

1. Introduction

History of the Review

- 1.1 The NSW Parliament passed the *Mental Health Act 1990* (NSW) ('1990 Act') and the *Mental Health (Criminal Procedure) Act 1990* (NSW) ('MHCP Act') in 1990.
- 1.2 At that time, the 1990 Act 'was considered by some to be a high water mark in Australian mental health legislation in relation to the recognition it gave to the rights and liberty of persons with a mental illness'. The Mental Health Act Implementation Monitoring Committee reviewed the Act shortly after its introduction, and its report provided the basis for a series of statutory amendments in 1994 and 1997.¹
- 1.3 In 2002, the Legislative Council Select Committee on Mental Health released a report, *Inquiry into Mental Health Services in New South Wales*. The Committee made a number of substantial findings in relation to mental health services in the civil and forensic context, and a range of recommendations for reform.²
- 1.4 In 2004, the NSW Government commenced a substantial review of the 1990 Act. This review has arisen out of that broader review, which culminated in the enactment of the *Mental Health Act 2007* (NSW) ('2007 Act'). Once the 2007 Act commences, it will transfer the provisions currently contained in Chapter 5 of the 1990 Act into the MHCP Act, with some amendment.
- 1.5 In 2005, the MHCP Act was reviewed by a NSW Government Interdepartmental Committee, which made a series of recommendations to simplify procedures, improve operational efficiency and update the law in relation to people with a mental illness, mental condition or intellectual disability. The Committee's recommendations were based on the NSW Law Reform Commission's report on people with an intellectual disability in the criminal justice system (1996), and

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

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

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

Specific Issues under the Terms of Reference

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

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

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

The Review Process

- 1.8 Mr James released a Consultation Paper in December 2006, which provided an overview of the existing law and practice in relation to the areas covered by the review, and outlined various options for reform.
- 1.9 The Consultation Paper was made available on the Mental Health Review Tribunal and NSW Health websites. In addition, Mr James circulated the paper widely to stakeholder groups, including mental health service providers and consumers, non-governmental organisations involved in the mental health field, government agencies and all local council libraries throughout New South Wales.
- 1.10 The Review received 50 formal submissions in response to the Consultation Paper from Government agencies, organisations and individuals working within the forensic mental health system, victims and members of the community (Appendix 1 contains a list of written submissions received). Numerous informal representations were also made to Mr James at Consultation meetings.
- 1.11 Mr James personally conducted a large number of consultation meetings with stakeholders, interested persons and groups—including patient groups, psychiatrists, judges, members of the NSW Bar, the Law Society of NSW, the Mental Health Advocacy Service, the Legal Aid Commission, the Australian Medical Association, the Mental Health Advisory Council, the Schizophrenia Fellowship, the Homicide Victims Support Group, the Victims of Crime Assistance League, Enough is Enough, ARAFMI NSW (Inc), the NSW Police Force, NSW Health (including Justice Health and the Forensic Executive Support Unit), the Attorney General's Department, the Department of Corrective Services, the Department of Juvenile Justice, the Serious Offenders Review Council, and members of the Mental Health Review Tribunal and others.
- 1.12 Finally, the Government asked Mr James to convene and chair a Taskforce to assist with the review. Some 25 representatives of stakeholders from a number of fields involved in the forensic mental health system were nominated by the Minister to take part in the Taskforce. These stakeholders were primarily

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

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

The Administrative Review

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

The NSW Law Reform Commission

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

The Mental Health Policy Context

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

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

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

- Expansion of Community Forensic Mental Health Services—Community forensic mental health services will provide assessment, support court diversion, discharge planning from custody and case management of difficult adults and adolescents with a mental illness in contact with the criminal justice system.
- Supporting People with Mental Illness in the Prison System—this involves providing enhancement funding for programs to assist people with mental illness in correctional centres who are exhibiting challenging behaviours.
- Building and Operating a New Forensic Facility at Long Bay Prison.⁵

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

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

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

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

1.20 The Plan commits the NSW Government to: various targets including; increasing the percentage of people with a mental illness aged 15-64 who are employed to 34% by 2016; and increasing the community participation rates of people with a mental illness by 40% by 2016.⁸ To achieve these targets, the Government will implement the State's plan for improving mental health services, *NSW New Direction for Mental Health*, involving \$940 million of additional funding over five years, including:

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

⁶ NSW Government, *State Plan: A New Direction for NSW* (2006).

