



New South Wales

# Mental Health and Cognitive Impairment Forensic Provisions Regulation 2021

under the

Mental Health and Cognitive Impairment Forensic Provisions Act 2020

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*.

MARK SPEAKMAN, MP  
Attorney General, and Minister for the Prevention of Domestic Violence

## Explanatory note

The object of this Regulation is to remake, with minor amendments, the provisions of the *Mental Health (Forensic Provisions) Regulation 2017* as a consequence of the *Mental Health (Forensic Provisions) Act 1990* being repealed and replaced by the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*.

This Regulation—

- (a) prescribes certain psychologists as a class of persons who may provide reports to the Supreme Court or District Court following a verdict in a special hearing, or for determining whether to make an order releasing a person not criminally responsible because of mental health impairment or cognitive impairment, and
- (b) requires the Mental Health Review Tribunal (*the Tribunal*) to review the case of a person subject to an order for transfer from a correctional centre to a mental health facility if the person is not transferred after 14 days, and
- (c) provides for the Tribunal to be constituted by a President or Deputy President for reviews of certain orders, adjourning a review of a forensic patient and for determining a request made by a victim not to disclose the whole or part of a submission made by the victim, and
- (d) prescribes certain psychologists as a class of persons who may provide reports to the Tribunal for the purposes of determining whether to make an order releasing a forensic patient or correctional patient, and
- (e) sets out procedures for appeals to the Tribunal against decisions by the Secretary of the Ministry of Health not to grant a forensic patient or correctional patient leave of absence from a mental health facility, and
- (f) sets out matters that may be the subject of submissions by victims of forensic patients for the purposes of proceedings before the Tribunal relating to the consideration of a grant of leave or release, and
- (g) enables the Tribunal to disclose an edited version of a victim's submission to the legal representative of a forensic patient, or a legal representative appointed by the Tribunal, in circumstances where the

- Tribunal has agreed to a request by the victim not to disclose the submission but is of the opinion that some disclosure is required for reasons of procedural fairness, and
- (h) enables a victim to be represented before the Tribunal by a nominated representative, and
  - (i) enables the Tribunal to disclose all or part of or a summary of a submission by a victim of a forensic patient to a person treating the patient or a delegate of the person, and
  - (j) modifies the application of Chapter 3, Part 3 of the *Mental Health Act 2007* to community treatment orders made in relation to forensic patients, correction patients, inmates of correctional centres and persons subject to orders for transfer to mental health facilities, and
  - (k) provides for certain matters relating to the Victims Register, including additional information to be included in the Victims Register, administration of the Victims Register and matters relating to the disclosure of information to the Tribunal, and
  - (l) prescribes persons who may transport persons to or from places for the purposes of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*, and
  - (m) prescribes as forensic patients certain persons found not guilty of an offence by reason of mental illness or mental impairment under a law of Norfolk Island, who are transferred and detained in New South Wales under New South Wales law, and
  - (n) sets out additional information that may be covered by an information sharing protocol between the Ministry of Health and the Department of Justice.

This Regulation is made under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*, including sections 17(1), 22(1), 26, 33(2), 66(1), 72(1), 84(1), 89(1), 97(2) and (3), 99(2), 115(6), 145(5), 148(4) and (5), 156(2) and (5), 157(2), 161(2), 166 (the general regulation-making power) and Schedule 2, Part 1.

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## Mental Health and Cognitive Impairment Forensic Provisions Regulation 2021

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### Part 1 Preliminary

#### 1 Name of Regulation

This Regulation is the *Mental Health and Cognitive Impairment Forensic Provisions Regulation 2021*.

#### 2 Commencement

This Regulation commences on 27 March 2021 and is required to be published on the NSW legislation website.

#### 3 Definitions

In this Regulation—

***forensic community treatment order*** means a community treatment order made under section 99 of the Act.

***Justice Health and Forensic Mental Health Network*** means the statutory health corporation of that name constituted under the *Health Services Act 1997*.

***the Act*** means the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*.

**Note.** The Act and the *Interpretation Act 1987* contain definitions and other provisions that affect the interpretation and application of this Regulation.

