentence, and set the limiting term in accordance with the former rather than latter period.

The advantage of this approach is that it would ensure greater parity between limiting terms and sentences of imprisonment. In effect, the limiting term would expire at the same time as the person would have been eligible for parole, if convicted. However, this option may be difficult to implement in practice because the court may not have sufficient information before it (due to the person's unfitness) to set an appropriate minimum term.

Presumption as to mitigating factors

Another option is to provide a presumption in favour of the unfit accused in relation to mitigating sentencing factors, such as plea of guilty or demonstration of remorse. This would mean that the court would be required to take such presumptions into account when setting the limiting term (and reduce the term accordingly).

Currently, when setting the limiting term, the court considers the particular circumstances of the case, and has regard to subjective factors (such as a plea of guilty or demonstration of remorse) only to the extent that they existed at any time after the offence was committed, and before sentence. If the person's mental state means that these subjective factors were not present, there is no presumption in favour of the accused.[103] The NSW Law Reform Commission has recommended that a judge should be required to assume that the person has pleaded guilty, and give the appropriate discount when setting a limiting term.[104] However, the NSW Court of Criminal Appeal has queried whether any general principle could be established as to whether and how such subjective factors should be taken into account.[105]

While in some cases this approach might lead to presumptions that do not accord with the facts of the particular case, it would avoid the current situation where a person who is unable to enter a plea of guilty (due to mental illness, intellectual disability or other reasons) is subject to a longer period of detention than a person who committed the offence but pleaded guilty at trial.

Standard limiting terms

A third option is to provide in legislation for standard limiting terms for each offence (or category of offence). This would ensure that no person is subject to the maximum penalty that would apply upon conviction. However, as it involves replacing the court's discretion in setting a limiting term with a specific nominal term, it would not take into consideration the spectrum of behaviour that may be involved in a particular offence.

The Victoria legislation provides for statutory nominal terms for supervision orders if a person has been found not guilty due to mental impairment, or found at a special hearing to have committed an offence. The nominal terms are: murder or treason: 25 years; a 'serious offence' (as defined) other than murder or threats to kill: the maximum term of imprisonment; any other offence for which there is a statutory maximum term of imprisonment: half the maximum term; and any other offence punishable by imprisonment but for which there is no statutory maximum term: a period specified by the court.[106]

If NSW were to adopt this approach, the standard non-parole periods specified in the *Crimes (Sentencing Procedure) Act 1999 (NSW)* could provide a useful model. Standard non-parole periods represent the non-parole period for an offence in the middle of the range of objective seriousness of offences. However, as the list of standard non-parole periods is not exhaustive of all NSW offences, it would be necessary to consider the relevant periods for offences falling outside this scheme. Another approach, which was proposed in the Model Mental Health Legislation, would be to set limiting terms that represent the average period of imprisonment for the particular offence.

The advantage of this approach is that it avoids asking the court to determine the term it would have considered appropriate had the person been convicted. It therefore also avoids the problems regarding the absence of any minimum term or presumptions in relation to mitigating factors. However, this approach could be criticised as arbitrary, and potentially leading to unjust results, given that the term imposed will have no correlation to the actual circumstances of the offence and the patient.

Option 1
Retain the current provisions for setting limiting terms.

Option 2
Amend the legislation to provide that a limiting term represents the minimum sentence the court would have imposed if the person had been convicted of the offence.

Option 3
Amend the legislation to provide that, in setting a limiting term, the court must presume that the accused would have pleaded guilty if he or she had been fit to be tried, and give a discount accordingly.

Option 4
Amend the legislation to provide that a limiting term represents the average term of imprisonment for which a person convicted of the offence would be liable.

Option 5
Amend the legislation to provide that the limiting term for a person found to have committed an offence at a special hearing is the term specified in legislation.

Special verdicts

Introduction

The Review has been asked to consider various aspects of the law relating to the management and release of forensic patients, including the appropriate authority or person to make decisions, and mechanisms for ensuring that issues of public safety are properly considered and addressed. These matters give rise to a question as to the adequacy of the framework dealing with special verdicts of not guilty due to mental illness, and the length of time for which a person may be detained under these provisions.

The current law

As discussed in Chapter 3, the *Mental Health (Criminal Procedure) Act 1990 (NSW) ('MHCP Act')* provides for a 'special verdict' of 'not guilty by reason of mental illness' where it appears that the person committed the offence but was mentally ill at the relevant time.[107] The Act does not define the defence of mental illness, but instead relies on the common law definition, which is based on M'Naghton's case:

> To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.[108]

A special verdict may be returned at trial, or at a special hearing. Once a person becomes subject to a special verdict, the court may order that he or she be detained in any place or manner it thinks fit until released by due process of law, or it may make any other order it considers appropriate. However, the court may not order the person's release unless it is satisfied, on the balance of probabilities, that the person's safety, or that of any member of the public, will not be seriously endangered.[109]

The Tribunal generally must review the person's case as soon as practicable after the order is made, and must make a recommendation to the Minister for Health as to the person's detention, care or treatment; the person's release (if satisfied that the person's safety, or that of any member of the public, will not be seriously endangered by such release); or the person's transfer to a hospital, prison or other place.[110]

The mental illness defence

One practical concern that arises in relation to the defence of mental illness is the extent to which it applies to an accused with an intellectual disability.

The NSW Law Reform Commission has commented that some people with an intellectual disability have received a special verdict of not guilty due to mental illness. However, it noted the inappropriateness and confusion caused by the defence applying in these circumstances, given that intellectual disability is not an illness in itself. The Commission also commented that:

> [T]here are fundamental problems beyond those of terminology when intellectual disability is treated as a sub-set of mental illness. The channelling of people with an intellectual disability from the criminal justice system into the mental health system (which occurs when the mental illness defence is made out) may not reflect or adequately address their needs in terms of supervision and care. Additionally, the detention consequences of the defence ... are more appropriate for people with an impairment which may be temporary and treatable than for people with a permanent disability such as intellectual disability.[111]

The Commission concluded that there should be an appropriate defence available for people with an intellectual disability whose understanding is affected to the extent covered by the M'Naghten defence. It considered that it would be unjust if a person who does not understand the nature and quality of his or her conduct, or that the conduct was wrong, were convicted of an offence-whatever the nature of the person's impairment. After considering other options, the Commission recommended that the existing defence be retained and renamed the 'defence of mental impairment' (which could include senility, intellectual disability, mental illness, brain damage and severe personality disorder).[112] Alternatively, several Australian jurisdictions have, over time, introduced a statutory defence of 'mental impairment', which is defined to include intellectual disability.[113]

Option 1
Retain the existing defence of mental illness.

Option 2
The NSW Government should conduct a further inquiry into the need to reform the defence of mental illness to better address intellectual disability.

Alternatives to detention

As discussed in Chapter 6, the *Crimes (Sentencing Procedure) Act 1999 (NSW)* provides various non-custodial sentencing options where a person has been found guilty of an offence. As a special verdict represents a finding of not guilty, and the purpose of detaining a person is for the purpose of public safety and treatment (rather than punishment), it does not seem appropriate in principle to apply that legislation to persons within this category. However, it may be appropriate to provide greater guidance to the court in determining what order-including conditional or unconditional release-it considers appropriate.

Chapter 6 outlined the Tasmanian provisions for dealing with a person found not guilty due to mental illness. Under these provisions, the court may make a restriction order; release the defendant and make a supervision order; make a continuing care order; release the defendant and make a community treatment order; release the defendant on such conditions as the court considers appropriate; or release the defendant unconditionally.[114]

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

Option 1
Retain the current provisions stating that, where a person is subject to a special verdict, the court may order the person's detention or make such other order as it considers appropriate.

Option 2
Amend the legislation to provide a non-exhaustive list of alternative orders available to the court where a person is subject to a special verdict of not guilty due to mental illness.

The length of detention

While NSW has previously reformed the system relating to persons found unfit to be tried, a person found not guilty of an offence due to mental illness still faces the prospect of indefinite detention. As previously noted, there is no outer limit placed on the period for which a person may be detained after a special verdict. The person only ceases to be a forensic patient if the Governor (acting on the advice of the Executive Council) orders his or her unconditional release, or on the expiry of any conditions of release. It is therefore possible, in practice, that a person could be detained for a period longer than the maximum penalty for the offence for which he or she has been acquitted.

The NSW Law Reform Commission acknowledged the artificiality of setting a limiting term for a person acquitted of an offence, but concluded that it was a pragmatic alternative to indeterminate detention. The Commission considered that the advantages of a limiting term were that the person would no longer serve more than the maximum penalty for the offence; the length of the limiting term given could be appealed in the same way as a normal sentence; and it might encourage more use of the defence of mental illness in appropriate cases. However, it also noted potential disadvantages, including the difficulty in setting a limiting term; the fact that the imposition of any sentence is inconsistent with the person's acquittal; and the possibility that the person might be automatically released at the end of the limiting term (despite constituting a risk to the community or him or herself).[115]

There appear to be several options for reform in relation to detention following a special verdict of not guilty due to mental illness. One option is to provide in legislation that a person found not guilty due to mental illness cannot be detained for a period longer than the maximum penalty applying to the particular offence. *The Crimes Act 1914 (Cth)* currently contains such a provision.[116] However, the practical difficulty with this option is that certain NSW offences – such as murder – carry maximum penalties of life imprisonment. If a person were found not guilty due to mental illness of such an offence, this reform would make no practical difference and the person would remain subject to indefinite detention.

Another option is to set a statutory period of detention (for example, three years), and provide that the person must be released at the end of this period unless the release criteria have not been met. The legislation could also require that reasonable efforts be made by all relevant agencies responsible for the person's detention, care and treatment to progress the person toward release at that time. If the person is not released at the end of this statutory period, a maximum period of detention could nonetheless apply. This option would have the benefit of a setting a maximum period of detention, and providing a framework for the person to be progressed to a point where he or she may be ready for release prior to the expiry of the statutory period (or the maximum detention term).

A third option is to set a limiting period in relation to a person found not guilty due to mental illness. While this approach raises obvious concerns of principle, it does provide a pragmatic resolution to the problem of indefinite detention. Several other Australian jurisdictions have adopted this approach, and impose limiting terms on persons subject to a special verdict.[117] For the purpose of consistency, such limiting terms could be set according to the same criteria as apply to a person found, at a special hearing, to have committed an offence. Of course, the person could be released at any time prior to the expiry of that term if the determining body considers it appropriate to do so according to statutory release criteria, and could (if necessary) be involuntarily detained upon the expiry of the limiting term under the civil provisions of the *Mental Health Act*.

Option 1
Retain the current system of indeterminate detention in relation to persons subject to a special verdict of not guilty due to mental illness.

