

# Mental Health and Cognitive Impairment Forensic Provisions Act 2020 No 12

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New South Wales

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### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **See also**  
[Statute Law \(Miscellaneous Provisions\) Bill \(No 2\) 2023](#)

### Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

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# Mental Health and Cognitive Impairment Forensic Provisions Act 2020 No 12



New South Wales

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# Mental Health and Cognitive Impairment Forensic Provisions Act 2020 No 12



New South Wales

An Act with respect to criminal proceedings involving persons with a mental health impairment or cognitive impairment and the care, treatment and control of those persons; and for other purposes.

## Part 1 Preliminary

### 1 Name of Act

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

### 2 Commencement

This Act commences on a day or days to be appointed by proclamation.

### 3 Definitions

(1) In this Act—

***cognitive impairment***—see section 5.

***Commissioner of Victims Rights*** means the Commissioner of Victims Rights established under the *Victims Rights and Support Act 2013*.

***correctional centre*** has the same meaning as in the *Crimes (Administration of Sentences) Act 1999*.

***correctional patient***—see section 73.

***defence of mental health impairment or cognitive impairment*** means the defence established under section 28(1).

***defendant*** includes an accused person and a person about whom a finding has been made at a special hearing.

***detention centre*** has the same meaning as in the *Children (Detention Centres) Act 1987*.

**extension order** means an order for the extension of a person's status as a forensic patient under section 121.

**Forensic Division** of the Tribunal means the Forensic Division of the Tribunal established under Division 1 of Part 7.

**forensic patient**—see section 72.

**high risk offender detention order** means a continuing detention order or an interim detention order under the [Crimes \(High Risk Offenders\) Act 2006](#) or the [Terrorism \(High Risk Offenders\) Act 2017](#).

**inmate** has the same meaning as in the [Crimes \(Administration of Sentences\) Act 1999](#).

**inquiry** means an inquiry conducted under Division 2 of Part 4 in order to determine whether a person is unfit to be tried for an offence.

**interim extension order** means an order for the interim extension of a person's status as a forensic patient under section 130.

**limiting term** means a term nominated for a person under Division 3 of Part 4.

**Magistrate** means a Magistrate or a Children's Magistrate.

**mental health impairment**—see section 4.

**registered victim** means a victim registered on the Victims Register.

**Secretary** means the Secretary of the Ministry of Health.

**special hearing**—see section 54.

**special verdict of act proven but not criminally responsible** means a special verdict of act proven but not criminally responsible entered at a trial or following a special hearing if the defence of mental health impairment or cognitive impairment is established.

**Tribunal** means the Mental Health Review Tribunal constituted under the [Mental Health Act 2007](#).

**victim** of a forensic patient means a primary victim, or a family victim, of an act of violence (within the meaning of the [Victims Rights and Support Act 2013](#)) committed by the forensic patient.

**Victims Register** means the Register established under Part 8.

**Note—**

The [Interpretation Act 1987](#) contains definitions and other provisions that affect the interpretation and

application of this Act.

- (2) Words and expressions used in this Act have the same meanings as in the *Mental Health Act 2007*.
- (3) For the purposes of the application of this Act to a person detained in, or transferred to or from, a detention centre—
  - (a) a reference to the Commissioner of Corrective Services is taken to be a reference to the Secretary of the Department of Communities and Justice, and
  - (b) a reference to a sentence of imprisonment is taken to include a reference to a term of detention under a detention order within the meaning of the *Children (Detention Centres) Act 1987*.
- (4) Notes included in this Act do not form part of this Act.

#### 4 Mental health impairment

- (1) For the purposes of this Act, a **person has a mental health impairment** if—
  - (a) the person has a temporary or ongoing disturbance of thought, mood, volition, perception or memory, and
  - (b) the disturbance would be regarded as significant for clinical diagnostic purposes, and
  - (c) the disturbance impairs the emotional wellbeing, judgment or behaviour of the person.
- (2) A mental health impairment may arise from any of the following disorders but may also arise for other reasons—
  - (a) an anxiety disorder,
  - (b) an affective disorder, including clinical depression and bipolar disorder,
  - (c) a psychotic disorder,
  - (d) a substance induced mental disorder that is not temporary.
- (3) A person does not have a mental health impairment for the purposes of this Act if the person's impairment is caused solely by—
  - (a) the temporary effect of ingesting a substance, or
  - (b) a substance use disorder.

#### 5 Cognitive impairment

- (1) For the purposes of this Act, a **person has a cognitive impairment** if—

- (a) the person has an ongoing impairment in adaptive functioning, and
  - (b) the person has an ongoing impairment in comprehension, reason, judgment, learning or memory, and
  - (c) the impairments result from damage to or dysfunction, developmental delay or deterioration of the person's brain or mind that may arise from a condition set out in subsection (2) or for other reasons.
- (2) A cognitive impairment may arise from any of the following conditions but may also arise for other reasons—
- (a) intellectual disability,
  - (b) borderline intellectual functioning,
  - (c) dementia,
  - (d) an acquired brain injury,
  - (e) drug or alcohol related brain damage, including foetal alcohol spectrum disorder,
  - (f) autism spectrum disorder.

## 6 References to juries and matters determined by a judge alone

In this Act (other than sections 29, 41, 56 and 58), a reference to a matter or question that is or is to be determined by a jury, or to another function of a jury, includes a reference to a judge in proceedings determined by a judge alone.

## Part 2 Summary proceedings

### Division 1 Preliminary

#### 7 Interpretation

- (1) In this Part—

**authorised justice** has the same meaning as in the [Bail Act 2013](#).

**authorised officer** has the same meaning as in the [Criminal Procedure Act 1986](#).

**juvenile justice officer** has the same meaning as in the [Children \(Detention Centres\) Act 1987](#).

**treatment or support plan** means a plan outlining programs, services or treatments or other support that may be required by a defendant to address the defendant's apparent mental health impairment or cognitive impairment.

- (2) A reference to an order in a Division of this Part is a reference to an order made under

that Division.

## **8 Application of Part**

- (1) This Part applies to the following criminal proceedings before a Magistrate—
  - (a) summary proceedings for offences,
  - (b) indictable offences triable summarily,
  - (c) any related proceedings under the *Bail Act 2013*.
- (2) This Part does not apply to committal proceedings.

## **9 Magistrate may make order at any time**

- (1) A Magistrate may make an order specified under this Part at the commencement of or at any other time during the course of proceedings before the Magistrate, whether or not the defendant has entered a plea.
- (2) (Repealed)

## **10 Means by which Magistrate may be informed**

For the purposes of this Part, a Magistrate may inform himself or herself as the Magistrate thinks fit, but not so as to require a defendant to incriminate himself or herself.

## **11 Magistrate to state reasons for decisions**

- (1) A Magistrate is to state the reasons for making a decision as to whether or not a defendant should be dealt with by an order under this Part.
- (2) A failure to comply with this section does not invalidate a decision of a Magistrate under this Part.

## **Division 2 Defendants with mental health impairments or cognitive impairments**

### **12 Defendants with mental health impairments or cognitive impairments**

- (1) A Magistrate may make an order under this Division or adjourn proceedings if it appears to the Magistrate that the defendant has (or had at the time of the alleged commission of the offence to which the proceedings relate) a mental health impairment or a cognitive impairment, or both.
- (2) The Magistrate may take action under this Division only if it appears to the Magistrate, on an outline of the facts alleged in the proceedings or other evidence the Magistrate considers relevant, it would be more appropriate to deal with the defendant in

accordance with this Division than otherwise in accordance with law.

- (3) This Division does not apply if the defendant is a mentally ill person or a mentally disordered person.

### **13 Adjournment of proceedings**

A Magistrate may, for the purposes of this Division—

- (a) adjourn proceedings to enable—
- (i) the defendant's apparent mental health impairment or cognitive impairment to be assessed or diagnosed, or
  - (ii) the development of a treatment or support plan for the defendant for the purposes of an order, or
  - (iii) a responsible person to be identified for the purposes of an order, or
  - (iv) for any other reason the Magistrate considers appropriate in the circumstances, or
- (b) make other interim orders that the Magistrate considers appropriate.

### **14 Orders Magistrate may make**

- (1) A Magistrate may make an order to dismiss a charge and discharge the defendant—
- (a) into the care of a responsible person, unconditionally or subject to conditions, or
  - (b) on the condition that the defendant attend on a person or at a place specified by the Magistrate for assessment, treatment or the provision of support for the defendant's mental health impairment or cognitive impairment, or
  - (c) unconditionally.
- (2) An order to dismiss a charge against a defendant does not constitute a finding that the charge against the defendant is proven or otherwise.

### **15 Considerations of Magistrate when making order**

In deciding whether it would be more appropriate to deal with a defendant in accordance with this Division, the Magistrate may consider the following—

- (a) the nature of the defendant's apparent mental health impairment or cognitive impairment,
- (b) the nature, seriousness and circumstances of the alleged offence,
- (c) the suitability of the sentencing options available if the defendant is found guilty of the offence,

- (d) relevant changes in the circumstances of the defendant since the alleged commission of the offence,
- (e) the defendant's criminal history,
- (f) whether the defendant has previously been the subject of an order under this Act or section 32 of the *Mental Health (Forensic Provisions) Act 1990*,
- (g) whether a treatment or support plan has been prepared in relation to the defendant and the content of that plan,
- (h) whether the defendant is likely to endanger the safety of the defendant, a victim of the defendant or any other member of the public,
- (i) other relevant factors.

#### **16 Failure of defendant to comply with condition of order**

- (1) If a Magistrate suspects that a defendant has failed to comply with a condition of an order under section 14, the Magistrate may, within 12 months of the order being made, order the defendant to appear before the Magistrate.
- (2) If the defendant fails to appear, the Magistrate may—
  - (a) issue a warrant for the defendant's arrest, or
  - (b) authorise an authorised officer to issue a warrant for the defendant's arrest.
- (3) If at the time the Magistrate proposes to make an order under subsection (1) the Magistrate is satisfied that the location of the defendant is unknown, the Magistrate may immediately—
  - (a) issue a warrant for the defendant's arrest, or
  - (b) authorise an authorised officer to issue a warrant for the defendant's arrest.
- (4) If a Magistrate discharges a defendant subject to a condition under an order, and the defendant fails to comply with the condition within 12 months of the discharge, the Magistrate may deal with the charge as if the defendant had not been discharged.

#### **17 Reports from treatment providers**

- (1) Despite any law, a person who is, in accordance with an order under section 14, to assess another person's mental condition or provide treatment to another person (a **treatment provider**) may report a failure to comply with a condition of the order by the other person to any of the following—
  - (a) an officer of the Department of Communities and Justice,
  - (b) another person or body prescribed by the regulations.



- (2) A treatment provider may include in the report information that the treatment provider considers is relevant to the making of a decision in relation to the failure to comply with the condition.
- (3) The report is to be in the form approved for the time being by the Secretary of the Department of Communities and Justice.

## **Division 3 Mentally ill or mentally disordered persons**

### **18 Mentally ill or mentally disordered persons**

- (1) A Magistrate may make an order under this Division if it appears to the Magistrate that the defendant is a mentally ill person or a mentally disordered person.
- (2) A Magistrate may make an order under this Division without affecting any other order the Magistrate may make in relation to the defendant, whether by way of adjournment, the granting of bail in accordance with the *Bail Act 2013* or otherwise.

**Note—**

Certain orders by a Magistrate or authorised justice under this Division in relation to an offence are taken to be a decision to dispense with bail for the offence (see section 24).

### **19 Orders Magistrate may make**

A Magistrate may make one or more of the following orders—

- (a) an order that the defendant be taken to, and detained in, a mental health facility for assessment,
- (b) an order that the defendant be taken to, and detained in, a mental health facility for assessment and that, if the defendant is found on assessment at the mental health facility not to be a mentally ill person or mentally disordered person, the defendant be brought back before a Magistrate or an authorised justice as soon as practicable unless granted bail by a police officer at that facility,
- (c) an order for the discharge of the defendant, unconditionally or subject to conditions, into the care of a responsible person.

### **20 Community treatment orders**

- (1) Without limiting section 19(c), the Magistrate may make a community treatment order in accordance with the *Mental Health Act 2007* for implementation by a declared mental health facility in relation to the defendant, if the Magistrate is satisfied that all of the requirements for the making of a community treatment order at a mental health inquiry under that Act (other than the holding of an inquiry) have been met in respect of the defendant.
- (2) The *Mental Health Act 2007* (other than section 51(1) and (2)) applies to and in

respect of the defendant and a community treatment order as if the order had been made by the Tribunal under that Act.

