

Mental Health Review Tribunal



Forensic Guidelines

Version 4 - August 2017

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SECTION 1. INTRODUCTION TO THE FORENSIC GUIDELINES

The purpose of these Guidelines is to document the Mental Health Review Tribunal's processes in relation to the work of its Forensic Division. under the *Mental Health (Forensic Provisions) Act 1990* ("the MHFPA")

The aim is to ensure that all of those who are involved in the lives of forensic patients, understand their roles and responsibilities, as well as what they can expect from the Tribunal. Members of the public who have an interest in the workings of the Tribunal will hopefully find the answers to their questions here.

SECTION 2. THE FORENSIC DIVISION OF THE TRIBUNAL, FORENSIC PATIENTS AND CORRECTIONAL PATIENTS

The Mental Health Review Tribunal is a specialist quasi-judicial body constituted under the *Mental Health Act 2007* (referred to throughout these guidelines as the MHA).

The Forensic Division of the Tribunal has a statutory role in making decisions about people who are mentally ill or have some other form of mental or cognitive impairment and who have:

- been accused of committing a crime and have been refused bail after having been found unfit to be tried, or
- have been found unfit to be tried, had a special hearing, found to have committed one or more offence(s) and been ordered to be detained for not longer than a 'limiting term' nominated by the court, or
- been found not guilty by reason of mental illness of one or more offence(s) after a trial or special hearing, and either detained or conditionally released.

These people are all referred to as “forensic patients” and continue to be reviewed by the Tribunal until they are unconditionally released or, in the case of a person detained subject to a limiting term, that term has expired. (A forensic patient who has had a limiting term nominated may also have that limiting term extended).

The Forensic Division also has certain statutory functions relating to people who are found unfit and given bail, and for sentenced prisoners who, due to mental illness have become “correctional patients”.

The Tribunal has a President, two full time Deputy Presidents, a number of part-time Deputy Presidents and approximately 140 part time members. When the Tribunal conducts forensic hearings, it sits as a three member panel: the President or a Deputy President who is a lawyer and who chairs the hearing, a psychiatrist, and another suitably qualified member. All Tribunal members have extensive experience in mental health or other relevant experience, and some have personal experience with a mental illness or caring for a person with mental illness.

The Tribunal’s role in overseeing the care and treatment of mentally ill people generally is dealt with in the Tribunal’s [Civil Hearing Kit](#) which can be found on the Tribunal’s website.

The Ministry of Health has issued a [Policy Directive for Forensic Mental Health Services](#) which sets out the Ministry’s standards and governance arrangements for forensic patients. This Policy Directive will be referred to in these guidelines as the Forensic Policy Directive.

What is the Tribunal’s Role in Making Decisions About Forensic Patients?

The Tribunal conducts regular reviews or hearings for forensic and correctional patients.

Regular Reviews of Forensic Patients

The Tribunal is required to conduct regular reviews of forensic patients, and to make orders about whether and where the patient should be detained, as well as the patient’s care and

treatment. If a patient is well enough to live in the community, so that their safety or the safety of the public would not be seriously endangered by the person's release, the Tribunal can make an order that the patient be conditionally released. The Tribunal can also make an order that a person is unconditionally released from their forensic order, once the safety of the person and the public is not in serious danger.

The Tribunal conducts reviews of forensic patients every six months. It can extend this time frame to 12 months, if the patient's condition is stable and more frequent reviews may be detrimental to the patient or there are other good reasons to grant the application: s. 46(5) MHFPA.

The Tribunal's powers of review under ss. 46 and 47 of the MHFPA are very broad. A review is the opportunity for a fresh consideration of any aspect of a patient's present or future care and treatment. The Tribunal must, of course, have regard to the personal circumstances of the patient, including the circumstances of their index offence and the Tribunal's accumulated store of knowledge about the patient.

The Tribunal will usually leave day to day decisions in relation to care and treatment to the treating team. However, the Tribunal does have the power to make orders in relation to a patient's care or treatment.

Usually the Tribunal's review will consider only a limited range of issues. A review may focus on:

- the patient's own hopes and aspirations;
- whether the patient is currently receiving appropriate care and/or treatment; and
- planning for the patient's future pathway, including ensuring that the patient lives in the least restrictive environment that is consistent with safe and effective care.

A patient and/or their advocate will have the opportunity to raise any issues of concern at a review.

The Tribunal also has the power to make recommendations under s. 76A(1) MHFPA. This power will be used by the Tribunal to highlight issues of concern which it wishes to raise formally.

The Tribunal can also make requests of the Ministry of Health, the Commissioner of Corrective Services, the Family and Community Services and any other agency responsible for the detention, care or treatment of a forensic or correctional patient. Those agencies must use their best endeavours to comply with a Tribunal request: s 76K of the MHFPA.

Some reviews require the Tribunal to consider specific statutory issues. These are discussed below.

Fitness to Stand Trial

When a court has decided that a person who has been charged with an offence is unfit to stand trial, the court must refer the person to the Tribunal under s. 14 of the MHFPA.

The Tribunal then reviews the person under s. 16 of the MHFPA and determines whether, on the balance of probabilities, it is likely that the person will become fit to be tried in the 12 months following the court's decision.

The Tribunal does this by considering the reasons why the person was not fit to be tried at the time that the court made its decision, and decides whether the person's condition is likely to change.

A person who has been found unfit because they have a major mental illness, and released on bail, should be linked into their local Community Mental Health Team or may also have private arrangements for psychiatric care. Psychiatric treatment and care will improve the likelihood of a person becoming fit to stand trial. The Community Forensic Mental Health Service (CFMHS) will arrange to interview a person who has been found unfit to stand trial because of psychiatric difficulties. The CFMHS will provide the Tribunal with a report and will be available to advise the patient's community treating team.

If a person is released on bail by the court, the person does not become a forensic patient and so will only be reviewed by the Tribunal once under s.16 of the MHFPA. The Tribunal cannot make any orders about a person's care, treatment or detention if the person is on bail. However, the Tribunal can make a recommendation to the Court

If a patient is found unfit to be tried by a court and then detained, the patient is a forensic patient (although she or he has not yet been tried) and the patient will continue to be reviewed by the Tribunal every six months.

The Sentencing Bench Book and the Criminal Trial Bench Book contain information about how the Court may obtain an independent report from the Community Forensic Mental Health Service (CFMHS) (a part of Justice Health and the Forensic Mental Health Network). This report could assist the court in formulating appropriate bail conditions, which in turn should facilitate an unfit person getting the kind of mental health treatment that may allow them to become fit.

Reviews of Prisoners/Correctional Patients

If a prisoner becomes mentally ill and needs treatment in a mental health facility, the Director -General (or delegate) of the Ministry of Health can order his or her transfer to a mental health facility: s. 55 MHFPA.

The Tribunal is required under s. 58 of the MHFPA to review a prisoner who has been ordered to be transferred to a mental health facility, but where the transfer has not yet taken place. The prisoner is reviewed by the Tribunal every month until the transfer takes place, or until the transfer order is revoked. The Tribunal must decide whether the person should be transferred to a mental health facility or to some other place.

