

**Review of the Mental Health
Review Tribunal in respect of
Forensic Patients**

Legal Aid NSW submission to the
Hon Anthony Whealy QC

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Table of Contents

About Legal Aid NSW	2
Introduction	3
Leave and release decisions.....	4
<i>Legislative requirements for leave and release</i>	4
<i>Information available to the Tribunal</i>	5
<i>Decisions regarding leave and release in practice</i>	5
<i>Involvement of victims</i>	6
<i>Supervision of forensic patients</i>	6
Engagement of victims.....	8
<i>Mechanisms for victims to be heard</i>	8
<i>Information available to victims</i>	9
<i>Support services available to victims</i>	9
<i>Section 162 of the MHFP Act</i>	9
<i>The make up of the Tribunal</i>	11
<i>Rules and processes</i>	11

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 29 Women's Domestic Violence Court Advocacy Services.

The MHAS is the Mental Health Advocacy Service (**MHAS**), a statewide specialist service of Legal Aid NSW. It provides free legal information, advice and assistance about mental health law, including advice and representation to forensic patients, who are required to be represented in their appearances before the Mental Health Review Tribunal unless they choose otherwise. This

involved appearing in 873 reviews in the financial year 2016/17. The MHAS also appeared in a number of matters involving forensic patients in the Supreme Court of NSW.

Legal Aid NSW welcomes the opportunity to make a submission to the review of the Mental Health Review Tribunal in respect of forensic patients. Should you require any further information, please contact:

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Introduction

Legal Aid NSW is grateful for the opportunity to provide a submission to this review. We provide long term representation to forensic patients across the State, and therefore consider ourselves to be in a strong position to provide insight into the Mental Health Review Tribunal's management of forensic patients.

Legal Aid NSW recognises that the offences with which some of our clients are charged are, at times, very serious, and lead to genuine trauma for victims and their families. However, the purpose of the forensic mental health system is primarily to manage the detention, care and treatment of forensic patients, rather than to impose punishment for the conduct involved.

In summary, we are comfortable with the legislative and administrative framework governing the leave and release of forensic patients, and the role of victims in that process. We consider that the *Mental Health Forensic Provisions Act 1990* (NSW) (MHFP Act), and the Tribunal's practices and procedures, ensure that decisions regarding leave and release are based on clinical evidence, and can be tested by the State when appropriate.

In our view, victims receive appropriate information and have an adequate opportunity to be heard, including on non-association and geographical restriction orders to ensure their protection. However, we would be open to extending the right to make victim impact statements to victims of defendants found unfit and not acquitted, or not guilty by reason of mental illness. We also consider that additional support services would be a better way of meeting the needs of victims of forensic patients, rather than enhancing their role in the Tribunal's decision-making processes.

Legal Aid NSW is aware that media attention to the issue of forensic patients precipitated and may have, in part, prompted this review. Some of our clients' cases were discussed in these media articles, and we wish to inform the review that there were significant inaccuracies in some of these articles. We can provide the review with further information on this issue, if requested.

Legal Aid NSW also notes that the NSW Law Reform Commission, Report 138: *Criminal responsibility and consequences* (2013) has made a number of useful recommendations for reform of the forensic system. We look forward to the Government response to that Report.

Leave and release decisions

Legislative requirements for leave and release

Do the current legislative requirements for Tribunal decisions regarding leave and release sufficiently protect the public, including the needs of victims, whilst balancing the rights of forensic patients?

Legal Aid NSW notes that this discussion question, and the first term of reference for the review, assume that the Mental Health Review Tribunal must balance the needs and interests of victims, with the rights, care and treatment needs of forensic patients.

In our view, this is a misplaced assumption. When making decisions regarding the leave and release of forensic patients, the Tribunal is not undertaking a balancing exercise between the needs and interests of victims and those of forensic patients. While the Tribunal will take into account the impact of its decisions on victims (for instance, by imposing non-association and geographical restriction conditions), its focus is on the forensic patient, and in particular any risks posed by that patient. An analogy can be drawn with the prosecution and sentencing of criminal offenders, where victims have a role, but their interests are not central to the decision-making process or the outcome.

In terms of the protection of the public, Legal Aid NSW does not have concerns with the legislative test for leave and release in the MHFP Act. We note that the Court of Appeal has provided useful guidance on the interpretation of the test in *Attorney General for the State of NSW v XY*, holding that: ‘the phrase “seriously endangered” ... as used in s 43(a), involves a consideration of both the probability and the gravity of the risk’ posed by the forensic patient.¹

We also highlight the NSW Law Reform Commission’s observation that the NSW legislative provisions are stricter than those of many other Australian jurisdictions, as they contain a presumption in favour of detention.² That is, the Tribunal cannot make an order for leave or release ‘unless it can be positively established that their release or leave of absence will not present serious danger to the public or themselves’.³

Further, the legislative framework for leave and release is supported by a detailed NSW Health Policy Directive (the Policy Directive for Forensic Mental Health Services).