⁷ *Ibid*, 73.

⁸ *Ibid*.

⁹ *Ibid*.

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

The International Context

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

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

- Recognise that all people are equal before the law, prohibit discrimination on the basis of disability, guarantee equal legal protection against discrimination, and ensure equal and effective access to justice for people with disabilities;
- Ensure that people with disabilities enjoy the right to liberty and security and are not deprived of their liberty unlawfully or arbitrarily
- Protect people with disabilities from torture and from cruel, inhuman or degrading treatment or punishment, and recognise their right of respect for their physical and mental integrity; and

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

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

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

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

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

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

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

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

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

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

2. Underlying Principles

- 2.1 The present Forensic Mental Health system in New South Wales is derived from an historical context in which all persons found unfit for trial or not guilty by reason of mental illness were detained in strict custody. That system originated in times in which no or no useful treatment might be available for such persons, and where there was a perception that all such persons were dangerous no matter what their individual condition might be.
- 2.2 The modern attitudes to mental health, national and international standards reflected in international instruments to which Australia is a party, and the announcements of Federal and State Governments concerning the issue accept that detention for treatment for mental illness is appropriate in a context in which that detention is warranted as necessary on community safety grounds.
- 2.3 Where the detention is involuntary, it is liable to be reviewed at law so as to ensure that it is justified. Where a person who has not been convicted and the subject of sentence is detained on the ground of community safety, detention can only be justified so long as there is that appropriate necessity.
- 2.4 The Government has committed to a mental health system which is characterised by the least restrictive care consistent with safe and effective treatment. Where that treatment can be provided in the community it should be. The system should provide an alternative to the long-term detention of persons who have not been convicted and sentenced but who have been detained on unstated and indeterminate grounds.
- 2.5 The *Mental Health (Criminal Procedure) Act 1990* was amended following a Government initiative in 2005 which amendment took effect as and from 1 January 2006. The courts were empowered under section 39 to make such order in respect to persons found not guilty by reason of mental illness on such terms as to the court seems fit, to release a person from custody either unconditionally or subject to conditions but the court is not to make an order for the release of the person from custody unless it is satisfied on the balance of probabilities that the safety of the person or any member of the public will not be

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

- 2.6 Those amendments reflect the modern perception that detention must be justified on safety or treatment grounds. Similarly, the treatment of those unfit for trial yet not guilty by reason of mental illness, has been equated by the legislation inconsistency. A further inconsistency has occurred with that of those subject to a verdict of not guilty by reason of mental illness. The reforms proposed in this Report are designed to be consistent with those introduced in 2006 and to avoid the tensions between those reforms, as exemplified in the role of the courts and the exercise of Executive discretion.
- 2.7 Those found unfit for trial in respect of whom there is no verdict of that kind have been the subject of a limiting term fixed by the courts designed to ensure that they would not be detained indefinitely or longer than they would be if sentenced since that term has to because such people have been detained in Corrective Services establishments, where that limiting term has been equated to a term of imprisonment equivalent to the actual time that such a person is to spend in custody. That is inconsistent with the original purpose of the limiting term and has resulted in discrimination against such persons which itself is out of accord with Federal and State law otherwise and international instruments. These matters which if not rectified could result in successful challenges in individual cases where administrative review might be sought.
- 2.8 The Law Reform Commission has a substantive reference on the treatment of such persons within the criminal justice system when dealing with the sentencing of those suffering from cognitive deficits. The anomalous position of such people deserves an intensive examination of any justification for their being detained on any basis other than community safety.

Legislative Principles

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

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

- (a) to provide for the care, treatment and control of those persons, and
- (b) to facilitate the care, treatment and control of those persons through community care facilities and hospital facilities, and
- (c) to facilitate the provision of hospital care for those persons on an informal and voluntary basis where appropriate and, in a limited number of situations, on an involuntary basis, and
- (d) while protecting the civil rights of those persons, to give an opportunity for those persons to have access to appropriate care.

