



New South Wales

# Mental Health (Forensic Provisions) Amendment Bill 2013

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The object of this Bill is to amend the *Mental Health (Forensic Provisions) Act 1990* (*the principal Act*) to provide for a scheme for the extension of the status of certain persons as forensic patients and to facilitate the review by the Mental Health Review Tribunal (*the Tribunal*) of those forensic patients' care, treatment, detention and release from custody.

The amendments made by the Bill apply to persons who:

- (a) are found unfit to be tried for an offence but are not acquitted at a special hearing and on whom a limiting term is imposed, and
- (b) pose an unacceptable risk of causing serious harm to others (being a risk that cannot be adequately managed by less restrictive means than extending the person's status as a forensic patient).

The Bill implements recommendations of the NSW Law Reform Commission in its *Report 138 People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences* of May 2013.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on the date of assent to the proposed Act.

## **Schedule 1      Amendment of Mental Health (Forensic Provisions) Act 1990 No 10**

The principal Act provides for the conduct of special hearings in respect of persons who are found unfit to be tried for an offence (whether by reason of mental illness, mental condition or developmental disability of mind). If the court finds at a special hearing that a person committed an offence, the court may nominate a term (*a limiting term*) to represent the sentence that the court would have imposed had the person been found guilty of the offence at a normal trial of criminal proceedings. The nomination of a limiting term enables the court to order that the person be detained in a mental health facility or other place. A person who has been detained following the nomination of a limiting term is a *forensic patient*, being a person whose care, treatment, detention and release from custody is subject to the review of the Tribunal.

The proposed amendments to the principal Act provide for the extension of the status of certain persons as forensic patients whose limiting terms expire to facilitate the review by the Tribunal of their care, treatment, detention and release from custody.

**Schedule 1 [8]** provides for the extension of a person's status as a forensic patient in accordance with the provisions set out in proposed Schedule 1. **Schedule 1 [3]** gives a person whose status as a forensic patient has been extended in accordance with that proposed Schedule the status of a forensic patient for the purposes of the principal Act. This has the effect of extending to those persons the application of the provisions of Part 5 of the principal Act that relate to the review of the care, treatment, detention and release from custody of forensic patients.

**Schedule 1 [13]** inserts proposed Schedule 1 into the principal Act. The new Schedule contains the following provisions:

Proposed clause 1 enables the Supreme Court to make an order for the extension of a person's status as a forensic patient (*an extension order*). Proposed clause 2 provides that the Court may make an extension order only if the Supreme Court is satisfied to a high degree of probability that the forensic patient poses an unacceptable risk of causing serious harm to others if he or she ceases being a forensic patient, and that the risk cannot be adequately managed by other less restrictive means.

Proposed clause 3 enables any Minister administering the principal Act to apply for an extension order against a forensic patient.

Proposed clause 4 provides that an application for an extension order may only be made if the forensic patient is subject to a limiting term or existing extension order and may not be made more than 6 months before the expiry of the limiting term or existing extension order.

Proposed clause 5 requires that the application be supported by certain documentation relevant to the application, including a report prepared by a qualified psychiatrist, registered psychologist or registered medical practitioner that assesses the risk of the forensic patient causing serious harm to others and the need for ongoing management of the patient as a forensic patient.

Proposed clause 6 requires an application to be served on the forensic patient within 2 days after it is filed in the Supreme Court. Within 28 days after the application is filed, the Court is to conduct a preliminary hearing. The Court may appoint qualified psychiatrists, registered psychologists and registered medical practitioners to examine the forensic patient if it is satisfied that the matters alleged in the supporting documentation would, if proved, justify the making of an extension order. If the Court is not so satisfied, it must dismiss the application.

Proposed clause 7 provides for the matters to which the Supreme Court must have regard in determining whether or not to make an extension order (including the safety of the community, reports prepared by qualified psychiatrists, psychologists and medical practitioners and orders or decisions made by the Tribunal with respect to the forensic patient).

Proposed clause 8 provides that the term of an extension order cannot exceed 5 years, but a subsequent order may be made against the same forensic patient.

Proposed clause 9 continues the effect of any order made in respect of a forensic patient, relating to the patient's care, detention, treatment or release from custody, that was in force immediately before the making of an extension order or interim extension order.