Option 2
Amend the legislation to provide that the person must be released at the end of a specified period unless it is satisfied that the release criteria have not been met; provide that reasonable efforts be made to progress the person toward release at that time; and set a maximum period of detention if the person is not released at this time.

Option 3
Amend the legislation to provide for the imposition of a limiting term in relation to persons subject to a special verdict.

Offenders and inmates

Introduction

The Terms of Reference ask the review to consider the current definition of 'forensic patient', and in particular whether there should be two categories of patients – that is, 'forensic patients' and 'security patients', the latter to cover persons who are transferees to a hospital from a correctional centre. The review has also been asked to consider the ability of the Mental Health Review Tribunal ('Tribunal') to make community treatment orders for people who are in prison and who are mentally ill.

Diagnosis in the prison context

In NSW, all inmates are screened on reception to prison for medical and psychiatric illnesses, as well as substance abuse. If a psychiatric illness is identified at this point, psychiatric care may be provided within the correctional centre. Alternatively, if specialist medical or more intensive psychiatric services are considered necessary – and beds are available – the person may be transferred to screening units within the correctional setting.[118]

The Mental Health Act 1990 (NSW) ('Mental Health Act') provides that the Chief Health Officer may order that a prison inmate be transferred to a hospital if it appears on the certificates of two medical practitioners (one being a psychiatrist) that he or she is a 'mentally ill person' (as defined in the *Act*), or is suffering from a mental condition for which treatment is available in a hospital (and the person consents to the transfer).[119] Once the person is transferred to a hospital for mental health treatment, he or she becomes a 'forensic patient'.

A forensic patient who has been transferred from a prison to hospital must be transferred back to a prison within seven days unless the Chief Health Officer (or an authorised person) considers that he or she is a mentally ill person, or is suffering from a mental condition for which treatment is available in a hospital – and that other care of an appropriate kind would not be reasonably available to the patient in prison. The Chief Health Officer or authorised person may, however, transfer a forensic patient back to a prison at any time if his or her condition changes. In addition, the patient may at any time request the Tribunal to recommend an order for his or her transfer back to prison.[120]

The Tribunal must review the person's case as soon as practicable after his or her transfer to a hospital, and make a recommendation to the Minister as to the person's continued detention, care or treatment in the hospital.[121] The Tribunal may also recommend that a transferee be transferred back to prison at any time.[122]

If a patient requests to be moved back to prison, s 96 of the *Act* provides that the Tribunal must make the recommendation if satisfied that the person is not a 'mentally ill person'. This is a relatively inflexible position when compared to the civil provisions which are not limited only to mental illness. Amending the provision to bring it into line with the civil provision may better serve the needs of patient management.

A new category?

As noted above, the review has been asked to consider whether there should be two categories of patients – that is, 'forensic patients' (being those found unfit to be tried, or subject to a limiting term or special verdict of not guilty due to mental illness), and 'security patients' (being transferees from a correctional centre).

Chapter 5 of the *Mental Health Act* deals with various matters involving the detention, care and treatment of forensic patients. The Chapter deals with 'forensic patients' as a whole in relation to matters such as security conditions, leave arrangements, breaches of conditional release, and dealing with escapes. It makes separate provision for each category in relation to the initial and periodic reviews of their cases, and the termination of their status as forensic patients. Finally, the Chapter makes specific provision for transferees in relation to their transfer to and from hospital, certain Tribunal reviews, the effect of the transfer on their sentence, and the Tribunal's capacity to recommend their release.

The NSW Health discussion paper (2004) noted that establishing separate categories of forensic patient would allow differential approaches to be taken to the management and care of these groups in relation to security, leave, release, status as a prison inmate, and provisions for transfer to other jurisdictions.[123]

Other jurisdictions

The Victoria legislation distinguishes between 'forensic patients', being those detained in a mental health service on remand or under a supervision order (after being found to be unfit to be tried or not guilty due to mental illness);[124] and 'security patients', which includes convicted offenders who are subject to a hospital security order (which is available as a sentencing alternative upon conviction), or a restricted hospital transfer order (which may be made in relation to a person detained in a prison or other place of confinement).[125]

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

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

Discussion

There are important differences of legal principle between the categories of forensic patient in NSW. For example, persons found not guilty due to mental illness, or unfit to be tried (but who have not yet had a special hearing) are not subject to any finding of guilt. Persons detained after a special hearing are subject to a 'qualified' finding of guilt, which does not equate to a conviction. By contrast, transferees are persons who are on remand for, or have been found guilty of, an offence during a normal criminal trial.

As discussed in Chapter 10, forensic patients who have not been convicted of an offence may, for various reasons, be held in a correctional centre in New South Wales. This includes those patients who are accommodated in the Long Bay Prison Hospital, which is deemed to be a correctional centre under the *Mental Health Act*.[126] In practice, forensic patients who are held in 'correctional centres' in NSW are treated as inmates for the purposes of the *Crimes (Administration of Sentences) Act 1999 (NSW)*, and subject to prison regulations regarding security requirements.

The creation of separate categories of forensic patient could have several advantages. First, a new category could assist in simplifying and clarifying the application of the existing provisions by re-organising them under the new categories. Second, it could give greater recognition to the distinction between those forensic patients who are under conviction and those who are not, and facilitate their different administrative treatment while they are detained. The legislation could specify the provisions applying to forensic patients in relation to their security conditions, and access to leave and conditional release, and these could override any administrative measures applying by virtue of their place of detention.

However, if the legislation were to distinguish between the different categories of forensic patient, it would be important to ensure that transferees do not become penalised within the forensic mental health system by virtue of their status as offenders. For example, a view has been expressed that people who are mentally ill should be treated as mentally ill – regardless of whether or not that illness arose before or after they entered prison. A particular concern was that the creation of a new category could discriminate against convicted offenders by facilitating their early transfer back to prison, and could lead to those patients who would benefit from remaining in the mental health system being prematurely removed from it.

Option 1
Retain the existing provisions that include transferees within the definition of a 'forensic patient'.

Option 2
Amend the legislation to provide for 'security patients', being convicted offenders who are transferred from a correctional centre to a hospital for treatment, and make provision for their treatment, security, leave, release and inter-jurisdictional transfer.

Expiry of non parole period

While it might be thought that forensic patients subject to limiting terms and others acquitted by reason of mental illness should be detained in a prison or hospital or other appropriate facility on the basis of therapeutic and safety criteria, the legislation should specifically provide that they are not to be disadvantaged by comparison with prisoners in respect of treatment or classification in the facility.

Having regard to the recent decision of the NSW Court of Appeal in Wedge and that of Hidden J in Macdonald, express provision should be made to empower detention in an appropriate facility, whether within a corrections centre or a gazetted hospital, of patients whose non-parole period has expired, notwithstanding any judicial order in relation to parole. However, this power should also allow transfer of the patient to a hospital outside the prison system and for the Tribunal to then exercise supervision as it would for a civil patient.

Option 1
Retain the existing provisions.

Option 2
Amend the legislation to expressly provide in relation to a forensic patient whose non-parole period has expired:

i That if they are mentally ill they may be detained in an appropriate correctional facility (whether a gaol or hospital) notwithstanding that their non-parole period has expired or

ii That they may be transferred to and detained in a suitable hospital or other facility outside the corrections system or treated as would be a civil patient.

Grounds for transfer

The provisions for transfer of a prison inmate to a hospital for mental health treatment are analogous to the civil provisions of the *Mental Health Act,* except that the grounds for admission differ in the civil and correctional contexts.

The civil provisions of the *Act* provide for the admission of a person to a mental health facility on a voluntary basis, or on an involuntary basis if the person is a 'mentally ill person' or a 'mentally disordered person'. A person is a 'mentally ill person' if 'the person is suffering from mental illness and, owing to that illness, there are reasonable grounds for believing that care, treatment or control of the person is necessary:

a for the person's own protection from serious harm or

b for the protection of others from serious harm'.

A person is a 'mentally disordered person' if 'the person's behaviour for the time being is so irrational as to justify a conclusion on reasonable grounds that temporary care, treatment or control of the person is necessary:

a for the person's own protection from serious physical harm; or

b for the protection of others from serious physical harm'.[127]

By contrast, the *Mental Health Act* provides for the transfer of a prison inmate to a hospital for treatment on a voluntary basis only where ordered by the Chief Health Officer on the basis of two certificates that he or she has a mental condition for which treatment is available in a hospital; or on an involuntary basis where he or she is a mentally ill person (as defined).[128] These grounds are more limited than the civil provisions because they limit the scope for voluntary admissions, and do not provide for admission where the person is a 'mentally disordered person'.

One option would be to amend the legislation to align the admission provisions with the civil provisions, so that a prison inmate could be transferred to a hospital for mental health treatment on the same grounds as a civil patient. Another option is to adopt a form of the civil provisions, so that an inmate may be transferred where he or she has a mental condition for which treatment is available in a hospital, and consents to such a transfer, or where he or she is a mentally ill person or mentally disordered person.

Either of these options would appear to ensure greater consistency within the legislation, and would ensure that a prison inmate is not denied access to mental health treatment in circumstances where temporary care, treatment or control is necessary for his or her own protection, or that of others, from serious physical harm.

Option 1
Retain the existing provisions for transferring prison inmates from a correctional centre to hospital for mental health treatment.

Option 2
Amend the legislation to provide an additional ground of transfer from a correctional centre to a hospital, being where the person is a 'mentally disordered person' as defined in the *Act.*

Option 3
Amend the legislation to provide for the transfer of a person from a correctional centre to a hospital on the same grounds as apply under the civil provisions of the *Mental Health Act.*

Transferees and continued treatment orders

Section 89 of the *Mental Health Act* allows for classification of a transferee as a 'continued treatment patient' within six months of the term of imprisonment expiring. There appears to be no good reason why such an option should not be available at, or immediately before, the expiry of the non-parole period.

Option 1
Retain the present system.

Option 2
Amend the legislation to provide that a transferee may also be classified as a continuing treatment patient immediately before or at the expiry of the non-parole period.

Community treatment orders for prison inmates

The *Mental Health Act* provides a framework for the making of a community treatment order in relation to a person who is detained in a hospital as an involuntary patient, or living in the community on a current order. A community treatment order requires the person to be present at a specified place, at reasonable times, to receive such medication, therapy, rehabilitation or other services, as are specified in a treatment plan. The order currently operates for a period of up to six months (and may be renewed prior to its expiry).[129]

Currently, a magistrate or Tribunal cannot make a community treatment order unless satisfied that:

- the magistrate would otherwise make an order detaining the person as a temporary patient
- the person is either a person diagnosed for the first time as suffering from mental illness, or has previously refused to accept treatment on more than one occasion, which has led to a relapse into an active phase of the illness[130]
- the person would benefit from the order as the least restrictive alternative consistent with safe and effective care; and a health care agency has an appropriate treatment plan and is capable of implementing it.[131]

The *Exposure Draft Mental Health Bill 2006 (NSW)* proposes various reforms to the existing framework for community treatment orders. This includes consolidating the existing community counselling and community treatment orders into a single order that can be issued while a person is in a mental health facility or living in the community, and the extension of their duration from a maximum of six to 12 months. If these proposals are implemented, it may mean that community treatment orders will become available within the prison community. However, specific provision may need to be made in the legislation for the particular circumstances arising in the prison context.