## **21 Proceedings before authorised justice**

- (1) If, at the commencement of or at any time during the course of the hearing of proceedings under the *Bail Act 2013* before an authorised justice, it appears to the authorised justice that the defendant is a mentally ill person or a mentally disordered person, the authorised justice may (without affecting any other order under the *Bail Act 2013* that the officer may make in relation to the defendant)—
  - (a) order that the defendant be taken to, and detained in, a mental health facility for assessment, or
  - (b) order that the defendant be taken to, and detained in, a mental health facility for assessment and that, if the defendant is found on assessment at the mental health facility not to be a mentally ill person or mentally disordered person, the defendant be brought back before a Magistrate or an authorised justice as soon as practicable unless granted bail by a police officer at that facility.
- (2) An authorised justice is to state the reasons for making a decision as to whether or not a defendant should be dealt with by an order under subsection (1).
- (3) A failure to comply with subsection (2) does not invalidate a decision of an authorised justice under this section.

## **22 Orders may relate to transfer of defendants by certain persons**

- (1) An order by a Magistrate or authorised justice may provide that a defendant—
  - (a) in the case of a defendant who is under the age of 18 years, be taken to or from a place by a juvenile justice officer, or
  - (b) in the case of any defendant, be taken to or from a place by a person of a kind prescribed by the regulations for the purposes of this section.
- (2) A function conferred on a juvenile justice officer under an order is taken to be a function under the *Children (Detention Centres) Act 1987* and the juvenile justice officer has the same functions in respect of the defendant as the officer has in respect of a detainee under that Act and the regulations under that Act.
- (3) If a correctional officer has power under an order to take a defendant to or from a place, that power is taken to be a function under the *Crimes (Administration of Sentences) Act 1999* and the correctional officer has the same functions in respect of the defendant as the officer has in respect of an inmate under that Act and the regulations under that Act.
- (4) In this section—

**correctional officer** has the same meaning as in the *Crimes (Administration of Sentences) Act 1999*.

### 23 Dismissal of charges

- (1) If a defendant is dealt with by a Magistrate or authorised justice in accordance with this Division, the charge which gave rise to the proceedings, on the expiration of the period of 6 months after the date on which the defendant is so dealt with, is taken to have been dismissed unless, within that period, the defendant is brought before a Magistrate to be further dealt with in relation to the charge.
- (2) If a defendant is brought before a Magistrate to be further dealt with in relation to a charge, the Magistrate must, in dealing with the charge, take account of any period during which the defendant was detained in a mental health facility as a consequence of an order.
- (3) The fact that charges are taken to have been dismissed under subsection (1) does not constitute a finding that the charges against the defendant are proven or otherwise.

### 24 Bail

- (1) An order by a Magistrate or authorised justice under section 19(a) or (b) or 21(1)(a) or (b) in relation to an offence is, for the purposes of the *Bail Act 2013*, taken to be a decision to dispense with bail for the offence.
- (2) An order under section 19(b) or 21(1)(b) that a defendant be brought back before a Magistrate or authorised justice may be satisfied by taking the defendant to an appropriate police officer for the making of a bail decision in respect of the defendant.
- (3) An appropriate police officer may make a bail decision in respect of a defendant brought before the appropriate police officer under this section (despite section 43(3) of the *Bail Act 2013*).
- (4) In this section—

**appropriate police officer** means a police officer who may make a bail decision under the *Bail Act 2013* in respect of a person accused of an offence who is present at a police station.

## Division 4 General

### 25 Transfer from correctional centre or detention centre

- (1) This section applies to a person who is awaiting committal for trial or trial for an offence or summary disposal of the person's case.
- (2) If it appears to a Magistrate that it may be appropriate to transfer a person to whom this section applies from a correctional centre or detention centre to a mental health

facility under section 86, the Magistrate may make an order directing—

- (a) that the defendant be examined by 2 medical practitioners, 1 of whom is a psychiatrist, and
- (b) that, if appropriate, the relevant certificates be given to the Secretary under section 86, and
- (c) that the Chief Executive, Justice Health or, in the case of a person who is under the age of 18 years, the Secretary of the Department of Communities and Justice to ensure that the Magistrate is notified of the action, if any, taken under section 86.

## **26 Regulations**

The regulations may prescribe the form of an order under this Part.

## **Part 3 Defence of mental health impairment or cognitive impairment**

### **27 Application of Part**

This Part applies to criminal proceedings in the Supreme Court (including criminal proceedings within the summary jurisdiction of the Supreme Court) and the District Court.

### **28 Defence of mental health impairment or cognitive impairment**

- (1) A person is not criminally responsible for an offence if, at the time of carrying out the act constituting the offence, the person had a mental health impairment or a cognitive impairment, or both, that had the effect that the person—
  - (a) did not know the nature and quality of the act, or
  - (b) did not know that the act was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the act, as perceived by reasonable people, was wrong).
- (2) The question of whether a defendant had a mental health impairment or a cognitive impairment, or both, that had that effect is a question of fact and is to be determined by the jury on the balance of probabilities.
- (3) Until the contrary is proved, it is presumed that a defendant did not have a mental health impairment or cognitive impairment, or both, that had that effect.
- (4) In this Part, **act** includes—
  - (a) an omission, and
  - (b) a series of acts or omissions.

## **29 Explanation to jury**

The judge must explain the following matters to the jury if the question of whether the defendant had a mental health impairment or a cognitive impairment, or both, as referred to in section 28(1) is raised—

- (a) the findings which may be made on the trial,
- (b) the legal and practical consequences of those findings,
- (c) the composition of the Tribunal and its relevant functions with respect to forensic patients,
- (d) without limiting paragraph (b), that a defendant who is found to have committed the act constituting the offence but not to be criminally responsible because of a mental health impairment or cognitive impairment, or both, may be ordered to be released by the Tribunal only if the Tribunal is satisfied, on the evidence available to it, that the safety of the defendant or any member of the public will not be seriously endangered by the defendant's release,
- (e) that the jury should not be influenced by the consequences of a special verdict of act proven but not criminally responsible in deciding a verdict.

## **30 Effect of finding of act proven but not criminally responsible because of mental health impairment or cognitive impairment**

A jury must return a special verdict of act proven but not criminally responsible if the jury is satisfied that the defence of mental health impairment or cognitive impairment has been established.

## **31 Special verdict where defendant and prosecutor agree on impairment**

The court may enter a special verdict of act proven but not criminally responsible at any time in the proceedings (including before the jury is empanelled) if—

- (a) the defendant and the prosecutor agree that the proposed evidence in the proceedings establishes a defence of mental health impairment or cognitive impairment, and
- (b) the defendant is represented by an Australian legal practitioner, and
- (c) the court, after considering that evidence, is satisfied that the defence is so established.

## **32 Special verdict not available for alternative offence**

The fact that a court enters a special verdict of act proven but not criminally responsible in respect of an offence does not result in a requirement for the court to also enter a special verdict in respect of an offence available as an alternative to the offence.

### **33 Effect of special verdict**

- (1) On the return of a special verdict of act proven but not criminally responsible, the court may make one or more of the following orders—
  - (a) an order that the defendant be remanded in custody until a further order is made under this section,
  - (b) an order that the defendant be detained in the place and manner that the court thinks fit until released by due process of law,
  - (c) an order for the unconditional or conditional release of the defendant from custody,
  - (d) other orders that the court thinks appropriate.
- (2) Before making an order for the release of a defendant, the court may request a report by a forensic psychiatrist or other person of a class prescribed by the regulations, who is not currently involved in treating the defendant, as to the condition of the defendant and whether the release of the defendant is likely to seriously endanger the safety of the defendant or any member of the public.
- (3) The court must not make an order for the release of a defendant unless it is satisfied, on the balance of probabilities, that the safety of the defendant or any member of the public will not be seriously endangered by the defendant's release.

**Note—**

A person for whom a special verdict of act proven but not criminally responsible is entered is a forensic patient unless unconditionally released and is to be dealt with under Part 5.

### **34 Referral of defendant to Tribunal**

The court must refer the defendant to the Tribunal if a special verdict of act proven but not criminally responsible is returned or entered and an order is not made for the unconditional release of the defendant.

## **Part 4 Fitness to stand trial**

### **Division 1 Preliminary**

#### **35 Application of Part**

This Part applies to criminal proceedings in the Supreme Court (including criminal proceedings within the summary jurisdiction of the Supreme Court) and the District Court.

#### **36 Fitness test**

- (1) For the purposes of proceedings to which this Part applies, a person is taken to be unfit to be tried for an offence if the person, because the person has a mental health

impairment or cognitive impairment, or both, or for another reason, cannot do one or more of the following—

- (a) understand the offence the subject of the proceedings,
- (b) plead to the charge,
- (c) exercise the right to challenge jurors,
- (d) understand generally the nature of the proceedings as an inquiry into whether the person committed the offence with which the person is charged,
- (e) follow the course of the proceedings so as to understand what is going on in a general sense,
- (f) understand the substantial effect of any evidence given against the person,
- (g) make a defence or answer to the charge,
- (h) instruct the person's legal representative so as to mount a defence and provide the person's version of the facts to that legal representative and to the court if necessary,
- (i) decide what defence the person will rely on and make that decision known to the person's legal representative and the court.

- (2) This section does not limit the grounds on which a court may consider a person to be unfit to be tried for an offence.

### **37 When question of unfitness may be raised**

- (1) The question of a defendant's unfitness to be tried for an offence is, so far as practicable, to be raised before the defendant is arraigned on a charge in respect of the offence but may be raised at any time during the course of the hearing of the proceedings in respect of the offence.
- (2) The question of a defendant's unfitness to be tried for an offence may be raised on more than one occasion in the same proceedings.

### **38 Question of unfitness to be determined on balance of probabilities**

The question of a defendant's unfitness to be tried for an offence is to be determined on the balance of probabilities.

### **39 Court and other persons may raise question of unfitness**

The court, the defendant or the prosecutor may raise the question of a defendant's unfitness to be tried for an offence.

## **Division 2 Procedure when question of unfitness to be tried raised**

### **40 Procedure where question of unfitness raised before arraignment**

- (1) If the question of a defendant's unfitness to be tried is raised before the defendant is arraigned on a charge in respect of the offence, the court must determine whether an inquiry should be conducted before the hearing of the proceedings in respect of the offence.
- (2) The court may, at any time before an inquiry is commenced, determine that there is no longer a need for the inquiry to be held.

### **41 Procedure where question of unfitness raised after arraignment**

If the question of a defendant's unfitness to be tried is raised after the person is arraigned on a charge in respect of the offence, the court must hear any submissions relating to holding an inquiry in the absence of a jury which has been constituted for the purposes of the proceedings relating to the offence.

### **42 When an inquiry is required or may not be held**

- (1) The court must conduct an inquiry to determine whether a defendant is unfit to be tried for an offence if—
  - (a) the court determines that an inquiry should be conducted before the defendant is arraigned on a charge in respect of the offence and does not subsequently determine that the inquiry is not needed, or
  - (b) the question of the defendant's unfitness to be tried is raised after the defendant is arraigned on a charge in respect of the offence.
- (2) The inquiry is to be held as soon as practicable after the court makes the determination or the question is raised after arraignment.
- (3) Despite subsection (1), the court is not required to hold an inquiry unless it appears to the court that the question of the defendant's unfitness to be tried for the offence has been raised in good faith.
- (4) Despite subsection (1), the court may determine not to hold an inquiry, dismiss the charge and order that the defendant be released if it is of the opinion, having regard to any of the following, that it is inappropriate to inflict any punishment—
  - (a) the trivial nature of the charge or offence,
  - (b) the nature of the defendant's mental health impairment or cognitive impairment,
  - (c) any other matter the court thinks proper to consider.



### **43 Actions pending inquiry**

The court may do one or more of the following before holding an inquiry—

- (a) adjourn the proceedings,
- (b) grant the defendant bail in accordance with the *Bail Act 2013*,
- (c) order the defendant to be remanded in custody for a period not exceeding 28 days,
- (d) order the defendant to undergo a psychiatric examination or other examination,
- (e) order that a psychiatric report or other report relating to the defendant be obtained,
- (f) discharge a jury constituted for the purpose of the proceedings,
- (g) make other orders the court thinks appropriate.

### **44 Inquiry procedures**

- (1) The question of a defendant's unfitness to be tried for an offence is to be determined by the judge alone.
- (2) At an inquiry, the defendant is to be represented by an Australian legal practitioner, unless the court otherwise allows.
- (3) An inquiry is not to be conducted in an adversarial manner.
- (4) The onus of proof of the question of a defendant's unfitness to be tried for an offence does not rest on any particular party to the proceedings.
- (5) In addition to any other matter the court may consider in determining whether the defendant is unfit to be tried for an offence, the court is to consider the following—
  - (a) whether the trial process can be modified, or assistance provided, to facilitate the defendant's understanding and effective participation in the trial,
  - (b) the likely length and complexity of the trial,
  - (c) whether the defendant is represented by an Australian legal practitioner, or can obtain representation by an Australian legal practitioner.