We do not support the NSW Law Reform Commission’s proposed reformulation of sections 43, 49(3) and 74(d) of the MHFP Act, as the test refers to ‘serious risk of psychological harm to others’.⁴ In our view, any test should be limited to the risk of serious physical harm to others, as it is conceivable that the release of a forensic patient will always give rise to a risk of psychological harm for some victims and/or their families. This should not provide grounds for not releasing the patient. To include psychological harm

¹ *Attorney General for the State of New South Wales v XY* [2014] NSWCA 466 at [51].

² NSW Law Reform Commission, Report 138: Criminal responsibility and consequences (2013), pp221-223 (“Report 138”).

³ *Ibid*, p222.

⁴ *Ibid*, recommendation 8.1.

into the legislation would introduce a very subjective element into the test for leave and release, which would be dependent upon the relative mental state of the victim and/or his or her family.

Information available to the Tribunal

Are there any improvements that could be made to the information provided to the Tribunal and the Tribunal's decision making processes?

Legal Aid NSW considers that the Tribunal has adequate and appropriate information on which to base its decisions regarding leave and release. We note that its decisions are largely based on comprehensive clinical evidence.

The Tribunal receives a detailed report from the forensic patient's treating team, who have spent considerable time treating and observing the patient.

When making decisions regarding release, the Tribunal also has the benefit of an independent clinical report from a forensic expert who is not involved in treating the patient. This report is generally prepared by the Community Forensic Mental Health Service (**CFMS**). In our experience, the CFMS will usually err on the side of caution, or maintaining the status quo, in its recommendations.

The Tribunal also has the power to request reports from a range of agencies,⁵ and can issue a summons requiring persons to attend a Tribunal hearing and/or produce documents relating to any matter before the Tribunal.⁶

In our view, this clinical information provides a strong basis for sound, evidence-based decision making by the Tribunal.

As the Discussion Paper notes, both the Attorney General and the Minister for Health (delegated to the Minister for Mental Health) have the right to make submissions and appear in relation to certain matters, including the possible release of, or grant of leave of absence to, a forensic patient.⁷ In our experience, this right is regularly exercised and the State will often brief counsel to appear. This means that the opinions of the treating team can be challenged or tested.

Decisions regarding leave and release in practice

Legal Aid NSW would like to emphasise to the review that forensic patients are only granted leave and/or release after a considerable period of time and after intensive mental health treatment, and even then on a gradual and incremental basis and subject to conditions. In general, forensic patients are only granted external leave from a Medium Secure Unit (**MSU**). Not all forensic patients will be transferred to a MSU, and for those that are, the process will take years, with forensic patients usually spending two years in a correctional facility, and then approximately three to four years at the Forensic Hospital,

⁵ *Mental Health Act 2007* (NSW), s 162A.

⁶ *Mental Health Act 2007* (NSW), s 157(1).

⁷ MHFP Act, s76(A)(2).

beforehand. When external leave is granted, it always commences as escorted leave and for a short period of time, and is only increased where the patient is compliant and stable.

As the Discussion Paper notes, leave and release are also accompanied by risk assessment and drug and alcohol screening, and subject to a range of conditions and supervision. We also note that forensic patients are often on conditional release for significant periods, and much longer than offenders in criminal justice system usually spend supervised in the community. The supervision of patients on leave and released is discussed in more detail below.

Involvement of victims

Is the current involvement of victims in the Tribunal decision-making process appropriate?

Legal Aid NSW considers that the current involvement of victims in the Tribunal decision-making process is, in general, appropriate. As noted earlier, we do not think it appropriate for the views of victims to drive the care, treatment and control of forensic patients; victims and/or their families are unlikely to have the detachment necessary to make objective and evidence-based decisions regarding these matters.

As noted in the Discussion Paper, registered victims have the right to make applications for non-association and place restriction conditions. These are appropriate matters on which victims should be heard.

The Tribunal's broad powers to conduct its proceedings as it sees fit also allow other submissions to be made by victims. In our experience it is common for such submissions to be made, and then tendered and read by the Tribunal.

Legal Aid NSW would be comfortable with victims being permitted to make a victim impact statement following a finding that a defendant is unfit and not acquitted, or not guilty by reason of mental illness. This suggestion, and the involvement and engagement of victims generally, is discussed in more detail below.

Supervision of forensic patients

Legal Aid NSW does not believe that arrangements for the supervision of forensic patients in the community require improvement.