Once a prisoner has been transferred to a mental health facility, the person is called a “correctional patient” and is reviewed by the Tribunal again to see if s/he is a mentally ill person and should continue to be detained in a mental health facility. After that initial review, the correctional patient is reviewed every six months unless the Tribunal extends this review time frame to up to 12 months.

Where do Forensic Patients Stay?

Forensic patients who are detained are housed in mental health facilities, or in correctional centres. Patients also live in the community once the Tribunal or the Court has made an order that they can be conditionally released.

What Kinds of Orders Does the Tribunal Make?

The Tribunal can make orders about where a forensic patient is to be detained, which is usually in a correctional centre or mental health facility. The Tribunal also decides when it is appropriate to transfer a person from one place to another. The Tribunal can make orders about the care and treatment which a patient is to receive, although most of the time decisions on this issue are left up to the staff in the correctional centre or mental health facility. The Tribunal is alerted to the kinds of orders which either the patient or the treating team would like considered by the Notice of Intent, which is returned to the Tribunal several weeks before the hearing.

The Tribunal decides whether a forensic patient can be given leave of absence from correctional centres or mental health facilities. The Tribunal takes into account a range of factors, including the patient’s mental state, the patient’s future plans and whether there is any risk to the patient’s safety or to public safety. Usually a patient will over time have increasing amounts of leave, with less and less supervision, to gradually allow that patient to safely adjust to living in the community.

The Tribunal also decides when it is appropriate for a person to live in the community on a conditional release order. The Tribunal must be satisfied that the patient or public would not be seriously endangered. The Tribunal usually imposes a significant list of conditions which the forensic patient must obey while they are in the community.

If a forensic patient breaches the conditions of their leave or conditional release, or becomes unwell for any other reason, the Tribunal decides whether the patient should be detained again, and if so, where the person should be detained.

It is possible for a patient’s limiting term to be extended, by order of the Supreme Court. These applications are made by the Attorney General or the Minister for Mental Health, following the scheme set out in Schedule 1 of the MHFPA.

The Tribunal can make an order for unconditional release, but again must be satisfied that the patient or public would not be seriously endangered. If a patient has been detained subject to a limiting term, then the patient is released when the limiting term expires.

The Tribunal can order that a patient who is six months from the end of their limiting term becomes an involuntary patient under the MHA, if the patient remains mentally ill, poses a

serious risk of harm to him/herself or other members of the community, and still needs an involuntary hospital admission.

The Tribunal cannot classify a person as an involuntary patient unless both the Attorney General and the Minister for Mental Health have advised the Tribunal that they do not propose to apply for an extension order, or the Supreme Court has dismissed an application for extension of the person's forensic patient status.

The Tribunal also decides whether a prisoner should be transferred to a mental health facility to receive treatment

SECTION 3. TRIBUNAL HEARINGS FOR FORENSIC PATIENTS

The [Forensic Policy Directive](#) outlines the information that is to be provided to the Tribunal prior to reviews. The Tribunal has also issued a [practice direction](#) dealing with the time frames for providing information and reports prior to a hearing.

Legal Aid NSW provides will arrange for free legal representation for all forensic patients through the Mental Health Advocacy Service

Before a Hearing

The Tribunal's hearings are usually listed six months apart, although the Tribunal may, if appropriate, decide to extend that time to 12 months. The patient and the treating team are usually notified of the review date six weeks before the date of the hearing.

If the patient or the treating team wish the Tribunal to hold an early review for any reason, they may write to the Tribunal outlining their reasons for seeking the early review.

Notice of Intent

The Tribunal's practice is to ask a patient's treating team and/or lawyer to provide the Tribunal with advance notice of the orders that they will ask the Tribunal to consider at a review. This is done by completing the Notice of Intent. The Tribunal's staff rely on the Notice of Intent to advise the Minister for Mental Health, the Attorney General and any registered victims of the kinds of orders which the Tribunal will be considering at the review, so that those persons can consider whether they wish to exercise their statutory rights to attend the review and/or make submissions. The treating team/patient's lawyer will be notified of the contents of any Notice of Intent provided to the Tribunal, so that they are able to properly prepare for the review.

The Tribunal's procedure in relation to providing notification to the Minister for Mental Health and the Attorney General are set out in its [practice direction](#) called Notification to the Minister for Health and the Attorney General under s. 76A(2) *Mental Health (Forensic Provisions) Act 1990* updated on 6 February 2017.

The Tribunal's staff will send a copy of the Notice of Intent form to treating teams and the Mental Health Advocacy Service six weeks prior to a hearing date. It should be completed and returned to the Tribunal at least four weeks before the review date.

The Tribunal may be unable to make orders in relation to leave or release which go beyond the orders foreshadowed in the Notice of Intent if it considers that it would breach procedural fairness to the Ministers or victims. Any decisions about leave or release which were not able to be dealt with at one review may be raised at a subsequent review, if foreshadowed on a Notice of Intent.

Extra or Early Reviews

The Tribunal may conduct a review at any time. If issues arise between the scheduled reviews, the Tribunal may arrange an early review so that the issues can be considered.

If the patient or treating team seeks an early review to consider a new request for leave or a conditional or unconditional release application, they should first contact the Tribunal on
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9816 5955 and ask to speak to a Senior Forensic Officer. The Tribunal will decide if an early review is appropriate but will only list the early review when all the necessary reports have been filed with the Tribunal.

If the patient wishes to seek changes to the current orders, which differ from the treating team's proposal, the patient should also let the Tribunal know at least four weeks prior the review date.

The Tribunal advises the Minister for Mental Health¹ and the Attorney General of the nature of the application which was described in the Notice of Intent, to allow the Ministers to exercise their right of appearance if they wish to do so. The Notice is also used to inform registered victims of the orders which have been requested, so as to allow a victim the opportunity to request an order for non-association or geographical restriction if they wish.

Conflict of Interest

When listing reviews the Tribunal tries to ensure that its members have no conflict of interest with a particular case. There could be the appearance of a conflict of interest if:

- A panel member has been a treating clinician of the patient within the last two years.
- A panel member was previously the legal representative of the patient.
- A panel member was a Judge involved in a matter before the court for the patient.
- A panel member is a treating clinician at a mental health facility to which the patient may be transferred from the mental health facility or correctional centre where the patient is currently detained.

There may, of course, be other bases on which a panel member could appear to have a conflict of interest.

Every effort is made to ensure that the panel members who may appear to have a conflict of interest do not participate in reviews of the patient.

Anyone with a concern about apparent conflicts of interest for a panel member should contact the Tribunal, preferably before the hearing.

Evidence Before the Tribunal

The Tribunal expects that clinicians involved in working with the patient will provide the Tribunal with reports. The [Forensic Policy Directive](#) sets out examples of information to be included in reports. A pro forma report is Appendix 6 to that policy.

If a patient or their lawyer wishes the Tribunal to consider their own reports, documents or statements at the hearing, these should be provided to the Tribunal at least one week prior to the hearing. The Tribunal does not require evidence to be in a formal statement, but the

¹ The MHFPA allows the Minister for Health a right of appearance before the Tribunal in matters relating to leave or release. However, responsibility for this aspect of the MHFPA is exercised by the Minister for Mental Health. The Tribunal's practice is to notify the Minister for Mental Health.

Tribunal should be provided with a letter or email which outlines what the witness is expected to say.