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

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

Option 1
Retain the current framework for providing mental health treatment to prison inmates.

Option 2
Amend the legislation to provide a framework for the making, implementing and monitoring of community treatment orders in the correctional context.

Dual patient care

A number of bodies can make orders affecting patient care, including the Tribunal and the Serious Offenders Review Council. Further consideration needs to be given to the appropriate role for the Serious Offenders Review Council in relation to forensic patients, including those serious offenders who are transferred to a hospital for mental health treatment; and the interrelationship between the work of theses bodies, including issues such as: the priority which should be accorded to their orders; dual management conflicts; and duplication of patient reviews.

Review of forensic patients

Introduction

The Terms of Reference ask the Review to consider the appropriate structure for the review process. If the Mental Health Review Tribunal ('Tribunal') is given responsibility for decision-making in relation to forensic patients, the review hearing will play a more formal role in providing the structure for such decisions to be made. Alternatively, even if it does not become the determining body, it is likely to continue making recommendations as to the decisions that should be made. Accordingly, it may be desirable to provide more formal structures in relation to these reviews.

The current law

Chapter 5 of the *Mental Health Act 1990 (NSW) ('Mental Health Act')* provides for the Tribunal to conduct initial reviews of a forensic patient, and then ongoing periodic reviews. The Tribunal must review a person's case as soon as practicable after the person is: ordered to be detained after a finding that the person is unfit to be tried, or after the imposition of a limiting term; ordered to be to detained (or released subject to conditions) after being found not guilty due to mental illness at a trial or a special hearing; or transferred from a correctional centre to a hospital for treatment for a mental illness or mental condition.[132]

The Tribunal must also review the case of each forensic patient at least once every six months, and when requested by certain officials.[133] After each review, the Tribunal must make a recommendation to the Minister for Health as to the patient's continued detention, care or treatment in a hospital, prison or other place; the fitness of the patient to be tried for an offence (where relevant);[134] or the patient's release (either with or without conditions).[135] Generally, the Tribunal's recommendation could stipulate where the patient is to be detained, under what kind of security, the range and kinds of leave privileges (if any) that may be permitted, and the range and kinds of conditions that may apply in relation to a conditional release to allow the patient to remain within the community.

Notifying the Tribunal

Given that the Tribunal is responsible for reviewing a person's case as soon as practicable after the person becomes a forensic patient, it is important that the Tribunal be notified when it acquires jurisdiction over a person.

The forensic mental health legislation contains several provisions that seek to ensure that such notification is made. For example, the *Mental Health (Criminal Procedure) Act 1990 (NSW) ('MHCP Act')* provides that the court must refer a person to the Tribunal after finding that a person is unfit to be tried for an offence, and after nominating a limiting term.[136] The *Act* also provides that the registrar of the court must notify the Tribunal of the terms of any order made after a special verdict that a person is not guilty due to mental illness.[137] Finally, the *Mental Health Act* provides that the Chief Health Officer must notify the Tribunal in writing of any order made to transfer a prisoner to hospital for mental health treatment.[138]

If the safeguard of Tribunal review of forensic patients is to operate effectively, it is important that the Tribunal be notified when it acquires jurisdiction over a person. While there are existing duties to notify the Tribunal of these events, in practice there can be delays in doing so. The Deputy State Coroner recently conducted an inquest into the death of a forensic patient who committed suicide while waiting to be transferred to hospital for mental health treatment. The inquest found that there had been a delay of two months in notifying the Tribunal that the man had become a forensic patient. The Deputy State Coroner recommended that a protocol be developed between the referring courts and the Tribunal to ensure that notifications of the court decision that a person is subject to a special verdict occurs at the earliest possible time and, at the outside, no later than seven days.[139] An interdepartmental committee has been established to consider the recommendations arising out of this inquest and progress their implementation.

The courts already appear to have a protocol in place for notifying the Tribunal of these matters. However, it may be desirable to establish a comprehensive framework for Tribunal notification by developing a protocol between all the agencies responsible for providing such advice.

Option 1
Retain the existing administrative framework for notifying the Mental Health Review Tribunal that it has acquired jurisdiction over a forensic patient.

Option 2
The Attorney General, Minister for Health, Minister for Justice and the Tribunal should develop a protocol to ensure that the Tribunal is notified that it has acquired jurisdiction over a forensic patient within a specified period.

The review provisions

As noted above, the *Mental Health Act* provides that the Tribunal must review the case of a forensic patient as soon as practicable after certain events, and at least once every six months. The *Act* outlines the matters that the Tribunal must either determine (eg in relation to fitness to be tried), or make recommendations to the Minister about, as a result of these reviews.

These review provisions appear to be complex and repetitious, and could benefit from simplification. In practice, the timing of such reviews can be dependent on the provision by the detaining facility of the necessary information and making the arrangements to enable a hearing to be listed.

One option would be to provide one review provision that merely consolidates the Tribunal's existing responsibilities to review forensic patients, and determine and recommend matters arising from these reviews. This would assist those involved in implementing the provisions, as well as those who are subject to them (and their representatives). Another option would be consolidate the existing provisions, remove any unnecessary inconsistencies between them, and update them to ensure that they cover all circumstances in which the Tribunal may acquire jurisdiction over a forensic patient.

Option 1
Retain the existing separate provisions regarding the Mental Health Review Tribunal's responsibility for conducting initial and ongoing reviews of forensic patients.

Option 2
Amend the legislation to simplify and consolidate the provisions for initial and ongoing reviews of forensic patients.

Timing of reviews

The Tribunal's periodic reviews of forensic patients serve several purposes. The Tribunal has the opportunity to monitor any changes in the patient's condition; consider whether the current arrangements for his or her detention, care and treatment remain appropriate; and follow up on the implementation of any orders that resulted from a previous review. This provides a measure of transparency and accountability to the forensic mental health system, by ensuring that the care, detention and treatment of a forensic patient remains under review, and that a patient has a forum to raise any concerns in relation to these matters.

In practice, however, the conduct of six monthly reviews can be resource intensive and may not always be necessary or useful for the particular forensic patient whose case is being reviewed (eg where a forensic patient's condition has little prospect of change in the short-term). Several Australian jurisdictions currently provide for annual reviews of forensic patients, while others provide that they be conducted on a six monthly basis.

One reform option would to provide for reviews on a less regular basis, for example every 12 months. The advantage of this approach would be the saving of resources for the Tribunal and other organisations involved in the review process. It could also result in less distress for some patients whose condition and prospects of release will not change in the foreseeable future. However, as noted above, the disadvantage would be the removal of a level of transparency and accountability through a more regular framework of independent oversight of the system.

If such a reform were adopted, it would be important to ensure that forensic patients are not disadvantaged by the change in frequency of reviews. Accordingly, the Tribunal could be given the power to conduct a review at any time within the 12 month period on its own motion, or at the request of the forensic patient, or certain other officials. In addition, the Tribunal could be given a statutory obligation to monitor the detention, care and treatment of each forensic patient on an ongoing basis. Alternatively, it could be required to obtain and consider reports from the patient's treating team on a six monthly basis, to determine whether a review should be conducted on its own motion.

Option 1
Retain the current provisions regarding frequency of reviews of forensic patients.

Option 2
Amend the legislation to provide that the Mental Health Review Tribunal must:

- conduct a review at least once every 12 months, but may do so at any time (and must do so if requested by the forensic patient [or his or her representative] on reasonable grounds, or by the Minister for Health, the Attorney General, the Minister for Corrective Services, the Chief Health Officer or a medical superintendent)
- monitor the detention, care and treatment of each forensic patient on an ongoing basis.

Option 3
Adopt Option 2 but provide that the Tribunal must obtain and consider reports from the forensic patient's treating team on a six monthly basis.

Review of conditions of detention, care and treatment

As noted above, the Tribunal has the power to review the detention, care and treatment of a forensic patient. Issues may arise as part of the review in relation to the conditions of a person's detention, care or treatment. For example, forensic patients who are detained in correctional centres have, in some circumstances, been held in isolation for long periods for administration purposes. This can raise human rights concerns, as well as concerns regarding the potential impact of such conditions on the person's mental condition, and his or her access to therapeutic or rehabilitation programs.

While the Tribunal currently reviews matters such as the conditions of a person's detention, care and treatment – and makes recommendations to the prescribed authority in relation to them – it may be desirable for the legislation to clarify the Tribunal's power to do so, and the determining body's power to make orders in relation to these matters.

Option 1
Retain the current provisions regarding the Mental Health Review Tribunal's jurisdiction to review the detention, care and treatment of a forensic patient.

Option 2
Amend the legislation to provide that the Tribunal may review, and the determining body may make orders, in relation to any matter it considers appropriate in relation to the detention, care or treatment of a forensic patient, including the conditions of a patient's detention, care or treatment.

Informal reviews

Currently, the Tribunal must conduct an informal monthly review of the case of each prison inmate who has not been transferred to hospital within 14 days of the Chief Health Officer's order until the transfer takes place, or until the Tribunal recommends that the transfer not take place.[140] In addition, if the person is on remand or has been found unfit to be tried (but has not had a special hearing), the Tribunal must also informally review the person's case each month to determine whether the legal proceedings have been delayed, and if so, take such action as it considers appropriate.[141]

The *NSW Health discussion paper (2004)* noted that the Tribunal had expressed concerns with this requirement, as the reason that a person has not been transferred is usually due to a lack of beds rather than any question about their need for care. The Tribunal has also had difficulty accessing information in sufficient time to perform this role meaningfully. It also noted that the Tribunal considered itself ill-equipped to respond to delays caused by the legal process (which might be better addressed by the person's legal representative in any proceedings), and that the purpose of the provision is not clear.[142]

However, it is also arguable that these informal reviews provide a valuable safeguard for an accused person who is detained within the correctional context. There may be cases of unreasonable delay in transferring an inmate to a hospital for treatment, or in completing a trial or holding a special hearing. Given that the Chief Health Officer will only order an inmate's transfer if he or she is in need of treatment – and the person's condition could be severe – it may be appropriate to provide for the form of transparency and accountability that is afforded by periodic reviews of the patient's case by an independent body. This may also be the case in relation to a person on remand who experiences delays in the finalisation of his or her proceedings. While the Tribunal may not have any formal powers to expedite a person's transfer or hearing, it would have the capacity to make inquiries into such delays, and make any representations that it considers appropriate in the circumstances.