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

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

- (a) persons who are mentally ill or who are mentally disordered receive the best possible care and treatment in the least restrictive environment enabling the care and treatment to be effectively given, and
- (b) in providing for the care and treatment of persons who are mentally ill or who are mentally disordered, any restriction on the liberty of patients and other persons who are mentally ill or mentally disordered and any interference with their rights, dignity and self-respect are kept to the minimum necessary in the circumstances.

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

The objects of this Act are:

- (a) to provide for the care, treatment and control of persons who are mentally ill or mentally disordered, and

- (b) to facilitate the care, treatment and control of those persons through community care facilities, and
- (c) to facilitate the provision of hospital care for those persons on a voluntary basis where appropriate and, in a limited number of situations, on an involuntary basis, and
- (d) while protecting the civil rights of those persons, to give an opportunity for those persons to have access to appropriate care, and
- (e) to facilitate the involvement of those persons, and persons caring for them, in decisions involving appropriate care, treatment and control.

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

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

- (a) people with a mental illness or mental disorder should receive the best possible care and treatment in the least restrictive environment enabling the care and treatment to be effectively given,
- (b) people with a mental illness or mental disorder should be provided with timely and high quality treatment and care in accordance with professionally accepted standards,
- (c) the provision of care and treatment should be designed to assist people with a mental illness or mental disorder, wherever possible, to live, work and participate in the community,
- (d) the prescription of medicine to a person with a mental illness or mental disorder should meet the health needs of the person and should be given only for therapeutic or diagnostic needs and not as a punishment or for the convenience of others,
- (e) people with a mental illness or mental disorder should be provided with appropriate information about treatment, treatment alternatives and the effects of treatment,
- (f) any restriction on the liberty of patients and other people with a mental illness or mental disorder and any interference with their rights, dignity and self-respect is to be kept to the minimum necessary in the circumstances,
- (g) the age-related, gender-related, religious, cultural, language and other special needs of people with a mental illness or mental disorder should be recognised,

- (h) every effort that is reasonably practicable should be made to involve persons with a mental illness or mental disorder in the development of treatment plans and plans for ongoing care,
- (i) people with a mental illness or mental disorder should be informed of their legal rights and other entitlements under this Act and all reasonable efforts should be made to ensure the information is given in the language, mode of communication or terms that they are most likely to understand,
- (j) the role of carers for people with a mental illness or mental disorder and their rights to be kept informed should be given effect.

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

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

Recommendation 1

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

3. Forensic Patients

The Definition of a Forensic Patient

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

- (a) is detained in a hospital, prison or other place, or released from custody subject to conditions, pursuant to an order under section 10(3)(c), 14, 17(3), 25, 27 or 39 of the *Mental Health (Criminal Procedure) Act 1990* or section 7(4) of the *Criminal Appeal Act 1912* (including that subsection as applied by section 5AA(5) of that Act), or
- (b) is detained in a hospital pending the person's committal for trial for an offence or pending the person's trial for an offence, or
- (c) has been transferred to a hospital while serving a sentence of imprisonment and who has not been classified by the Tribunal as a continued treatment patient, or
- (d) is granted bail pursuant to section 14(b)(ii) or 17(2) of the *Mental Health (Criminal Procedure) Act 1990*.¹⁶

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

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

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

- 3.4 For example, in *Mailes v DPP*,¹⁷ the plaintiff had been found unfit to be tried, and a special hearing had resulted in a qualified finding of guilt. The judge had nominated a limiting term, referred the plaintiff to the Mental Health Review Tribunal ('Tribunal') for a determination pursuant to s 24 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) ('MHCP Act'), and ordered that he be detained in custody pending notification of the Tribunal's determination and the court's further order.
- 3.5 The Tribunal subsequently notified the court of its determination, in which case the court had the discretion to order the plaintiff's detention under s 27 of the Act. As no such order was made, the plaintiff remained in custody but the Tribunal declined to review him on the basis that he was not a 'forensic patient' (as the statutory definition does not include a person detained pursuant to an order under s 24 of the Act). The court agreed that the plaintiff did not fall within the definition of a 'forensic patient', but noted that he would have become one once an order was made under s 27 of the Act.¹⁸
- 3.6 The Consultation Paper noted that a narrative definition of 'forensic patient' would provide greater clarity and consistency regarding the operation of the forensic mental health system and those who are covered by it; and would protect against technical gaps in coverage. Accordingly, it suggested amending the legislation to provide a simplified definition of a 'forensic patient' (and consistency in the references to them), and the submissions overwhelmingly supported this option.
- 3.7 Therefore, the Review recommends that the legislation be amended to provide a narrative definition of a 'forensic patient' that expressly and comprehensively outlines the circumstances in which a person becomes a forensic patient. Under a narrative definition, a 'forensic patient' should include a person detained or conditionally released (including on bail) pending a fitness inquiry, after being found unfit to be tried, after a qualified finding of guilt (eg where subject to a limiting term), or after a special verdict of not guilty due to mental illness. (See chapter 4 in relation to transferees from the prison system).