**Note—**

The test for determining whether or not a person is unfit to be tried for an offence is set out in section 36.

- (6) A determination by the judge must include the principles of law applied by the judge and the findings of fact on which the judge relied.

#### **45 Presumptions as to findings about unfitness**

It is presumed—

- (a) that a person who has, in accordance with this Part or on a review under Part 5, been found to be unfit to be tried for an offence continues to be unfit to be tried for the offence until the contrary is, on the balance of probabilities, determined to be the case, and
- (b) that a person who has, in accordance with this Part or on a review under Part 5, been found fit to be tried for an offence continues to be fit to be tried for the offence until the contrary is, on the balance of probabilities, determined to be the case.

#### **46 Finding after inquiry that defendant is fit to be tried**

If a defendant is found fit to be tried following an inquiry, the proceedings brought against the person in respect of the offence are to recommence or to continue in accordance with the appropriate criminal procedures.

#### **47 Finding after inquiry that defendant is unfit to be tried**

- (1) If a defendant is found unfit to be tried for an offence following an inquiry, the court must also determine whether, on the balance of probabilities, during the period of 12 months after the finding of unfitness, the defendant—
  - (a) may become fit to be tried for the offence, or
  - (b) will not become fit to be tried for the offence.
- (2) The court may do one or more of the following after a finding that a defendant is unfit to be tried for an offence—
  - (a) make an order discharging a jury constituted for the purpose of the proceedings,
  - (b) adjourn the proceedings,
  - (c) grant the defendant bail in accordance with the [Bail Act 2013](#),
  - (d) make an order remanding the defendant in custody,
  - (e) make other orders that the court thinks appropriate.

#### **48 Finding after inquiry that defendant will not become fit to be tried within 12 months**

- (1) If the court determines that a defendant will not, during the period of 12 months after a finding by a court that the person is unfit to be tried for an offence, become fit to be tried for the offence, the defendant is to be dealt with under Division 3.
- (2) This section does not apply if the court is required to order the release of the defendant because of advice under section 53 that further proceedings will not be

taken against the defendant in respect of the offence.

**49 Tribunal review and court orders after finding that defendant may be fit to be tried within 12 months**

- (1) The court must refer the defendant to the Tribunal for review if the court determines that the defendant is unfit to be tried for an offence and may become fit to be tried for the offence during the period of 12 months after the finding.
- (2) The court may grant the defendant bail in accordance with the [Bail Act 2013](#) for a period not exceeding 12 months on being notified of a determination by the Tribunal under section 80 that the defendant has become fit to be tried for the offence.
- (3) As soon as practicable after an order is made or bail is granted under this section, the registrar of the court is to notify the Tribunal of the terms of the order or the grant of bail.

**50 Finding by Tribunal that defendant is fit to be tried**

- (1) If the court is notified by the Tribunal following a review that a defendant has become fit to be tried for an offence, the proceedings brought against the defendant in respect of the offence are to recommence or to continue in accordance with the appropriate criminal procedures.
- (2) A court is not to hold a further inquiry into the fitness of a defendant to be tried for an offence merely because the Tribunal notifies the court that the defendant has become fit to be tried for an offence.
- (3) Subsection (1) does not apply if the court is required to order the release of the defendant because of advice under section 53 that further proceedings will not be taken against the defendant in respect of the offence.

**51 Finding by Tribunal that defendant will not become fit to be tried within 12 months**

- (1) If the court is notified by the Tribunal following a review that a defendant has not and will not, during the period of 12 months after a finding by a court that the defendant is unfit to be tried for an offence, become fit to be tried for the offence, the defendant is to be dealt with under Division 3.
- (2) This section does not apply if the court is required to order the release of the defendant because of advice under section 53 that further proceedings will not be taken against the defendant in respect of the offence.

**52 Committal proceedings following finding of fit to be tried**

- (1) This section applies to a defendant who was committed for trial for an offence under Division 7 of Part 2 of Chapter 3 of the [Criminal Procedure Act 1986](#).

- (2) The court may, on the application of the defendant or on its own motion, make an order remitting the matter to a Magistrate for the holding of a case conference under Division 5 of Part 2 of Chapter 3 of the *Criminal Procedure Act 1986*, if the defendant has, following an inquiry, been found fit to be tried for an offence.
- (3) The court must make the order on the application of the defendant unless it is satisfied that it is not in the interests of justice to do so or that the offence is not an offence in relation to which a case conference is required to be held under that Division.
- (4) The court may, on its own motion, make an order remitting the matter to a Magistrate for the holding of a case conference under Division 5 of Part 2 of Chapter 3 of the *Criminal Procedure Act 1986* at any time, if it is satisfied that the question of the defendant's unfitness to be tried for an offence is not going to be raised in proceedings for the offence.
- (5) If a matter is remitted to a Magistrate, the matter is to be dealt with as if the defendant had not been committed for trial and the proceedings are taken to be a continuation of the original committal proceedings.
- (6) If no application is made or the matter is not remitted to a Magistrate, the matter is to be dealt with in accordance with section 50.

### **53 Advice as to whether further proceedings are to be taken**

- (1) This section applies if—
  - (a) the court determines that a defendant will not, during the period of 12 months after a finding by a court that the person is unfit to be tried for an offence, become fit to be tried for an offence, or
  - (b) the Tribunal determines that a defendant has not become fit to be tried for an offence and will not become fit to be tried for an offence during the period of 12 months after a finding by a court that the person is unfit to be tried for an offence, or
  - (c) the Tribunal determines that a defendant or a forensic patient has become fit to be tried for an offence after a finding by a court that the person is unfit to be tried for an offence or a special hearing has been held for an offence.
- (2) The court must obtain advice from the Director of Public Prosecutions as to whether or not further proceedings will be taken by the Director in respect of the offence.
- (3) The court must order the release of the defendant if the Director of Public Prosecutions advises that further proceedings will not be taken by the Director in respect of the offence.

#### **Note—**

This does not prevent the admission of the defendant as a voluntary or an involuntary patient under the [Mental Health Act 2007](#).

- (4) The Director of Public Prosecutions must notify the Minister for Police and Emergency Services and the Minister for Health and Medical Research of a decision by the Director that no further proceedings will be taken by the Director in respect of the offences.

## Division 3 Special hearings

### 54 Nature of special hearings

In this Act, a **special hearing** is a hearing for the purpose of ensuring, despite the unfitness of the defendant to be tried in accordance with the normal procedures, that the defendant is acquitted unless it can be proved to the required criminal standard of proof that, on the limited evidence available, the defendant committed the offence charged, or another offence available as an alternative to the offence charged.

### 55 When special hearings are held

- (1) A court must hold a special hearing as soon as practicable after the court or the Tribunal determines that a defendant will not, during the period of 12 months after a finding that the person is unfit to be tried for an offence, become fit to be tried for the offence.
- (2) This section does not apply if the court is required to order the release of the defendant because of advice under section 53 that further proceedings will not be taken against the defendant in respect of the offence.

#### Note—

This does not prevent the admission of the defendant as a voluntary or an involuntary patient under the [Mental Health Act 2007](#).

### 56 Procedure for special hearings

- (1) **Trial procedure** A special hearing is to be conducted as nearly as possible as if it were a trial of criminal proceedings.
- (2) The court may, if it thinks it appropriate in the circumstances of the case, modify court processes to facilitate the effective participation by the defendant in the special hearing.
- (3) **Representation** At a special hearing, the defendant must, unless the court otherwise allows, be represented by an Australian legal practitioner.
- (4) The fact that the defendant has been found unfit to be tried for an offence is to be presumed not to be an impediment to the person's representation.

- (5) **Plea of not guilty** The defendant is taken to have pleaded not guilty in respect of the offence charged.
- (6) **Defences** The defendant may raise any defence that could properly be raised if the special hearing were an ordinary trial of criminal proceedings.
- (7) **Evidence and participation by defendant** The defendant is entitled to give evidence.
- (8) The court may permit the defendant not to appear, or exclude the defendant from appearing, at a special hearing if the court thinks it appropriate in the circumstances and the defendant or the defendant's Australian legal practitioner agrees.
- (9) **Judge to try proceedings, unless jury election** The question of whether the defendant at a special hearing has committed an offence charged or another offence available as an alternative is to be determined by the judge alone unless an election to have the matter determined by a jury is made by—
  - (a) the defendant and the court is satisfied that the defendant sought and received advice about the election from an Australian legal practitioner and the defendant understood the advice, or
  - (b) an Australian legal practitioner representing the defendant, or
  - (c) the prosecutor.
- (10) **Right to challenge jurors** If a jury is to be constituted, the Australian legal practitioner (if any) representing the defendant may exercise the defendant's rights to challenge the jurors or jury.
- (11) **Explanation to jury** The court must explain the following matters to a jury constituted for the purposes of a special hearing—
  - (a) the fact that the defendant is unfit to be tried in accordance with the normal procedures,
  - (b) the meaning of unfitness to be tried,
  - (c) the purpose of the special hearing,
  - (d) the verdicts that are available to the jury,
  - (e) the legal and practical consequences of the verdicts.

## **57 Amendment of indictment**

- (1) The Director of Public Prosecutions may, with the leave of the court or the consent of an Australian legal practitioner representing the defendant, amend an indictment to which a special hearing relates.

- (2) The provisions of the *Criminal Procedure Act 1986* apply to the amendment of an indictment under this section in the same way as they apply to the amendment of an indictment in ordinary criminal proceedings, subject to any modifications that the court considers appropriate in the circumstances.

## **58 Juries at special hearings**

- (1) An election to have a special hearing determined by a jury must be made—
  - (a) on a day before the day fixed for the special hearing, if the election is made by the defendant, or
  - (b) at least 7 days before the day fixed for the special hearing, if the election is made by the prosecutor.
- (2) The defendant, or an Australian legal practitioner for the defendant, may subsequently elect to have the special hearing determined by a judge instead of a jury.
- (3) The *Jury Act 1977* applies to the constitution of a jury, and to a jury constituted, for a special hearing in the same way as it applies to the constitution of a jury, and to a jury constituted, for a trial of criminal proceedings.
- (4) A member of a jury otherwise constituted for the purpose of a proceeding related to the same defendant and the same offence is not eligible to be a member of a jury constituted for the purposes of a special hearing.
- (5) Rules of court may be made with respect to elections to have a special hearing determined by a jury.

## **59 Verdicts at special hearings**

- (1) The verdicts available at a special hearing include the following—
  - (a) not guilty of the offence charged,
  - (b) a special verdict of act proven but not criminally responsible,
  - (c) that on the limited evidence available, the defendant committed the offence charged,
  - (d) that on the limited evidence available, the defendant committed an offence available as an alternative to the offence charged.
- (2) A judge who determines a special hearing must include in the determination the principles of law applied by the judge and the findings of fact on which the judge relied.
- (3) A special verdict of act proven but not criminally responsible may only be entered

under this section if the judge is satisfied that the requirements of section 28(1) and (2) are met.

### **60 Verdict of not guilty**

A defendant who is found not guilty of an offence at a special hearing is to be dealt with as if the defendant had been found not guilty of the offence at an ordinary trial of criminal proceedings.

### **61 Special verdict of act proven but not criminally responsible because of mental health impairment or cognitive impairment**

- (1) A special verdict of act proven but not criminally responsible at a special hearing is taken for all purposes to be a verdict reached at an ordinary trial of criminal proceedings.
- (2) Without limiting subsection (1), the court may make any order or take any action in respect of the defendant that a court could make on reaching the same verdict under Part 3.

### **62 Verdict of offence committed on limited evidence available**

A verdict at a special hearing that on the limited evidence available the defendant committed the offence charged or an offence available as an alternative to the offence charged—

- (a) constitutes a qualified finding of guilt and does not constitute a basis in law for a conviction for the offence to which the finding relates, and
- (b) is subject to appeal in the same manner as a verdict in an ordinary trial of criminal proceedings, and
- (c) is taken to be a conviction for the purpose of enabling a victim of the offence to make a claim for compensation.

### **63 Penalties after finding of guilt**

- (1) **Application of section** This section applies if a court finds at a special hearing that on the limited evidence available the defendant committed the offence charged or an offence available as an alternative to the offence charged.
- (2) **Limiting terms** If the court would have imposed a sentence of imprisonment for the offence if the special hearing had been an ordinary trial of criminal proceedings and the person had been fit to be tried for the offence, the court must nominate a term (a **limiting term**) that is the best estimate of the sentence that the court would have imposed on the defendant in those circumstances.
- (3) **Other penalties and orders** If the court determines that it would not have imposed a



sentence of imprisonment, the court may impose any other penalty or make any order it might have imposed or made if the defendant had been found guilty of the offence in an ordinary trial of criminal proceedings.