Option 1
Retain the existing provisions requiring the Mental Health Review Tribunal to conduct informal reviews.

Option 2
Amend the legislation to provide the Tribunal with greater powers to address these concerns.

Option 3
Amend the legislation to remove the requirement that the Tribunal conduct informal reviews of these matters.

Release of forensic patients

Introduction

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

Overriding principles

When considering the legislative provisions for the leave and release of forensic patients, it is necessary to note the context in which they arise. Section 4(2) of the *Mental Health Act 1990 (NSW) ('Mental Health Act')* provides that:

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

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

In addition, Chapter 5 of the *Mental Health Act* makes it clear that, in making any recommendation for the release of a forensic patient, the Mental Health Review Tribunal ('Tribunal') must consider the principle of community protection. The *Act* provides that the Tribunal may not recommend leave or release unless it is satisfied, on the available evidence, that the safety of the patient or any member of the public will not be seriously endangered by the patient's leave or release.

Security classifications

A forensic patient who is detained in a correctional centre is treated as an inmate for the purposes of the *Crimes (Administration of Sentences) Act 1999 (NSW)*, and is subject to prison regulations regarding security requirements (as well as any requirements imposed by the *Mental Health Act*).[143]

A person who has not been convicted of an offence may be held in a correctional centre if he or she does not have a mental illness (eg if the person has an intellectual disability), has a mental condition which may be treated within the correctional setting (eg a transitory psychotic episode), or has a mental illness but there are insufficient beds available at that time within a hospital. In addition, the *Mental Health Act* deems those forensic patients accommodated in the Long Bay Prison Hospital to be detained within a 'correctional centre', and subject to the security conditions determined by Corrective Services.[144]

Where a forensic patient is held in a correctional centre, his or her leave entitlements and placement are subject to the prisoner classification system.[145] Therefore, the patient will need an appropriate prisoner classification before any order of the Minister or Governor for less secure accommodation or leave privileges can be implemented.[146] If the patient's classification is such that he or she does not have access to leave privileges, this can prevent the person progressing to a point where the Tribunal would be prepared to recommend his or her conditional (or unconditional) release.

In practice, where a patient is serving a limiting term, his or her security classification status may not be reduced to a level that would permit access to leave until a substantial part of that term has been served. Alternatively, where a forensic patient is subject to indeterminate detention after a special verdict of not guilty due to mental illness, the security classification system may preclude his or her access to leave or release indefinitely. The *Crimes (Administration of Sentences) Act 1999* does not preclude this however Department of Corrective Services guidelines require inmates to be within a specified number of months prior to release before consideration can be given to external leave.

The *Legislative Council Select Committee on Mental Health (2002)* noted that NSW is one of only a few jurisdictions in the Western World that hospitalises forensic patients within the precincts of a correctional facility, and under the authority of Corrective Services staff.[147] The Senate Select Committee on Mental Health (2006) recently recommended that 'state and territory governments aim as far as possible for the treatment of all people with mental illness in the justice system to take place in forensic facilities that are physically and operationally separate from prisons'.[148]

In 2003, the NSW Government announced the development of a new facility for forensic patients, which will be placed outside the grounds of the Long Bay Prison complex. The NSW Health discussion paper (2004) noted that, unlike existing forensic facilities, the new hospital would operate separate from the prison system, and would be administered by NSW Health and staffed by health professionals and non-corrections personnel.[149] Once this occurs, it would appear that the only forensic patients who would be subject to the prison security classification system would be those detained in the prison system.

Leaves of absence

One of the mechanisms by which the forensic mental health system is able to assess, monitor and progress a forensic patient's capacity to be released back into the community is through the framework of leave privileges. The provision of progressively expanded forms of leave assists the forensic patient to gain the social skills necessary to operate independently within the community, and assists in establishing a structure for ongoing support that may be provided by friends, relatives or community agencies. At the same time, the program of leave privileges assists the treating team, Tribunal and executive to make realistic assessments as to the person's ability to manage within the community, and the level of risk the person may pose to public safety if released.

The *Mental Health Act* provides that the Tribunal may recommend to the Minister that a forensic patient be given a leave of absence from a hospital for such period and subject to such terms and conditions as it thinks fit, if it considers that this will benefit the patient's health. An authorised officer may also authorise a leave of absence on the recommendation of the medical superintendent of a hospital. However, such leave cannot be recommended or granted unless satisfied that the safety of the patient or any member of the public will not be seriously endangered by granting leave. The *Act* also provides for special leave of absence in emergencies.[150]

In practice, a hierarchy of leave privileges has been developed over time, and a forensic patient will usually be required to move through the hierarchy before the Tribunal will recommend his or her conditional or unconditional release. These leave privileges include:

- escorted ground leave – this allows staff to evaluate the patient's social skills, behaviour and mental state, and facilitates attendance at hospital-based rehabilitation programs
- escorted outside day leave – this involves leave outside facility under the direct supervision of a staff member
- supervised ground leave – this involves ground leave under the supervision of a staff member, or a relative, friend or some other responsible person
- supervised outside day leave – this involves leave outside the facility under the supervision of a staff member, or a relative, friend or other responsible person
- unsupervised outside day leave-this allows for further assessment of the person's ability to cope in normal settings, and is usually sought prior to the Tribunal considering conditional release
- overnight and/or weekend leave – this may be granted on a supervised or unsupervised basis[151]
- special leave – this may be granted for educational or other purposes.

The leave provisions of the *Mental Health Act* apply only to forensic patients who are detained in a hospital, rather than those who are held in a correctional centre (for example, because they have an intellectual disability rather than a mental illness). Forensic patients held in correctional centres would appear to be subject to the leave arrangements applying to inmates generally under the *Crimes (Administration of Sentences) Act 1999 (NSW)*. However, as noted above, eligibility for leave would depend on the forensic patient's security classification within the prison system.

Alternatively, as the Tribunal has the power to make recommendations regarding the detention, care and treatment of a forensic patient, it would seem that this would include the power to recommend a leave of absence from the correctional centre in which he or she is held. In practice, however, this would require the more formal process of obtaining an order of the Minister or Governor, and may be difficult to implement within the correctional context. Should the Tribunal have the determinative role these difficulties might be overcome and the leave could be granted according to defined criteria.

One reform option may be to provide a legislative framework under the *Mental Health Act* for leaves of absence for those forensic patients held within correctional centres. The advantage of this approach is that it would give forensic patients with intellectual disabilities the same opportunity to gain the skills necessary to re-enter the community, and to demonstrate their capacity to do so. It would also be in the public interest, given that those forensic patients serving limiting terms will eventually be released into the community at some point. The possible disadvantage of this approach is that it would have resource implications for those agencies within the corrective services system, and the community, who would be responsible for supervising and managing the leave of such patients.

This option would also require a reconsideration of the use of the prisoner classification system on forensic patients held within the correctional system. As noted above, these classifications can prevent patients obtaining advantages (such as access to leave privileges) that would allow them to progress to a point where they may be eligible for conditional or unconditional release from detention. If NSW continues to accommodate forensic patients within the prison system, there does not appear to be any justification for punishing or detaining them further or more intensively than those who have been found wholly responsible for the offences they have committed.

The previous Option 2 seeks to address the problem that the statutory provisions for leave do not cover forensic patients held in prisons. The discussion further below outlines the options for statutory criteria for release and leave.

Option 1
Retain the current framework for the grant of leaves of absence by the medical superintendent, the Minister or the Governor in relation to forensic patients.

Option 2
Amend the legislation to provide for leaves of absence for forensic patients, to be granted by the Tribunal in lieu of the Minister or the Governor and to provide criteria for such grants.

Option 3
Adopt Option 2 and establish a new security classification category for forensic patients held in correctional centres that better facilitates access to leave and release arrangements.

Release of forensic patients

As noted above, the *Mental Health Act* provides that the Tribunal can recommend the release of a forensic patient, but may not do so unless it is satisfied, on the available evidence, that the safety of the patient or any member of the public will not be seriously endangered by the patient's release.[152]

Only the Minister for Health may order the release of a forensic patient who has been found unfit to be tried, or is a transferee. By contrast, only the Governor (on the advice of the Executive Council) may order the release of a person found not guilty due to mental illness.[153] As the Act does not provide any criteria for authorising the release of a forensic patient, the executive has absolute discretion in making a decision as to release, and any conditions placed on release.

The public safety criterion

The *NSW Health discussion paper (2004)* noted concerns that the existing public safety test may not be adequate as it does not factor in a broader 'public safety' test; and that the requirement of 'seriously endangered' may be too high a test. The discussion paper asked whether the provisions should be varied, and whether similar criteria should be imposed when making leave decisions.[154] Only a limited number of submissions addressed this issue, and the views expressed were mixed.

The Victorian legislation contains a similar public safety test, but expands its scope to a consideration of the safety of 'members of the public'. It provides that a court must not vary a custodial supervision order to a non-custodial supervision order during the nominal term unless 'satisfied on the evidence available that the safety of the person subject to the order or members of the public will not be seriously endangered as a result of the release of the person'.[155]

If the NSW test were broadened to a consideration of risk to 'members' of the public, this would appear to address the concern that it does not properly take into account any risks posed to unidentified members of the public, or the community more generally.

Broader criteria for decision-making

As noted above, the executive currently has absolute discretion as to the grounds upon which leave and release may be ordered. However, if the current system were to be replaced with a framework for decisions to be made by a new determining body, it may be desirable to articulate the grounds upon which release orders may be made. This would facilitate both the transparency and consistency of such decision-making.

Several other Australian jurisdictions have developed statutory criteria to guide the decision maker when making determinations as to the leave or release of forensic patients. For example, the Victorian legislation provides that, in deciding whether or not to make, vary or revoke a supervision order, remand a person in custody, or grant or revoke extended leave, the court must apply the principle that 'restrictions on a person's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community'. In addition, the court must have regard to specified matters, including the nature of the person's mental impairment or other condition or disability, the relationship between the impairment, condition or disability and the offending conduct, public safety concerns, and whether there are adequate resources available for the treatment and support as the person in the community.[156]

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

Therefore, one option would be to retain the existing public safety test (but expand its scope to a consideration of the risk to 'members' of the public), and apply the test to both recommendations and decisions regarding leave and release. This would have the benefit of more transparent and consistent decision-making (by reference to a statutory test), and would ensure that any decision maker must consider the potential risks both to identified members of the public, and the public more generally.

