

Mental Health (Forensic Provisions) Amendment (Victims) Act 2018 No 85

[2018-85]



New South Wales

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Provisions in force

Some, but not all, of the provisions displayed in this version of the legislation have commenced.

Notes—

- **Note**

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Mental Health (Forensic Provisions) Amendment (Victims) Act 2018 No 85



New South Wales

An Act to amend the *Mental Health (Forensic Provisions) Act 1990* and other legislation with respect to the rights of victims of forensic patients and proceedings relating to forensic patients; to amend the *Crimes (Forensic Procedures) Act 2000* with respect to the retention of forensic material relating to forensic patients; and for other purposes.

1 Name of Act

This Act is the *Mental Health (Forensic Provisions) Amendment (Victims) Act 2018*.

2 Commencement

- (1) This Act commences on the date of assent to this Act, except as provided by subsection (2).
- (2) The following provisions of this Act commence on a day or days to be appointed by proclamation:
 - (a) Schedule 1 [1], to the extent that it inserts the definitions of **Commissioner of Victims Rights, registered victim** and **Victims Register**,
 - (b) Schedule 1 [8]-[10] and [14] (except to the extent it inserts the heading to Part 5A and section 76L),
 - (c) Schedules 3 and 4.

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

[1] Section 3 Definitions

Insert in alphabetical order in section 3 (1):

Commissioner of Victims Rights has the same meaning as in the *Victims Rights and Support Act 2013*.

registered victim means a victim registered on the Victims Register.

victim of a forensic patient means:

- (a) a primary victim of an act of violence (within the meaning of the [Victims Rights and Support Act 2013](#)) committed by a forensic patient, and
- (b) a family victim (within the meaning of section 22 of that Act) of an act of violence committed by a forensic patient.

Victims Register means the Victims Register established under Part 5A.

[2] Section 26A

Insert after section 26:

26A Reports about accused person

- (1) The Court may, following a verdict being reached at a special hearing and on its own motion, request a report by an expert, who is not currently involved in treating the accused person, as to:
 - (a) the condition of the accused person, and
 - (b) whether the release of the accused person is likely to seriously endanger the safety of the accused person or any member of the public.
- (2) The Court may consider the report, and any other report of an expert that is tendered to the Court for the purposes of this section, before determining what orders to make about the accused person.
- (3) In this section, **expert** means a forensic psychiatrist or other person of a class prescribed by the regulations.

[3] Section 38A

Insert after section 38:

38A Reports about accused person

- (1) The Court may, following a special verdict of not guilty by reason of mental illness at the trial of a person for an offence, request a report by an expert, who is not currently involved in treating the person, as to:
 - (a) the condition of the person, and
 - (b) whether the release of the person is likely to seriously endanger the safety of the person or any member of the public.

- (2) The Court may consider the report, and any other report of an expert that is tendered to the Court for the purposes of this section, before determining what orders to make about the person.
- (3) In this section, **expert** means a forensic psychiatrist or other person of a class prescribed by the regulations.

[4] Section 40 Objects

Insert after section 40 (e):

- (f) to protect the safety of victims of forensic patients and to acknowledge the harm done to victims.

[5] Section 52A

Insert after section 52:

52A Effect of unlawful absence on limiting term

- (1) For the purposes of calculating whether a limiting term has expired, any period during which the person on whom the term was imposed was unlawfully absent from a mental health facility or other place in which the person was detained under this Act is not to be counted as part of the limiting term.
- (2) In this section, a person is **unlawfully absent from a mental health facility or other place** during any period commencing when an order is made for the apprehension of the person under section 68 (1) and ending when the person is apprehended and detained under the order.
- (3) On being notified of the apprehension and detention of a forensic patient on whom a limiting term has been imposed and who is the subject of an order under section 68 (1), the Tribunal must give the forensic patient a written notice setting out the effect of this section and the new expiration date of the limiting term.

[6] Section 68 Breach of orders for release

Omit “under this Part” from section 68 (1) (d).

[7] Section 68 (2)

Omit the subsection. Insert instead:

- (2) The Tribunal must review the case of a person apprehended under this section and may:

- (a) order the person's temporary detention, care or treatment in a mental health facility, correctional centre or other place, and in the manner, specified in the order, or
- (b) confirm the person's release or leave, either unconditionally or subject to conditions, or
- (c) revoke the conditional release order and order the person's detention, care or treatment in a mental health facility, correctional centre or other place, and in the manner, specified in the order.