- (4) The penalty or order is to be subject to appeal in the same manner as a penalty or order in an ordinary trial of criminal proceedings.
- (5) **Factors for consideration in determining penalty** Without limiting subsection (2) or (3), in determining a limiting term or other penalty, the court—
  - (a) must take into account that, because of the defendant’s mental health impairment or cognitive impairment, or both, the person may not be able to demonstrate mitigating factors for sentencing or make a guilty plea for the purposes of obtaining a sentencing discount, and
  - (b) may apply a discount of a kind that represents part or all of the sentencing discounts that are capable of applying to a sentence because of those factors or a guilty plea, and
  - (c) must take into account periods of the defendant’s custody or detention before, during and after the special hearing that related to the offence.
- (6) **Notice to Tribunal where no limiting term imposed** If the court indicates that it would not have imposed a sentence of imprisonment in respect of a defendant, the court must notify the Tribunal that a limiting term is not to be nominated in respect of the person.

#### **64 Commencement of limiting terms**

- (1) A limiting term takes effect from when it is nominated unless—
  - (a) the court determines it is taken to have effect from an earlier time, after taking into account periods of the defendant’s custody or detention before, during and after the special hearing that related to the offence, or
  - (b) the court directs that the term commence at a later time so as to be served consecutively with (or partly concurrently and partly consecutively with) some other limiting term nominated for the person or sentence of imprisonment imposed on the person.
- (2) Before making a direction that the term commence at a later time, the court is to take into account the following—
  - (a) a sentence of imprisonment imposed in an ordinary trial of criminal proceedings may be subject to a non-parole period but a limiting term is not,
  - (b) in an ordinary trial of criminal proceedings, consecutive sentences of imprisonment are to be imposed with regard to non-parole periods.

### **65 Referral to Tribunal after limiting term imposed**

- (1) The court must refer the defendant to the Tribunal if it nominates a limiting term for the defendant and must notify the Tribunal of orders it makes under this section.
- (2) The court may order that the defendant be detained in a mental health facility, correctional centre, detention centre or other place pending the review of the defendant by the Tribunal.

### **66 Reports about defendant**

- (1) The court may, following a verdict being reached at a special hearing and on its own motion, request a report by a forensic psychiatrist or other person of a class prescribed by the regulations, who is not currently involved in treating the defendant, as to the condition of the defendant and whether the release of the defendant is likely to seriously endanger the safety of the defendant 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 defendant.

### **67 Referral of defendant to Tribunal following special verdict**

The court must refer the defendant to the Tribunal if there is a special verdict of act proven but not criminally responsible at a special hearing and an order is not made for the unconditional release of the defendant.

### **68 Effect of finding that offence was committed on other proceedings for the offence**

- (1) A verdict at a special hearing that on the limited evidence available the defendant committed the offence charged or an offence available as an alternative to the offence charged constitutes a bar to any other criminal proceedings for the same offence or substantially the same offence.
- (2) Despite subsection (1), criminal proceedings for the same offence or substantially the same offence may be commenced against a defendant if—
  - (a) a limiting term has been nominated at the special hearing for the defendant, and
  - (b) the limiting term has not expired, and
  - (c) the defendant has not been released from custody as an inmate or discharged from detention as a forensic patient.
- (3) Despite subsection (1), criminal proceedings for the same offence or substantially the same offence may be commenced against a defendant if the defendant is subject to an extension order or interim extension order.
- (4) A defendant who has been released from custody under a conditional release order or

leave order made by the Tribunal is not a person who has been released from custody for the purposes of subsection (2)(c).

- (5) A court must, in sentencing a defendant found guilty in ordinary criminal proceedings of the same offence or substantially the same offence, fully take into account periods of the defendant's custody or detention before, during and after the special hearing that related to the offence.

## **Part 5 Forensic patients and correctional patients**

### **Division 1 General principles and concepts**

#### **69 Objects**

- (1) The objects of this Part are as follows—
- (a) to protect the safety of members of the public,
  - (b) to provide for the care, treatment and control of persons subject to criminal proceedings who have a mental health impairment or cognitive impairment,
  - (c) to facilitate the care, treatment and control of any of those persons in correctional centres or detention centres through community treatment orders,
  - (d) to facilitate the provision of hospital care or care in the community through community treatment orders for any of those persons who require involuntary treatment,
  - (e) to give an opportunity for those persons to have access to appropriate care,
  - (f) to protect the safety of victims of forensic patients and acknowledge the harm done to victims.
- (2) The objects of this Part extend to the provisions of Part 6.

#### **70 Treatment, care and detention of patients**

- (1) The principles set out in section 68 of the *Mental Health Act 2007* apply to the administration of this Act with respect to forensic patients and correctional patients.
- (2) A forensic patient who is ordered to be detained in a mental health facility should, so far as practicable, be detained in a mental health facility or other facility that is appropriate to the patient's needs and appropriate having regard to the safety of the patient and other persons.

#### **71 Application of provisions of *Mental Health Act 2007* to forensic patients and correctional patients**

The following provisions of the *Mental Health Act 2007* apply with respect to forensic

patients and correctional patients—

- (a) section 70 for a medical examination of a person for the purposes of this Part,
- (b) sections 71–72A relating to carers,
- (c) section 73 if the patient is detained in a mental health facility.

## **72 Forensic patients**

- (1) The following persons are **forensic patients** for the purposes of this Act—
  - (a) a person who is found unfit to be tried for an offence and who is detained in a mental health facility, correctional centre, detention centre or other place,
  - (b) a person for whom a limiting term has been nominated after a special hearing (including a person who is subsequently subject to an extension order or an interim extension order) and who is detained in a mental health facility, correctional centre, detention centre or other place or who is released from custody subject to conditions under an order made by the Tribunal,
  - (c) a person who is the subject of a special verdict of act proven but not criminally responsible and who is detained in a mental health facility, correctional centre, detention centre or other place or who is released from custody subject to conditions under an order made by a court or the Tribunal,
  - (d) a person who is a member of a class of persons prescribed by the regulations for the purposes of this section.
- (2) To avoid doubt, a person is not a forensic patient if the person has been found unfit to be tried for an offence and has been released on bail.

## **73 Correctional patients**

A person is a **correctional patient** for the purposes of this Act if—

- (a) the person has been transferred from a correctional centre or detention centre to a mental health facility while—
  - (i) serving a sentence of imprisonment, or
  - (ii) on remand, or
  - (iii) subject to a high risk offender detention order, and
- (b) the person is not a forensic patient and has not ceased to be a correctional patient under section 104 or been classified as an involuntary patient under this Part.

#### **74 Role of objects and principles provisions**

The provisions of sections 69 and 70 are intended to give guidance in the administration of this Act and do not create, or confer on any person, any right or entitlement enforceable at law.

### **Division 2 General provisions relating to reviews by Tribunal**

#### **75 Matters Tribunal must consider that apply to all orders**

On a review or other proceedings under this Act relating to a person, the Tribunal must have regard to the following matters when determining what order to make about the person—

- (a) whether the person has a mental health impairment or cognitive impairment,
- (b) whether there are reasonable grounds for believing that care, treatment or control of the person is necessary for the person's own protection from serious harm or the protection of others from serious harm,
- (c) the continuing condition of the person, including any likely deterioration in the person's condition and the likely effects of that deterioration.

#### **76 Unlawful absence from mental health facility or other place**

The Tribunal is not required to review the case of a person during a period in which the person is unlawfully absent from a mental health facility or other place in which the person has been detained under this Act.

#### **77 Extension of mandatory review period**

- (1) The period within which the following reviews must be held may, on the motion of the Tribunal or on the application of the forensic patient or correctional patient or a designated carer or the principal care provider of the patient, be extended by the Tribunal to a maximum of 12 months—
  - (a) a mandatory review of a forensic patient under section 78(d), (e), (f) or (g),
  - (b) a mandatory review of a correctional patient under section 91(b),
  - (c) a review under section 100 of a person in custody who is subject to a community treatment order.
- (2) The Tribunal may grant an application to extend the review period if it is satisfied that—
  - (a) there are reasonable grounds to grant the application, or
  - (b) an earlier review is not required because—

- (i) there has been no change since the last review in the patient's condition and there is no apparent need for any change in existing orders relating to the patient, or
  - (ii) there has been no change since the last review in the patient's condition and an earlier review may be detrimental to the condition of the patient.
- (3) This section does not apply to the first review of a forensic patient or to a review of a forensic patient who is subject to an extension order.

### **Division 3 Reviews of forensic patients by Tribunal**

#### **78 Mandatory reviews of forensic patients**

The Tribunal must carry out reviews of forensic patients at the following times—

- (a) as soon as practicable after a limiting term is nominated by a court for a forensic patient,
- (b) as soon as practicable after a court finds at an inquiry that a defendant is unfit to be tried for an offence and may become fit to be tried for an offence within 12 months and the proceedings are adjourned,
- (c) in the case of a person for whom a court enters a special verdict of act proven but not criminally responsible, as soon as practicable after the court enters the verdict,
- (d) at intervals of 6 months during the period that a person is a forensic patient,
- (e) if a forensic patient is detained in a correctional centre or detention centre and is subject to a community treatment order, no later than 3 months after the community treatment order is made and at least once every 6 months during the term of the order,
- (f) as soon as practicable after being requested to carry out a review of a forensic patient by the Minister for Health and Medical Research, the Attorney General and Minister for the Prevention of Domestic Violence, the Minister for Counter Terrorism and Corrections or the Secretary,
- (g) as soon as practicable after being requested to carry out a review of a forensic patient by the medical superintendent of the mental health facility in which the patient is detained.

#### **79 Tribunal may review patient at any time**

The Tribunal may carry out a review of a forensic patient at any time.

#### **80 Reviews of persons found unfit to be tried for an offence**

- (1) On a review of a person who has been found unfit to be tried for an offence, the

Tribunal must determine whether the person has become fit to be tried for an offence.

- (2) The Tribunal must notify the court that made the finding of unfitness, the Director of Public Prosecutions and the person's legal representative if, on a review, it is of the opinion that the person reviewed—
  - (a) has become fit to be tried for an offence, or
  - (b) has not become fit to be tried for an offence and will not, during the period of 12 months after the finding of unfitness by the court, become fit to be tried for the offence.
- (3) The Tribunal must make a determination as to the fitness of a person to be tried for an offence on the balance of probabilities.

**Note—**

The presumptions in section 45 apply to the person.

**81 Orders that may be made on reviews generally**

On a review of a forensic patient under this Act, the Tribunal may make an order as to—

- (a) the patient's detention, care or treatment in a mental health facility, correctional centre, detention centre or other place, or
- (b) the patient's release (either unconditionally or subject to conditions).

**82 Orders for transfer of forensic patients**

On a review under this Part, the Tribunal may make an order for the transfer of a forensic patient to a mental health facility, correctional centre, detention centre or other place.

**83 Orders for release of forensic patients**

- (1) An order for release of a forensic patient under this Division may be made despite any other provision of this Act or any order of a court under this Act.
- (2) Despite subsection (1), the Tribunal must not order the release of a forensic patient if the patient is a person who has been remanded in custody pending the person's return to court but may make a recommendation to the court as to the person's release.
- (3) Despite subsection (1), the Tribunal must not make an order as to the unconditional release of a forensic patient who is subject to an extension order or interim extension order but may make a recommendation to the Supreme Court as to the variation or revocation of the extension order.

**84 Matters that Tribunal must consider when determining whether to release a forensic**

**patient**

- (1) **General matters for consideration** The Tribunal must not make an order for the release (including the conditional release) of a forensic patient unless it has considered the following matters—
- (a) whether or not other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the patient or that the patient does not require care,
  - (b) a report by a forensic psychiatrist or other person of a class prescribed by the regulations, who is not currently involved in treating the patient, as to the condition of the patient and whether the safety of the patient or any member of the public will be seriously endangered by the patient's release,
  - (c) in the case of the proposed release of a forensic patient subject to a limiting term, whether or not the patient has spent sufficient time in custody.

**Note—**

The Tribunal is also required to consider the matters set out in section 75.

- (2) **Tribunal must be satisfied patient or public safety not seriously endangered** The Tribunal must not make an order for the release (including the conditional release) of a forensic patient 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.