Another option would be to provide a broader statutory test for determinations as to leave or release. The advantage of this approach is that broader public interest matters may be taken into account, rather than a single focus on matters of public safety. These grounds could include satisfaction that care of a less restrictive kind (where necessary) is appropriate and reasonably available to the patient within the community; reasonable arrangements have been made to ensure the person's continued care or treatment (where necessary) within the community; and the safety of the patient, or members of the public, will not be seriously endangered by the person's release.

A possible disadvantage of this approach is that it would narrow the existing discretion in relation to such decision-making. However, if such decisions were to be made in the future by a determining body such as the Tribunal or a court, it would seem appropriate that it be required to address specific criteria when making these decisions. This would assist the executive, victims and forensic patients in preparing submissions in relation to an application for leave or release, and would assist superior courts in reviewing any such decisions made. As with the first option, it would also facilitate greater transparency and consistency in decision-making, which would assist in maintaining public confidence in the forensic mental health system.

If this option were adopted, it may also be desirable to specify in legislation the matters to which the determining body should have regard when making decisions for the leave or release of forensic patients. This would ensure that decisions would only be made after considering all of the relevant factors and interests involved.

These criteria could include matters already included in the Mental Health Act, such as: the need to ensure that persons who are mentally ill or mentally disordered receive the best possible care and treatment in the least restrictive environment enabling the care and treatment to be effectively given; and the need to ensure that any restriction on the liberty of persons who are mentally ill or mentally disordered and any interference with their rights, dignity and self-respect are kept to the minimum necessary in the circumstances. The criteria could also include additional factors relevant to public safety.

Option 1
Amend the legislation to provide that the determining body must order the leave or release of a forensic patient at any time if it is satisfied, on the available evidence, that the safety of the patient or any members of the public will not be seriously endangered by the patient's leave or release.

Option 2
Amend the legislation to provide that the determining body must order the leave or release of a forensic patient at any time if it is satisfied, on the available evidence, that:

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

Option 3
Adopt Option 2, and amend the legislation to provide that, when making such decisions, the determining body must consider criteria such as the following:

- The need to ensure that persons who are mentally ill or mentally disordered receive the best possible care and treatment in the least restrictive environment enabling the care and treatment to be effectively given.
- The need to ensure that any restriction on the liberty of persons who are mentally ill or mentally disordered and any interference with their rights, dignity and self-respect are kept to the minimum necessary in the circumstances.
- The nature of the person's condition.
- The prospect of a relapse or deterioration in the person's condition once released into the community.
- The potential safety concerns arising from such relapse or deterioration in the person's condition.
- The availability of care and treatment in the community.
- The availability of relevant social factors mitigating against a future relapse or deterioration in the person's condition.

Conditions placed on release

Another mechanism for assessing, monitoring and progressing a forensic patient's capacity for release into the community is through the framework of conditional release. As the Act does not prescribe the kinds of conditions that may be applied, they tend to be formulated by the Tribunal to reflect the person's particular circumstances, and the stage that he or she has reached in recovery. These conditions can include matters such as taking medication, not using drugs or alcohol, regular reporting to a psychiatrist or case manager, and residing in a particular place. However, it is the Minister and Governor who make the ultimate decision as to the conditions to be placed on release.[157]

In 1996, the NSW Law Reform Commission recommended that a non-exhaustive list of release conditions should be inserted into the legislation. In its view, a list would make decisions more openly structured, which would balance the recommended transfer of discretionary power from elected representatives to the Tribunal. It also felt that the provision of a list in legislation would have an educative role.[158]

Option 1
Retain the current framework that does not specify the conditions that may be placed on a forensic patient's conditional release.

Option 2
Amend the legislation to provide a non-exhaustive list of conditions that the determining body may place on a forensic patient's conditional release.

Notification of release

The *Mental Health Act* requires that certain persons be notified of the proposed release of a forensic patient, whether conditionally or unconditionally.

Attorney General and DPP

Under the *Mental Health Act,* the Minister for Health must notify the Attorney General and the Director of Public Prosecutions of a recommendation for release. The Attorney General has 30 days to object to the person's release on the ground that the person has not served sufficient time in custody or detention, or that the Attorney General or DPP intends to proceed with criminal proceedings against the person. If the Attorney General objects, the person cannot be released.[159]

The *Mental Health Act* Implementation Monitoring Committee recommended that the Attorney General's power of objection based on 'insufficient time in custody' be limited to forensic patients who are transferees from the prison system. The Committee noted that the justification for detaining persons found not guilty due to mental illness is the danger that they may pose to themselves or the community; and once this danger has passed, they are entitled to their liberty. The Committee considered that the concept of 'insufficient time in custody' is also inappropriate for the unfit accused, given that full criminal responsibility has not been found to apply to these patients.[160] The NSW Law Reform Commission agreed with this recommendation.[161]

The Mental Health Act Implementation Monitoring Committee recommended that the power to object to release on the basis of pending criminal charges should be limited to persons found unfit to be tried, or those detained in hospital pending committal for trial or the trial itself. By contrast, the NSW Law Reform Commission recommended that the provision be removed entirely (except in relation to transferees), on the basis that it discriminates against forensic patients (given that there is no corresponding power in relation to convicted offenders).[162]

Minister for Police

The *Mental Health Act* also provides that the prescribed authority must inform the Minister for Police that a person will be released.[163] In that case, the *NSW Police Handbook* provides that the police will create a warning on COPS (the Police computer record system), create an information report, and forward it to the Local Area Command where the forensic patient intends to live. Where any victim wishes to be advised of the forensic patient's release, the police will notify him or her accordingly.[164]

The *Mental Health Act* Implementation Monitoring Committee and the NSW Law Reform Commission both recommended that this provision be removed. The Monitoring Committee considered that the notification implies that the police would have some role in monitoring the person in the community, which is inappropriate. It also noted that, in most cases, the person will have been found not guilty of the offence due to mental illness, so the situation is not analogous to releasing a criminal back into the community.[165] The Law Reform Commission considered that the requirement is discriminatory and in breach of human rights, and that it appears unnecessary given that the person will only have been released where the Tribunal considers that he or she is not dangerous.[166] The *NSW Health discussion paper (2004)* noted that the need for the provision may have been overtaken by other developments in the area in relation to victims rights.[167]

Discussion

If the current system of executive discretion were to be replaced by a new determining body, one option (outlined in Chapter 5) is that the Minister for Health and the Attorney General could be given the right to make submissions at any hearing, and to appeal any such decision on public interest grounds. This would ensure that the NSW Government has adequate opportunity to raise any concerns regarding the potential release of a forensic patient, and would ensure that those concerns are given a proper hearing. Accordingly, it would not appear necessary to retain the existing provisions for objection to a proposed release. In addition, as Chapter 11 of this Paper suggests the option of making notification orders and non-contact orders for victims prior to the release of a forensic patient, this may render the requirement to notify the Minister for Police unnecessary.

Option 1
Retain the current framework for notification of the possible release of a forensic patient.

Option 2
Amend the legislation to provide that only the Minister for Police should be notified of the proposed release of a forensic patient.

Option 3
Amend the legislation to remove all of the notification requirements regarding the possible or proposed release of a forensic patient.

Supervision of released patients

Before making a recommendation for conditional release, the Tribunal requests a comprehensive psychiatric report (or other appropriate expert report), and a NSW Health 'risk assessment' as to the safety and appropriateness of the person's release. Before the forensic patient is discharged on conditional release, release plans and arrangements for treatment, care, management and review should be finalised. Generally, these plans will nominate a treating psychiatrist and a case manager who would be jointly responsible for the management of the patient under the conditional release order.[168]

In practice, several agencies are involved in supervising and managing a forensic patient's conditional release, including the Tribunal, Justice Health, NSW Health, and other agencies (such as the Department of Ageing, Disability and Home Care, the Department of Housing and the Department of Community Services).[169]

The *NSW Health discussion paper (2004)* commented on the lack of formal mechanisms requiring interagency cooperation, and noted that questions have been raised as to whether there should be a more formal mechanism to ensure that planning occurs, either through protocols or memoranda of understanding between the agencies involved, or through a mandatory legislative requirement. The discussion paper asked whether the *Act* should be amended to require or recognise the need for interagency cooperation in the planning for the future of forensic patient, and whether this should include mechanisms to ensure that exit and transition planning is provided.[170] While only a limited number of submissions address these issues, they generally supported this approach.

The Legislative Council Standing Committee on Mental Health (2002) has previously recommended that the Minister for Health should implement a formal agreement with the Tribunal for the supervision and management of released forensic patients. The agreement should clarify: clinical services' responsibilities in monitoring and reporting on clinical supervision (and the Tribunal's role in monitoring progress); and the formal procedures for managing breaches of release conditions.[171]

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

Option 1
Retain the current framework for supervision of forensic patients within the community.

Option 2
The Mental Health Review Tribunal should enter into a formal agreement with relevant government agencies to ensure that there is a consistent and complementary framework for the supervision, treatment and care of forensic patients who are subject to conditional release from detention.

Option 3
Amend the legislation to require relevant government agencies to cooperate with each other for the supervision, treatment and care of forensic patients who are subject to conditional release from detention.

Breach of conditional release

If a person is conditionally released, and it appears that he or she has breached the order or has suffered a deterioration of mental condition and become a serious danger to himself or herself or any member of the public, the Minister or Governor (whichever is the prescribed authority) may order the person's apprehension and detention, care or treatment in the place or manner specified.[172]

In practice, the treating psychiatrist or case manager should notify the Forensic Executive Support Unit within NSW Health regarding any suspected breach of the condition, or deterioration in mental condition.[173] If the Minister makes an order for the person's apprehension and detention, the patient may ask the Tribunal to investigate the evidence on which the order was made, and the Tribunal may then make any recommendation it considers appropriate to the prescribed authority.[174] However, the forensic patient would continue to be detained until an order is made for his or her release.

The *NSW Health discussion paper (2004)* noted that confusion appears to have arisen in relation to these provisions, with some service providers being reluctant to seek an order for what are considered minor or technical breaches of release conditions, or where they consider the patient is only in need of a short term hospital stay. It asserted that the alternative of scheduling a person as a civil patient may be legally questionable (given that the overall scheme of the *Act* implies that a forensic patient should be dealt with in accordance with the forensic provisions); and that it can lead to confusion over the patient's status and the conditions under which they are required to operate.[175]

In relation to minor breaches, or deterioration in the person's condition, it may be appropriate to provide legislative alternatives to the person's apprehension and detention. For example, minor breaches could be dealt with by the agency supervising the forensic patient; a deterioration in the person's condition could be dealt with by voluntary or involuntary admission under the civil provisions of the Act (and any concerns regarding the application of these provisions, or possible confusion over the patient's status could be addressed in the forensic mental health legislation); and more serious breaches could be dealt with by the determining body.

