

**“Our Prisons-
Human Rights, Mental Health & Privatisation”**

Applying the Amended *Mental Health (Forensic Provisions) Act 1990*

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*The following paper provides a brief overview of the main changes introduced by the Mental Health Legislation Amendment (Forensic Provisions) Act 2008 on 1 March 2009 and an overview of the forensic mental health system in New South Wales. It focuses on changes made to the role and functions of the Mental Health Review Tribunal and on developments in the care, treatment and detention of forensic patients in New South Wales.*¹

We are all affected by mental illness in some way, whether as individuals or through our family and friends. Increasingly as a society we are beginning to realise this and to demand of government that the mentally ill receive prompt care, treatment and support in the least restrictive environment consistent with safety.

But there remains a deep prejudice and fear in the community about the mentally ill. That prejudice and fear, understandably, is greatest about those who have been detained after committing acts of violence as a result of their mental illness. These are the forensic patients. Many people would prefer this group to be locked away, out of harms way, never to be released.

Fortunately that is not the law in NSW. The law says that a forensic patient in NSW who has been detained in a mental health facility or prison can be given

¹ *The paper is based on a paper delivered by the author at the NSW Legal Aid Commission Criminal Law conference and similar articles which appeared in the June edition of the NSW Law Society Journal and the April issue of the Judicial Officer's Bulletin.*

leave or release into the community if to do so would NOT seriously endanger their safety or the safety of others.

Thus the law focuses our attention clearly on the risk posed by the patient to themselves and to the community and today I want to talk to you about the NSW forensic mental health system, which has the responsibility for managing that risk.

In recent years, the system has gone through enormous change both in terms of law reform and improved forensic mental health services. Overall, the changes have made the forensic regime in NSW more effective, transparent and accountable.

Overview of the Changes

The *Mental Health Legislation Amendment (Forensic Provisions) Act 2008* (the Amendment Act) came into effect on 1 March 2009.² The Amendment Act retitles the *Mental Health (Criminal Procedure) Act 1990* as the *Mental Health (Forensic Provisions) Act 1990* (the Act).

The Amendment Act abolishes the system of determinations previously made by the Minister for Health and Governor for the treatment, care, detention and release of persons found not guilty by reason of mental illness or unfit for trial under the *Mental Health (Criminal Procedure) Act*. It makes the Mental Health Review Tribunal, constituted by a special Forensic Panel, the determining authority in such matters. The Panel must be presided over by a current or former judge when considering release matters. The Amendment Act also introduces a new category of patient — correctional patient — which covers persons who develop mental illness whilst in custody on remand (including persons refused bail) or whilst serving a sentence. The category “forensic patients” only includes persons found not guilty by reason of mental illness and either detained or released subject to conditions or persons found unfit to stand trial who are detained.

² Gazette No 44 of 27.2.2009, p1.

The Act does not change the legal concepts of unfit for trial and not guilty due to mental illness. The NSW Law Reform Commission is currently considering those concepts and the relevant procedure as part of its reference on sentencing of persons suffering from mental illness or cognitive deficit.

Role of the Tribunal

For those of you who don't know, the Tribunal is a quasi-judicial body constituted under the Mental Health Act 2007. It reviews the cases of detained patients in both the civil and forensic systems. In the last financial year it conducted 8,429 civil reviews and 788 forensic reviews. The Tribunal is required to conduct its hearings with as little formality and technicality as a proper consideration of the matters before it allow. Participants at hearings usually include the patient and their lawyer, primary carers and members of the treating team and or case managers. In forensic review hearings it is also not uncommon for victims to attend. In the forensic area, following the amendments, the Tribunal is required to review the cases of correctional patients and forensic patients.

Forensic Patients

In relation to forensic patients, the Tribunal is required to review the cases of persons found unfit to be tried (as soon as practicable after the finding is made) to determine whether they are likely to remain unfit for 12 months following the finding of unfitness.³ At the same time the Tribunal may now make a recommendation to the Court about the person's care and treatment needs.

The Tribunal is also required to review the cases of persons found not guilty by reason of mental illness as soon as practicable after the finding is made and must make orders as to the person's care, detention, treatment or release.⁴ Thereafter the Tribunal conducts regular six monthly reviews of the

³ Mental Health (Forensic Provisions) Act 1990, s 16(1).

⁴ Mental Health (Forensic Provisions) Act 1990, s 44.

cases of every forensic patient,⁵ and in some circumstances the Tribunal can now extend the review period up to 12 months. When the Tribunal conducts further reviews of persons found unfit to be tried, it must consider the fitness issue at each review.