## **Part 2 Proceedings**

### **Division 1 Court proceedings**

#### **4 Matters to be considered by Court—reports**

A person is prescribed for the purposes of sections 33(2) and 66(1) of the Act, if the person—

- (a) is a registered psychologist, and
- (b) has, in the opinion of the Court, appropriate experience or training in forensic psychology or neuro-psychology.

### **Division 2 Tribunal proceedings**

#### **5 Adjournments**

The Tribunal may be constituted by the President or a Deputy President for the purpose of adjourning a review under the Act.

#### **6 Matters to be considered by Tribunal**

A person is prescribed for the purposes of section 84(1)(b) of the Act, if the person—

- (a) is a registered psychologist, and
- (b) has, in the opinion of the Tribunal, appropriate experience or training in forensic psychology or neuro-psychology.

#### **7 Reviews by Tribunal of persons awaiting transfer to mental health facility**

- (1) For the purposes of section 89(1) of the Act, the prescribed period is 14 days after the making of the order.
- (2) The Tribunal may be constituted by the President or a Deputy President for the purposes of conducting a review under section 89 of the Act.

#### **8 Appeals against decisions of Secretary about leave of absence**

- (1) An appeal in writing under section 97 of the Act is to be made by giving a notice of appeal, in the form approved by the Secretary, to the medical superintendent of the mental health facility in which the forensic patient or correctional patient making the appeal is being detained.
- (2) The medical superintendent must forward the notice of appeal to the Tribunal within 2 business days after receiving it and must notify the Secretary of the appeal within that period.
- (3) An oral appeal under section 97 of the Act is to be made by telling the medical superintendent of the wish to make an appeal.
- (4) The medical superintendent must provide written notice of an oral appeal to the Tribunal within 2 business days after the appeal is made and must notify the Secretary of the appeal within that period.
- (5) A copy of the written notice is to be given to the forensic patient or correctional patient making the appeal and a copy is to be kept by the medical superintendent as a record of the appeal.

**9 Reviews of persons in custody who are subject to forensic community treatment orders**

The Tribunal may be constituted by the President or a Deputy President for the purposes of conducting a review under section 100 of the Act.

**10 Tribunal to disclose the whole or part of a submission**

A request made by the victim not to disclose the whole or part of a submission under section 145 of the Act may be determined by the President or Deputy President of the Tribunal sitting alone.

**11 Submissions to Tribunal by victims**

- (1) For the purposes of section 145(6)(a) of the Act, a victim may make a submission about the following—
  - (a) the forensic patient's behaviour and the impact of the behaviour on the victim or the victim's family,
  - (b) the risk posed by the forensic patient to the victim, the victim's family or any other person,
  - (c) the impact on the victim and the victim's family if the forensic patient is released or granted a leave of absence, whether unconditionally or subject to proposed conditions,
  - (d) the conditions that should be imposed on the release of or grant of leave of absence to forensic patients, including non-association conditions and place restriction conditions under section 146 of the Act.
- (2) A submission may be made in writing or orally.
- (3) The Tribunal must acknowledge the receipt of a submission.
- (4) A victim who makes a submission to the Tribunal may, with the leave of the Tribunal, raise questions that the Tribunal considers to be appropriate for discussion during the proceedings.

**12 Disclosure of victims' submissions by Tribunal**

- (1) The Tribunal may disclose an edited version of a submission by a victim to the legal representative of a forensic patient if—
  - (a) the Tribunal determines under section 145 of the Act that a submission is not to be disclosed to a forensic patient, and
  - (b) the Tribunal is of the opinion that information contained in the submission should be provided to the legal representative of the patient for reasons of procedural fairness, and
  - (c) the legal representative has agreed to the non-disclosure conditions in subclause (2).
- (2) The non-disclosure conditions are as follows—
  - (a) the edited submission must not be disclosed to the forensic patient without the consent of the Tribunal,
  - (b) the following information may be disclosed, but not information identifying the location of the residence or place of work of the victim or the victim's family or friends or of other places frequented by the victim—
    - (i) information about proposed place restrictions,
    - (ii) general information about the areas the proposed restrictions apply,
    - (iii) the reasons for the victim's proposal,