**85 Conditions that may be imposed by Tribunal on release of forensic patients**

- (1) The Tribunal may impose conditions relating to the following matters on orders for release made by it in relation to a forensic patient—
- (a) the appointment of a case manager, psychiatrist or other health care professional to assist in the care and treatment of the patient,
  - (b) the care, treatment and review of the patient by persons referred to in paragraph (a), including home visits to the patient,
  - (c) medication,
  - (d) accommodation and living conditions,
  - (e) enrolment and participation in educational, training, rehabilitation, recreational, therapeutic or other programs,
  - (f) the use or non-use of alcohol and other drugs,
  - (g) drug testing and other medical tests,
  - (h) agreements as to conduct,



- (i) association or non-association with victims or members of victims' families,
  - (j) prohibitions or restrictions on frequenting or visiting places,
  - (k) overseas or interstate travel,
  - (l) requirements for the purposes of monitoring (including by electronic means) compliance with the conditions of release.
- (2) This section does not limit the matters in relation to which a condition may be imposed.

## **Division 4 Transfer of correctional patients, forensic patients and other persons in custody**

### **86 Transfer from correctional centre or detention centre by Secretary**

- (1) The Secretary may, by order in writing, direct that a person imprisoned in, or a forensic patient detained in, a correctional centre or detention centre be transferred to a mental health facility.
- (2) The Secretary may make a transfer order on the basis of 2 certificates about the person's condition issued by 2 medical practitioners, 1 of whom is a psychiatrist.
- (3) The certificates are to be in the form set out in Schedule 1.
- (4) A transfer order may be made without the person's consent if it appears to the Secretary, on the basis of the certificates, that the person is a mentally ill person.
- (5) A transfer order may be made with the person's consent if it appears to the Secretary, on the basis of the certificates, that the person has a mental health impairment or other condition for which treatment is available in a mental health facility.
- (6) The Secretary may revoke a transfer order.
- (7) The Secretary must notify the Tribunal in writing if the Secretary makes or revokes a transfer order.

### **87 Transfer back to correctional centre or detention centre**

- (1) This section applies to a person transferred from a correctional centre or detention centre to a mental health facility under a provision of this Division.
- (2) The person must be transferred back to the correctional centre or detention centre within 7 days unless the Secretary is of the opinion that—
  - (a) the person is a mentally ill person or has a mental health impairment or other condition for which treatment is available in a mental health facility, and

- (b) other care of an appropriate kind would not be reasonably available to the person in the correctional centre or detention centre.
- (3) The person may be transferred back to the correctional centre or detention centre at any time if the Secretary is of the opinion that—
  - (a) the person has ceased to be a mentally ill person or to have a mental health impairment or other condition for which treatment is available in a mental health facility, or
  - (b) other care of an appropriate kind would be reasonably available to the person in a correctional centre or detention centre.
- (4) Nothing in this section affects the powers of the Tribunal in respect of a person transferred to a mental health facility from a correctional centre or detention centre.

#### **88 Requests for transfer to correctional centre or detention centre**

- (1) A correctional patient or forensic patient who is detained in a mental health facility may, at any time, request the Tribunal to make an order that the patient be transferred to a correctional centre or detention centre.
- (2) The Tribunal, after considering the request, may make the order requested by the patient or may refuse to make that order.
- (3) The Tribunal must make the order if it is satisfied that the person is not a mentally ill person.

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

- (1) The Tribunal must conduct a limited review of the case of a person who is subject to an order for transfer to a mental health facility under this Division but who is not transferred within the period prescribed by the regulations for the purposes of this section.
- (2) The Tribunal must carry out a limited review each month until the person is transferred to a mental health facility or the Tribunal or the Secretary revokes the order.
- (3) On a limited review, the Tribunal may make an order as to the person's detention, care or treatment in a mental health facility or other place.
- (4) For the purposes of a limited review, a report as to the person's condition and the reason for the delay in transfer is to be provided to the Tribunal by the Secretary and the Commissioner of Corrective Services.

#### **Note—**

In the case of a person under the age of 18 years, the report is to be provided by the Secretary of the Department of Communities and Justice (see section 3(3)).

## **90 Reviews of patients transferred under this Division**

- (1) The Tribunal must carry out a review of a correctional patient or forensic patient as soon as practicable after the patient is transferred to a mental health facility under this Division.
- (2) If a person is transferred under this Division from a correctional centre to a mental health facility, the Tribunal may, at any time, make an order that the person be transferred to a correctional centre.

## **Division 5 Reviews of correctional patients**

### **91 Mandatory reviews of correctional patients**

The Tribunal must carry out reviews of correctional patients at the following times—

- (a) as soon as practicable after a correctional patient is transferred to a mental health facility under this Act,
- (b) at intervals of 6 months during the period that a person is a correctional patient,
- (c) as soon as practicable after being requested to carry out a review of a correctional patient by the Minister for Health and Medical Research, the Attorney General and Minister for the Prevention of Domestic Violence, the Minister for Counter Terrorism and Corrections or the Secretary,
- (d) as soon as practicable after being requested to carry out a review of a correctional patient by the medical superintendent of the mental health facility in which the patient is detained.

### **92 Periodic and other reviews of correctional patients**

- (1) On the first review of a correctional patient after the patient is transferred to a mental health facility, the Tribunal is to determine whether the patient is a mentally ill person who should continue to be detained in a mental health facility or has a condition for which treatment is available in a mental health facility.
- (2) On any review of a correctional patient, the Tribunal may make an order as to the patient's continued detention, care or treatment in, or transfer to, a mental health facility, correctional centre, detention centre or other place.

### **93 Tribunal may review patient at any time**

The Tribunal may carry out a review of a correctional patient at any time.

## **Division 6 Leave of absence**

### **94 Tribunal may grant leave for forensic patients**

- (1) The Tribunal may make an order allowing a forensic patient to be absent from a mental health facility, correctional centre, detention centre or other place for a period and subject to any terms and conditions that the Tribunal thinks fit.
- (2) An order may be made on the application of the patient or on the motion of the Tribunal.
- (3) The Tribunal must not make an order allowing a forensic patient to be absent from a mental health facility, correctional centre, detention centre or other place unless it is satisfied, on the evidence available to it, that the safety of the patient, a registered victim of the patient or any other member of the public will not be seriously endangered if the leave of absence is granted.
- (4) The Tribunal may impose any condition on an order granting leave of absence that it may impose on an order releasing a forensic patient.
- (5) This section does not prevent leave of absence being granted to a forensic patient detained in a correctional centre or detention centre under any other Act or law.
- (6) This section has effect despite the *Crimes (Administration of Sentences) Act 1999*.

### **95 Commissioner of Corrective Services may grant leave for correctional patients**

- (1) The Commissioner of Corrective Services may allow a correctional patient to be absent from a mental health facility for the period and subject to any terms and conditions that the Commissioner of Corrective Services thinks fit.
- (2) The Tribunal may, on a review of a correctional patient, make recommendations to the Commissioner of Corrective Services as to the granting of leave to the patient.
- (3) In determining whether to grant leave to a correctional patient to be absent from a mental health facility, the Commissioner of Corrective Services must have regard to recommendations made by the Tribunal on a review of the patient as to the granting of leave.

### **96 Leave for forensic patients and correctional patients in emergencies or special circumstances**

- (1) The Secretary may allow a forensic patient or a correctional patient to be absent from a mental health facility for the period, and subject to any conditions that the Secretary thinks fit, in circumstances constituting an emergency or in other special circumstances as the Secretary thinks fit.
- (2) The Secretary must not allow a patient to be absent from a mental health facility

(otherwise than in a medical emergency) under this section unless the Secretary is satisfied, on the evidence available to the Secretary, that the safety of the patient or any member of the public will not be seriously endangered if the leave of absence is granted.

- (3) The Secretary must not allow a patient to be absent from a mental health facility if, in the same or similar circumstances—
  - (a) for a forensic patient—the Tribunal has refused to make an order allowing the patient to be absent from a mental health facility, or
  - (b) for a correctional patient—the Commissioner of Corrective Services has refused to make an order allowing the patient to be absent from a mental health facility.
- (4) This section has effect despite the *Crimes (Administration of Sentences) Act 1999*.

**Note—**

See section 117 for security conditions relating to correctional patients who are absent on leave from mental health facilities.

## **97 Appeals against decisions of Secretary**

- (1) A forensic patient or a correctional patient may appeal to the Tribunal against a failure or refusal by the Secretary to grant the patient leave of absence under this Part.
- (2) An appeal may be made orally or in writing and is to be made in accordance with the regulations.
- (3) An oral appeal is to be recorded in accordance with the regulations.
- (4) The Secretary must provide the Tribunal with a report about the patient, including the Secretary's reasons for refusing or failing to grant leave of absence.
- (5) For the purpose of determining an appeal, the Tribunal has and may exercise the functions of the Secretary with respect to the granting of leave and may make an order accordingly.
- (6) In addition, the Tribunal may determine that no further right of appeal may be exercised under this section before the date on which the person is next reviewed by the Tribunal under this Act, if it thinks it appropriate to do so.

## **98 Grants of leave do not affect sentences or limiting terms**

The grant of leave of absence to a forensic patient or a correctional patient under this Part does not affect the operation of a limiting term or sentence of imprisonment imposed in respect of the patient concerned.

## **Division 7 Community treatment orders**

### **99 Community treatment orders**

- (1) On a review under this Part or at any other time, the Tribunal may make a community treatment order in relation to—
  - (a) a forensic patient, or
  - (b) a correctional patient ordered to be transferred to a correctional centre or detention centre, or
  - (c) a person who is subject to an order for transfer to a mental health facility from a correctional centre or detention centre but who has not been transferred, or
  - (d) an inmate in a correctional centre or a detention centre.
- (2) Part 3 of Chapter 3 of the *Mental Health Act 2007* applies to the making of a community treatment order under this section, subject to any modifications prescribed by the regulations under that Act or under this Act.
- (3) Without limiting subsection (2), the regulations may modify that Part for the purpose of consistency with the operation of the *Crimes (Administration of Sentences) Act 1999* and regulations under that Act with respect to correctional patients, inmates of correctional centres or detention centres and persons subject to parole.
- (4) A community treatment order made in respect of a person detained in a correctional centre, detention centre or other place continues in force if the person is released from the centre or place, subject to the terms of the order or the variation or revocation of the order.
- (5) A community treatment order may be made in respect of a forensic patient who is to be released unconditionally in accordance with an order of the Tribunal.
- (6) On and from the release of the forensic patient unconditionally in accordance with the order of the Tribunal, the community treatment order is taken to have been made under the *Mental Health Act 2007*.

### **100 Reviews of persons in custody who are subject to community treatment orders**

The Tribunal must carry out reviews of persons (other than forensic patients) who are subject to community treatment orders and who are detained in correctional centres or detention centres no later than 3 months after the community treatment orders are made and at least once every 6 months during the term of each order.

## **Division 8 Termination of status as patient and other status changes**

### **101 Termination of status as forensic patient**

A person ceases to be a forensic patient if one of the following circumstances occurs—

- (a) the person is released unconditionally in accordance with an order made by the Tribunal or by a court,
- (b) the person is released conditionally in accordance with an order made by the Tribunal and the conditions expire,
- (c) the person has been found unfit to be tried for an offence and is found not guilty of an offence at a special hearing,
- (d) the person has been found unfit to be tried for an offence and is found guilty at a special hearing and no limiting term is imposed on the person,
- (e) a limiting term imposed on the person expires and no extension order or interim extension order is made against the person,
- (f) an extension order or interim extension order made against the person expires and no further order is made,
- (g) the person was found unfit to be tried for an offence and is later found fit to be tried for the offence, and the Director of Public Prosecutions has provided advice to the court under section 53(2),
- (h) the relevant charges against the person are dismissed or the Director of Public Prosecutions notifies the court that the person will not be further proceeded with for the relevant charges,
- (i) the Tribunal classifies the patient as an involuntary patient,
- (j) in any other circumstances prescribed by the regulations for the purposes of this section.

### **102 Effect of unlawful absence on limiting term**

- (1) For the purposes of calculating whether a limiting term has expired, a 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 109 and ending when the person is apprehended and detained under the order.

- (3) The Tribunal must notify a person who is apprehended under an order made under section 109 or 111 in writing of the effect of this section and the new expiry date of the person's limiting term, if the Tribunal is notified that the person has been so apprehended.

### **103 Extension of status as forensic patient**

A person's status as a forensic patient may be extended in accordance with Part 6.

### **104 Termination of status as correctional patient**

A correctional patient ceases to be a correctional patient if one of the following circumstances occurs—

- (a) the person is transferred to a correctional centre, detention centre or other place (other than another mental health facility) from the mental health facility,
- (b) a sentence of imprisonment expires and no high risk offender detention order is made against the person,
- (c) a high risk offender detention order made against the person expires and no further high risk offender detention order is made,
- (d) the person is ordered to be released on parole,
- (e) the person is otherwise released on the order of a court,
- (f) the relevant charges against the person are dismissed,
- (g) the Director of Public Prosecutions notifies the court or the Tribunal that the person will not be further proceeded against in respect of the relevant charges.