The Tribunal may make orders to permit leave and release for forensic patients from mental health facilities, correctional centres or other places and may make orders which would have the effect of terminating the status of a person as a forensic patient.⁶ I will say more about this shortly.

The new provisions continue the power for the Tribunal to reclassify a forensic patient, on a limiting term, as an involuntary patient when they are in the last six months of the term⁷. Similarly the Act in section 65 now extends this power to correctional patients in the last six months of their sentence. These provisions are commonly used in conjunction with the community treatment order provisions under the Mental Health Act 2007 to reclassify the person and then release them immediately to the community on a CTO.

Correctional Patients

As noted at the beginning, the Amendment Act introduces a new category of patient — correctional patient — which covers persons who develop mental illness whilst in custody on remand (including persons refused bail) or whilst serving a sentence.

The provisions are essentially the same as the old transferee provisions. Under s55, the Director-General (or delegate) may direct that a person imprisoned in a correctional centre be transferred to a mental health facility, if it appears that the person is a mentally ill person (as defined in the Mental Health Act) on the basis of two certificates about the person's condition issued by two medical practitioners (one of whom must be a psychiatrist).

⁵ Mental Health (Forensic Provisions) Act 1990, s 46(1).

⁶ Mental Health (Forensic Provisions) Act 1990, ss 51–53.

⁷ Mental Health (Forensic Provisions) Act 1990, s 53

In addition, under s55(4), a transfer order may be made with the person's consent if it appears to the Director-General, on the basis of the certificates, that the person is suffering from a mental condition for which treatment is available in a mental health facility.

When the Director-General (or delegate) makes an order under s55, the actual transfer does not always take place immediately because a place may not be immediately available in a mental health facility. Section 58 makes provision for the Tribunal to conduct limited reviews at least once each month of such cases until the person is transferred (or until the order is revoked).

Under s59 the Tribunal must review the case of a person transferred to a mental health facility as soon as practicable after the transfer and may order the persons continued detention, care or treatment in a mental health facility or correctional centre. The Tribunal must continue to review the case of a correctional patient every six months and may review them at any time (s61(1)).

The significant point in relation to correctional patients is that the Tribunal cannot grant them leave or release to but can under s62(2) recommend leave for correctional patients to the Commissioner of Corrective Services who can grant the leave. As I mentioned before the Tribunal can reclassify correctional patients as involuntary patients in the last six months of their term. Section 64 sets out the circumstances in which a person ceases to be a correctional patient.

CTOs

A real innovation under the new provisions is that the Act now provides in section 67 for forensic Community Treatment Orders (CTOs) for compulsory treatment in correctional centres. These orders can be made by the Tribunal for forensic patients, correctional patients and inmates.⁸ The Tribunal is currently working with Justice Health to implement this aspect of the

⁸ Mental Health (Forensic Provisions) Act 1990, s 67.

legislation. Generally speaking the CTO provisions of the Mental Health Act 2007 apply to forensic CTOs with some variations as specified in the Regulations. The Act envisages that the forensic CTO may be amended in order to continue when the person is released thereby providing a vital continuity of care link between the corrections environment and the community.

Specific requirements for orders

The Act is now far more prescriptive about the matters the Tribunal should consider when determining what order to make in relation to forensic patients and correctional patients. The Tribunal is now required to consider the following matters set out in section 74:

1. whether a person is suffering from a mental illness or other mental condition,
2. whether there are reasonable grounds for believing that care treatment or control is necessary for the person's own protection from serious harm or the protection of others from serious harm;
3. the continuing condition of the person, including any likely deterioration and the effects of such deterioration;
4. whether a forensic patient subject to a limiting term (imposed in consequence of having been found unfit for trial) has spent sufficient time in custody; and
5. in the case of proposed release, a report by a forensic psychiatrist or other person of a class prescribed by the regulation (such as a forensic psychologist) not currently involved in treating the person, as to the condition of the patient and whether the safety of that person or any member of the public will be seriously endangered by that person's release.

The last requirement for an independent report in release matters reflects section 43 which provides that where the Tribunal considers ordering the release of a forensic patient, it must not make the order unless it is satisfied that the safety of the patient or any member of the public will not be seriously

endangered by the patient's release and that no other care of a less restrictive kind consistent with safe and effective care is appropriate.⁹

The other limitation on the release power is that the Tribunal must not make an order for release if the court has remanded the person in custody but may make a recommendation to the court as to the person's release.¹⁰

The Act provides that the Tribunal may release a person with or without conditions. If the Tribunal releases a person conditionally it may impose conditions specified in s75 including conditions as to medication, living arrangements and use or non-use of alcohol and other substances. In addition, victims may apply for further conditions to be imposed under s76 for non contact with the victim or their family members and prohibitions or restrictions on visiting places. Such restrictions may also be imposed in relation to any leave granted by the Tribunal.