Any information should be forward to the Tribunal by emailing mhrforensic@doh.health.nsw.gov.au

Standard Clinical Report

Any report to the Tribunal should include at least the following information:

- A summary of the patient's background
 - Patient's general background and family history
 - Diagnosis and when diagnosed
 - Prior to index event – life, activities, income, work and interests
 - Past forensic and psychiatric history
 - Any drug and alcohol history
 - Index event
 - Prior history of offending
 - Previous location and when admitted
- Progress since the last MHRT hearing (if relevant)
- Current presentation
- Current medications
- Current risk assessment
- Recovery pathway and future plans to ensure that the patient is receiving proper care and treatment in the least restrictive environment

Where there is a multidisciplinary team treating the patient, it is not necessary to duplicate this information in each report, provided it is all covered in the reports of the treating team for each hearing.

Fitness

If a court decides that a person is unfit to stand trial, the court is to refer the person to the Tribunal under s. 14 MHFPA. The Tribunal must determine if the person is likely, on the balance of probabilities, to become fit to be tried for the offence with which s/he has been charged within 12 months of the date of the court's order (s. 16 MHPFA).

There is a presumption in s. 15 of the MHFPA that if the Court has found a person to be unfit, then the person remains unfit. The Tribunal would need to be persuaded by evidence to the contrary. The Tribunal needs to be satisfied on the balance of probabilities that the person is now fit.

The Tribunal will be assisted by an up to date report from a forensic psychiatrist or psychologist addressing:

- The person's diagnosis (if available)
- Current mental state

- Whether the person currently meets the criteria in *R v Presser* [1958] VR 45 and *Kesavarajah v The Queen* (1994) 181 CLR 230 for fitness (see para 1.4 of the [Forensic Policy Directive](#)), having regard to the offence with which the person has been charged, and the likely nature of a trial for that offence
- Available treatment options
- Whether the implementation of those options are likely, on the balance of probabilities to lead to the person becoming fit to stand trial within 12 months of the date of the court order
- Whether the person is suffering from a mental condition for which treatment is available in a mental health facility. If “yes” to the above, the report should include whether the person objects to being detained in a mental health facility.

If a person is detained in a correctional centre or a mental health facility at the time of a fitness hearing, the Tribunal will also conduct a review of a patient under ss. 46 and 47 of the MHFPA, and so will also require the standard information about a patient’s background and progress.

Ongoing Fitness Reviews

If a patient has been found unfit by the court and is detained, the patient’s fitness to stand trial will need to be considered by the Tribunal at every subsequent review until a special hearing has been held.

After the special hearing, if the patient has had a limiting term nominated, then the question of the patient’s fitness to be tried must be considered by the Tribunal at each subsequent review.

The question of a patient’s fitness should be addressed in the report of the treating team at each review as below:

- Where the patient’s level of fitness varies, a detailed analysis is required, including a consideration of the *Presser* and *Kesavarajah* criteria
- If the patient’s level of fitness is attributable to an organic condition, then it may be enough to say in subsequent reviews that there has been no change to the patient’s fitness to be tried
- If the team considers that a patient has become fit, this should be signalled to the Tribunal on the Notice of Intent, if possible.

Transfer

The Tribunal is empowered to consider the place of a patient’s detention, as well as the care and treatment that the patient is to receive. Consequently, the Tribunal will sometimes make an order transferring a patient from their current place of detention to another facility. This will usually be made on the basis that the patient could safely be housed in a less restrictive environment, or requires treatment or services of a kind that are not available in the current place of detention.

The requirements in relation to the handover of patients from one service to another are set out in the [Forensic Policy Directive](#).

Before making an order for transfer, the Tribunal would usually expect to see written evidence that the receiving facility has agreed that the patient is a suitable candidate for transfer to their facility.

The treating team should provide the Tribunal with up to date information about estimated timeframe for transfer in their reports, and the reasons for any delay in transfer.

The Tribunal will also conduct a review of a patient under ss. 46 and 47 of the MHFPA, and so will also require the standard information about a patient's background and progress.

Leave

Approved leave is required for a patient to access any place which is outside of the declared boundaries of the facility in which the patient is detained. The Tribunal must not make an order allowing a forensic patient leave unless it is satisfied that the safety of the patient or any member of the public will not be seriously endangered if the leave of absence is granted.

The types of leave that are available are:

- **Ground leave (Ground Access)**
Ground leave is when a patient is granted permission to enter the grounds of the facility at which the patient is detained. During the ground leave, the patient may be escorted, supervised, or unsupervised. The grounds of a declared mental health facility are defined as only those grounds that are explicitly set out in the declaration of the facility. (Chapter 5 of the [Forensic Policy Directive](#) refers to this type of leave as Ground Access)
- **Escorted day leave**
Escorted day leave is leave granting access to a place or places outside a mental health facility, correctional centre or other place under close supervision and escorted by at least one member of staff of the facility.
- **Supervised day leave**
Supervised day leave means leave to a place outside a mental health facility, correctional centre, or other place, under the close supervision of at least one responsible adult (who is not a member of staff of the facility). Supervisors should be formally approved by the Medical Superintendent or delegate.
- **Unsupervised day leave**
Unsupervised day leave is leave from a mental health facility, correctional centre, or other place without being accompanied by a supervisor or an escort. It may be given in general terms, or for specific purposes.
- **Supervised overnight leave**
Supervised overnight leave enables a forensic patient to be absent from a mental health facility, correctional centre, or other place, for periods of up to 24 hours per

day, while under the close supervision of at least one responsible adult. Supervisors should be formally approved by the Medical Superintendent or delegate.

- **Unsupervised overnight leave**
Unsupervised overnight leave is leave enabling a patient to be absent from a mental health facility, correctional centre, or other place, for periods of up to 24 hours per day, while not being subject to supervision or accompanied by an escort.

In describing the categories of leave, the Tribunal uses the same terminology as the [Forensic Policy Directive](#). The [Forensic Policy Directive](#) sets out the matters the treating team should consider when preparing for leave. The Tribunal expects that these issues are specifically addressed in the treating team's report.

Section 49 the MHFPA provides that only the patient can apply for leave. The Tribunal can consider making an order for leave on its own motion. Practically speaking, it is often treating teams that complete the Notice of Intent. The Tribunal treats the Notice of Intent as a suggestion from the treating team which the Tribunal then considers of its own motion. Treating teams should fully consider the leave that they think should be considered in order to allow the patient to undertake the rehabilitation and other activities that the patient and team have planned. For reasons of procedural fairness, the Tribunal cannot grant leave which goes significantly outside the terms of the Notice of Intent.

Where a patient has previously been given a grant of leave, it is important that access to and progress on any leave is included in the next report to the Tribunal, highlighting both the successes and any incidents that have occurred on leave.

Any significant incidents that have occurred whilst the patient is on leave should be brought to the Tribunal's attention in between review hearings as soon as possible after the incident occurs.

The Tribunal will also conduct a review of a patient under ss. 46 and 47, and so will also require the standard information about a patient's background and progress.

Conditional Release

Preparing an application for conditional release can take some time, both to ensure that all of the necessary clinical steps have been taken and to assemble the reports. Ideally, plans for conditional release will be foreshadowed at the Tribunal hearing 6 months before it is proposed to make a conditional release application. See 7.2.3 of the [Forensic Policy Directive](#).