### **105 Classification of patients as involuntary patients**

- (1) The Tribunal may, on a review under this Part, classify a patient detained in a mental health facility, correctional centre, detention centre or other place as an involuntary patient if—
  - (a) the patient is a forensic patient detained following a special hearing and is to cease to be a forensic patient within 6 months after the date of the review, or
  - (b) the patient is a correctional patient who is to cease to be a correctional patient within 6 months after the date of the review.
- (2) The Tribunal may order that a patient classified as an involuntary patient be transferred from a correctional centre or detention centre to a mental health facility.

### **106 Limits on classification of forensic patients**

- (1) The Tribunal may only classify a forensic patient who is subject to a limiting term or an



extension order as an involuntary patient if—

- (a) each Minister entitled to apply for an extension of the patient's forensic status has notified the Tribunal that an application for an extension is not proposed to be made, or
  - (b) the Supreme Court has dismissed an application under Part 6 for extension of the patient's forensic status.
- (2) The Tribunal may ask a Minister to provide advice about whether the Minister proposes to make an application under Part 6.
  - (3) A Minister entitled to make an application under Part 6 for extension of a patient's forensic status is to notify the Tribunal as soon as practicable of a decision to apply for, or not to apply for, the extension.

#### **107 Release from detention on ceasing to be a forensic patient or correctional patient**

- (1) A person who ceases to be a forensic patient must be discharged from the mental health facility, correctional centre, detention centre or other place in which the person is detained.
- (2) A person who ceases to be a correctional patient must be discharged from the mental health facility in which the person is detained.
- (3) A person must not be discharged from a mental health facility under this section if the person is classified as an involuntary patient.
- (4) A person who is detained in a correctional centre or detention centre must not be discharged from the centre under this section if—
  - (a) the person has ceased to be a forensic patient because the person has been found fit to be tried for an offence, or
  - (b) the person is required to continue to be detained for any other lawful reason.

#### **108 Person who ceases to be forensic patient or correctional patient may become voluntary patient**

Nothing in this Part prevents the application of Chapter 3 of the *Mental Health Act 2007* to a person who ceases to be a forensic patient or a correctional patient or the person from remaining in a mental health facility as a voluntary patient.

### **Division 9 Enforcement**

#### **109 Breach of orders for release**

- (1) The President of the Tribunal may make an order for the apprehension of a person if it appears to the President that—

- (a) the person has breached a condition of an order for the person's conditional release under this Part, or
  - (b) the person has committed a breach of an order releasing the person from custody made by a court after a special verdict of act proven but not criminally responsible, or
  - (c) the person has breached a condition of leave of absence granted under this Part, or
  - (d) the person has been granted conditional release or leave of absence and has suffered a deterioration of mental condition and is at risk of causing serious harm to himself or herself or to any member of the public because of the person's condition.
- (2) An apprehension order authorises the detention of the person at the mental health facility, correctional centre, detention centre or other place specified in the order.
- (3) The President of the Tribunal may, pending a review of a person who is apprehended, make one or more of the following orders—
- (a) an order that the person continue to be given treatment in accordance with the order for the person's conditional release,
  - (b) an order that the person be assessed by a medical practitioner,
  - (c) an order that the person be detained in a mental health facility for assessment and treatment.
- (4) 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, detention centre or other place 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 order for release and order the person's detention, care or treatment in a mental health facility, correctional centre, detention centre or other place in the manner, specified in the order.

**Note—**

The Tribunal may also make a community treatment order under Division 7.

### **110 Execution of apprehension orders**

- (1) A police officer to whose notice an apprehension order under this Division is brought must—
  - (a) apprehend and take or assist in taking the person to the mental health facility, correctional centre, detention centre or other place specified in the order, or
  - (b) cause or make arrangements for some other police officer to do so.
- (2) A police officer may—
  - (a) enter premises to apprehend the person, and
  - (b) apprehend the person without a warrant, and
  - (c) exercise any of the powers conferred on a person who is authorised under section 81 of the *Mental Health Act 2007* to take a person to a mental health facility.

### **111 Apprehension of persons not permitted to be absent from mental health facility**

- (1) Without limiting section 109, the authorised medical officer of a mental health facility may apprehend a person, or direct a person to be apprehended, if the person fails to return to the facility at the end of a period of leave of absence granted under this Part or fails to comply with a condition to which that grant of leave was subject.
- (2) The person may be apprehended by any of the following persons—
  - (a) the authorised medical officer or any other suitably qualified person employed at the mental health facility,
  - (b) a police officer,
  - (c) a person authorised by the Secretary or the authorised medical officer,
  - (d) a person assisting a person referred to in paragraph (a), (b) or (c).
- (3) The authorised medical officer may request that a police officer apprehend, or assist in apprehending, a person under this section if the authorised medical officer is of the opinion that there are serious concerns relating to the safety of the person or other persons if the person is taken to the mental health facility without the assistance of a police officer.
- (4) A police officer to whose notice the request is brought may—
  - (a) apprehend and take or assist in taking the person to the mental health facility, or
  - (b) cause or make arrangements for some other police officer to do so.
- (5) A police officer may enter premises to apprehend a person under this section, and

may apprehend the person, without a warrant and may exercise any of the powers conferred on a person who is authorised under section 81 of the *Mental Health Act 2007* to take a person to a mental health facility.

- (6) A person who is apprehended under this section is to be conveyed to and detained at the mental health facility at which the person was detained immediately before the period of leave commenced.
- (7) The authorised medical officer must notify the Tribunal if—
  - (a) the authorised medical officer directs a person to be apprehended under this section, or
  - (b) a person is apprehended under this section.

### **112 Apprehended person may seek reconsideration by Tribunal**

- (1) A person who is apprehended under this Division may request the Tribunal to investigate the evidence on which the order for the person's apprehension was made and may adduce other evidence for the consideration of the Tribunal.
- (2) On a reconsideration under this section, the Tribunal may make any order it thinks fit concerning the detention or release of the person.

### **113 Aiding or permitting escape**

- (1) A person must not release or attempt to release a person who is being conveyed to or detained in a mental health facility or other place under this Act.
- (2) A medical superintendent or any other person employed in a mental health facility must not—
  - (a) intentionally or negligently permit a person detained in the facility under this Act to escape from the facility, or
  - (b) aid a person so detained to escape or attempt to escape from a mental health facility.

Maximum penalty—

- (a) on conviction on indictment—imprisonment for 3 years, or
- (b) on summary conviction—imprisonment for 1 year or 10 penalty units, or both.

### **114 Issue of warrants for apprehension of persons outside State and other persons**

A Magistrate or an authorised officer within the meaning of the *Criminal Procedure Act 1986* may issue a warrant for the apprehension of a person if a credible person, on oath before the Magistrate or officer, shows reasonable cause to suspect that the person is a forensic patient or a correctional patient—

- (a) who has escaped from a mental health facility and is outside the State, or
- (b) is the subject of an apprehension order under this Division.

## **Division 10 Miscellaneous**

### **115 Transfer and transport of patients**

- (1) The Secretary may, by order in writing, order the transfer of a forensic patient or correctional patient detained in a mental health facility to another mental health facility.
- (2) The order is sufficient authority for the transfer.
- (3) A person may be transferred to and detained in a mental health facility, correctional centre, detention centre or other place in accordance with an order under this Act.
- (4) A forensic patient or correctional patient may be transported to or from a mental health facility, correctional centre, detention centre or other place if it is necessary or convenient to do so for the administration of this Act or the *Mental Health Act 2007*.
- (5) The transport is to be subject to any security conditions that the Secretary considers necessary.
- (6) A forensic patient, a correctional patient or a person the subject of a transfer order under section 86 who has not yet been transferred may be taken to or from a mental health facility by a person referred to in section 81(1) of the *Mental Health Act 2007*, a person employed by the Department of Communities and Justice or any other person prescribed by the regulations.
- (7) Section 81 of that Act, and any regulations made under that section, apply to or in respect of the transport of the following persons in the same way as they apply to or in respect of the transport of a person under that Act—
  - (a) a forensic patient,
  - (b) a correctional patient,
  - (c) a person the subject of a transfer order under section 86 of this Act who has not yet been transferred to or from a mental health facility, correctional centre, detention centre or other place under this Act.

### **116 Effect of detention in mental health facility on sentence and parole**

- (1) A period of detention of a person in a mental health facility or other place, following a transfer under this Part from a correctional centre or detention centre, is to be treated as if it were a period of imprisonment in a correctional centre or a detention centre for the purposes of the person's sentence and parole.

- (2) For the purposes of Part 6 of the *Crimes (Administration of Sentences) Act 1999*, a forensic patient who is currently serving a sentence of imprisonment, or a correctional patient, who is detained in a mental health facility, is taken to be serving a full-time sentence of detention in a correctional centre or detention centre.

**Note—**

Part 6 of that Act contains provisions permitting the granting of parole to certain persons serving full-time sentences of detention.

- (3) The detention of a person in a mental health facility or other place under this Part does not prevent the granting of parole to the person under the *Crimes (Administration of Sentences) Act 1999*.

### **117 Security conditions for patients**

- (1) A forensic patient who is detained in a mental health facility or other place (other than a correctional centre or detention centre) or is absent in accordance with this Part is to be subject to any security conditions that the Secretary considers necessary.
- (2) A forensic patient who is detained in a correctional centre or detention centre or in a part of a correctional centre or detention centre that is a mental health facility, or a correctional patient who is detained in a mental health facility or other place or is absent in accordance with this Part, is to be subject to security conditions in accordance with relevant legislation and with any protocol agreed between the Secretary and the Commissioner of Corrective Services or the Secretary of the Department of Communities and Justice (as the case requires).
- (3) To avoid doubt, for the purposes of subsection (2)—
- (a) a part of a correctional centre that is a mental health facility is taken to be a correctional centre within the meaning of the *Crimes (Administration of Sentences) Act 1999* and a forensic patient or correctional patient who is detained in that facility is taken to be an inmate within the meaning of that Act and that Act and the regulations under that Act, apply to the patient, subject to any modifications and to the extent specified by the regulations, and
- (b) a part of a detention centre that is a mental health facility is taken to be a detention centre within the meaning of the *Children (Detention Centres) Act 1987* and a forensic patient or correctional patient who is detained in that facility is taken to be an inmate within the meaning of that Act and that Act and the regulations under that Act, apply to the patient, subject to any modifications and to the extent specified by the regulations.

### **118 Planning for release and leave**

- (1) The authorised medical officer of a mental health facility must, if a person detained in a mental health facility as a forensic patient is to be released or granted leave under

this Part, take all reasonably practicable steps to ensure that the person and any designated carer or the principal care provider of the person are consulted in relation to planning the person's release or leave and any subsequent treatment or other action considered in relation to the person.

- (2) In planning the release of the person and subsequent treatment or other action considered in relation to the person, the authorised medical officer must take all reasonably practicable steps to consult with agencies involved in providing relevant services to the person, any designated carer or the principal care provider of the person and any dependent children or other dependants of the person.
- (3) The authorised medical officer must take all reasonably practicable steps to provide a person who is released or given leave of absence from the mental health facility with appropriate information as to follow-up care.
- (4) The Commissioner of Corrective Services and the chief executive of Youth Justice NSW within the Department of Communities and Justice must provide support to an authorised medical officer for the purposes of this section.

#### **119 Retaking of escapees**

- (1) A forensic patient or correctional patient who escapes from a mental health facility or other place may be apprehended at any time by any of the following persons—
  - (a) the medical superintendent of the mental health facility or any other suitably qualified person employed in the mental health facility who is authorised to do so by the medical superintendent,
  - (b) a police officer,
  - (c) a person authorised by the Secretary or the medical superintendent,
  - (d) a person assisting a person referred to in paragraph (a), (b) or (c).
- (2) On being apprehended, the patient is to be conveyed to and detained in the mental health facility or other place from which the patient escaped.
- (3) This section does not affect any power of any other person to apprehend a person under the *Crimes (Administration of Sentences) Act 1999*.

#### **120 Forensic patients and correctional patients in the community may be detained and treated under [Mental Health Act 2007](#)**

Nothing in this Part limits the application of the [Mental Health Act 2007](#) to a person who has been granted conditional release or leave of absence under this Part.

## **Part 6 Extension of status as forensic patient**

### **Division 1 Extension orders**

#### **121 Extension orders for forensic patients**

- (1) The Supreme Court may, on application under Division 2, make an order for the extension of a person's status as a forensic patient.
- (2) An order made under this section is an ***extension order***.