- (c) the legal representative must only disclose to the forensic patient general information about the submission of a kind specified by the Tribunal.
- (3) The edited version of the submission may be created by the victim or the Tribunal.
- (4) Before disclosing an edited version of a submission, the Tribunal must—
  - (a) inform the victim of the proposed disclosure, and
  - (b) give the victim an opportunity to withdraw or amend the submission, and
  - (c) if the edited version is created by the Tribunal—provide the victim with a copy of the edited version and give the victim an opportunity to request amendments to the edited version, and
  - (d) if the edited version is created by the victim—give the victim an opportunity to amend the edited version.
- (5) If the forensic patient is not represented by a legal representative, the Tribunal may appoint an Australian legal practitioner to act on behalf of the forensic patient for the purposes of this clause.
- (6) In this clause—  
*the Tribunal* includes the President or Deputy President of the Tribunal sitting alone.

### **13 Representation of victims**

- (1) A representative may be nominated by a victim to represent the victim at a hearing of the Tribunal at which the victim is entitled to make a submission.
- (2) The representative is not eligible to represent a victim at a hearing unless—
  - (a) the representative has completed and lodged with the Tribunal a statutory declaration, in the form approved by the Secretary, as to confidentiality, and
  - (b) the representative has the victim's written authority to attend the hearing and represent the victim, and
  - (c) if the representative is the legal representative of the victim—leave is granted by the Tribunal or President or Deputy President sitting alone.
- (3) The representative may do anything at the hearing that the victim may do.

### **14 Disclosure by Tribunal to treatment team**

- (1) The Tribunal may disclose all or part of, or a summary of, a submission received from a victim of a forensic patient to a person who is treating the forensic patient or a delegate of the person.
- (2) The submission must be disclosed on the condition that the person to whom the information is disclosed does not disclose the information to the forensic patient.
- (3) In this clause—  
*the Tribunal* includes the President or Deputy President of the Tribunal sitting alone.

## Part 3 Forensic community treatment orders

### 15 Modification of provisions of Mental Health Act 2007

For the purposes of section 99(2) of the Act, Chapter 3, Part 3 of the *Mental Health Act 2007* is modified as set out in this Part for the purposes of the making of a forensic community treatment order.

### 16 Applications for forensic community treatment orders

- (1) An application under section 51 of the *Mental Health Act 2007* for a forensic community treatment order may also be made by a medical officer authorised by the Chief Executive of Justice Health and Forensic Mental Health Network.
- (2) Sections 52(3) and 53(3)(c) of the *Mental Health Act 2007* do not apply to an application for a forensic community treatment order.

### 17 Treatment plans

A reference in section 53 or 56 of the *Mental Health Act 2007* to a declared mental health facility is taken to also include a reference to Justice Health and Forensic Mental Health Network if the reference relates to a community treatment order.

### 18 Implementation of forensic community treatment orders

- (1) A medical officer authorised by Justice Health and Forensic Mental Health Network may exercise functions under section 57(2) and (4) of the *Mental Health Act 2007* in relation to a forensic community treatment order in the same way as the director of community treatment of a declared mental health facility.
- (2) Section 57(5) of the *Mental Health Act 2007* does not apply to a forensic community treatment order.

### 19 Breaches of forensic community treatment orders

- (1) This clause applies to the following persons who are subject to forensic community treatment orders (an *affected person*)—
  - (a) a forensic patient, correctional patient or other person who is detained in a correctional centre,
  - (b) a person who is subject to an order for transfer from a correctional centre but who has not been transferred.
- (2) Sections 58–64 of the *Mental Health Act 2007* do not apply to an affected person and are replaced by subclauses (3)–(5).
- (3) A medical officer authorised by Justice Health and Forensic Mental Health Network must take the steps set out in subclauses (4) and (5) if an affected person refuses or fails to comply with the forensic community treatment order and the officer is of the opinion that—
  - (a) Justice Health and Forensic Mental Health Network has taken all reasonable steps to implement the order, and
  - (b) there is a significant risk of deterioration in the mental or physical condition of the affected person.
- (4) The officer must cause the affected person to be informed that further refusal or failure to comply with the order may result in the person being given treatment in accordance with the forensic community treatment order.
- (5) If there is a further refusal or failure to comply with the order—



- (a) the officer must cause the affected person to be assessed for the purpose of issuing certificates for the purpose of a transfer of the person under section 86 of the Act to a mental health facility, and
- (b) the officer may cause the affected person to be given treatment in accordance with the forensic community treatment order, if the officer thinks it appropriate for clinical reasons to do so, and must notify the Tribunal within 2 business days after the treatment is given.