In such a case, the determining body could order a person's apprehension and detention, care or treatment where – on the balance of probabilities – it appears that the person has breached a condition of release. The determining body could be required to review the case as soon as reasonably practicable after the person has been apprehended, and the forensic patient would then have an opportunity to make submissions in relation to his or her continued detention or release.

The advantage of these options are that they provide a hierarchy of responses to alleged breaches of conditional release (or a deterioration in the person's condition), and bring transparency and accountability to the process by ensuring that the initial apprehension and continued detention are subject to reviews at which the forensic patient may be represented and make submissions.

If it appears that a person on conditional release has breached the conditional release order or has suffered a deterioration of mental condition and is likely to become a serious danger to himself or herself or members of the public:

Option 1
Retain the current framework for responding to these matters.

Option 2
Amend the legislation to provide a hierarchy of responses according to the seriousness of an alleged breach of conditional release, and a clear mechanism for responding to a deterioration in a person's condition.

Option 3
Adopt Option 2, and amend the legislation to provide a framework for the determining body to: order the apprehension and detention, care or treatment of a forensic patient if satisfied, on the balance of probabilities, that he or she has breached a condition of release; conduct a review of the person's case as soon as reasonably practicable after the person is apprehended; and make a determination as to the person's detention or release.

Termination of forensic patient status

The *Mental Health Act* contains complex provisions for termination of forensic patient status in relation to each category of such patient. Regardless of the basis upon which a person became a forensic patient, he or she may in any case be detained (after the termination of forensic patient status) as an involuntary patient under Chapter 4 of the *Mental Health Act*.[176]

A person who has been found not guilty of an offence due to mental illness at a special hearing and has been detained in a hospital or other place; or at trial or appeal, and has been detained in a hospital or other place or released from custody subject to conditions) ceases to be a forensic patient either on unconditional release by order of the Governor, or upon the expiry of any conditions of release.[177]

A person who has been found unfit to be tried, and for whom a limiting term has been imposed, ceases to be a forensic patient: on the earlier of being classified as a 'continued treatment patient', the expiry of the limiting term, unconditional release, or the expiry of any conditions of release. If a special hearing has not been held and further proceedings will not be taken against the person, the person ceases to be a forensic patient upon his or her release by the Minister. Alternatively, if the person becomes fit to be tried, the person ceases to be a forensic patient on the earlier of: a finding at a further inquiry that the person is fit to be tried; or, if further proceedings will not be taken against the person, upon his or her release by the Minister.[178]

Finally, a transferee generally ceases to be a forensic patient on the earlier of: the expiry of the term of imprisonment; if the non-parole period has expired, on unconditional release by order of the Minister; if the non-parole period has expired and the person has been conditionally released, on the expiry of those conditions; on being classified as a continuing treatment patient; or being transferred to a prison.[179]

The current provisions for the termination of forensic patient status appear to contain various inconsistencies, and may not cover all the circumstances in which a person's status would be expected to terminate (so that in some cases forensic patient status may be permanent or at least very long-term). For example, the *Act* is silent as to the termination of forensic patient status for a person who is subject to a special verdict at a special hearing but is not detained in a hospital or other place. As a result, it is not clear whether the person becomes a forensic patient in the first place; and if so, when that status terminates. By contrast, a person who is subject to a special verdict at a trial and is conditionally released is classified as a forensic patient, and provision is made for the termination of that status.

Another practical concern arises in relation to transferees. In practice, these provisions can lead to the circumstance where a transferee who would have been released on parole if he or she remained within the prison system, may be detained after that time as a forensic patient for potentially the full term of imprisonment. If the person's non-parole period has expired, his or her forensic patient status will only terminate upon release by order of the Minister, or the expiry of the term of imprisonment.[180] Given that the forensic patient could receive care and treatment within the community (under the civil provisions of the *Act*) there does not appear to be any reason in principle for detaining transferees within the forensic system after the non-parole period has expired.

One reform option would be to replace the current provisions for termination of forensic patient status with a new, consistent and consolidated provision. Generally this could provide that a person's status as a forensic patient is terminated on the earlier of: the expiry of any limiting term; unconditional release; the expiry of any conditions of release; or, in relation to transferees, upon release on parole or the expiry of the term of imprisonment. The advantage of this option is that it would provide a consolidated approach to the termination of forensic status, and the provision could be drafted to remove any inconsistencies or gaps in its application.

Option 1
Retain the current provisions for termination of forensic patient status.

Option 2
Amend the legislation to consolidate the provisions dealing with termination of forensic patient status, and provide that it terminates upon the earlier of:

a the expiry of a limiting term

b unconditional release

c the expiry of any conditions of release

d in the case of transferees, release on parole or the expiry of the term of imprisonment.

A related issue: bail

Where a person is found to be unfit by the court and is granted bail, there is currently a lack of clarity about what the Tribunal can recommend and what orders can be approved by the Minister based on Tribunal recommendations.

Option 1
Retain the current provisions.

Option 2
Amend the legislation to clarify the powers to make recommendations and orders concerning a person who is granted bail after being found unfit.

Victims of crime

Introduction

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

The current law

New South Wales has made extensive legislative provision for victims of crime within the criminal justice system. The *Victims Rights Act 1996 (NSW)* provides a framework for recognising and promoting the rights of victims of crime through a Charter of Victims Rights. The *Act* defines a 'victim of crime' as 'a person who suffers harm as a direct result of an act committed, or apparently committed, by another person in the course of a criminal offence'.[181] The Charter of Victims Rights provides that 'a victim should, on request, be kept informed of the offender's impending release or escape from custody, or of any change in security classification that results in the offender being eligible for unescorted absence from custody'.

In addition, the *Crimes (Sentencing Procedure) Act 1999 (NSW)* provides a mechanism for victims to give victim impact statements for consideration on the sentencing of a convicted offender. Section 26 of the *Act* defines a 'victim' as a primary victim or a family victim. A 'primary victim' is 'a person against whom the offence was committed, or a person who was a witness to the act of actual or threatened violence, the death or the infliction of the physical bodily harm concerned, being a person who has suffered personal harm as a direct result of the offence'. In relation to offences directly resulting in the death of a primary victim, a 'family victim' is 'a member of the primary victim's immediate family, and includes such a person whether or not the person has suffered personal harm as a result of the offence'.

Finally, the *Victims Support and Rehabilitation Act 1996 (NSW)* provides for compensation, support and rehabilitation for victims through financial compensation and counselling.

Chapter 5 of the *Mental Health Act* does not make any specific reference to victims of crime, but does ensure that any risk to their safety be considered when determining whether the safety of any member of the public would be seriously endangered by the forensic patient's release.

The Forensic Executive Support Unit of the Statewide Forensic Mental Health Directorate manages a Forensic Patient Victims Register. Victims may register with the Unit to receive information about tribunal hearings, and have the opportunity to make submissions in relation to them. Generally, the Mental Health Review Tribunal ('Tribunal') has adopted a procedure in which registered victims are notified of upcoming hearings, and permitted to attend (either in person or, if this is not possible, via videoconference or teleconference facilities). Registered victims may submit a written statement to the Tribunal for consideration at a hearing. The Tribunal requests that statements address the care, treatment, detention and release of the forensic patient. If the victim has any concerns regarding his or her safety if the forensic patient were released, those concerns could be outlined in the submission.[182]

The NSW system does not, however, make specific provision for the family members of forensic patients. In some cases, family members may play a significant support role for patients, and may wish to be notified of upcoming reviews and decisions for that reason. In other cases, family members may have been the subject of previous violence or threats by the patient and may hold legitimate concerns regarding their safety.

Other jurisdictions

Several Australian jurisdictions have incorporated provisions for victims in their forensic mental health legislation. For example, Victoria provides for the notification of victims in relation to major reviews etc, and court hearings, and the making of victim reports. The Act states that the purposes of the reports are to assist counselling and treatment processes for people affected by the offence, and assist the court in determining any conditions for an order.[183]

Queensland provides for the making of: notification orders for a person a with 'sufficient personal interest' to be notified of certain matters, such as patient reviews and the decisions arising out of them;[184] non-contact orders to protect victims or their relatives when a forensic patient is being released into the community; and victim impact statements in relation to the mental condition of the alleged offender when the offence was committed, or the risk the victim believes the person represents to the victim or the victim's family.[185]

In May 2006, the Queensland Government announced that it would conduct a review of its *Mental Health Act 2000 (Qld)* as a result of concerns about the level of consultation with victims and their families in relation to certain decisions. The review has been asked to assess the efficacy of the legislation and administrative arrangements relating to the Mental Health Court and Mental Health Review Tribunal in protecting the interests of victims and their families. In September 2006, the review released a discussion paper which considers various issues, including the adequacy of the current scheme for notification orders.[186]

Tasmania and South Australia have similar provisions in relation to victims. In Tasmania, where a court is making a determination in relation to forensic orders, the Attorney General must provide a court with a report outlining the views of the defendant's next of kin and any victims (as far as they can be reasonably ascertained). The court may not discharge a restriction order, release a defendant, or significantly reduce the degree of supervision unless it has considered this report, and is satisfied that the defendant's next of kin and any victims have been given reasonable notice of the proceedings.[187]

Discussion

Given that several other Australian jurisdictions make legislative provision for victims of crime, and that NSW already has an administrative process for incorporating them into the review and release process, one option would be to formalise the existing provisions in legislation. This would provide certainty to registered victims as to their rights and interests in the process, but would not involve any substantive change to current practices.

Another option would be to introduce specific orders that would be available to a registered victim, which would ensure the victim is notified of hearings and significant decisions in relation to a forensic patient, and (where necessary) cannot be contacted by the forensic patient once released. The advantage of providing for formal orders is that they would have legal force, which would provide greater security to victims who may hold concerns as to their safety once the forensic patient is released. As NSW already provides for the making of victim impact statements on the sentencing of a convicted offender, and for non-association orders as a condition of bail, and as an option in sentencing, these provisions could provide a basis for similar provisions under the forensic mental health legislation.

Finally, in some cases, family members may have legitimate concerns in relation to a forensic patient, but may not actually fall within the definition of a 'victim'. Therefore, it may also be desirable to expand the scope of these provisions to a forensic patient's family members. The definitions in the *Crimes (Sentencing Procedure) Act* could be adopted to ensure consistency and to ensure that those to whom it applies should have clearly stated statutory recognition but that definition would be too narrow to accommodate the views of others to which there may be need to have regard to in particular cases. In practice, the forensic patient's family members may have legitimate safety concerns without ever having been members of the family of a deceased victim; ie the forensic patient may have made a previous threat against family members but the actual offence leading to his or her detention may have been against an unrelated person. Also, family members of forensic patients may wish to support the person in relation to his or her reviews, leave or release. Therefore, in addition to the options set out below there should be a discretion for the determining body to receive further information as appears to it to be material to the issues it must consider under the *Act*.

