

10. The Role of the Mental Health Review Tribunal

Mental Health Review Tribunal and Forensic Patients

Under the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 a forensic patient is:

- a) a person who has been found unfit to be tried and is detained pending the finalisation of the court proceedings
- b) a person for whom a limiting term has been nominated after a special hearing
- c) a person who is the subject of a special verdict of act proven but not criminally responsible (until unconditionally released
- d) a person who is subject to an extension order or an interim extension order: s 72(2).

A person charged with an indictable offence can become a forensic patient in four ways:

- when the Court finds the person unfit to stand trial and remands them in custody: s 72
- where the person remains unfit, and at the end of a special hearing, the Court finds on the limited evidence that the person committed the act (or an alternative). The Court decides that if the person was being sentenced at trial, they would need to spend a period of time in detention, and so the Court sets a limiting term: Pt 2, Div 3 and s 72
- at the end of the person's limiting term if the Supreme Court decides to extend the person's forensic patient status under Pt 6
- following either a special hearing or a trial, the Court decides that the person committed the act charged but has made out the defence that they are not criminally responsible by reason of mental illness: ss 31, 33, 67.

Once a person becomes a forensic patient, the Tribunal will be the decision maker about the fundamental aspects of that person's life.

The Tribunal decides:

- Whether the forensic patient should be detained and if so, where they should be detained. Should it be custody, a mental health facility or some other place?
- When the forensic patient may have leave from that place and what kind of leave. The Tribunal's orders usually refer to:
 - escorted leave (with staff from the facility),
 - supervised leave (in the company of people who are not staff, but who are approved by staff to act as supervisors),
 - unsupervised leave (where the person is on their own, but subject to a leave plan imposed by the facility, which includes regular and random monitoring)

Leave can be granted for daytime only, or include periods of time overnight. The Tribunal can impose detailed conditions, or allow the treating team at the facility the discretion to impose their own conditions.

- When a forensic patient may be conditionally released. This means that a forensic patient lives in the community, under the supervision of a case manager. If the person has a major mental illness, the case manager will be part of the local Community Mental Health Team and the person will also see the psychiatrist who works with that CMHT. If the person has a cognitive impairment the case manager will be from the Community Safety Program, which is a part of the Department of Communities and Justice. A person who has been conditionally released to a nursing home may have the Director of Nursing as their case manager. The Tribunal can decide the type of conditions to impose but has a standard set of conditions that it uses as a starting point.
- When a forensic patient is ready for unconditional release. This means the person is no longer a forensic patient or under the control of the tribunal. The Tribunal may make a community treatment order at the time of unconditional release or the person may transition to voluntary mental health care.

The Tribunal relies on public sector facilities to follow the Ministry of Health Policy Directive which is [PD2012_50](#). The Tribunal often uses the same terminology as is found in that Directive. The Directive has not yet been updated to refer to the new Act. However, the statutory criteria in relation to leave and release have not changed significantly, so that the Policy Directive is still relevant to the practical implementation of leave.

The Tribunal can only grant leave or conditional or unconditional release if satisfied that release will not seriously endanger the safety of the forensic patient, the public or a registered victim (but only for leave): ss 84(2) and 94(3). The phrase “seriously endanger” was considered by the Court of Appeal in *Attorney General for the State of New South Wales v XY* [2014] NSWCA 466, Beazley P at [51], Basten JA at [168], McColl JA agreeing. The Court of Appeal held that the decision involved weighing both the probability of the risk occurring and the gravity of the risk were it to occur.

A person who is subject to a limiting term cannot be conditionally released unless the Tribunal is also satisfied that the person has spent sufficient time in custody: s 84(1)(c). The meaning of the phrase “sufficient time” is discussed in *Adams* [2013] NSWMHRT 1 and *Talbingo* [2015] NSWMHRT 6.

The Tribunal will conduct a review of forensic patients as soon as practicable after their court process has finished and will then usually review a forensic patient every six months. The Tribunal may extend this timeframe to 12 months if there are reasonable grounds to do so or an earlier review is not required: s 77.

Other functions of the Tribunal

The Tribunal also has a role in overseeing compulsory mental health care for people in custody. Involuntary treatment could include an order that a person detained in custody be involuntarily treated in a mental health facility (usually the Long Bay Hospital inside the Long Bay Correctional Complex or the Forensic Hospital for juveniles and most women) under s 90 of the Act. People in this situation are called correctional patients under s 73 of the Act. There is also an option for the Tribunal to order compulsory mental health care in a correctional centre under a community treatment order that is made under s 99 of the Act.

Practice Directions

The Tribunal has issued three Practice Directions that deal with its general forensic processes; processes unique to forensic patients who are subject to limiting terms or extension orders and correctional patients. These can be found on the Tribunal's Website and are titled:

- MHCIFP Act – Correctional Patients and Forensic CTOs
- MHCIFP Act – Forensic Patients Overview
- MHCIFP Act – Limiting Terms and Extension Orders.

These Practice Directions set out the requirements for notifying the Tribunal about the issues to be considered at an upcoming hearing, as well as the requirements for the filing and distribution of evidence and submissions.