Proposed clauses 10 and 11 provide for the making of interim extension orders in circumstances where the limiting term or existing extension order will expire before the determination of proceedings on an application for an extension order. The term of an interim extension order may not exceed 28 days, but the order may be renewed for periods totalling not more than 3 months.

Proposed clause 12 provides for the variation or revocation of an extension order or interim extension order on the application of a Minister administering the principal Act or on the recommendation of the Tribunal.

Proposed clauses 13–22 provide for miscellaneous matters, including appeal rights, the right of a party to appear in the proceedings, call witnesses and make submissions and the power to make rules of court.

**Schedule 1 [4]** provides that the period within which the Tribunal must review the case of a forensic patient who is subject to an extension order cannot be extended beyond the period of 6 months.

**Schedule 1 [5]** provides that the Tribunal must not make an order for the unconditional release of a forensic patient who is subject to an extension order but may make a recommendation to the Supreme Court as to the variation or revocation of the order.

**Schedule 1 [6] and [7]** provide that a person ceases to be a forensic patient if an extension order or interim extension order made against the person expires or is revoked without a subsequent extension order being made.

**Schedule 1 [9]** allows the Minister for Health and the Attorney General to appear before, or make submissions to, the Tribunal in relation to the possible recommendation to revoke an extension order in respect of a forensic patient.

**Schedule 1 [10]** requires the Tribunal to notify each Minister administering the principal Act of the upcoming expiry of a forensic patient's limiting term or extension order at least 6 months before that expiry.

**Schedule 1 [13]** provides for the making of regulations of a savings or transitional nature consequent on the enactment of the proposed Act.

**Schedule 1 [1], [2], [11] and [12]** make consequential amendments.



New South Wales

# Mental Health (Forensic Provisions) Amendment Bill 2013

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New South Wales

# Mental Health (Forensic Provisions) Amendment Bill 2013

No. , 2013

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## A Bill for

An Act to amend the *Mental Health (Forensic Provisions) Act 1990* with respect to the continued supervision and review by the Mental Health Review Tribunal of certain persons as forensic patients; and for related purposes.

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<b>The Legislature of New South Wales enacts:</b>	1
<b>1 Name of Act</b>	2
This Act is the <i>Mental Health (Forensic Provisions) Amendment Act 2013</i> .	3
<b>2 Commencement</b>	4
This Act commences on the date of assent to this Act.	5

<b>Schedule 1</b>	<b>Amendment of Mental Health (Forensic Provisions) Act 1990 No 10</b>	1
		2
<b>[1] Section 3 Definitions</b>		3
Insert in alphabetical order in section 3 (1):		4
<i>extension order</i> means an order for the extension of a person’s status as a forensic patient under clause 1 of Schedule 1.		5
<i>interim extension order</i> means an order for the interim extension of a person’s status as a forensic patient under clause 10 of Schedule 1.		6
<i>limiting term</i> means a term nominated in respect of a person under section 23 (1) (b).		7
		8
		9
		10
<b>[2] Section 23 Procedure after completion of special hearing</b>		11
Omit “, in this section referred to as <i>a limiting term</i> ,” from section 23 (1) (b).		12
<b>[3] Section 42 Forensic patients</b>		13
Insert after section 42 (a):		14
(a1) a person in respect of whom an extension order or interim extension order is in force,		15
		16
<b>[4] Section 46 Further reviews by Tribunal of forensic patients</b>		17
Insert “(other than a review of the case of a forensic patient who is subject to an extension order)” after “this section” in section 46 (4).		18
		19
<b>[5] Section 47 Orders and recommendations on further Tribunal reviews</b>		20
Insert after section 47 (2):		21
(2A) The Tribunal must not make an order as to the release, unconditionally, of a forensic patient who is subject to an extension order but may make a recommendation to the Supreme Court as to the variation or revocation of the extension order.		22
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		24
		25
<b>[6] Section 52 Additional circumstances for termination of classification as forensic patient</b>		26
		27
Omit “expires” from section 52 (2) (a).		28
Insert instead “under section 23 expires and an extension order or interim extension order has not been made against the person”.		29
		30
<b>[7] Section 52 (2) (a1)</b>		31
Insert after section 52 (2) (a):		32
(a1) any extension order or interim extension order made against the person expires or is revoked and a subsequent extension order has not been made against the person,		33
		34
		35