In our experience, forensic patients on leave and conditional release are, initially on their release, closely monitored. For instance, forensic patients on external leave:

- must fill out a detailed itinerary indicating where they will be at any given time in the day
- have a mental state assessment before and after going on leave
- are searched and undergo drug and alcohol screening before and after leave
- are required to have their mobile phone with them at all times and ring the unit at various times during the day, and
- are subject to random spot checks by staff to ensure that they are where they are meant to be.

When forensic patients are conditionally released, the Tribunal is able to tailor conditions to suit the individual circumstances of the patient (while some conditions are common to all patients). Forensic patients on conditional release are required to meet with their case manager and psychiatrist at regular times determined by the Tribunal, and are subject to drug and alcohol screening and other restrictions. Monitoring of leave and conditional release is only eased when the Tribunal has determined it is safe to do so.

It is also our experience that breaches of leave and release are dealt with swiftly. If a forensic patient breaches a condition of their leave or release, the treating team will notify the Tribunal. The President of the Tribunal has the power to issue an order for the apprehension and detention of a forensic patient in these circumstances.⁸ Any breaches of leave result in instant cancellation of leave while the breach is dealt with, and leave may then be cancelled or wound back as a result of the breach.

Case study

One of Legal Aid NSW's clients, John, was a forensic patient in a MSU. John had unsupervised leave to attend TAFE and play with a local football team, as well as unsupervised overnight leave three nights a week to stay in his own unit. John breached his leave by drinking alcohol and taking methamphetamine at his football team's end of season party. John was almost sent back to the Forensic Hospital as a result. Ultimately, John was allowed to remain in the MSU with unescorted leave to TAFE, but lost all other leave.

We understand that some sections of the media and community appear to hold an underlying belief that forensic patients on leave or conditional release will abscond or offend at the earliest opportunity. This belief is misplaced. The bulk of forensic patient clients were undiagnosed and/or untreated for a serious mental illness at the time of their offence. Once these patients are at the stage of being granted leave or conditional release, they will have spent a considerable amount of time receiving treatment for their illness, and are stable and wish to become productive members of the community.

In our experience, offending while on leave or conditional release is relatively rare. Some patients do breach their conditions of leave or release, but this is more likely to be for use of drugs or alcohol, rather than causing another person harm. This is quickly detected before there is any deterioration in their mental state and appropriate measures, including suspension of leave or change of placement, are implemented.

⁸ MHFP Act, s 68. The President can also issue an order under this section if it appears that the forensic patient 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 his or her mental condition.

Engagement of victims

Mechanisms for victims to be heard

Are the mechanisms for victims to be heard by the Tribunal appropriate? If not, how can they be improved?

Legal Aid NSW considers that current mechanisms for victims to be heard by the Tribunal are generally appropriate. Like all members of the public, registered victims are entitled to attend Tribunal hearings and listen to proceedings, unless the hearing is closed. Victims also have the right to apply for non-association and place restriction orders. As noted above, victims will also in practice make other submissions to the Tribunal and the Tribunal will often accept these submissions, using its broad power to conduct its proceedings as it sees fit.

We note that in its Report 138, the NSW Law Reform Commission recommended that the victim impact statement provisions in the *Crimes (Sentencing Procedure) Act 1999* (NSW) should be extended to apply to circumstances where the defendant is found unfit and not acquitted or not guilty by reason of mental illness under the MHFP Act.⁹ Legal Aid NSW accepts this recommendation, and consider that this statement should be passed to the MHRT and considered in the ongoing management of the forensic patient.

However, we would not support any broadening of victims' right to participate in Tribunal hearings regarding the leave and release of forensic patients. Ultimately, the focus of these hearings must be on the care, treatment and control of forensic patients. Although victims may have some insight into matters of risk associated with leave and release, these can be dealt with by submissions on association and geographical restrictions. Otherwise, decisions regarding risk assessment are fundamentally a clinical exercise that should be informed by the opinions of qualified, skilled and experienced professionals.

At times, we also find the involvement of victims to be counter-productive. Victims often have little understanding of the legal process they are involved in. Some victims believe that because they are invited to attend hearings they should be able to determine what conditions are placed on forensic patients (beyond non-association orders and geographical restrictions), and to veto an order for conditional release. Some victims have also been known to express anger and make threats against patients, or even the treating team and the Tribunal.

Case study

Legal Aid NSW represented a forensic patient who was granted conditional release. There were four or five victims in the hearing room, and the patient appeared via AVL. The victims became verbally abusive towards the Tribunal members at the end of the hearing saying that the Tribunal had put their lives at risk, even though there were no threats made to them by the patient, and they were protected by non-association orders and a very large geographical restriction on the patient. There was also an assessment

⁹ NSW Law Reform Commission, Report 138, rec 8.4.

by the CFMHS stating that the patient did not present a threat to himself or any member of the community. The victims were so hostile that the Tribunal members and the Legal Aid NSW lawyer representing the patient did not leave the hearing room until the victims had left the Tribunal premises.