Note—

The Tribunal may also make a community treatment order under Division 5.

[8] Sections 74A and 74B

Insert after section 74:

74A Victims may make submissions to Tribunal on review of and release of, or grant of leave to, forensic patients

- (1) A victim of a forensic patient may make a submission to the Tribunal if the Tribunal is considering the release of or the grant of leave of absence to the forensic patient.
- (2) A submission may include an application under section 76 (2).
- (3) The victim may request the Tribunal not to disclose the whole or part of a submission made by the victim to the forensic patient.
- (4) The Tribunal is to agree to a request of a victim not to disclose the whole or part of a submission unless it considers that it is not in the interests of justice to agree to the request.

Note—

Among other things that may be considered by the Tribunal is the question of procedural fairness to the forensic patient.

- (5) The regulations may make provision for or with respect to submissions by victims relating to the release of or grant of leave of absence to forensic patients.
- (6) Without limiting subsection (5), the regulations may make provision for or with respect to the following:
 - (a) the matters about which a victim may make submissions,
 - (b) the representation of victims by nominated support persons at hearings

conducted for the purpose of a review,

(c) the form of submissions by victims,

(d) the disclosure of victims' submissions to the forensic patient or other persons, including the circumstances in which the Tribunal may determine that, having regard to the interests of justice, non-disclosure is reasonable in the circumstances of the case.

74B Rights of victims

In conducting a review under this Act, the Tribunal is to have regard to the rights of victims in accordance with the Charter of Victims Rights set out in the [Victims Rights and Support Act 2013](#).

[9] Section 75 Conditions that may be imposed by Tribunal on release or leave of absence

Insert after section 75 (1) (k):

(l) requirements for the purposes of monitoring (including by electronic means) compliance with the conditions of release or leave.

[10] Section 76 Tribunal may amend or impose conditions on release or leave orders on application of victims

Insert "(in a submission made under section 74A or otherwise)" after "may apply" in section 76 (2).

[11] Section 76J Exchange of information

Insert ", the Secretary of the Department of Family and Community Services" after "Corrective Services" in section 76J (1).

[12] Section 76J (4)-(4B)

Omit section 76J (4). Insert instead:

(4) The Commissioner of Victims Rights and the President of the Tribunal may enter into arrangements with each other to exchange information held by the Department of Justice, the Commissioner or the Tribunal for the purposes of the Victims Register and notifications under Part 5A.

(4A) If an arrangement under subsection (4) applies to them, the Department of Justice, the Commissioner and the Tribunal are authorised:

(a) to request and receive information held by any of them, and

(b) to disclose information to any of them,

and without the consent of any person concerned, but only to the extent that the information is reasonably necessary for the purposes of the Victims Register and notifications under Part 5A.

(4B) This section does not limit the operation of any Act under which the Department or associated agency concerned, or the Commissioner of Victims Rights or the Tribunal, is authorised or required to disclose information to another person or body.

[13] Section 76J (5A)

Insert after section 76J (5):

(5A) The provision of information under this section does not constitute a contravention of the *Health Records and Information Privacy Act 2002* or the *Privacy and Personal Information Protection Act 1998*.

[14] Part 5A

Insert after Part 5:

Part 5A Victims Register

76L Victims Register

- (1) There is to be a Victims Register.
- (2) The following matters are to be included in the Victims Register:
 - (a) the names of victims of forensic patients who have requested that they be given notice of the review by the Tribunal of those patients,
 - (b) any other matter prescribed by the regulations.
- (3) The Victims Register may only include the name of a victim of a forensic patient if:
 - (a) the forensic patient has been found not guilty by reason of mental illness of an offence (whether or not following a special hearing), or
 - (b) a limiting term has been imposed on the forensic patient following a verdict in a special hearing.
- (4) The Victims Register is to be kept by the Commissioner of Victims Rights and is to be in the form determined by the Commissioner.
- (5) The regulations may make provision for or with respect to the following matters:
 - (a) applications to register as a victim,

- (b) the verification by the Commissioner of the identity of persons applying to register as victims, and the circumstances under which they became victims,
- (c) the use and disclosure of information contained in the Victims Register,
- (d) notifications to victims by the Tribunal or the Commissioner,
- (e) the operation and administration of the Victims Register.