- (2) The Supreme Court is not required to determine that the risk of a person causing serious harm to others is more likely than not in order to determine that the person poses an unacceptable risk of causing serious harm to others. 1  
2  
3

## **Part 2 Extension orders** 4

### **Division 1 Application for extension order** 5

#### **3 Minister may apply for extension order** 6

A Minister administering this Act may apply to the Supreme Court for an extension order against a forensic patient. 7  
8

#### **4 Application for extension order** 9

- (1) An application for an extension order may be made in respect of a forensic patient only if the forensic patient is subject to: 10  
11  
(a) a limiting term, or 12  
(b) an existing extension order. 13
- (2) An application in respect of a forensic patient may not be made more than 6 months before: 14  
15  
(a) the end of the forensic patient's limiting term, or 16  
(b) the expiry of the existing extension order, 17  
as appropriate. 18

#### **5 Requirements with respect to application** 19

An application for an extension order must be supported by documentation: 20  
(a) that addresses each of the matters referred to in clause 7 (2) (to the extent relevant to the application), and 21  
22  
(b) that includes a report (prepared by a qualified psychiatrist, registered psychologist or registered medical practitioner): 23  
24  
(i) that assesses the risk of the forensic patient causing serious harm to others, and 25  
26  
(ii) that addresses the need for ongoing management of the patient as a forensic patient and the reasons why the risk of the forensic patient causing serious harm to others cannot be adequately managed by other less restrictive means. 27  
28  
29  
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#### **6 Pre-hearing procedures** 31

- (1) An application under this Part for an extension order must be served on the forensic patient concerned within 2 business days after the application is filed in the Supreme Court or within such further time as the Supreme Court may allow. 32  
33  
34  
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- (2) The Minister applying for the extension order must notify the Tribunal as soon as practicable after making the application. 36  
37
- (3) Subject to subclauses (7)–(9), the Minister applying for the extension order must disclose to the forensic patient such documents, reports and other information as are relevant to the proceedings on the application (whether or not intended to be tendered in evidence): 38  
39  
40  
41  
(a) in the case of anything that is available when the application is made, as soon as practicable after the application is made, and 42  
43

- (b) in the case of anything that subsequently becomes available, as soon as practicable after it becomes available. 1  
2
- (4) A preliminary hearing into the application is to be conducted by the Supreme Court within 28 days after the application is filed in the Supreme Court or within such further time as the Supreme Court may allow. 3  
4  
5
- (5) If, following the preliminary hearing, it is satisfied that the matters alleged in the supporting documentation would, if proved, justify the making of an extension order, the Supreme Court must make orders: 6  
7  
8
- (a) appointing: 9
- (i) 2 qualified psychiatrists, or 10
- (ii) 2 registered psychologists, or 11
- (iii) 2 registered medical practitioners, or 12
- (iv) any combination of 2 persons referred to in subparagraphs (i)–(iii), 13  
14
- to conduct separate examinations of the forensic patient and to furnish reports to the Supreme Court on the results of those examinations, and 15  
16
- (b) directing the forensic patient to attend those examinations. 17
- (6) If, following the preliminary hearing, it is not satisfied that the matters alleged in the supporting documentation would, if proved, justify the making of an extension order, the Supreme Court must dismiss the application. 18  
19  
20
- (7) A forensic patient in respect of whom an application for an extension order has been made is, unless the Supreme Court otherwise determines, entitled to inspect or otherwise have access to any medical records in the possession of any person relating to the forensic patient. 21  
22  
23  
24
- (8) A representative of the forensic patient is entitled, at any time before or during the proceedings on the application, to inspect or otherwise have access to any medical records in the possession of any person relating to the forensic patient. 25  
26  
27
- (9) Subject to any order or direction of the Supreme Court, in relation to an inspection under subclause (8) of, or other access under that subclause to, any medical record relating to a forensic patient: 28  
29  
30
- (a) if a medical practitioner warns the representative of the forensic patient that it may be harmful to communicate to the forensic patient, or any other person, specified information contained in those medical records, the representative is to have full and proper regard to that warning, and 31  
32  
33  
34
- (b) the representative is not obliged to disclose to the forensic patient any information obtained by virtue of the inspection or other access. 35  
36