When considering leave or release the Tribunal should also have regard to whether the authorised medical officer has discharged the duties prescribed by s76 G, namely consultation with the patient, primary carer and, where appropriate, with dependents and relevant agencies.

Finally and in addition to these considerations, the "Principles for care and treatment" set out in section 68 of the *Mental Health Act 2007* apply to forensic patients and correctional patients¹¹.

Now, none of these requirements are surprising but they do add a degree of transparency and potential accountability for the Tribunal's decision making process and they make it clear that forensic patients and correctional patients are entitled to receive appropriate care and treatment which is no more restrictive than is necessary for safety reasons.

⁹ Mental Health (Forensic Provisions) Act 1990, s 43.

¹⁰ Mental Health (Forensic Provisions) Act 1990, s 47(2).

¹¹ Mental Health (Forensic Provisions) Act 1990, s 76B.

Right of appearance or submissions

Section 154 of the Mental Health Act 2007 provides that forensic and correctional patients having any matter before the Tribunal **must** be represented; unless the patient decides he or she does not want to be represented. The forensic patient is to be represented by an Australian legal practitioner or, with the approval of the Tribunal, by another person of the patient's choice.

The new development however is that although the Tribunal is now the determining authority for leave and release matters, the Act now provides in s76A(2) that the Minister for Health and the Attorney General may appear before the Tribunal, or make submissions to the Tribunal in relation to the possible release or grant of leave to a forensic patient. Because of this provision, and the victim's right to seek place restriction and non association orders on leave and release matters, the Tribunal has introduced a requirement for treating teams and forensic patients to give notice of any intended application for leave and release. This allows the Tribunal to give the Minister for Health, the Attorney General and victims appropriate notice of such applications.

Appeals from Forensic Division of Tribunal

The Act now provides in Section 77A for appeals from Tribunal decisions to the Supreme Court and to the Court of Appeal.

Tribunal decisions

The Act requires Tribunal orders to be in writing and the Tribunal aims to produce orders and reasons concerning leave or release within four weeks of a review hearing. The Tribunal will generally indicate at the hearing when the order is to take effect. In conditional or unconditional release matters the Tribunal will usually order that the release decision will take effect at the end of the 28 day appeal period after publication of the release order and reasons.

The same approach will generally apply to leave orders except where the leave is uncontroversial and no objection has been indicated at the time of the hearing. In such cases the Tribunal may order that the leave is to have immediate effect upon the order being issued. An example of relatively uncontroversial leave may, depending on the patient, be Escorted Leave where the forensic patient is escorted by staff of the mental health facility.

Overview of NSW Forensic Mental Health System

There are approximately 315 people (280 are males and 35 are females) currently subject to the provisions of the Act, the vast majority of whom have been found not guilty by reason of mental illness. Of the 315, 229 are detained and 86 are currently released in the community subject to conditions.

As I said at the outset, the forensic mental health system is about managing and reducing the risk forensic patients pose to the community and to themselves. If a forensic patient's rehabilitation is successful they will be able to re-enter the community because they no longer present an unacceptable risk, (that is their safety or the safety of any member of the public will not be seriously endangered) and they can be safely managed with supervision in the community.

The Court is the point at which people with mental illness enter the forensic system. Of course depending on the seriousness of the alleged offence its preferable for people with mental illness to be diverted away from the justice system. In this regard the Justice Health Court Liaison Service provides a daily service to the 20 busiest magistrates' courts in NSW. This is done using a Clinical Nurse Consultant in each Court and they have the immediate help of Consultant psychiatrists when required. A BOCSAR evaluation found that

the service reduces the frequency with which people with a mental health problem come into contact with the court system, a new study has found.¹²

However if not diverted from the justice system new forensic patients enter the system from court and will usually land at Long Bay Hospital or if a bed is not available there they will generally end up in the assessment units at the MRRC and Silverwater Women's prison. From there they should be assessed for transfer to one of the specialist forensic rehabilitation units whose treating teams include forensic psychiatrists, occupational therapists, psychologists, social workers and mental health nurses.

The following is a brief overview of the key elements and services within the NSW forensic system involved in managing and reducing risk.