Option 1
Retain the current administrative framework for dealing with victims of crime within the forensic mental health system.

Option 2
Amend the legislation to provide for the courts to receive victim impact statements when considering the imposition of a limiting term or release, and at any hearing of the determining body which might result in an order for leave or release of the patient.

Option 3
Amend legislation to provide that registered victims may apply to the determining body for notification and non-contact orders in relation to a forensic patient.

Option 4
Adopt Option 2 but extend to family victims, as defined in the *Crimes (Sentencing Procedure) Act 1999 (NSW).*

Option 5
Adopt Option 3 but extend to victims as defined in the *Crimes (Sentencing Procedure) Act 1999 (NSW).*

Other issues

Further matters may warrant consideration in the course of the review including:

Inter-jurisdictional arrangements

Chapter 10A of the *Mental Health Act 1990 (NSW) ('Mental Health Act')* deals with the inter-jurisdictional transfer, treatment and apprehension of mental health patients. In some cases, a forensic patient who is detained in a hospital or correctional centre in NSW may wish to be transferred back to his or her own State or Territory, or to a jurisdiction in which his or her family resides. Alternatively, a forensic patient held in another jurisdiction may wish to be returned to New South Wales.

The *Act* provides that the Minister for Health may enter into an agreement with a Minister of another State or Territory in relation to the application of their mental health laws, and the transfer, detention and apprehension of patients within their mental health systems. To date, the Minister for Health has only entered into agreements with Victoria, Queensland and the Australian Capital Territory. Concerns have arisen that these agreements may not provide an adequate framework to adequately address all the circumstances arising under the legislation, and as to the comprehensiveness of these agreements in dealing with the inter-jurisdictional transfer of forensic patients, and the inter-jurisdictional application of the legislative provisions. In addition, problems can arise in relation to those jurisdictions with whom NSW has not entered into agreements, and the lack of a framework to deal with forensic patients who wish to move overseas.

Accordingly, it may be desirable for the Minister to take any further action necessary to ensure that the framework for the inter-jurisdictional transfer of forensic patients, and the inter-jurisdictional application of the legislative provisions, operates effectively. This would include finalising agreements with the remaining Australian jurisdictions.

Option 1
The Minister for Health should take the legislative and administrative action necessary to ensure an effective framework for the inter-jurisdictional transfer of forensic patients, and the inter-jurisdictional application of the legislative provisions.

Option 2
Adopt Option 1 and consider the need for arrangements in relation to forensic patients who may wish to move overseas.

Interaction between the legislation

The provisions dealing with the detention, treatment and care of people with mental illnesses are generally contained in the *Mental Health Act*, which is administered by the Minister for Health. The provisions dealing with criminal procedures involving people with mental illnesses are contained in the *Mental Health (Criminal Procedure) Act 1990 (NSW)*, which is administered by the Attorney General.

In practice, the interaction between these two pieces of legislation can be complicated and, at times, confusing. Accordingly, one option would be to consolidate the legislative provisions dealing with forensic mental health into the one piece of legislation.

Option 1
Retain the current legislative framework.

Option 2
Consolidate forensic mental health legislation into a new stand-alone piece of legislation.

Option 3
Consolidate forensic mental health legislation by transferring the provisions of Chapter 5 of the *Mental Health Act 1990 (NSW)* into the *Mental Health (Criminal Procedure) Act 1990 (NSW).*

Conditions other than mental illness

A problem arises for treating authorities when a person's current condition requires them to be detained but they are not mentally ill. For example a person with a personality disorder or intellectual or developmental disability may need to be detained due to some temporary crisis. However if detention is to be justified on therapeutic grounds an important issue may arise because there might not be any therapeutic options to offer in the detention setting.

Sharing information

The capacity to share information with relevant bodies is currently very restricted. The provisions in s 273 of the *Mental Health Act* for releasing information prohibits the necessary exchange of information between Tribunal and organisations involved in the management and care of forensic patients such as the Department of Corrective Services and the Department of Justice Health and others. A less restrictive information sharing regime would facilitate optimum patient care.

Consideration should also be given to the needs of family members and cares to be kept informed with relevant information.

One of the main reforms evidenced in the *Exposure Draft Mental Health Bill* is to include provisions which facilitate the greater involvement of people who have primary responsibility for providing care and support for a patient in the community. Recognition that carers and family members need greater access to patient information was one of the key issues arising from the Parliamentary Select Committee on Mental Health Services, and from the submissions received by the Department of Health in response to the *Discussion Papers.*

The Government has accepted the proposals in *Discussion Paper 1,* and new provisions have been drafted which for the first time in NSW include the notion of a 'primary carer', as opposed to a relative or friend. These provisions:

- define the term 'primary carer' (section 71)
- give effect to the role of carers (section 3(j))
- allow them to make applications for involuntary detention and release (sections 18 and 43)
- allow a person to nominate a primary carer to receive information (see section 72)
- allow a person to identify persons who they do not wish to have identified as the primary carer (see section 72)
- provide for a primary carer where there has been no nomination
- where there is no nomination, the Bill establishes a process for identifying an appropriate carer, starting with the person's guardian and moving down a list of persons who may provide care or support to a patient. This list has been drawn from the concept of 'person responsible' used under the *Guardianship Act* (see section 71)
- identify what sort of information should be provided to the identified primary carer (see section 73, 75, 76 and 78)
- provide for health service providers to take reasonable steps to involve the primary carer in discharge planning discussions (see section 79)
- provide for carers to request visits or inspections by Official Visitors (sections 131 and 134)
- permit the disclosure of information to carers (section 182)
- provide that it is a function of the Director-General to promote service provider co-operation (section 106(i)).

In relation to the forensic patients, there may well be different policy considerations that require the role of carers to be more circumscribed (and there are the victim information provision requirements that do not extend to civil patients).

There may be merit in including an s106 type provision to focus some consideration on service co-ordination and information transfer but consideration would need to be given as to who would be the recipient of this duty.

References

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

2 Introduced by the Hon Bob Debus MP, Attorney General, NSW Legislative Assembly Hansard, 8 November 2005.

3 Legislative Council, Report from the Select Committee on the Lunatic Asylum, Tarban Creek, 21 October 1846; Legislative Council, Report from the Commissioners of Inquiry on the Lunatic Asylums of New South Wales, 6 June 1855; Royal Commission on Lunacy Law and Administration, 1923; and Royal Commission on Matters affecting Callan Park Mental Hospital, 1961: all cited in *Legislative Council Select Committee on Mental Health, Inquiry into Mental Health Services in New South Wales* (2002), Sydney.

4 D T Richmond, (Chair), Inquiry into Health Services for the Psychiatrically Ill and Developmentally Disabled, 1983; and Ministerial Implementation Committee on Mental Health and Development Disability, Report to the Minister for Health, W Barclay, (Chair), 1988, both cited in ibid; *Mental Health Act Implementation Monitoring Committee, Report to the Honourable R A Phillips MP, Minister for Health, on the NSW Mental Health Act 1990 (1992) Parliament of NSW*; NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Report 80* (1996), Sydney; Legislative Council Select Committee on Mental Health, Inquiry into Mental Health Services in New South Wales (2002), Sydney.

5 *Human Rights and Equal Opportunity Commission, Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993) AGPS; Mental Health Council of Australia and the Brain and Mind Research Institute, *Not For Service: Experiences of Injustice and Despair in Mental Health Care in Australia* (2005) MHCA; Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (2006) Sydney; Senate Select Committee on Mental Health, *A National Approach to Mental Health-From Crisis to Community: First Report and Final Report* (2006).

6 Australian Health Ministers, *National Mental Health Plan 2003-2008* (2003) Australian Government.

7 Council of Australian Governments, *National Action Plan on Mental Health 2006-2011* (2006).

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

9 UN General Assembly, Pr*inciples for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care A/RES/46/119*, 17 December 1991.

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

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

12 The average number of months since these forensic patients were first referred to the Mental Health Review Tribunal were: not guilty due to mental illness (87 months); unfit to be tried (15 months); limiting terms (51 months); and transferees (48 months). Of the total forensic patient population, 25% had been referred to the Tribunal within the previous year; 14% within the previous 1-3 years; 18% within the previous 3-5 years; 29% within the previous 5-10 years; and 14% within a period of over 10 years.

13 For an overview of the development of the common law rule regarding fitness to be tried, see R v Mailes (2001) 126 A Crim R 20, per Woods CJ at CL.

14 See D Howard & B Westmore, Crime and Mental Health Law in New South Wales (2005) LexisNexis, Butterworths, 93.

15 R v Presser [1958] VR 45, per Smith J. In R v Kesavarajah (1994) 181 CLR 230, the High Court held that both the Presser factors and the length of the trial are relevant in determining fitness to be tried: see NSW Law Reform Commission, People with an Intellectual Disability and the Criminal Justice System: Report 80 (1996), Sydney, 208.

16 See D Howard & B Westmore, Crime and Mental Health Law in New South Wales (2005) LexisNexis, Butterworths, 91.

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

18 In DPP v Mills [2000] NSWCA 236, Handley JA (with whom Sheller JA agreed) commented that 'a limiting term not only deprives the forensic patient of his liberty, but does so by way of punishment': [39].

19 R v M'Naghton (1843) 8 ER 718, As the spelling of this case differs, this paper uses the spelling adopted by Sir Owen Dixon in O Dixon, 'A Legacy of Hadfield, M'Naghten and Maclean' (1957) 31 Australian Law Journal 255.

20 See Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993) Australian Government Publishing Service, 798.

21 *MHCP Act* s 33.

22 *MHCP Act* s 32.

23 *MHCP Act* ss 32(3A), 33(2).

24 *MHCP Act* ss 32(3D), 33(2).

25 However, as Part 2 of the *MHCP Act* only deals with criminal proceedings in the superior courts, the common law would appear to apply.

26 See, generally, *Crimes (Sentencing Procedure) Act 1999 (NSW).*

27 *MHCP Act* ss 5, 7.

28 *MHCP Act* ss 11, 14, 16, 19, 20.

29 *MHCP Act* ss 21-24.

30 *MHCP Act* ss 25, 38-39.