¹⁷ *Mailes v DPP* [2006] NSWSC 267.

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

Recommendation 2

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

Powers to Detain, Treat and Release

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

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

Recommendation 3

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

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

Intellectual Disability

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

- Diverted from the criminal justice system under Part 3 of the MHCP Act (for summary matters);²⁰
- Found unfit to be tried (on indictment), in which case the person may be released, subjected to a normal trial (if he or she becomes fit within a specified period) or subjected to a special hearing (which may result in a finding of not guilty, a special verdict of not guilty due to mental illness, or a qualified finding of guilt; or
- Subject to a normal trial, which may result in an acquittal, conviction or a special verdict of not guilty due to mental illness (if the M’Naghten criteria are satisfied).

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

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

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

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

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

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

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

- The Criminal Justice Support Network, which provides support for people with intellectual disabilities in court and police interviews.
- The Criminal Justice Program, which includes recurrent funding for the Department of Ageing, Disability and Home Care to provide accommodation and related supported for people with significant intellectual disabilities who are exiting correctional and juvenile justice centres.²³
- The Department of Corrective Services has a multidisciplinary Disability Services Unit, and several support units to provide assessment and programs for certain prisoners with intellectual disabilities within correctional centres.

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

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

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

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

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

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

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

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

²⁴ NSW Council for Intellectual Disability submission.

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

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

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

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

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

Women and Children

- 3.21 The Consultation Paper also noted that the forensic mental health legislation does not make any specific provision for forensic patients under the age of 18 years, and that there is a general lack of information regarding the position of juveniles within the forensic mental health system.
- 3.22 The Consultation Paper outlined various reform options in relation to children, including making specific provision for them within the forensic mental health system, and conducting a further inquiry into the need for specific provision in such legislation. The submissions generally supported either one, or both, of these options. Several submissions noted the need to take care in identifying the particular needs of children and the most appropriate arrangements and services for them, including non-custodial accommodation options.
- 3.23 Given the general lack of information in relation to children and young people in the forensic mental health system, the Review is not able to recommend any specific reforms in relation to them. The Review instead recommends that this matter be included in the work to be conducted by the Human Services and Criminal Justice Chief Executive Officers, in developing specific legislative and administrative proposals dealing with the detention, care, treatment, release and co-ordinated community support of forensic patients with an intellectual disability. As several submissions suggested that similar concerns arise in relation to forensic patients who are women, the Review recommends that they also be included within the scope of this work.
- 3.24 The submissions also raised concerns regarding issues such as mechanisms for diversion from the criminal justice system, the regime for determining criminal responsibility, and the detention of people found not criminally responsible for their actions. The Review considers that such issues could be considered by the NSW Law Reform Commission. These matters are discussed when considering recommendations 7 and 17.

Recommendation 4

The NSW Government should:

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

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

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

Federal Offenders

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendation 5

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

Recommendation 6

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

References to Mental Illness and Mental Condition

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

3.34 The Consultation Paper proposed a review of the concepts and terminology used in the law and forensic mental health legislation, including the terms ‘mental illness’ and ‘mental condition’, and most of the submissions supported this option. The NSW Law Reform Commission has commenced a review of the sentencing principles applying to people with cognitive or mental health impairments³⁰ and has sought a wider reference to consider these matters. The Review considers that that body should also undertake the proposed review of these concepts and this terminology in the interest of consistency and particularly because this review relates to the consequences of Courts’ examining the curial process on such matters.