76M Notification to victims of reviews and other matters

- (1) The Commissioner of Victims Rights must give notice to any registered victim of a forensic patient if:
 - (a) the forensic patient is due for a mandatory review by the Tribunal, or
 - (b) an application is made by or for the forensic patient for a review by the Tribunal, or an application is made by or for the forensic patient to the Tribunal, in relation to release or leave of absence, or
 - (c) the Tribunal makes or varies an order for the release (including the conditional release) of, or granting leave of absence to, the forensic patient or refuses to make any such order, or
 - (d) the forensic patient ceases to be a forensic patient, or
 - (e) the forensic patient is the subject of an order for apprehension made under section 68 or a request for apprehension under section 70, or
 - (f) the forensic patient appeals against a decision of the Tribunal, or
 - (g) notice is required to be given of a specified matter by regulations made for the purposes of this paragraph.
- (2) The notice is to be given subject to and in accordance with the regulations.
- (3) Without limiting subsection (2), the notice must contain the following information:
 - (a) the matter being notified,
 - (b) that the victim may make a submission to the Tribunal in any review proceedings involving the release of or a grant of leave to the forensic patient,
 - (c) the form that a submission may take,
 - (d) the period within which a submission must be made.
- (4) The Commissioner is not required to give notice of a matter under this section if:

- (a) the matter required to be notified to the victim is included in any other requirement to give notice to the victim under this Act, or
 - (b) the victim has notified the Commissioner that the victim does not require notice of the matter.
- (5) A failure by the Commissioner to comply with this section does not affect the validity of any decision or order made by the Tribunal.

[15] Schedule 1 Extension of status as forensic patient

Omit “28 days” from clause 11 (1). Insert instead “3 months”.

[16] Schedule 1, clause 17 (1) and (3)

Insert “or extension order” after “limiting term” wherever occurring.

[17] Schedule 3 Savings and transitional provisions

Insert at the end of the Schedule, with appropriate Part and clause numbering:

Part Mental Health (Forensic Provisions) Amendment (Victims) Act 2018

Existing victims register

- (1) The information contained in the register of victims of forensic patients kept by the Tribunal immediately before the commencement of section 76L, as inserted by the *Mental Health (Forensic Provisions) Amendment (Victims) Act 2018*, (the **former register**) is taken to form part of the Victims Register for the purposes of this Act.
- (2) The Commissioner of Victims Rights may add to, correct or remove any information included in the Victims Register by this clause.
- (3) A victim whose name was contained in the former register is taken, for all purposes, to be a victim registered in the Victims Register under this Act and accordingly is to be treated as a registered victim for the purposes of this Act.
- (4) This clause applies whether or not the person is a victim within the meaning of this Act.

Schedule 2 Amendment of Crimes (Forensic Procedures) Act 2000 No

59

Section 88 Destruction of forensic material after 12 months

Insert after section 88 (8):

- (9) For the purposes of subsection (4), a person is not a suspect who has been acquitted of an offence to which the forensic material relates if:
 - (a) a special verdict of not guilty of the offence on the ground of mental illness has been returned, or
 - (b) the person has been found, following a special hearing under the *Mental Health (Forensic Provisions) Act 1990*, on the limited evidence available, to have committed the offence charged or an available alternative offence.

Schedule 3 Amendment of *Crimes (Sentencing Procedure) Act 1999* No 92

[1] Sections 28A and 28B

Insert after section 28:

28A Victim impact statements where verdict of not guilty by reason of mental illness or limited finding of guilt

- (1) A court may receive a victim impact statement after:
 - (a) a verdict that an accused person is not guilty by reason of mental illness (whether or not following a special hearing) under the *Mental Health (Forensic Provisions) Act 1990*, or
 - (b) a verdict following a special hearing under that Act, that, on the limited evidence available, an accused person committed an offence.
- (2) A court must acknowledge receipt of the victim impact statement.
- (3) A court may consider a victim impact statement when it considers what conditions are to be imposed on the release of the accused person.
- (4) A court is not to consider a victim impact statement when determining the limiting term to be imposed on an accused person.
- (5) A court must not consider a victim impact statement under this section unless it has been given by or on behalf of the victim to whom it relates or by or on behalf of the prosecutor.