Information available to victims

Is the information available from the Tribunal appropriate? If not, how could this be improved?

Legal Aid NSW considers that the information available to victims from the Tribunal is appropriate. In this regard, we note that registered victims may be notified of upcoming hearings, and whether any changes to the arrangements for the patient are likely to be considered; the outcome of hearings; and if there is a request to release the patient, or if the patient has escaped or failed to return from leave and the Tribunal has issued an order for apprehension.

Support services available to victims

Are support services available to victims appropriate? If not, how could they be improved?

We would suggest that ongoing victim participation in hearings is not necessarily a helpful way to assist victims to deal with their trauma. These hearings are focused on the forensic patient, and highlight the resources expended on forensic patients and their recovery. While we consider this to be appropriate, we also acknowledge that victims can receive relatively little support under the *Victims Rights and Support Act 2013* (NSW) scheme. It can take many years of therapy to address a particularly traumatic experience and reminding the victim of their experience every six months without providing any long lasting therapy can be at best unhelpful, and at worst, damaging.

Expanding the counselling and other support available to victims would be a better way of responding to victim trauma and needs.

Prohibition on publication of names

Section 162 of the MHFP Act

Does section 162 appropriately balance the interests of participants involved in Tribunal hearings with the need to ensure transparency of decision-making? If not, what legislative or policy amendments could be made?

Legal Aid NSW supports the current provision which prohibits the publishing the names of people who come before the Tribunal, unless the Tribunal orders otherwise. As the Discussion Paper notes, Tribunal hearings involve detailed discussions about a patient's personal and health information. It is appropriate that the privacy of this information be protected. Placing a prohibition on the publication of names also helps ensure participants partake in a full and frank discussion of all relevant matters.

The right to close Tribunal hearings to the public is complementary to this provision.¹⁰ It not only protects the privacy of forensic patients, but also in many cases their safety and rehabilitation. In some cases, victims can threaten forensic patients, campaign with the media, or otherwise interfere with the release plans for a forensic patient, as the case study below demonstrates.

Case study

Legal Aid NSW represented Jacob, a forensic patient in a Medium Secure Facility. At a standard review hearing, Jacob's guardian (the Public Guardian) mentioned that it had found a placement for Jacob in a secure nursing home facility. The registered victim was present at the hearing and heard the name of the facility offering to accommodate Jacob. After the hearing, the victim then visited the facility and made enquiries about the proposed placement, including security arrangements for Jacob. At the next hearing, which was to deal with Jacob's proposed conditional release, the facility had withdrawn the offer to accommodate Jacob. Although it was not confirmed, Legal Aid NSW suspects that the facility had done so because the victim knew of the proposed placement location and had made her own direct inquiries with the facility.

As the Discussion Paper notes, section 162 of the MHFP Act does not prevent persons from publishing information that a person is a forensic patient, or details about a court case where a person has been found not guilty by reason of mental illness. Some of our patients have been adversely affected by such publication, as illustrated by the following case study.

Case study

Legal Aid NSW represents Adam, a forensic patient who was found not guilty by reason of mental illness in 2000. Adam was named in articles published about his offence in 2003. Two years ago, Adam obtained volunteer work in a café on the campus of the MSU where he was a patient. Because of the ease at which these articles can be found on the internet, Adam was sacked from his position, even though his work had been very satisfactory. Adam has decided not to seek paid employment for the foreseeable future because of his experience, and is now on the disability support pension. He is therefore not working for a living or paying tax, both of which are integral to the rehabilitation and reintegration process.

We believe that there is a case for expanding the prohibition on the publication on the names of forensic patients. We consider that there should also be restrictions on publishing the names of forensic patients with matters in the Supreme Court, and those subject to applications to extend their forensic patient status. We also submit that it should not be lawful to publicly identify where a forensic patient lives in the community. To do so risks protests or other actions that may compromise the safety of forensic patients, as well as their rehabilitation. In terms of community safety, we note that there are already

¹⁰ *Mental Health Act 2007* (NSW), s151.

safeguards in the system to protect the community from dangerous offenders, such as the child protection register, working with children checks, and non-association and geographic restrictions under the MHFPA.

Appointment of Tribunal members

The make up of the Tribunal

Does the make up of the Tribunal meet the needs of the public, victims and forensic patients? If not, how could it be changed?

Legal Aid NSW supports the Tribunal panel requirements for decisions with respect to forensic patient matters, and has no concerns with the make up of the Tribunal.

Rules and processes

Are the current rules and processes for appointing members of the Tribunal appropriate?

In our view, the criteria and processes used to recruit members of the Tribunal appear transparent and appropriate.