Recommendation 7

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

³⁰ See the Commission’s website (www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_index)

4. Prison Inmates

The Current Law

- 4.1 In NSW, all prison inmates are screened on reception to prison for medical and psychiatric illnesses, as well as substance abuse. If a psychiatric illness is identified at this or a later point, psychiatric care may be provided within the correctional centre. Alternatively, if specialist medical or more intensive psychiatric services are considered necessary—and beds are available—the person may be transferred to screening units within the correctional setting.³¹
- 4.2 The *Mental Health Act 1990* (NSW) ('1990 Act') provides that a person may become a forensic patient if detained in a hospital while on remand for an offence, or if transferred to a hospital while serving a sentence of imprisonment or remanded in prison.³² The Chief Health Officer may order that a prison inmate be transferred to a hospital if it appears, on the certificates of two medical practitioners (one being a psychiatrist) that he or she is a 'mentally ill person' (as defined in the Act);³³ or is suffering from a mental condition for which treatment is available in a hospital (and the person consents to the transfer).³⁴
- 4.3 A forensic patient who has been transferred from a prison to hospital must be transferred back to a prison within seven days unless the Chief Health Officer (or an authorised person) considers that he or she is a mentally ill person, or is suffering from a mental condition for which treatment is available in a hospital—and that other care of an appropriate kind would not be reasonably available to the patient in prison. The Chief Health Officer or authorised person may, however, transfer a forensic patient back to a prison at any time if his or her condition changes. In addition, the patient may at any time ask the Mental Health

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

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

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

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

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

- 4.4 The Tribunal must review the person's case as soon as practicable after his or her transfer to a hospital, and make a recommendation to the Minister as to the person's continued detention, care or treatment in the hospital.³⁶ The Tribunal may also recommend that a transferee be transferred back to prison at any time.³⁷ If a patient asks to be moved back to prison, s 96 of the Act provides that the Tribunal must make the recommendation if satisfied that the person is not a 'mentally ill person' (as defined).
- 4.5 The *Mental Health Act 2007* (NSW) transfers these provisions into the *Mental Health (Criminal Procedure) Act 1990* (NSW) ('MHCP Act'), with some amendment.³⁸

A New Category?

- 4.6 Currently, the definition of a 'forensic patient' includes a person who has been found unfit to be tried or not guilty of an offence by reason of mental illness, as well as members of the prison population who are transferred to a hospital for mental health treatment (ie 'transferees'). The 1990 Act deals with forensic patients as a whole in relation to matters such as security conditions, leave arrangements, breaches of conditional release, and dealing with escapes. However, the Act:
- Makes separate provision for each category of forensic patient in relation to the initial and periodic reviews of their cases, and the termination of their status as forensic patients; and
 - Makes specific provision for transferees in relation to their transfer to and from hospital, certain Tribunal reviews, the effect of the transfer on their sentence, and the Tribunal's capacity to recommend their release.

³⁵ 1990 Act, ss 96, 100A.

³⁶ 1990 Act, s 86(1).

³⁷ 1990 Act, s 86(3).

³⁸ 2007 Act, Sch 7. For example, the new provisions provide for the Director-General of NSW Health, rather than the Chief Health Officer, to make these orders.

- 4.7 The Terms of Reference ask the Review to consider the current definition of forensic patient, and in particular whether there should be two categories of patients—that is, ‘forensic patients’ and ‘security patients’, the latter to cover people who are transferees to a hospital from a correctional centre.
- 4.8 A NSW Health discussion paper (2004) suggested that establishing separate categories of forensic patient would allow differential approaches to be taken to the management and care of these groups in relation to security, leave, release, status as a prison inmate, and provisions for transfer to other jurisdictions.³⁹
- 4.9 Several other Australian jurisdictions distinguish between forensic patients who have been convicted of offences and those who are not responsible at law. For example, Victoria classifies as ‘forensic patients’ those detained in a mental health service while on remand or under a supervision order (after being found unfit to be tried or not guilty due to mental illness);⁴⁰ and as ‘security patients’ those convicted offenders who are subject to a hospital security order (available as a sentencing option), or a restricted hospital transfer order.⁴¹
- 4.10 Generally, the Victorian legislation makes separate provision for forensic and security patients in relation to matters such as security conditions, transfer to other hospitals, leaves of absence, apprehension, and discharge. For example, forensic patients are eligible for leaves of absence, extended leave of up to 12 months, ‘on-ground’ or ‘off-ground’ leave or special leave. By contrast, security patients are eligible for leaves of absence for up to 6 months (which can be continued) or special leave. The provisions for granting and reviewing such leave also differ, in particular as the Forensic Leave Panel has jurisdiction over certain decisions relating to forensic patients, while the Mental Health Review Board has jurisdiction over security patients.