The conditions that the Tribunal can impose on release are set out in s. 75 of the MHFPA.

Critically, under s. 74(d) of the MHFPA, the Tribunal cannot grant conditional release unless it has a report by a psychiatrist who is not involved in treating the person, which provides an

opinion as to risk required under s. 74(d). These are usually provided by the CFMHS. However, a patient may also engage a private psychiatrist or psychologist to conduct the necessary assessment and provide a report and evidence to the Tribunal.

The [Forensic Policy Directive](#) sets out the matters to be addressed by the treating team when preparing for conditional release. These should be documented in the report provided to the Tribunal. In particular, the Tribunal would usually expect that the report to include:

- Evidence that the patient has been compliant with their current forensic order.
- Details of the risk assessment and proposed risk management plan, including recovery based interventions.
- If the patient is going to be supported in the community by a community mental health service or other support service, written confirmation that the service accepts the referral.
- If the forensic patient has a mental illness then the name of a psychiatrist and case manager from a Local Health District who will be responsible for management of the forensic patient
- Evidence of a home/accommodation assessment that has been conducted by appropriate staff.
- Evidence that the conditional release plan has been discussed with the patient and the primary carer. The term primary carer is not defined in the MHFPA, but is likely to include, at the very least, a person who is a designated carer under the MHA

A representative of the service to which the patient will be released should be available (at least by phone) to attend the hearing.

The Tribunal will also conduct a review of a patient under ss. 46 and 47, and so will also require the standard information about a patient's background and progress.

The Court may also conditionally release a forensic patient, at the time that the Court reaches its decision that a person is not guilty by reason of mental illness. The Court may then impose whichever conditions it thinks fit. The Tribunal is obliged to conduct a review as soon as possible after the Court's verdict.

Conditional Release for Patients with an Intellectual Disability or Cognitive Impairment

Patients who have an intellectual disability and do not have a mental illness are generally not eligible for assessment by the CFMHS. In these circumstances, the Tribunal requires a report by an independent psychiatrist or psychologist. The Tribunal may be able to fund the report. These funds are very limited and generally only one report can be paid for in relation to any particular forensic patient. It is important therefore that the report is obtained only where it is likely that an application for release will be made within the next six to 12 months. The process for obtaining a report is set out in the Tribunal's [practice direction](#).

Conditional Release for Patients on a Limiting Term

When a patient is subject to a limiting term, the Tribunal must consider whether the patient has spent "sufficient time in custody" before granting a conditional release application: s. 74

(e) MHFPA. The Tribunal has published several decisions in which it considered the interpretation of the phrase “sufficient time in custody”: [Adams \[2013\] MHRTNSW 1](#) and [Talbingo \[2015\] NSWMHRT 6](#).

If there is any doubt about whether a limiting term patient has served sufficient time in custody, then the Tribunal is prepared to consider two conditional release applications for limiting term patients. The first application will consider only whether the person has served sufficient time in custody, and there may be limited information available about the proposed conditional release arrangements. The second application will consider whether there is any reason to depart from the Tribunal’s earlier determination that sufficient time in custody has been served, and then to consider the appropriateness of the conditional release arrangements themselves.

Working With a Forensic Patient Who Has Been Conditionally Released

The [Forensic Policy Directive](#) outlines the ways in which a forensic patient is to be managed whilst on conditional release.

A forensic patient will usually be required to be linked to their local community mental health team and to see a public case manager and public psychiatrist. The Tribunal ordinarily imposes a range of other conditions relating to accommodation, drug and alcohol use and testing, and engagement in therapeutic programs.

The case manager and the patient should work together to complete the Notice of Intent for future reviews. If there is a disagreement about what should be sought, separate Notices can be lodged with the Tribunal. The patient’s case manager and psychiatrist will be required to provide a report to the Tribunal prior to each review hearing. Ideally both the case manager and psychiatrist will be available to attend the Tribunal hearing. However, the Tribunal expects that, at least the case manager will be available to attend.

Patients who are conditionally released and who have a major mental illness will also be reviewed by the CFMHS prior to every Tribunal review. The case manager is responsible for making arrangements for the patient to be interviewed by the CFMHS. It is useful if the case manager and psychiatrist have considered the CFMHS report prior to the review and are able to comment on their ability to implement the CFMHS recommendations. The CFMHS is also available to provide advice to case managers between reviews if issues of concern arise.

If any issues of concern arise between hearings, the case manager is responsible for notifying the Tribunal – see Section 6 of these Guidelines.

If a forensic patient has been conditionally released, but does not have a major mental illness, it may not be necessary or appropriate to require the involvement of a Community Mental Health Team. The Tribunal is likely to require an alternative public sector case manager, who will be able to liaise with the Tribunal, provide reports for hearings and alert the Tribunal of any concerns between hearings. In those circumstances the CFMHS will not provide a report to the Tribunal.

Unconditional Release

Para 7.3.3 of the [Forensic Policy Directive](#) outlines the preparations that will be needed before an application for unconditional release is made. The Tribunal would expect to see these matters documented in a report.

Critically, under s. 74(d) of the MHFPA, the Tribunal cannot grant unconditional release unless it has a report by an independent forensic psychiatrist or psychologist providing the opinion as to risk required under s. 74(d). These are usually provided by the CFMHS.

The Tribunal may also may a Forensic Community Treatment Order, as part of the unconditional release application: s. 67(5) MHFPA.

However a patient may also engage a private psychiatrist or psychologist to conduct the assessment and provide a report and evidence to the Tribunal.

Timing

The Tribunal has issued a [practice direction](#) in relation to the timing of reports. If any change is sought to the existing orders, all reports must be to the Tribunal no later than two weeks prior the review date.

If no change is sought, the reports must be provided one week prior to the review date.

Distribution of Material by the Tribunal

The Tribunal will copy the material provided by the treating team and any other party and provide it to the patient's legal representative and to its own panel members.

Submissions by registered victims seeking noncontact or geographical restrictions will be provided to the patient's legal representative (although identifying information may be removed) and may also be provided to the treating team if the submission is relevant to an application for leave or release .

If the CFMHS reviews a patient, they provide a copy of that report directly to the treating team, and the Mental Health Advocacy Service as well as to the Tribunal.

The reports provided by the CFMHS, the treating teams or other service providers are not made available to the public or registered victims. The reports will be provided to the Minister for Mental Health or the Attorney General, if the Minister or Attorney General is exercising their right to appear before the Tribunal.

Access to Venues for Members of the Public and Registered Victims

Tribunal hearings are usually held in the place at which a patient is detained. If the patient has been conditionally released into the community, the Tribunal hearing is held either at the Tribunal's hearing room in Gladesville or via a videolink from Gladesville.

Access and security arrangements for members of the public to access correctional facilities and mental health facilities are determined by the Commissioner of Corrective Services and/

or the Medical Superintendent of the mental health facility. The Tribunal has very limited influence over who may access these facilities.

If the Tribunal is notified in time, it can arrange for a registered victim(s) to attend or view the Tribunal's proceedings. A registered victim can attend in person if the proceedings are held at Gladesville. If the proceedings are held elsewhere, the Tribunal can arrange for the proceedings to be viewed by video-link from its Gladesville premises

The Tribunal does not make arrangements for the public to access its hearings in correctional centres or mental health facilities. These arrangements must be made by the person wishing to attend directly with the correctional centre or facility .