31 *Mental Health Act 1990 (NSW) ('MHA') Sch 1.*

32 Commissioner of Corrective Services and Others v Wedge [2006] NSWCA 271.

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

34 See, eg *NSW Law Reform Commission, People with an Intellectual Disability and the Criminal Justice System: Report 80* (1996), Sydney; and J Simpson, M Martin & J Green, T*he Framework Report: Appropriate community services in NSW for offenders with intellectual disabilities and those at risk of offending (2001) Intellectual Disability Rights Service and the NSW Council for Intellectual Disability.*

35 NSW Health, *Discussion Paper 2: The Mental Health Act 1990 (2004)*, 33, Q 52.

36 Australian Law Reform Commission, Same Crime, Same Time: Sentencing of Federal Offenders (2006) Sydney, 98.

37 Ibid.

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

39 *Mental Health Legislation (Commonwealth Detainees) Act 2004 (Vic),* See Ms Pike MP, Second Reading Speech for the Mental Health Legislation (Commonwealth Detainees) Bill 2004 (Vic), Legislative Assembly Hansard, 13 May 2004, 1325.

40 MHA, Sch 1.

41 R v M'Naghton (1843) 8 ER 718.

42 *Mental Health (Criminal Procedure) Act 1990 (NSW)* s 3(1).

43 R v S [1979] 2 NSWLR 1, 20-21, per O'Brien J.

44 Sir Owen Dixon, 'The Development of the Law of Homicide' (1935) 9 *Australian Law Journal* 64, 65-66.

45 R v S [1979] 2 NSWLR 1, 21-23, per O'Brien J.

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

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

48 L Craze, *The Care and Control of the Criminally Insane in New South Wales: 1788 to 1987 (1993),* Phd Thesis, 394.

49 Ibid, 494-496.

50 NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Report 80 (*1996), Sydney, 163.

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

52 *Mental Health Act 1990* (NSW) ('MHA') Ch 5, Pt 2.

53 *MHA* ss 83, 84.

54 *Mental Health Act Implementation Monitoring Committee, Report to the Honourable R A Phillips MP, Minister for Health,* on the *NSW Mental Health Act 1990* (1992) Parliament of NSW, 32; NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Report 80* (1996), Sydney, Rec 19 (however, the Commission recommended partially retaining the executive power of objection to release).

55 See Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993), 942-943.

56 Senate Select Committee on Mental Health, *A National Approach to Mental Health-From C risis to Community: Final Repor*t (2006), Rec 58.

57 NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Report 80* (1996), Sydney, 186.

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

59 Ibid. A person subject to a special verdict is referred to as a 'forensic patient' while a person found unfit to be tried is referred to as a 'person under supervision'.

60 Ibid.

61 Ibid.

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

63 *Draft National Statement of Principles for Forensic Mental Health (2002) Principle 12*, The draft Statement was developed by Commonwealth, State and Territory health authorities, and has been endorsed by the National Mental Health Working Group of the Australian Health Ministers' Advisory Council. As the Statement is still in draft form, the Senate Select Committee on Mental Health has recommended that the Australian Health Ministers agree to establish a timeline and implementation plan for the Principles: Select Committee on Mental Health, *A National Approach to Mental Health-From Crisis to Community: First Report* (2006), 330, 343; *Final Report* (2006), Rec 3.

64 *Crimes Act 1914* (Cth), Pt IB.

65 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), Pts 5, 6. The Western Australian legislation has been the subject of a recent review, see D Holman, *The Way Forward. Recommendations of the Review of the Criminal Law (Mentally Impaired Accused) Act 1996* (2003) Government of Western Australia.

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

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

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

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

70 *Mental Health Act 2000* (Qld).

71 See, generally, the discussion in *NSW Law Reform Commission, People with an Intellectual Disability and the Criminal Justice System: Report 80* (1996), Sydney, 184-186; *Mental Health Act Implementation Monitoring Committee, Report to the Honourable R A Phillips MP, Minister for Health*, on the *NSW Mental Health Act 1990* (1992) Parliament of NSW, 32-34; Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993) AGPS, 799-801.

72 X v United Kingdom, European Court of Human Rights, 5 November 1981; see Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993) AGPS, 801; and *Office of the High Commissioner for Human Rights in Cooperation with the International Bar Association, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (2002), 205.

73 Magistrate D Pinch, Deputy State Coroner, *Inquest into the Death of Scott Ashley Simpson,* 17 July 2006, Rec 3.

74 Review of the *Mental Health Act 1990*, *Discussion Paper 2: The Mental Health Act 1990* (2004) NSW Government, 28-30, Q 42.

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

76 *MHA* ss 281, 284.

77 *MHA* ss 265-270.

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

79 *MHA* s 278.

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

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

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

83 *MHA* ss 273, 280.

84 *Mental Health (Criminal Procedure) Act 1990* (NSW) ('MHCP Act') ss 5, 10(2).

85 *MHCP Act* ss 6, 11.

86 *MHCP Act* ss 14, 16(1).

87 *MHCP Act* s 16.

88 Where the person is suffering from a mental illness, or a mental condition for which treatment is available and he or she does not object to hospital detention.

89 Where the person does not have a mental illness or condition, or has a mental condition but objects to being detained in a hospital.

90 *MHCP Act* s 17.

91 *MHCP Act* ss 16(4), 19(1)-(2).

92 *MHCP Act* s 21A.

93 *MHCP Act* ss 21(1), 22.

94 *MHCP Act* s 23(1).

95 *MHCP Act* s 24.

96 *MHCP Act* s 27.

97 Mailes v DPP & 1 OR [2006] NSWSC 267

98 *MHCP Act* s 23(2).

99 Criminal Justice (Mental Impairment) Act 1999 (Tas) ss 18, 24, 29A, 31B, 31C.

100 See MHCP Act s 23(1); R v Mitchell (1999) 108 A Crim R 85.

101 R v Mitchell (1999) 108 A Crim R 85, 90.

102 NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Report 80* (1996), Sydney, 180-181.

103 See R v Mitchell (1999) 108 A Crim R 85, 96.

104 NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Report 80* (1996), Sydney, Rec 16.

105 R v Mitchell (1999) 108 A Crim R 85, 95-96.

106 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 28.

107 *Mental Health (Criminal Procedure) Act 1990* (NSW) ('MHCP Act') ss 22, 38. For an overview of the historical development of the defence of insanity, see R v S [1979] 2 NSWLR 1, per O'Brien J.

108 R v M'Naghton (1843) 8 ER 718,S ee the discussion in NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Report 80* (1996), Sydney.

109 *MHCP Act* ss 25, 38, 39.

110 *Mental Health Act* 1990 (NSW) ('MHA') ss 81, 85(2).

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

112 Ibid, 231-233, Rec 25.

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

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

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

116 *Crimes Act 1914* (Cth) ss 20BC(2), 20BJ(1).

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

118 See D Howard & B Westmore, Crime and Mental Health Law in New South Wales (2005) LexisNexis, Butterworths, 394-395. In addition, a Mandatory Notification Form is completed if an inmate is believed to be at risk of suicide or self harm, a risk to others, is on serious charges, or has a mental health problem that renders him or her at risk from others or unable to function in his or her current state within the prison. In this case, the inmate will be held in a safe cell and managed by a risk intervention team: ibid, 395-396.

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

120 *MHA* ss 96, 100A.

121 *MHA Act* s 86(1).

122 Ibid, s 86(3).

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

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

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

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

127 MHA ss 9, 10, 12, A 'mental illness' is defined as 'a condition which seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence in the person of any one or more of the following symptoms: (a) delusions; (b) hallucinations; (c) serious disorder of thought form; (d) a severe disturbance of mood; (e) sustained or repeated irrational behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs (a)-(d)': *MHA,* Sch 1.

128 *MHA* ss 97, 98.

129 *MHA* ss 131, 135.

130 And this has been followed by mental or physical deterioration justifying involuntary admission to a hospital, and the care and treatment following such admission resulted-or could have resulted-in an amelioration of the person's condition.

131 *MHA s* 133.

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

133 *MHA* s 82, That is, the Minister for Health, the Attorney General, the Minister for Corrective Services, the Chief Health Officer or a medical superintendent.

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

135 *MHA* s 82(1), but see s 82(5) of the Act.

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

137 *MHCP Act* s 39(3).

138 *MHA* ss 97(2), 98(2).

139 Magistrate D Pinch, Deputy State Coroner, Inquest into the Death of Scott Ashley Simpson, 17 July 2006.

140 *MHA Act* s 87, *Mental Health Regulation 2000 (NSW) reg 20.*

141 *MHA Act* s 86(2).

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

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

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

145 For a discussion of the NSW prisoner classification system, see Legislative Council General Purpose Standing Committee No 3, Issues relating to the operations and management of the Department of Corrective Services (2006) NSW Parliament, Ch 3.

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

147 See Legislative Council Select Committee on Mental Health, *Inquiry into Mental Health Services in New South Wales (2002)*, Sydney, 250. 148 Senate Select Committee on Mental Health, *A National Approach to Mental Health-From Crisis to Community: Final Report (2006)*, Rec 59.

149 *Review of the Mental Health Act 1990*, *Discussion Paper 2: The Mental Health Act 1990* (2004) NSW Government, 34-35.

150 MHA ss 90-92.

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

152 In any case, the Tribunal cannot recommend the release of a forensic patient who is remanded in custody pending an inquiry into his or her fitness to be tried, or who has been transferred to a hospital while serving a sentence of imprisonment and has not served the term, or the non-parole period (if any): *MHA* s 82(5).

153 *MHA* s 84(3); Mental Health Regulation 2000 (NSW) reg 19.

154 *Review of the Mental Health Act 1990, Discussion Paper 2: The Mental Health Act 1990 (2004)* NSW Government, 30, Qs 44, 45.

155 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 32(2)

156 Ibid, ss 39, 40.

157 *Review of the Mental Health Act 1990, Discussion Paper 2: The Mental Health Act 1990* (2004) NSW Government, 34.

158 NSW Law Reform Commission, P*eople with an Intellectual Disability and the Criminal Justice System: Report 80* (1996), Sydney, 193-194, Rec 21.

159 *MHA* ss 83, 84.

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

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

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

163 *MHA* s 84(3).

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

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

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

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

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

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

170 Ibid, 35, Q 55.

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

172 *MHA* s 93(1).

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

174 *MHA* s 94.

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

176 *MHA* s 109.

177 *MHA* s 101.

178 *MHA* ss 102-104.

179 *MHA* ss 105- 107.

180 See, generally, the discussion in McDonald v Commissioner of Corrective Services [2006] NSWSC 496; Wedge v Commissioner of Corrective Services [2006] NSWSC 998.

181 *Victims Rights Act 1996* (NSW) s 5, The term 'harm' includes actual physical bodily harm, mental illness or nervous shock, or the deliberate taking, destruction or damage of the person's property. If a victim dies as a result of the act concerned, a member of the person's immediate family is also a victim of crime.

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

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

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

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

186 *Review of the Queensland Mental Health Act 2000, Discussion Paper* (2006).

187 *Criminal Justice (Mental Impairment) Act 1999* (Tas) ss 33, 35; see also *Criminal Law Consolidation Act 1935* (SA).

SHPN (MH) 060178