- (6) Section 28 does not apply to a victim impact statement received by a court under this section.
- (7) For the purposes of the definitions of **family victim** and **primary victim** in this Division, an offence is taken to have been committed by an accused person referred to in subsection (1).

28B Submissions by designated carers and principal care providers

- (1) A court may seek a submission by the designated carer or principal care provider of an accused person after a verdict of not guilty by reason of mental illness (whether or not following a special hearing) under the [Mental Health \(Forensic Provisions\) Act 1990](#) or a verdict following a special hearing under that Act, that, on the limited evidence available, the accused person committed an offence.
- (2) The regulations may make provision for or with respect to submissions under this section.
- (3) In this section, **designated carer** and **principal care provider** have the same meaning as they have in the [Mental Health Act 2007](#).

[2] Section 30B

Insert after section 30A:

30B Victim impact statements in mental health and cognitive impairment forensic proceedings

- (1) A victim may request that a court not disclose the whole or part of a victim impact statement received by the court under section 28A to the accused person or that the statement not be read out to the court.
- (2) The court is to agree to a request of a victim not to disclose the whole or part of a victim impact statement to the accused person or that a statement not be read out to the court unless the court considers that it is not in the interests of justice to agree to the request.

Note—

Among other things that may be considered by the court is the question of procedural fairness to the forensic patient.

- (3) This section does not prevent the court from disclosing the whole or part of a victim impact statement to an Australian legal practitioner representing the accused person, on the condition that the statement is not to be disclosed to any other person, if the court is satisfied that it is in the interests of justice to do so.

- (4) The court is required to give a copy of the victim impact statement to the Mental Health Review Tribunal constituted under the [Mental Health Act 2007](#), in accordance with the regulations, as soon as practicable after the court makes a decision that results in the accused person becoming a forensic patient within the meaning of that Act.
- (5) The regulations may make provision for or with respect to the requirements and procedures for victim impact statements in proceedings under the [Mental Health \(Forensic Provisions\) Act 1990](#).

Schedule 4 Amendment of [Government Information \(Public Access\) Act 2009 No 52](#)

Schedule 2 Excluded information of particular agencies

Insert “and functions relating to dealing with confidential information concerning victims contained in the Victims Register established under the [Mental Health \(Forensic Provisions\) Act 1990](#)” after “[Victims Rights and Support Act 2013](#)” in clause 4.

Schedule 5 Amendment of [Mental Health Act 2007 No 8](#)

Section 160 Tribunal procedure generally

Insert “, designated carers, principal care providers” after “family members” in section 160 (2) (d).

Schedule 6 Amendment of [Victims Rights and Support Act 2013 No 37](#)

[1] Section 3 Definitions

Insert “and, in relation to a victim of a forensic patient, means the Charter set out in section 6A” after “section 6” in the definition of **Charter of Victims Rights** in section 3 (1).

[2] Section 3 (1)

Insert in alphabetical order:

forensic patient has the same meaning as in the [Mental Health \(Forensic Provisions\) Act 1990](#).

[3] Section 6A

Insert after section 6:

6A Additional matters for Charter of victims rights of forensic patients

The following comprises the Charter of rights of victims of crime who are victims of forensic patients:

6A.1 General matters

Each right referred to in section 6.

6A.2 Treatment of victim

A victim will be treated with respect and compassion, having regard to the fact that proceedings may touch on painful or tragic events in the victim's life and cause the victim to experience further grief and distress.

A victim making a submission before the Mental Health Review Tribunal should be listened to respectfully and in a way that is cognisant of the effects of the victim's experience and the benefit of expressing views about its impact.

6A.3 Information about reviews of and other proceedings relating to forensic patients

A victim will be informed in a timely manner of any matter before the Mental Health Review Tribunal, or the release of or granting of leave to a forensic patient or any other matter, that the victim is required to be informed of under the [Mental Health \(Forensic Provisions\) Act 1990](#).

[4] Section 7 Implementation of Charter

Insert after section 7 (3) (d):

- (e) the administration of matters relating to forensic patients and victims of forensic patients.

[5] Section 10 Functions of Commissioner

Insert after section 10 (1) (h):

- (h1) to manage the Victims Register established under Part 5A of the [Mental Health \(Forensic Provisions\) Act 1990](#).