Ordinarily, the patient's treating team will make arrangements for any designated carers and/or other family members to attend the hearing .

Hearings

The Tribunal holds regular review hearings for forensic patients, usually sitting as a panel of three.

Where Hearings are Held

The Tribunal conducts hearings for forensic and correctional patients in correctional centres, inpatient mental health facilities and community mental health centres. The Tribunal usually travels to venues in the Sydney, Wollongong, and Newcastle regions. Some hearings take place at the Tribunal's premises in Gladesville. Hearings for people living outside these areas are usually held by video conference.

The hearing room is set up informally, with the Tribunal panel sitting on one side of a table, and the other participants sitting on the other side of the table.

Procedure at a Hearing

The central focus of the hearing is on the forensic patient or correctional patient as the person about whom the review is being held. An effort will always be made to hear the person's point of view.

The Tribunal will be facing the patient. If necessary the hearing room furniture may need to be rearranged to ensure that this is achieved. Where video link is used to facilitate the participation of other people, it is important to ensure that this does not distract from the focus on the patient.

The dignity of the patient should be respected at all times. The patient should be addressed directly and not discussed in the third person as if he or she were not present.

At the start of each hearing, all of the participants (patient, lawyer, family, treating team and any members of the public) should come into the Tribunal room together. If people are attending the hearing by video link or telephone, they will be contacted by the Tribunal staff at the same time.

The Tribunal conducts each hearing in an informal way. Although informal, each hearing still remains part of a legal process. The Tribunal will ensure that it accords procedural fairness. However, it is not bound by the formal rules of evidence.

If a person considers that a Tribunal panel member has a conflict of interest and the issue has not been raised before the hearing, the issue should be raised at the beginning of any hearing (see **Conflict of Interest**).

All Tribunal hearings are recorded. This is a requirement of the MHA: s.159.

The precise format of each hearing will vary depending upon the patient, the issues to be decided and who is present. Generally speaking, a hearing will follow this format:

- The Tribunal members will introduce themselves and invite all those in attendance to give their names.
- The Tribunal will ask for the patient's views. Questions may be directed to the patient him or herself, or to the patient's lawyer. A patient will always have an opportunity to express their own views in their own words.
- If either Minister is represented at the hearing, the representative will be invited to outline the Minister's position
- The Tribunal will invite the treating team, usually starting with the psychiatrist or case manager, if there is anything to add to the written reports, or other comments that they wish to make. The psychiatrist may be invited to present a summary of the key issues regarding the patient for the purposes of the review.
- Members of the Tribunal may ask questions of the treating team to clarify any issues in the reports or in the evidence given in the hearing, or to raise matters of concern.
- The Tribunal will invite the patient's representative to ask any questions which the patient wishes to ask
- If there are any other participants at the hearing (community mental health team, staff from Corrective Services NSW, or the Department of Ageing Disability and Home Care (DADHC)) that person may be invited to add to their report or contribute to the discussion.
- Any Ministerial representatives will be given an opportunity to ask questions of the patient and other participants.
- The Tribunal may invite any family or support person to add any comments.
- If victims have requested a non-association order or geographical restriction and there is an issue about whether the Tribunal should make that order, the victim(s) may be invited to speak about their request or to answer any questions from the Tribunal members.

If anyone else wishes to ask a question of another person in the room, it should be done through the presiding member of the Tribunal.

Tribunal hearings are inquiries with a patient focus. The hearing is not adversarial, in that no one bears an onus of proof. However, there will be occasions where robust advocacy is

necessary. The Tribunal's Presidential member may intervene to ensure the content and tone of questions is appropriate

At any time or after all the evidence has been taken, the Tribunal may take a short break to discuss the matter privately amongst the members of the panel.

If the decision can be announced on the day then the Presidential member will do so and a brief summary of the reasons for decision will be given.

However, any orders made by the Tribunal do not take effect until a formal sealed order is issued by the Tribunal. The process that is followed after a hearing is discussed in more detail under the heading **Orders and Reasons for Decision**.

The Tribunal will provide a copy of the order and reasons for decision to those directly affected by them. This will usually be: the patient, through their legal representative; the treating team, either through the psychiatrist, case manager or the Tribunal's contact person; the Minister for Mental Health (in leave and release matters); and the Attorney General in release matters. The Tribunal will consider a request by a registered victim to obtain a copy of the reasons for decision where non association and place restriction orders have been made and the victim is contemplating an appeal to the Supreme Court

Time of Tribunal Hearings

Most Tribunal hearings are completed in about 45 minutes. However, sometimes they take longer to complete, depending on what may be needed to make sure that each person receives a full and fair hearing.

An approximate start time is given for patient's reviews. Every effort is made to keep to the proposed time frame, but all participants should be aware that issues arise unexpectedly and Tribunal hearings may run early or late.

Who Should Attend

It is preferable for the following people attend Tribunal hearings:

- The patient
- The patient's legal representative
- The treating psychiatrist (or Registrar) and/or case manager
- A representative of the nursing staff or
- Other allied health professionals who are members of the treating team.

Others who may wish to attend a Tribunal hearing are the designated carers, family or other support persons, or members of the public. The role of each participant is discussed below.

What is the Role of Participants in a Hearing

There are a range of people who participate in Tribunal hearings.

Patient and the Patient's Representative

An important part of the review process is for the Tribunal to hear from the patient, and understand any concerns or desires that the patient might have.

Forensic patients must be represented by a lawyer, unless they chose not to be. (See **Representation**). The lawyer's role is to communicate their client's instructions to the Tribunal.

If a patient refuses to attend a hearing of the Tribunal, the Tribunal can conduct the review in the patient's absence. In that case, it is useful if the legal representative is able to communicate to the Tribunal the patient's instructions including the fact that the patient does not wish to attend.

On rare occasions, a patient will not be well enough to attend a Tribunal hearing. In that case, the Tribunal may decide to take preliminary evidence from the treating team as to the patient's mental state. The Tribunal may move to where the patient is detained and take evidence from the patient at that location, if appropriate. Alternatively, a member of the Tribunal (usually the psychiatrist panel member) may visit and speak with the patient if possible, and convey their observations to the balance of the panel.

Treating Team

Prior to the hearing, the treating team should have prepared written reports, which will have been provided to the Tribunal and a copy provided to the patient and other clinicians.

At the hearing, the treating team should be ready to speak to their reports and to update the Tribunal about any recent progress or developments since the reports were prepared. The team should be prepared to discuss its plans for the patient's future, both short and medium term. The Tribunal may well have other questions for members of the treating team.

Designated Carers, Friends or Family of a Patient

Support from family and friends are an important part of a patient's recovery. A patient may, if they wish, nominate up to two people to be a designated carer. A designated carer may be the same as the person who is primarily responsible for providing support or care to the person.

Under the MHA, a designated carer and a principal care provider must both be consulted before discharge. Under the MHFPA, there is an obligation to consult the "primary carer". It would be prudent for the treating team to consult any designated carers, when plans are made for release or leave, subsequent treatment or other action.