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

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

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

- 4.11 The Northern Territory also makes specific provision in relation to convicted offenders. Part 11 of the *Mental Health and Related Services Act* (NT) provides for the admission of prisoners to an approved treatment facility, as well as discharge, leaves of absence and the making of arrangements between the Director of Correctional Services and Chief Health Officer to ensure the security and good order of prisoners receiving treatment outside a prison. The Part also specifies that a prisoner who has been admitted to such a facility is to be taken to be in lawful custody while he or she remains in the facility.
- 4.12 The Consultation Paper suggested either retaining the existing legislative provisions (which include transferees within the definition of a ‘forensic patient’), or amending the legislation to provide a new category of forensic patient for convicted offenders, and to make separate provision for their treatment, security, leave, release and inter-jurisdictional transfer.
- 4.13 The submissions were generally divided on this issue. Some submissions emphasised the legal distinction between those patients who are under conviction and those who are not, and noted that it is incompatible with the principles of criminal justice to categorise them together. In their view, removing the category of ‘transferees’ from the definition of a forensic patient would accord with principle and would facilitate the adoption of appropriate procedures for convicted offenders. On the other hand, other submissions emphasised that people should have the same access to treatment regardless of their convicted status, and expressed the concern that separate categories could discriminate against convicted offenders in terms of such access to treatment.
- 4.14 The Review has concluded that the legislation should be amended to create a new category of patient for members of the prison population who are on remand or serving sentences of imprisonment and transferred to a mental health facility for the following reasons.
- 4.15 First, it would greater reflect the important differences of legal principle between these categories of forensic patient. For example, people found not guilty of an offence due to mental illness, or unfit to be tried (but who have not yet had a special hearing) are not subject to any finding of guilt; and people detained after

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

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

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

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

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

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

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

Recommendation 8

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

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

Recommendation 9

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

Community Treatment Orders

- 4.21 The Terms of Reference ask the Review to consider the ability of the Tribunal to make community treatment orders ('CTO') for people who are in prison and who are mentally ill.
- 4.22 Generally, the 1990 Act provides a framework for making compulsory treatment orders for people detained in a hospital or living in the community on an existing order. The order requires the person to be present at a specified place, at reasonable times, to receive such medication, therapy, rehabilitation or other services, as are specified in a treatment plan. It operates for a period of up to six months (and may be renewed prior to its expiry).⁴²
- 4.23 Since the Consultation Paper was released, the *Mental Health Act 2007* (NSW) ('2007 Act') has been enacted (but not yet commenced). The 2007 Act combines the two previous forms of compulsory order into a new form of CTO, which may authorise compulsory medication and therapy, counselling, management, rehabilitation and other services in accordance with a treatment plan, and may operate for up to 12 months.⁴³

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

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

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

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

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

⁴⁴ 2007 Act, Ch 3.

- 4.27 The Consultation Paper suggested several options in this area, being retaining the current framework for providing mental health treatment to prison inmates, or amending the legislation to provide a framework for the making, implementing and monitoring of community treatment orders in the correctional context.
- 4.28 Several submissions supported retaining the current framework, generally on the basis that a person who is sufficiently mentally ill to require treatment should receive it in hospital rather than prison; and due to a concern that a CTO may become a substitute for proper medical care in hospital, for example by facilitating the transfer of a patient back into the ordinary prison system before clinically appropriate. Particular concerns were raised regarding the potential for abuses, such as the use of medication to control behaviour for administrative purposes, and the risk that prisons could become de facto psychiatric hospitals in a resource restricted environment.
- 4.29 On the other hand, several submissions supported the provision of a framework for making, implementing and monitoring CTOs in the correctional context. Such a regime was supported on the basis that it would be consistent with the principle that people with a mental illness (whether in the community or in prison) should have equal access to care and treatment and should not be treated differently; and that such orders would make it easier to plan and implement programs for post release treatment. Several submissions suggested possible safeguards for such a regime, including providing that a CTO cannot be imposed until the person has received an initial mental health assessment, care and treatment in hospital and his or her condition had stabilised.
- 4.30 The 2007 Act gives the Tribunal the power to make a CTO in relation to a forensic patient recommended to be released conditionally or to be transferred to a correctional centre or other place (but such an order will only have effect if confirmed by the prescribed authority). The Act provides that the provisions for making CTOs in the civil context apply to the making of any such order, subject to any modifications prescribed in regulations.⁴⁵