## **Division 2 Determination of application** 37

### **7 Determination of application for extension order** 38

- (1) The Supreme Court may determine an application under this Part for an extension order: 39  
40
- (a) by making the order, or 41
- (b) by dismissing the application. 42
- (2) In determining whether or not to make an extension order, the Supreme Court must have regard to the following matters in addition to any other matter it considers relevant: 43  
44  
45
- (a) the safety of the community, 46

(b)	the reports received from the persons appointed under clause 6 (5) to conduct examinations of the forensic patient,	1 2
(c)	the report of the qualified psychiatrist, registered psychologist or registered medical practitioner provided under clause 5 (b),	3 4
(d)	any other report of a qualified psychiatrist, registered psychologist or registered medical practitioner provided in support of the application or by the forensic patient,	5 6 7
(e)	any order or decision made by the Tribunal with respect to the forensic patient that is relevant to the application,	8 9
(f)	any report of the Director-General of the Ministry of Health, the Commissioner of Corrective Services, the Director-General of the Department of Family and Community Services or any other government Department or agency responsible for the detention, care or treatment of the forensic patient,	10 11 12 13 14
(g)	the level of the forensic patient's compliance with any obligations to which he or she is or has been subject while a forensic patient (including while released from custody subject to conditions and while on a leave of absence in accordance with section 49 or 50),	15 16 17 18
(h)	the views of the court that imposed the limiting term or existing extension order on the forensic patient at the time the limiting term or extension order was imposed,	19 20 21
(i)	any other information that is available as to the risk that the forensic patient will in future cause serious harm to others.	22 23
(3)	If the Supreme Court makes an extension order in respect of a forensic patient, the Court is to notify the Tribunal of the making of the order.	24 25
<b>8</b>	<b>Term of extension order</b>	26
(1)	An extension order:	27
(a)	commences when it is made, or when the limiting term or existing extension order to which the forensic patient is subject expires, whichever is the later, and	28 29 30
(b)	expires at the end of the period (not exceeding 5 years from the day on which it commences) that is specified in the order.	31 32
(2)	Nothing in this clause prevents the Supreme Court from making a second or subsequent extension order against the same forensic patient.	33 34
<b>9</b>	<b>Continuation of order relating to forensic patient</b>	35
	The making of an extension order or interim extension order in respect of a forensic patient does not affect the operation of any order as to the forensic patient's care, detention, treatment or release from custody to which the forensic patient was subject immediately before the making of the extension order.	36 37 38 39 40
<b>Division 3</b>	<b>Interim extension orders</b>	41
<b>10</b>	<b>Interim extension order</b>	42
	The Supreme Court may make an order for the interim extension of a person's status as a forensic patient if, in proceedings on an application for an extension order, it appears to the Court:	43 44 45

(a)	that the limiting term or existing extension order to which the forensic patient is subject will expire before the proceedings are determined, and	1 2
(b)	that the matters alleged in the supporting documentation would, if proved, justify the making of an extension order.	3 4
<b>11</b>	<b>Term of interim extension order</b>	5
(1)	An interim extension order commences on the day fixed in the order for its commencement (or, if no such day is fixed, as soon as it is made) and expires at the end of such period (not exceeding 28 days from the day on which it commences) as is specified in the order.	6 7 8 9
(2)	An interim extension order may be renewed from time to time, but not so as to provide for the extension of the person's status as a forensic patient under such an order for periods totalling more than 3 months.	10 11 12
<b>Division 4</b>	<b>General</b>	13
<b>12</b>	<b>Extension order or interim extension order may be varied or revoked</b>	14
(1)	The Supreme Court may at any time vary or revoke an extension order or interim extension order:	15 16
(a)	on the application of a Minister administering this Act or the forensic patient, or	17 18
(b)	on the recommendation of the Tribunal under section 47 (2A).	19
(2)	The period of an order must not be varied so that the total period as varied is greater than that otherwise permitted under this Part.	20 21
(3)	Without limiting the grounds for revoking an extension order or interim extension order, the Supreme Court may revoke an extension order or interim extension order if satisfied that circumstances have changed sufficiently to render the order unnecessary.	22 23 24 25
<b>Part 3</b>	<b>Supreme Court proceedings</b>	26
<b>13</b>	<b>Nature of proceedings</b>	27
	Proceedings under this Schedule (including proceedings on an appeal under this Schedule) are civil proceedings and, to the extent to which this Schedule does not provide for their conduct, are to be conducted in accordance with the law (including the rules of evidence) relating to civil proceedings.	28 29 30 31
<b>14</b>	<b>Right of appeal</b>	32
(1)	An appeal to the Court of Appeal lies from any determination of the Supreme Court to make, or to refuse to make, or to vary or revoke an extension order.	33 34
(2)	An appeal may be on a question of law, a question of fact or a question of mixed law and fact.	35 36
(3)	An appeal against the decision of the Supreme Court may be made, as of right, within 28 days after the date on which the decision was made or, by leave, within such further time as the Court of Appeal may allow.	37 38 39
(4)	The making of an appeal does not stay the operation of an extension order.	40
(5)	If the Court of Appeal remits a matter to the Supreme Court for decision after an appeal is made, the extension order the subject of the appeal continues in force, subject to any order made by the Court of Appeal.	41 42 43