Other family and friends are welcome to attend the hearing to offer support to a patient. Their input may be invited by the Presidential member of the Tribunal, depending upon the issues that are being discussed. It is possible that family or friends will be asked to leave the hearing if sensitive information is being discussed, and the patient, their lawyer or the treating team raises concerns about the presence of others in the hearing .

The treating team will make the arrangements for a designated carer and a principal care provider, family or friends of the patient to attend the hearing in secure venues, if they wish to do so.

Registered Victim

The term ‘victim’ is defined in the MHA in accordance with the *Victims Support and Rehabilitation Act 1996*. Essentially a victim is the primary victim of an act of violence committed by the patient or a member of the immediate family of a victim who has died as a result of the offence .

The Tribunal is responsible for managing the Forensic Patients Victim Register and it has adopted a process for registering victims and ascertaining their wishes so that the Tribunal can notify them about forensic patient issues. For this reason the Tribunal uses the term “registered victim”.

Victims can choose their level of contact with the Tribunal, and the information that they receive about Tribunal reviews. A victim’s level of involvement can be changed at any time by advising the Tribunal’s staff of their wishes

Some registered victims choose to attend every review hearing as is their right as members of the public. If the Tribunal is considering leave or release the registered victim will have received notice and they have a right to make an application for a non association or place restriction order. This would usually occur towards the end of the hearing after the evidence concerning leave or release has been heard.

The Tribunal is able to inform itself as it sees fit. If the registered victim knew the forensic patient before the offence occurred, the victim may be able to give the Tribunal information that is relevant to the Tribunal’s decision about the patient’s care, treatment or detention. If a registered victim has information of this kind, it is best if it is provided to the Tribunal in writing before the hearing. In the interests of procedural fairness, the information will be provided to the patient’s lawyer. It may be necessary to disclose the information to the patient’s treating team. The information can be de-identified if the registered victim has concerns about disclosing the information. These concerns should also be explained in the letter to the Tribunal.

Otherwise, If the Tribunal is not considering a leave or release application, or the question of a non association or place restriction does not need to be considered, then the registered victim is only an observer in the hearing and does not participate.

For more information, see the Tribunal’s Information for [Victims brochure](#).

Other Members of the Public

Tribunal hearings are open to the public. However, many Tribunal hearings are held in secure venues, which have their own rules about who and how many people can be allowed into the venue at any one time. The Tribunal has limited control over these decisions. Members of the public wishing to attend hearings in these venues will need to make their own arrangements or contact the treating team for assistance.

Recording of Hearings

The proceedings of the Tribunal are required to be recorded. A digital recorder will be turned on at the commencement of the hearing and everyone in attendance asked to identify themselves for the purposes of the recording.

The Tribunal has issued a [practice direction](#) about accessing copies of the recordings.

The Tribunal does not routinely prepare or provide transcripts of the proceedings.

Closing Hearings

The information considered by the Tribunal in its hearings can be very personal and sensitive for the patient. The Tribunal is able to exclude people from part or all of a hearing, if it is desirable for the welfare of the patient. If this is an issue in a particular case, it can be raised by the Tribunal, the treating team, the patient, their legal representative or a registered victim either prior to or at the commencement of the hearing. The Tribunal will then usually hear evidence and submissions on this issue, before deciding whether to exclude persons from some or all of the hearing .

To seek to close part or all of the hearings contact the Tribunal on fax number 9879 6811 or email mhrforensic@doh.health.nsw.gov.au. If you have any questions about the procedure, please contact the Tribunal on 9816 5955 and ask to speak to a Senior Forensic Officer.

Representation

A forensic patient or correctional patient must be represented unless they do not want to be. The Mental Health Advocacy Service (a part of the Legal Aid NSW) provides free legal representation for forensic patients and correctional patients. Alternatively, the patient can engage a private lawyer, at the patient's own expense .

In addition, someone who is not a lawyer may represent the client as his or her advocate, as long as the Tribunal agrees to this.

The Tribunal is keen to support and assist people through the hearing process, and generally encourages and welcomes the involvement of advocates and non-legal representatives. Someone wishing to represent a forensic patient before the Tribunal should advise the Tribunal before the hearing on fax number 9879 6811 or email mhrforensic@doh.health.nsw.gov.au. If you have any questions about the procedure, please contact the Tribunal on 9816 5955 and ask to speak to a Senior Forensic Officer.

A brief application should also be made at the start of the hearing. The proposed representative should indicate his or her name, relationship to the patient, and the reasons for asking to be acknowledged as the patient's representative. The Tribunal will usually ask

some preliminary questions before it decides about the appropriateness of the proposed representation.

Interpreters

People who speak a language other than English, or who require a sign interpreter, have a right to a free health care interpreter. Interpreters should always be involved in any Tribunal hearing where any person appearing before the Tribunal has a language difficulty, or where there is some doubt about that person's capacity to comprehend English. If a non-English speaking family member of the patient is attending to support the patient, an interpreter may also be required.

The mental health facility or correctional centre where the hearing is to be held is responsible for organising an interpreter for the patient, or their family if needed. If the hearing is to be held by video link at Gladesville, the interpreter needs to be located with the patient, and so should be organised by the hosting mental health service or correctional centre.

The Tribunal's strong preference is for an interpreter to be present at the hearing with the patient. If this is not possible, then a telephone interpreter service should be arranged.

Adjournments

The Tribunal may from time to time adjourn its proceedings to such times, dates and places and for such reasons as it thinks fit. The purpose of adjourning proceedings is to ensure they are properly conducted. The Tribunal may adjourn proceedings if it is necessary to arrange for appropriate legal representation, or for an interpreter to assist the person or family or to allow for the production of important evidence.

Adjourning proceedings can have serious consequences and the Tribunal does not regard administrative convenience as a sufficient justification for an adjournment.

After a Hearing—Orders and Reasons for Decision

Although the panel members of the Tribunal will try to give an indication of their decision at the time of the hearing, the Tribunal's orders only take effect when a formal, sealed, order is issued. The Tribunal will also prepare written reasons for its decision.

Sealed orders and the Tribunal's reasons for decision will be provided to the following people/agencies:

- The patient or their lawyer
- The mental health facility that detains a patient (via the treating team)
- Corrective Services NSW if the patient is detained in a correctional centre
- The Minister for Mental Health (for leave and conditional/unconditional release orders)
- The Attorney General (for conditional/unconditional release orders)

- The Minister for Police (for conditional/unconditional release orders only, not reasons).

The Tribunal's practice in relation to the notification of Ministers after a hearing is set out in its [Practice Direction](#) entitled "Notification to the Minister for Health and the Attorney General under s. 76A(2) of the *Mental Health (Forensic Provisions) Act 1990*..

Orders for Transfer including time limited orders

Where the Tribunal has considered the transfer of a patient from one place of detention to another, the Tribunal may make an order for the immediate transfer of a patient. More often, the Tribunal will order that the patient be transferred "when a bed becomes available" and specify the patient's place of detention in the meantime. In any particular case, the Tribunal may make an order for the transfer of the patient within a particular timeframe. The Tribunal has published an official report of its reasons for decision in a matter where the Tribunal considered whether to make a time limited order : [Mr Hallam \[2014\] NSWMHRT 1](#).

If the Tribunal is concerned about delays to a patient's transfer, or considers that a time limited order should be considered at the next review, the Tribunal will note this in its reasons for decision.