Within the Correctional System

The Statewide Forensic Mental Health Service provides mental health care to offenders, young people, and formal forensic patients in the NSW correctional system. Correctional Centre facilities include:

- Long Bay Hospital run by Justice Health and DCS- Mental Health Unit - 40 beds
- The Mental Health Screening Units at the MRRC (40 beds) and Silverwater Women's (10 beds)
- Ambulatory Services at 20 Correctional Centres
- DCS has accommodation for a small number of the more vulnerable offenders with intellectual and other cognitive disabilities within separate units at Long Bay (22 places covering all classifications) and Goulburn Correctional Centres (15 places for sentenced minimum security).

The Long Bay facility is the Additional Support Units. It is intended to address the assessment, general management, program and pre-release planning needs of offenders with disabilities.

¹² An Evaluation of the NSW Court Liaison Service, Deborah Bradford and Nadine Smith, BOCSAR 2009

The majority of the offenders housed here have intellectual and other cognitive disabilities. As well the target group may also experience comorbid issues such as acquired brain injury, psychiatric illness, visual, auditory or physical impairments which combined have resulted in reduced capacity in one or more major life activities such as communication, learning, mobility, decision making or self care.

Only one of the intended 3 units is operational. It is 5 Wing and it allows assessments and general programs. When all 3 additional support units are fully operational they will allow the Department to conduct assessments, therapeutic programs (including programs for sex offenders), vocational training, work options and more intensive pre-release planning.

Outside the Correctional System

Forensic patients can be transferred to the following specialist forensic mental health facilities:

- The new Forensic Hospital at Long Bay but outside the prison (135 beds when fully operational. Currently 72 patients including females and adolescence)
- The Bunya Unit at Cumberland Hospital (24 beds)
- The Kestrel Unit at Morisset Hospital (30 male only beds)
- Cottage programs at Cumberland and Morisset (a further 16 beds)
- A new 30 bed forensic facility at Bloomfield in Orange is due to open in 2011.

In addition forensic patients will sometimes be transferred to:

- Macquarie Hospital, Concord Hospital and Kenmore (10 to 15 beds)

The new Forensic Hospital is a high security facility which will offer a wide range of rehabilitation opportunities. However it will not offer external leave options, nor will it have any step down options, such as are available at Bunya and Kestrel. By that I mean that both these units have leave programs and cottage programs on the grounds of the hospital which offer a higher degree of independence for forensic patients, including doing their own grocery shopping and cooking.

In the Community

When forensic patients are conditionally released they may be supervised in the community by:

- Case Managers within one of the 8 Area Health Services
- DCS works with the Department of Ageing, Disability and Home Care (DADHC) in respect of intellectual disability offenders who are eligible for the Criminal Justice Program (CJP) when they are released from custody.
- The CJP provides specialised accommodation and support along with pre-and post release clinical and case management services.
- The CJP currently provides services to 105 individuals across NSW with approximately 40 new places per year in 2009/10 and 2010/11.

Before forensic patients can be conditionally released we need community agencies prepared to accept them and we have to have confidence in the competence of community agencies to safely manage forensic patients.

Until recently community agency clinicians had limited training and experience in the management of forensic patients. In particular they need to understand the responsibilities they have in managing these patients and must appreciate the community's interest and high expectations about how forensic patients should be managed. This is where the NSW Community Forensic Mental Health Service is playing a significant role providing statewide training in risk assessment and management for general mental health clinicians to build competency in risk management of high risk patients. This is an extremely important initiative because we know that in the past an unacceptably high proportion of forensic patients were not diagnosed and treated in relation to a serious mental illness until after the act which made them forensic patients..

Conclusion

For the forensic system to work fairly and effectively those who achieve successful rehabilitation should be conditionally released and thereby make way for other forensic patients who require the specialist services. This was one of the problems with the previous system. Some of the best forensic mental health treatment placements were taken up by forensic patients who arguably no longer required that level of care and security.

The developments I have outlined in the NSW forensic mental health system are very positive. There is now a level of transparency and accountability in relation to the decisions concerning forensic patients which should, in time, build confidence in the system.

If a person becomes a forensic patient today it is much more likely than ever before that they will receive appropriate care, treatment and rehabilitation in an environment which is **no** more restrictive than is necessary to manage the risk they pose to themselves and to the community. Subject only to their mental health and their related risk factors they should move through the system. If and when they are conditionally released they will continue to be reviewed by the Tribunal and will receive care, treatment and support in the community to ensure that they remain safe and well.

Finally, the NSW mental health system is developing a better capacity to intervene early to ensure that the relatively small number of mentally ill people who constitute a significant risk of harm to the community receive effective and comprehensive treatment and support. Overtime this will reduce the number of people who become forensic patients.