(6)	Without limiting any other jurisdiction it may have, if the Court of Appeal remits a matter to the Supreme Court for decision after an appeal is made, the Court of Appeal may make an interim order revoking or varying an extension order the subject of the appeal.	1 2 3 4
(7)	This clause does not limit any right of appeal that may exist apart from this Schedule.	5 6
<b>15</b>	<b>Costs not to be awarded against forensic patient</b>	7
	An order for costs may not be made against a forensic patient in relation to any proceedings under this Schedule (including proceedings on an appeal under this Schedule).	8 9 10
<b>16</b>	<b>Preservation of Supreme Court jurisdiction</b>	11
	Nothing in this Schedule limits the jurisdiction of the Supreme Court apart from this Act.	12 13
<b>Part 4</b>	<b>Miscellaneous</b>	14
<b>17</b>	<b>Minister may require provision of certain information</b>	15
(1)	A Minister administering this Act may, by order in writing served on any person, require that person to provide to the Minister any document, report or other information in that person's possession, or under that person's control, that relates to the behaviour, or physical or mental condition, of any forensic patient who is subject to a limiting term.	16 17 18 19 20
(2)	A person who fails to comply with the requirements of an order under this clause is guilty of an offence. Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.	21 22 23
(3)	A Minister administering this Act may request a court or the Tribunal to provide to the Minister any document, report or other information held by the court or Tribunal that relates to the behaviour, or physical or mental condition, of any forensic patient who is subject to a limiting term.	24 25 26 27
(4)	Despite any Act or law to the contrary, any document or report of a kind referred to in subclause (1) or (3), or any copy of any such document or report, is admissible in proceedings under this Act.	28 29 30
<b>18</b>	<b>Protection of certain persons from liability</b>	31
	No action lies against any person (including the State) for or in respect of any act or omission done or omitted by the person if it was done or omitted in good faith for the purposes of, or in connection with the administration or execution of, this Schedule.	32 33 34 35
<b>19</b>	<b>Hearings</b>	36
	This Schedule does not affect the right of any party to proceedings under this Schedule:	37 38
(a)	to appear, either personally or by the party's legal representative, or	39
(b)	to call witnesses and give evidence, or	40
(c)	to cross-examine witnesses, or	41
(d)	to make submissions to the Supreme Court on any matter connected with the proceedings.	42 43

<b>20</b>	<b>Bail Act 1978 not to apply</b>	1
	The <i>Bail Act 1978</i> does not apply to or in respect of a person who is the subject of proceedings under this Schedule.	2 3
<b>21</b>	<b>Rules of court</b>	4
(1)	Rules of court may be made under the <i>Supreme Court Act 1970</i> for regulating the practice and procedure of the Supreme Court in respect of proceedings under this Schedule.	5 6 7
(2)	This clause does not limit the rule-making powers conferred by the <i>Supreme Court Act 1970</i> .	8 9
<b>22</b>	<b>Qualification of psychiatrists</b>	10
	For the purposes of this Schedule, a psychiatrist is not a qualified psychiatrist unless he or she is a registered medical practitioner who is a fellow of the Royal Australian and New Zealand College of Psychiatrists.	11 12 13
<b>[14]</b>	<b>Schedule 3 Savings and transitional provisions (as renumbered by item [12])</b>	14
	Insert at the end of clause 1A (1):	15
	any other Act that amends this Act	16