Between review hearings, the Tribunal may also request updates from the treating team about bed availability.

On occasion, the need for a time limited order only becomes apparent at or shortly before a Tribunal review hearing. In that case, the Tribunal will make every effort to contact the Statewide Clinical Director for Forensic Mental Health of the Justice Health and Forensic Mental Health Network and allow the Director an opportunity for comment before making the time limited order. If the Director cannot be reached, the Tribunal may nonetheless consider it appropriate to proceed to make that order.

Further Distribution of the Tribunal's Orders and Reasons for Decision

The Tribunal's orders and reasons for decision are subject to the restriction on disclosing information that can be found in s. 189 of the MHA. Those who receive the orders and reasons for decision may distribute them further, if they do so in connection with the administration and execution of the MHA or the MHFPA. Otherwise anyone distributing the orders or reasons for decision may be committing a criminal offence.

Orders and Reasons for Decision—Fitness

Where a court has found a person unfit to be tried and referred the person to the Tribunal for review under s. 16, the Tribunal Registry will forward its orders and reasons for decision to the Judge or Court Registrar and the Director of Public Prosecutions (DPP). A copy will also be sent to the patient's legal representative .

Where the Tribunal reviews a patient again, before a special hearing has been held and within 12 months of the court's finding of unfitness, the Tribunal's orders and reasons for decision will also be sent to the Court, the DPP and the person's legal representative.

Once 12 months has passed from the court's finding of unfitness, or after a limiting term has been set, whichever is the earliest, the Tribunal will only send a copy of its order and reasons for decision to the DPP and the Court if it reaches the view that the patient has become fit to be tried .

Timeframes for Orders and Reasons for Decision

In straightforward matters the Tribunal's orders and reasons for decision will generally be made available as follows:

- Sealed orders relating to
 - transfer from one place of detention to another;
 - escorted leave from a mental health facility or correctional centre; or
 - arrangements in relation to care or treatment

will be provided within a few days of the Tribunal's hearing.

- Sealed orders relating to supervised or unsupervised leave will be provided (together with the Tribunal's reasons for decision) within six weeks of the Tribunal hearing.
- Where the Tribunal conducts a review, but does not make any changes to the existing orders following that review, a copy of the Tribunal's reasons for decision will be provided within six weeks of the Tribunal hearing. However, no new order will be issued.

Official Record of Tribunal Proceedings

The Tribunal has the power to issue an official record of its proceedings: s. 162(2) MHA. A document which is an official record of the Tribunal's proceedings can be published. The Tribunal has issued a [practice direction](#) on this issue.

If a document does not describe itself as an official record of Tribunal proceedings, then it is not one. Publication of that document would be a breach of s. 162 and/or s. 189 of the MHA.

The published Official Records of the Tribunal's proceedings can be found on its website and on the Austlii website.

Other Communications from the Tribunal Registry

For the purposes of a review, the Tribunal may communicate with anyone, take any action and make any recommendations it thinks fit.

Sometimes the Tribunal recommends that certain action be taken by the treating team or some other person or organisation following a hearing. In that case, the Tribunal's Registry staff will generally write to the organisation after the hearing and confirm the Tribunal's recommendation in writing.

Between Review Hearings

It is very important that a patient's case manager or treating team keep the Tribunal's Registry informed of changes to a patient's circumstances.

Part of the Tribunal's role is to monitor the progress of forensic patients between reviews. This monitoring has a number of purposes. The Tribunal may need to issue an order for a patient's apprehension and detention if the patient has breached the conditions of their leave or release, or simply if a patient has become very unwell and is at risk of serious harm to themselves or others.

The Tribunal is also able to arrange an early review for patients and may decide to do so where the patient's circumstances have changed or need closer monitoring e.g. where a patient has changed living arrangements, had a period of physical or mental ill health, where travel plans are being made and need to be discussed, or if there has been an incident during leave or release. The Tribunal can only decide whether an early review is warranted, and the kind of information that it might need for that review if it is kept informed of changes in a patient's circumstances by a treating team.

The Ministry of Health's policy on the provision of mental health services to forensic patients sets out the circumstances in which the Tribunal should be contacted [see [Forensic Policy Directive](#) paras 4.2.5, 4.3.5, 4.4.4, 4.5.5, 4.6.4, 4.7.7, 5.2.5, 5.3.5, 5.4.4, 7.2.4.]

Treating teams will naturally need to use their discretion about the need to inform the Tribunal if circumstances change. However, as a guide, the Tribunal would expect to be informed where:

- There is a change of case manager or psychiatrist for conditionally released patients.
- Any incident of concern occurs during leave.
- The patient is admitted to hospital for a physical or mental illness.
- The patient proposes to change living arrangements, including their address or the person with whom they are sharing their accommodation
- The patient returns a positive drug screen
- The patient misses appointments without explanation
- The patient cannot be contacted by the case manager
- There are any concerns for a patient's mental health
- There is any other alleged non-compliance with the conditions of leave or release
- There is a proposal to travel (see Part 8 in [Forensic Policy Directive](#)).

Please note, that for travel arrangements, a Presidential member of the Tribunal will review the proposed travel plan, and if concerned about the arrangements may request a hearing to review and discuss the proposed travel. However, the Tribunal cannot approve a patient as being well enough to travel. That is the role of the case manager and treating team.

SECTION 4. BREACH OF LEAVE OR CONDITIONAL RELEASE

The President or a Deputy President may issue an order for the apprehension and detention of a forensic patient where it appears to the President or Deputy President that the person has breached a condition of their leave or release, or has suffered a deterioration of mental condition so that the person is at risk of causing harm to themselves or others.

If a significant breach occurs out of hours, the Tribunal can be contacted on it's out of hours emergency contact number.

Part 10 of the [Forensic Policy Directive](#) deals with breaches of conditions of leave.

The Tribunal will usually become aware of breaches of the conditions of leave or release after being informed by the treating team responsible for the patient's care.

The treating team should first contact the Tribunal by telephone. A written report may be requested. The Tribunal will consider the seriousness of the breaches and the likelihood of there being a deterioration in the patient's condition and decide whether to issue an order under s. 68.

Deteriorations in Mental State

It is usually a condition of a patient's release that a case manager may direct a patient to attend a mental health facility for review or assessment. Even if it is not a condition of a patient's release, the patient can be encouraged to attend voluntarily.

Voluntary Admission

It is usually a condition of a patient's release that a case manager may direct a patient to attend a mental health facility for review and to reside at that facility. Even if it is not a condition of a patient's release, the patient can be encouraged to attend voluntarily.

The Tribunal should be informed that the patient has been admitted as a voluntary patient and be kept advised of the patient's progress. The Tribunal should be advised of the discharge.

Involuntary Admission under the MHA

A forensic patient may also be detained as an involuntary patient under the MHA: s.76HA MHFPA. In that case, the patient must meet the criteria for involuntary detention under the MHA and the procedures in the MHA should be followed. If a certificate is issued under s. 19 MHA (a Schedule) the police may also apprehend the patient.

Admission as an involuntary patient allows the patient to immediately access leave (subject to the Medical Superintendent's discretion). The patient may also be discharged at the discretion of the Medical Superintendent.

The authorised medical officer of the mental health facility must notify the Tribunal of the patient's admission and discharge.