#### **122 Forensic patients in respect of whom extension orders may be made**

- (1) A forensic patient can be made the subject of an extension order as provided for by this Part if and only if the Supreme Court is satisfied to a high degree of probability that—
  - (a) the forensic patient poses an unacceptable risk of causing serious harm to others if the patient ceases to be a forensic patient, and
  - (b) the risk cannot be adequately managed by other less restrictive means.
- (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.

**Note—**

Less restrictive means of managing a risk includes, but is not limited to, a patient being involuntarily detained or treated under the [Mental Health Act 2007](#).

### **Division 2 Application for extension orders**

#### **123 Minister may apply for extension order**

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

#### **124 Application for extension order**

- (1) An application for an extension order may be made in respect of a forensic patient only if the forensic patient is subject to—
  - (a) a limiting term, or
  - (b) an existing extension order.
- (2) An application in respect of a forensic patient may not be made more than 6 months before—
  - (a) the end of the forensic patient's limiting term, or



- (b) the expiry of the existing extension order,  
as appropriate.

### **125 Requirements with respect to application**

An application for an extension order must be supported by documentation—

- (a) that addresses each of the matters referred to in section 127(2) (to the extent relevant to the application), and
- (b) that includes a report (prepared by a qualified psychiatrist, registered psychologist or registered medical practitioner)—
  - (i) that assesses the risk of the forensic patient causing serious harm to others, and
  - (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.

### **126 Pre-hearing procedures**

- (1) An application under this Division 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 any further time that the Supreme Court may allow.
- (2) The Minister applying for the extension order must notify the Tribunal as soon as practicable after making the application.
- (3) Subject to subsections (7)–(9), the Minister applying for the extension order must disclose to the forensic patient the documents, reports and other information that are relevant to the proceedings on the application (whether or not intended to be tendered in evidence)—
  - (a) in the case of anything that is available when the application is made, as soon as practicable after the application is made, and
  - (b) in the case of anything that subsequently becomes available, as soon as practicable after it becomes available.
- (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 any further time that the Supreme Court may allow.
- (5) If, following the preliminary hearing, the Supreme Court 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—
  - (a) appointing—

- (i) 2 qualified psychiatrists, or
  - (ii) 2 registered psychologists, or
  - (iii) 2 registered medical practitioners, or
  - (iv) any combination of 2 persons referred to in subparagraphs (i)–(iii),  
to conduct separate examinations of the forensic patient and to give reports to the Supreme Court on the results of those examinations, and
- (b) directing the forensic patient to attend those examinations.
- (6) If, following the preliminary hearing, the Supreme Court 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.
- (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.
- (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.
- (9) Subject to any order or direction of the Supreme Court, in relation to an inspection under subsection (8) of, or other access under that subsection to, any medical record relating to a forensic patient—
- (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
  - (b) the representative is not obliged to disclose to the forensic patient any information obtained by virtue of the inspection or other access.

### **Division 3 Determination of applications**

#### **127 Determination of application for extension orders**

- (1) The Supreme Court may determine an application under this Division for an extension order—
- (a) by making the order, or
  - (b) by dismissing the application.

- (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—
- (a) the safety of the community,
  - (b) the reports received from the persons appointed under section 126(5) to conduct examinations of the forensic patient,
  - (c) the report of the qualified psychiatrist, registered psychologist or registered medical practitioner provided under section 125(b),
  - (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,
  - (e) any order or decision made by the Tribunal with respect to the forensic patient that is relevant to the application,
  - (f) any report of the Secretary of the Ministry of Health, the Commissioner of Corrective Services, the Secretary of the Department of Communities and Justice or any other government Department or agency responsible for the detention, care or treatment of the forensic patient,
  - (g) the level of the forensic patient’s compliance with any obligations to which the patient is or has been subject while a forensic patient (including while released from custody subject to conditions and while on leave of absence granted under this Act),
  - (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,
  - (i) any other information that is available as to the risk that the forensic patient will in future cause serious harm to others.
- (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.

### **128 Term of extension orders**

- (1) An extension order—
- (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
  - (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.

- (2) Nothing in this section prevents the Supreme Court from making a second or subsequent extension order against the same forensic patient.

### **129 Continuation of orders relating to forensic patients**

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.

## **Division 4 Interim extension orders**

### **130 Interim extension orders**

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—

- (a) that the limiting term or existing extension order to which the forensic patient is subject will expire before the proceedings are determined, and
- (b) that the matters alleged in the supporting documentation would, if proved, justify the making of an extension order.

### **131 Term of interim extension orders**

- (1) An interim extension order commences on the day fixed in the order for its commencement (or, if no day is fixed, as soon as it is made) and expires at the end of the period (not exceeding 3 months from the day on which it commences) that is specified in the order.
- (2) An interim extension order made for a period of less than 3 months 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 an order of that kind for periods totalling more than 3 months.

### **132 Interim extension orders to continue in force for 24 hours in certain circumstances**

- (1) If the Supreme Court dismisses an application for an extension order in respect of a forensic patient who is detained only as a result of an interim extension order, the Court may (on its own motion or on application) order that the patient be detained for a further period of up to 24 hours to enable a medical practitioner or accredited person to assess whether a mental health certificate should be given in respect of the patient under section 19 of the [Mental Health Act 2007](#).
- (2) The order ceases to authorise the detention of the person if the medical practitioner or accredited person making the assessment decides not to give that mental health certificate about the person.

## **Division 5 Extension orders or interim extension orders may be varied or revoked**

### **133 Extension order or interim extension order may be varied or revoked**

- (1) The Supreme Court may at any time vary or revoke an extension order or interim extension order—
  - (a) on the application of a Minister administering this Act or the forensic patient, or
  - (b) on the recommendation of the Tribunal under section 83(3).
- (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.
- (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.

## **Division 6 Supreme Court proceedings**

### **134 Nature of proceedings**

Proceedings under this Part (including proceedings on an appeal under this Part) are civil proceedings and, to the extent to which this Part does not provide for their conduct, are to be conducted in accordance with the law (including the rules of evidence) relating to civil proceedings.

### **135 Right of appeal**

- (1) An appeal to the Court of Appeal lies from a determination of the Supreme Court to make, or to refuse to make, or to vary or revoke an extension order.
- (2) An appeal may be on a question of law, a question of fact or a question of mixed law and fact.
- (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 the further time as the Court of Appeal may allow.
- (4) The making of an appeal does not stay the operation of an extension order.
- (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.
- (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.

(7) This section does not limit any right of appeal that may exist apart from this Part.

### **136 Costs not to be awarded against forensic patient**

An order for costs may not be made against a forensic patient in relation to proceedings under this Part (including proceedings on an appeal under this Part).

### **137 Preservation of Supreme Court jurisdiction**

Nothing in this Part limits the jurisdiction of the Supreme Court apart from this Act.

## **Division 7 Miscellaneous**

### **138 Minister may require provision of certain information**

(1) A Minister administering this Act may, by order in writing served on any person, require the person to provide to the Minister any document, report or other information in that person's possession, or under that person's control, relating to the behaviour, or physical or mental condition, of any forensic patient who is subject to a limiting term, extension order or interim extension order.

(2) A person who fails to comply with the requirements of an order under this section is guilty of an offence.

Maximum penalty—100 penalty units or imprisonment for 2 years, or both.

(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 relating to the behaviour, or physical or mental condition, of any forensic patient who is subject to a limiting term, extension order or interim extension order.

(4) Despite any Act or law to the contrary, a document or report of a kind referred to in subsection (1) or (3), or a copy of a document or report of that kind, is admissible in proceedings under this Act (whether admission is sought by the Minister to whom the document or report was provided or by another Minister administering this Act).

### **139 Information sharing**

(1) A Minister administering this Act may disclose forensic patient information obtained under this Act to any other Minister administering this Act—

(a) for the purpose of enabling or assisting either Minister to exercise functions under this Act, or

(b) for the purpose of the administration or execution of this Act.

(2) In this section—

**forensic patient information** means a document, report or other information relating to a forensic patient, including information of that kind that is—

- (a) personal information within the meaning of the *Privacy and Personal Information Protection Act 1998* or the *Health Records and Information Privacy Act 2002*, or
- (b) health information within the meaning of the *Health Records and Information Privacy Act 2002*.

#### **140 Protection of certain persons from liability**

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 Part.

#### **141 Hearings**

This Part does not affect the right of any party to proceedings under this Part—

- (a) to appear, either personally or by the party's legal representative, or
- (b) to call witnesses and give evidence, or
- (c) to cross-examine witnesses, or
- (d) to make submissions to the Supreme Court on any matter connected with the proceedings.

#### **142 Bail Act 2013 not to apply**

The *Bail Act 2013* does not apply to or in respect of a person who is the subject of proceedings under this Part.

#### **143 Rules of court**

- (1) Rules of court may be made under the *Supreme Court Act 1970* for regulating the practice and procedure of the Supreme Court in respect of proceedings under this Part.
- (2) This section does not limit the rule-making powers conferred by the *Supreme Court Act 1970*.

#### **144 Qualification of psychiatrists**

For the purposes of this Part, 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.

## **Part 7 Tribunal proceedings**

### **Division 1 Provisions relating to proceedings**

#### **145 Victims and reviews by Tribunal**

- (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 146(2).
- (3) The victim may request the Tribunal not to disclose to the forensic patient the whole or part of a submission made by the victim.
- (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.
- (7) 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*.

#### **146 Tribunal may amend or impose conditions on release or leave orders on application of victims**

- (1) This section applies to an order of the Tribunal for the release of, or granting leave of absence to, a forensic patient.



- (2) A registered victim of the patient may apply to the Tribunal for any of the following orders—
  - (a) an order varying a non-association condition of an order to which this section applies or imposing a non-association condition on an order to which this section applies,
  - (b) an order varying a place restriction condition of an order to which this section applies or imposing a place restriction condition on an order to which this section applies.
- (3) The Tribunal may, on an application being made, vary the order to which this section applies or impose any condition on the order or make any other order it may make under this Part.
- (4) In this section—

***non-association condition*** means a condition imposed by the Tribunal relating to the association or non-association by a forensic patient with victims or victims' families.

***place restriction condition*** means a condition imposed by the Tribunal relating to the frequenting or visiting of places by a forensic patient.

#### **147 General matters relating to Tribunal functions**

- (1) For the purposes of a review of a patient, the Tribunal may communicate with any persons, take any action and make any recommendations it thinks fit.
- (2) The Minister for Health and Medical Research and the Attorney General may appear before the Tribunal, or make submissions to the Tribunal, in relation to any of the following—
  - (a) the possible release of or grant of leave of absence to a forensic patient,
  - (b) a recommendation to revoke an extension order in respect of a forensic patient,
  - (c) the review of a patient who has been apprehended following an order by the President of the Tribunal under this Act.
- (3) A review of the case of a forensic patient or a correctional patient under this Act may be conducted at the same time as any other review of the patient under this Act.
- (4) An order by the Tribunal under this Act must be in writing.
- (5) The Tribunal must inform the Minister for Police and Emergency Services, the Minister for Health and Medical Research and the Attorney General of an order it makes for the release of a person and of the date of the person's release.

### **148 Forensic Division to exercise functions**

- (1) The functions of the Tribunal under this Act are to be exercised by the Forensic Division of the Tribunal.
- (2) The Forensic Division of the Tribunal is to consist of the following members—
  - (a) the President or a Deputy President,
  - (b) a member who is a psychiatrist, a psychologist or other suitable expert in relation to a mental condition,
  - (c) a member who has other suitable qualifications or experience.

**Note—**

Under section 150(1) of the *Mental Health Act 2007*, the Tribunal is to be constituted by members nominated by the President. See Chapter 6 of the *Mental Health Act 2007* for other provisions applying generally to the Tribunal.

- (3) The Tribunal must not order the release of a forensic patient under this Act unless it is constituted by at least 1 member, including the President or a Deputy President, who is the holder or former holder of a judicial office.
- (4) The regulations may provide that for specified functions of the Tribunal under this Act or the regulations, the Forensic Division is to be constituted by the President or a Deputy President.
- (5) The regulations may make provision for or with respect to the constitution of the Tribunal, and procedure, for a limited review under this Part.

**Note—**

Regulations may also be made under section 160 of the *Mental Health Act 2007* with respect to procedure of the Tribunal for the purposes of this Act.

## **Division 2 Appeals**

### **149 References to matters of law**

A reference in this Division to a matter of law includes a reference to a matter relating to the jurisdiction of the Tribunal.

### **150 Appeals against Tribunal determinations generally**

- (1) A forensic patient, a correctional patient or a person on bail who is a party to a proceeding before the Tribunal under this Act may appeal to the Supreme Court, by leave of the Court, from any determination (other than a determination as to the release of the person) of the Tribunal in that proceeding—
  - (a) on a question of law, or

(b) on any other question.