**20 Variation or revocation of forensic community treatment orders**

- (1) A person authorised by Justice Health and Forensic Mental Health Network may also apply to vary or revoke a forensic community treatment order under section 65(2) of the *Mental Health Act 2007*.
- (2) An application to vary or revoke a forensic community treatment order may also be made under section 65(3) of the *Mental Health Act 2007* on the grounds the person subject to the order is released, or proposed to be released, from a correctional centre.
- (3) A medical officer authorised by Justice Health and Forensic Mental Health Network may also revoke an order under section 66 of the *Mental Health Act 2007*.
- (4) A person who revokes a forensic community treatment order under this clause or section 66 of the *Mental Health Act 2007*, must notify the Tribunal in writing of the revocation within 7 days after the revocation.

## Part 4 Victims Register

### 21 Definition

In this Part—

**registered victim** means a victim whose name is included in the Victims Register.

### 22 Information to be in Victims Register

For the purposes of section 156(2)(b) of the Act, the following matters are to be included in the Victims Register in relation to each registered victim of a forensic patient—

- (a) particulars of the information used to verify the identity of the victim,
- (b) the name of the forensic patient,
- (c) whether the victim has obtained, or is the subject of, or is seeking to obtain, a non-association condition or place restriction condition under section 146 of the Act,
- (d) whether or not the victim made a victim impact statement to a court in proceedings against the forensic patient,
- (e) dates relating to the events the subject of court proceedings against the forensic patient or a victim of the forensic patient that may cause distress to a victim if Tribunal hearings were held on those dates,
- (f) the name and contact details of an emergency contact for the victim if the victim is unavailable when notice is given under clause 25(1)(d) or (2).

### 23 Verification of identity and status before registration

- (1) A person must not be registered on the Victims Register unless the Commissioner of Victims Rights is satisfied as to the person's identity and that the person is a primary victim or a family victim of an act of violence committed by a forensic patient.
- (2) A person requesting registration on the Victims Register as a victim of a forensic patient must provide the following to the Commissioner—
  - (a) at least 1 of the person's current Australian driver licence, current passport or birth certificate,
  - (b) the name of the forensic patient,
  - (c) if available, at least 1 of the following documents, to enable verification that the person is a victim—
    - (i) the case number of the Director of Public Prosecutions for each offence committed by the forensic patient that is relevant to the victim,
    - (ii) the hearing number for the Tribunal,
    - (iii) the police event number for each offence committed by the forensic patient that is relevant to the victim,
    - (iv) the claim number for assistance claimed by the person under the *Victims Rights and Support Act 2013*.
- (3) The Commissioner may require a person who applies to be registered on the Victims Register, or any other person, to execute undertakings or other documents relating to disclosure or publication of information contained in the Register.
- (4) The Commissioner may request a victim to provide further information for the purposes of the Victims Register.

- (5) A failure by the victim to provide information under subclause (2) or further information under subclause (4) does not prevent the registration of the victim on the Victims Register.
- (6) The Commissioner must notify a registered victim in writing when the victim is registered on the Victims Register.

#### **24 Administration of Victims Register**

- (1) The Commissioner of Victims Rights may remove the name of a victim from the Victims Register if—
  - (a) the forensic patient ceases to be a forensic patient or is no longer a forensic patient for reasons related to acts committed by the forensic patient that are relevant to the victim, or
  - (b) all limiting terms imposed on the forensic patient for acts committed by the forensic patient that are relevant to the victim have expired, or
  - (c) an extension order or interim extension order is in force in respect of the forensic patient.
- (2) The Commissioner of Victims Rights must give written notice to a person whose name is removed from the Victims Register about the removal.