⁴⁵ 2007 Act, Sch 7.

- 4.31 This provision accords with the Review's conclusion that a framework for the making and implementation of CTOs in the correctional context is desirable. The making of CTOs for transferee patients should be a useful mechanism to ensure that, once a patient's condition has been stabilised in hospital, his or her mental health will not be allowed to deteriorate upon release back into the community or prison environment. As with the compulsory orders operating in the community, this should assist in the long-term management of an offender's mental health.
- 4.32 The Review also notes that these provisions contain a number of important safeguards against abuse, including that only the Tribunal may make such orders, and only where it is recommending the person's conditional release or transfer to a correctional centre; and provisions for the person subject to the order to apply to vary or revoke it, or appeal against its making. In addition, the CTO must be administered in accordance with the treatment plan approved by the Tribunal when it makes the order.
- 4.33 However, the Review does have several concerns in this area. First, CTOs should not be used as a substitute for proper medical care in hospital, for example by facilitating the transfer of a patient into the prison system before it is clinically appropriate (eg, for a transferee patient), or where it is not appropriate at all (eg, for a patient who is unfit or not guilty due to mental illness). Accordingly, the Tribunal should not make a CTO *for the purpose of* facilitating the patient's transfer to a correctional centre.
- 4.34 Second, the procedural and other safeguards applying in the civil context should apply equally in the correctional context. While the 2007 Act provides that the civil provisions would apply, it allows for modifications outlined in regulations. The Review does not consider that such safeguards, such as an avenue of appeal, should be subject to removal in this way. The Review also considers that additional safeguards may be necessary, such as a legislative requirement that a CTO be implemented only by qualified health officers.
- 4.35 Third, given the particular concerns arising from the extension to such orders to the correctional context, the Review recommends that the legislation be amended to require the Tribunal to review the case of any person who is subject to a Community

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

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

Recommendation 10

Amend the legislation to:

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

Transferee Patients and Parole

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

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

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

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

[T]his result preserves for Mr Wedge the most appropriate detention or release regime for the forensic patient, namely under Chapter 5 of the Act with its emphasis on community safety as well as the safety of Mr Wedge. It brings to bear the expertise of a specialised Tribunal for his and the community's benefit. It is not appropriate instead to bring to bear the parole regime applicable to the criminal process where mental illness is not centrally at issue and where revocation of parole lacks the civil rights afforded by Chapter 5.⁴⁶

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

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

4.41 In practice, the Court of Appeal's decision could result in an offender being detained as a forensic patient⁴⁸ until the expiry of his or her full prison sentence (despite an initial court order that the person be released at the end of his or her non-parole period). Given that some offenders may not have a history of violence, it is not clear why they should be subject to the more stringent regime operating under the forensic provisions of the Act than the civil provisions that apply to the detention, care and treatment of any other member the community. This is particularly the case given that some offenders may be transferred to a hospital under s 98 of the 1990 Act,⁴⁹ in which case there may be no suggestion that the forensic patient has ever posed a risk of harm to any person as a result of his or her condition.

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

⁴⁷ *Ibid*, [23].

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

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

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

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

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

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

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

- The Parole Authority could grant or revoke the parole order or impose parole conditions requiring ongoing treatment and supervision having regard to that risk;
- The Tribunal could hold an expedited review so that it may recommend (or, if the determining body, order) the person’s continued detention; classify the person as an involuntary patient under the civil provisions of the Act; or make a Community Treatment Order for ongoing treatment within the community.

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

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

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

Recommendation 11

Amend the legislation to provide that:

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