(2) The Minister for Health and Medical Research may appeal to the Supreme Court, as of right, from any determination (other than a determination as to the release of the person) of the Tribunal in a proceeding before the Tribunal under this Act—

(a) on a question of law, or

(b) on any other question.

(3) A registered victim of a forensic patient who is a party to proceedings under section 145 may appeal to the Supreme Court, by leave of the Court, from any determination of the Tribunal under that section in those proceedings—

(a) on a question of law, or

(b) on any other question.

### **151 Appeals against release decisions**

(1) A person may appeal to the Court of Appeal, by leave of the Court, from a determination of the Tribunal under this Act as to the release of the person—

(a) on a question of law, or

(b) on any other question.

(2) The Minister for Health and Medical Research may appeal to the Court of Appeal, as of right, from a determination of the Tribunal under this Act as to the release of a person—

(a) on a question of law, or

(b) on any other question.

(3) The Attorney General may appeal to the Court of Appeal from a determination of the Tribunal under this Act as to the release of a person, as of right, on a question of law.

### **152 Making of appeals**

(1) An appeal under this Division must be made not later than 28 days—

(a) after the determination of proceedings by the Tribunal, or

(b) in the case of an appeal by the Minister for Health and Medical Research or the Attorney General, of written notification to the Minister or Attorney General by the Tribunal of the reasons for an order determining proceedings.

(2) The court may extend the period within which an appeal may be made.

(3) An appeal to a court under this Division is to be made subject to and in accordance

with the rules of the court.

### **153 Decisions on appeal**

- (1) After deciding the question the subject of an appeal under this Division, a court may, unless it affirms the determination of the Tribunal on the question—
  - (a) make an order that in relation to the proceedings in which the question arose, in its opinion, should have been made by the Tribunal, or
  - (b) remit its decision on the question to the Tribunal and order a rehearing of the proceedings by the Tribunal.
- (2) If a party has appealed under this Division to a court against a determination of the Tribunal, either the Tribunal or the court may suspend, until the appeal is determined, the operation of any order or determination made by the Tribunal in the proceedings the subject of the appeal.
- (3) If the Tribunal suspends the operation of an order or a determination, the Tribunal or the court may terminate the suspension or, where the court has suspended the operation of an order or a determination, the court may terminate the suspension.

### **154 Rehearings by Tribunal**

- (1) If a rehearing is held following an appeal, the Tribunal is not to proceed in a manner, or make an order or a decision, that is inconsistent with the decision of the court remitted to the Tribunal.
- (2) Fresh evidence, or evidence in addition to or in substitution for the evidence on which the original determination was made, may be given on a rehearing held by the Tribunal following an appeal.

### **155 Tribunal not liable for costs**

The Tribunal or a member of the Tribunal is not liable for any costs relating to a determination of the Tribunal, or the failure or refusal of the Tribunal to make a determination, in respect of which an appeal is made under this Act, or of the appeal.

## **Part 8 Victims Register**

### **156 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) there is a special verdict of act proven but not criminally responsible for the offence against the victim entered in respect of the forensic patient (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 in respect of the offence against the victim.
- (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.

**157 Notification to victims of reviews and other matters**

- (1) The Commissioner of Victims Rights must give notice to a victim of a forensic patient whose name is recorded in the Victims Register 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 an order for the release (including the conditional release) of, or granting leave of absence to, the forensic patient or refuses to make an order of that kind, or
  - (d) the forensic patient ceases to be a forensic patient, or
  - (e) the forensic patient is unlawfully absent from a mental health facility or other place of detention, 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 review proceedings involving 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.

## **Part 9 Miscellaneous**

### **158 Notification of expiry of limiting term or extension order**

At least 6 months before the expiry of a limiting term or extension order to which a forensic patient is subject, the Tribunal must inform each Minister administering this Act of the date on which the limiting term or extension order is due to expire.

### **159 Duties of certain agencies**

The following must use their best endeavours to comply with a request made to them under this Act by the Tribunal if the request is consistent with the discharge of their responsibilities and does not unduly prejudice the discharge of their functions—

- (a) the Secretary of the Ministry of Health,
- (b) the Commissioner of Corrective Services,
- (c) the Secretary of the Department of Communities and Justice,
- (d) the Commissioner of Victims Rights,
- (e) the Executive Director, Juvenile Justice, Department of Communities and Justice,
- (f) any other government Department or agency responsible for the detention, care or

treatment of a forensic patient or correctional patient.

#### **160 Tribunal to be notified if charges dismissed or proceedings end**

A court or the Director of Public Prosecutions must notify the Tribunal if the relevant charges against a forensic patient or correctional patient are dismissed or the person is not to be further proceeded against in respect of the relevant charges.

#### **161 Exchange of information**

- (1) The Secretary of the Ministry of Health, the Commissioner of Corrective Services and the Secretary of the Department of Communities and Justice may enter into arrangements (***information sharing protocols***) with each other to enable information held by their Departments and associated agencies to be shared or exchanged between those Departments and agencies.
- (2) The information to which an information sharing protocol may relate is limited to the following—
  - (a) information concerning forensic patients and correctional patients,
  - (b) other information that may be prescribed by the regulations.
- (3) 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 Communities and Justice, the Commissioner or the Tribunal for the purposes of the Victims Register and notifications under Part 8.
- (4) Under an information sharing protocol or other arrangement under this section, each Department and associated agency the subject of the arrangement is authorised, without obtaining the consent of any person whose consent would otherwise be required—
  - (a) to request and receive information held by another Department or associated agency the subject of the arrangement, and
  - (b) to disclose information to any of those Departments or associated agencies.
- (5) The authority conferred by this section relates only to information that is reasonably necessary—
  - (a) in the case of information exchanged under an information sharing protocol, to assist in the exercise of functions under this Act or the functions of the relevant Departments or associated agencies concerned, or
  - (b) in the case of information exchanged under an arrangement under subsection (3), for the purposes of the Victims Register and notifications under Part 8.
- (6) This section does not limit the operation of an Act under which the Department or

associated agency concerned is authorised or required to disclose information to another person or body.

- (7) This section has effect despite the *Crimes (Administration of Sentences) Act 1999* or the *Children (Detention Centres) Act 1987*.
- (8) 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*.
- (9) In this section—

**associated agency** means any of the following—

- (a) a local health district (within the meaning of the *Health Services Act 1997*),
- (b) a statutory health corporation (within the meaning of the *Health Services Act 1997*),
- (c) the Tribunal,
- (d) the Commissioner of Victims Rights.

## **162 Functions of Commissioner of Corrective Services and Secretary of Department of Communities and Justice**

- (1) Despite any provision of this Act or any order made under this Act, the Commissioner of Corrective Services and the Secretary of the Department of Communities and Justice may exercise any of their functions in relation to a forensic patient or correctional patient who is detained in a correctional centre or detention centre if the function is exercised for the purpose of maintaining the security, good order or safety, in any way, of the correctional centre or detention centre or its inmates.
- (2) The Secretary of the Department of Communities and Justice may delegate any of the Secretary's functions under this Part (other than this power of delegation) to the Executive Director, Juvenile Justice, Department of Communities and Justice.

## **163 Proceedings for offences**

- (1) Proceedings for an offence against this Act are to be dealt with summarily before the Local Court.
- (2) Proceedings for an offence under section 113 may be dealt with on indictment.

## **164 Delegation**

- (1) A Minister administering this Act may, by instrument in writing, delegate the exercise of any function of the Minister under this Act (other than this power of delegation)—
  - (a) to any person employed in a Department responsible to the Minister, or



(b) to any person, or any class of persons, authorised for the purposes of this section by the regulations.

(2) The Secretary of the Department of Communities and Justice may delegate the exercise of any function of the Secretary under this Act (other than this power of delegation)—

(a) to any person employed in the Department of Communities and Justice, or

(b) to any person, or any class of persons, authorised for the purposes of this section by the regulations.

(3) Nothing in this section limits the operation of section 21 of the *Health Administration Act 1982*.

### **165 Orders for transfer of forensic patients**

If an order is made by a court, the Tribunal or the Secretary of the Ministry of Health specifying that a forensic patient is to be detained in or transferred to a specified correctional centre or detention centre, the Commissioner of Corrective Services or the Secretary of the Department of Communities and Justice may cause that patient to be detained in any correctional centre or detention centre.

### **166 Regulations**

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

### **167 (Repealed)**

## **Schedule 1 Medical certificate as to examination of inmate**

(Section 86(3))

### *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*

I, [name in full—use block letters] (\*Medical Practitioner/Psychiatrist) of \_\_\_\_\_ do certify that on [date] at [state place where examination took place], separately from any other medical practitioner, I personally examined [name of inmate in full] \*detained at [name of correctional centre or detention centre where inmate is imprisoned or detained if not the place where the examination took place], and I am of the opinion that \*he/she is \*a mentally ill person/a person who has a condition for which treatment is available in a mental health facility.

I have formed this opinion on the following grounds—

(1) Facts indicating \*mental illness/condition observed by myself.

.....  
.....  
.....  
.....

(2) Other relevant information (if any) communicated to me by others (state name and address of each informant).

.....  
.....  
.....  
.....  
.....

Made and signed this [date]

[Signature]

\*Delete whichever does not apply.

## **Schedule 2 Savings, transitional and other provisions**

### **Part 1 General**

#### **1 Regulations**

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.
- (2) Any such provision—
  - (a) may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date, and
  - (b) has effect despite anything to the contrary in this Schedule.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication on the NSW legislation website, the provision does not operate so as—
  - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
  - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.
- (4) Without limiting subclauses (1) and (2), regulations made for the purposes of this clause may amend this Schedule to provide for additional or different savings and transitional provisions instead of including provisions in the regulations.

### **Part 2 Provisions consequent on enactment of this Act**

#### **2 Definition**

In this Part—

**former Act** means the *Mental Health (Forensic Provisions) Act 1990*.

### **3 General savings**

- (1) An act, matter or thing done or omitted to be done under a provision of the former Act and having force or effect immediately before the commencement of a provision of this Act that replaces that provision is, on that commencement, taken to have been done or omitted to be done under the provision of this Act.
- (2) This clause does not apply—
  - (a) to the extent to which its application is inconsistent with another provision of this Schedule or a provision of a regulation made under this Schedule, or
  - (b) to the extent that its application would be inappropriate in a particular case.

### **4 Existing victims register**

The information contained in the register of victims of forensic patients kept under the former Act immediately before the commencement of this Act is taken to form part of the Victims Register for the purposes of this Act.

### **5 Application of new Act to existing proceedings where defence of not guilty by reason of mental illness has been raised**

- (1) This clause applies to a defendant in proceedings for offences commenced before the commencement of Part 3 of this Act where a question has been raised before that commencement as to whether the defendant was, at the time of commission of the offence, mentally ill as referred to in section 38 of the former Act.
- (2) The former Act continues to apply to the defendant until a determination is made as to whether a special verdict should be entered or the defence is no longer being raised.
- (3) In circumstances where the court would have found the special verdict of not guilty by reason of mental illness the court must instead find the special verdict of act proven but not criminally responsible.

### **6 Former special verdicts**

A special verdict that a person was not guilty of an offence by reason of mental illness is taken, for all purposes, to be a special verdict against the person of act proven but not criminally responsible for the offence.

### **7 Application of new Act to existing proceedings where unfitness to be tried raised**

- (1) This Act extends to proceedings for offences commenced and not completed before the commencement of Part 4 of this Act if the question of the defendant's unfitness to be tried was raised before that commencement.
- (2) Without limiting subclause (1), an inquiry or a special hearing commenced under the

former Act and not completed before that commencement is to be continued in accordance with this Act.

#### **7A Application of Part 2 of former Act to particular persons**

(1) Part 2 of the former Act is to continue to apply to existing proceedings as if the former Act had not been repealed.

(2) In this clause—

***existing proceedings*** means criminal proceedings—

(a) in which the court has, before the commencement of this Act, nominated a limiting term in respect of a person, and

(b) in which the court has not made an order under section 27 of the former Act in relation to the person.

#### **8 Application of Part 3 of former Act to existing proceedings**

(1) Part 3 of the former Act is to continue to apply to existing proceedings as if the former Act had not been repealed.

(2) In this clause—

***existing proceedings*** means criminal proceedings for which a court attendance notice was issued before the commencement of this Act, even if another court attendance notice is issued in relation to the proceedings after that commencement.

#### **9 Application of Act to existing forensic patients**

A person who, immediately before the commencement of Part 5 of this Act, was a forensic patient or a correctional patient under the former Act is taken to be a forensic patient or a correctional patient within the meaning of this Act and this Act applies accordingly.

### **Schedule 3 (Repealed)**