#### **25 Notifications by Commissioner of Victims Rights**

- (1) The Commissioner of Victims Rights must give notice in writing of the following to a registered victim of a forensic patient—
  - (a) particulars of proposed orders to be sought in relation to the forensic patient at a hearing of the Tribunal and the location of that hearing,
  - (b) particulars of the reasons for a decision by the Tribunal about an application for a grant of leave to, or the release of, the forensic patient,
  - (c) if there is an application for an extension order or interim extension order or an extension order or interim extension order is made in relation to the forensic patient,
  - (d) safety concerns relating to the victim known to the Commissioner in relation to a hearing before the Tribunal or arising out of a breach of an order relating to the forensic patient,
  - (e) if the forensic patient is reclassified as an involuntary patient.
- (2) Despite subclause (1), notice may be given by telephone if the Commissioner is of the opinion that there is a risk of immediate harm to the victim or another person.
- (3) The Commissioner must give notice in writing to the victim of a matter within 1 business day after notice is given of the matter to the victim by telephone.
- (4) Notice under this clause must be given in a timely manner.

**Note.** Section 6A of the *Victims Rights and Support Act 2013* applies the Charter of rights of victims of crime to victims of forensic patients making submissions to the Tribunal. In particular, that section requires victims to be notified in a timely way of the release of or granting of leave to a forensic patient.

#### **26 Disclosure of information to Tribunal**

The Commissioner of Victims Rights may, with the consent of the victim, disclose to the Tribunal information contained in the Victims Register and other information relating to the victim.

**27 Publication of information in Victims Register**

- (1) A registered victim or any other person must not publish information contained in the Victims Register.  
Maximum penalty—10 penalty units.
- (2) This clause does not apply if the Tribunal or a court consents to or orders the publication or the information is publicly available.
- (3) In this clause, *publish* means disseminate or provide access to 1 or more persons by means of the internet, radio, television or other media.

**28 Giving notice**

A notice in writing under this Part may be given to a victim by any of the following methods—

- (a) by personal delivery to the victim,
- (b) by post to the address specified by the victim for the service of documents of that kind,
- (c) in the case of a victim who has not specified an address for service—by post to the residential or business address of the person last known to the person serving the document,
- (d) by email to an email address specified by the victim for the service of documents of that kind.

## Part 5 Miscellaneous

### 29 Transport of defendants in Local Court proceedings

For the purposes of section 22(1)(b) of the Act, the following persons are prescribed as persons who may take a defendant to or from a place—

- (a) if the defendant is on remand or serving a sentence of imprisonment, other than a defendant detained in a detention centre—a correctional officer or a police officer,
- (b) otherwise—a member of the NSW Health Service, a police officer, a correctional officer, a juvenile justice officer or a person who provides a transport service approved for that purpose by the Secretary.

### 30 Forensic patients

For the purposes of section 72(1)(d) of the Act, a person is prescribed if the person, whether before or after the commencement of this clause—

- (a) is found not guilty of an offence under the law of Norfolk Island by reason of mental illness or mental impairment, and
- (b) is transferred to and being held in the custody of this State—
  - (i) under a law of this State that provides for the person to be held in custody, and
  - (ii) under an order made or warrant issued following the finding.

### 31 Exchange of information

For the purposes of section 161(2)(b) of the Act, the following information is prescribed as information to which an information sharing protocol may relate—

- (a) information concerning former forensic patients or correctional patients transferred, or proposed to be transferred, to correctional centres,
- (b) information concerning persons, other than forensic patients or correctional patients, who are, or may be, subject to forensic community treatment orders,
- (c) information concerning persons, other than forensic patients or correctional patients, who were formerly subject to forensic community treatment orders and who have been released from a correctional centre and are subject to community treatment orders,
- (d) information concerning visitors to forensic patients or correctional patients who are reasonably believed to pose a security risk to the good management and order of a correctional centre or mental health facility.

### 32 Savings

Any act, matter or thing that, immediately before the repeal of the *Mental Health (Forensic Provisions) Regulation 2017*, had effect under that Regulation continues to have effect under this Regulation.