It is useful to refer to the Tribunal's [practice direction](#) on this issue

Detention Order Issued by the Tribunal under Section 68 MHFPA

The Tribunal may issue an order to detain a patient who is at risk of causing serious harm to himself or herself or to any member of the public as a result of a deteriorating mental condition: s. 68 of the MHFPA.

If the treating team considers it is appropriate to take action for a breach of the conditions of the release or leave through an order under s. 68, it should provide the Tribunal with a report (an email is sufficient) outlining the patient's mental state and its concerns for the patient's safety, or the safety of others.

As discussed below, a patient who is ordered to be apprehended and detained under s. 68 must be taken to the mental health facility named in the order, cannot access leave until reviewed by the Tribunal and may only be discharged from the facility on the Tribunal's order.

Order for Apprehension under Section 68

The order for apprehension issued under s. 68 of the MHFPA will specify the place at which the patient is to be detained. The treating team is responsible for identifying an appropriate mental health facility in which to detain the patient. Issues of bed availability may need to be discussed with the Statewide Clinical Director of the Justice and Forensic Mental Health Network.

An order for apprehension issued under s. 68 allows a police officer to apprehend the patient and to take them to the place specified in the order, and ONLY to that place.

If there are difficulties placing the patient at the mental health facility where the patient has been ordered to be detained, the Director General's delegate may order the transfer of the patient to another mental health facility under s. 76E of the MHFPA. The Director General's delegates are set out a part 9.3.2 of the [Forensic Policy Directive](#).

The patient must not be granted leave until reviewed by the Tribunal.

Review Following a Section 68 Order for Apprehension

The Tribunal will list a review of the patient as soon as practicable after the patient has been apprehended and detained.

The Ministers have a right to appear at a review under s. 68(2) of the MHFPA, and will be notified of the review date at least 2 business days prior to the review

At this review, the Tribunal may:

- confirm the person's ongoing release (perhaps with altered conditions) or

- revoke the conditional release order and require their ongoing detention care or treatment in a mental health facility, correctional centre or other place or
- adjourn the hearing.

In preparation for the review, the Tribunal will require a report from:

- the psychiatrist, and treating team where the patient is detained, commenting on the patient's current mental state, any contributors to the patient's deterioration, whether a grant of leave at the medical superintendent's discretion is appropriate and any plans for discharge; and
- a report from the patient's case manager commenting on the circumstances of the breach or deterioration and the patient's current mental state (if known).

The Tribunal may decide to adjourn the review of the patient under s. 155 of the MHA for a variety of reasons including:

- to allow the patient's mental state to stabilise;
- to obtain a report from the CFMHS or other necessary information;
- to allow for further engagement in treatment or therapeutic programs best delivered in the mental health facility; or
- to allow for appropriate discharge planning.

If the hearing is adjourned the Tribunal may also grant the person leave from the mental health facility under s. 49 of the MHPFA.

SECTION 5. REVIEW OF CORRECTIONAL PATIENTS

An inmate in a correctional centre who becomes mentally unwell can be transferred to a mental health facility.

The Director General (or delegates – see para 1.5 and 9.2.5 of the [Forensic Policy Directive](#)) can order a transfer under s. 55 MHFPA. There must be two certificates in the form set out in Schedule 2 of the MHFPA. If the inmate appears to be a mentally ill person (as defined in the MHA), the inmate can be transferred, regardless of the inmate's consent. If the inmate is suffering from a mental condition for which treatment is available in a mental health facility, the transfer can only take place with the inmate's consent.

The Tribunal should be sent the following information:

1. A copy of the transfer order signed by the Director General or delegate
2. A copy of the two Schedule 2 certificates
3. A copy of the request for a s. 55 order, including the inmate profile completed by the applicant.

The forms can be faxed to Tribunal on fax number 9879 6811 or emailed to mhrforensic@doh.health.nsw.gov.au. If you have any questions please contact the Tribunal on 9816 5955 and ask to speak to a Senior Forensic Officer.

Limited Reviews of Inmates Awaiting Transfer to a Mental Health Facility

If an inmate is still waiting for transfer one month after the s. 55 order was made, the Tribunal must review the person: s. 58 of the MHFPA. These reviews may be conducted by a Presidential member sitting alone.

The Tribunal Registry should be advised that if a correctional patient has been transferred or discharged from a mental health facility, or the discharge order has been revoked. If the person has not been transferred, the Tribunal will review the person every month under s. 58.

At the monthly s. 58 review the Tribunal will require:

1. A report from a psychiatrist outlining the patient's current mental state and whether there is an ongoing need for transfer
2. A letter from the Commissioner of Corrective Services as to the reason for the delay in the transfer.

The information can be faxed to Tribunal on fax number 9879 6811 or emailed to mhrforensic@doh.health.nsw.gov.au. If you have any questions please contact the Tribunal on 9816 5955 and ask to speak to a Senior Forensic Officer.

After Transfer to a Mental Health Facility

Once a person is transferred they become a correctional patient and must be reviewed by the Director General or delegate within seven days to decide:

1. if the person is a mentally ill person or is suffering from a mental condition for which treatment is available in a mental health facility, and
2. care of an appropriate kind is not reasonably available in the correctional centre.

If the delegate is not satisfied that these two criteria are met, the person must be transferred back to a correctional centre.

The Tribunal must conduct a review as soon as practicable after the person has been transferred to a mental health facility.

The Tribunal must consider whether the person is a mentally ill person who should continue to be detained in a mental health facility. If not satisfied, Tribunal may order that the person be transferred back to the correctional centre.

At this review the Tribunal will require:

1. A report from the treating team outlining the patient's current mental state and whether there is an ongoing need for detention in the mental health facility.

The Tribunal Registry should be advised if a correctional patient has been transferred or discharged from a mental health facility, or if the transfer order has been revoked.

Ongoing Review of Correctional Patients

After the initial review, the Tribunal will review a correctional patient at least every six months but may review the case of any correctional patient at any time. The Tribunal's Registry will advise the treating team of the date of a review hearing. At these hearings, the Tribunal expects:

1. A report from the treating team outlining the patient's current mental state and whether there is an ongoing need for detention in the mental health facility.

The Tribunal is not able to grant leave to a correctional patient, but may make recommendations to the Commissioner of Corrective Services: s. 62 MHFPA.

If a correctional patient is within six months of the end of their sentence, the Tribunal can consider making the person an involuntary patient under s. 65 of the MHFPA. This process is discussed under the heading **Classifying a limiting term patient or a correctional patient as an involuntary patient**.

Transfer Back to a Correctional Centre

The Director General's delegate may order that a correctional patient be transferred back to a correctional centre if the correctional patient is no longer suffering from a mental illness or mental condition, or care of an appropriate kind is available at the correctional centre.

It may be appropriate to seek a Forensic Community Treatment Order to minimise the possibility of a relapse into an active phase of mental illness. See Section 6 of these guidelines.

If a patient is transferred back to a correctional centre, the Tribunal should be informed.

The Tribunal itself may also order that the patient be transferred back to a correctional centre.

SECTION 6. EMERGENCIES

Absconding or Escaping Patient

If a forensic patient has escaped from their detention in a correctional centre or mental health facility, the Tribunal does not need to make an apprehension order. Section 70 of the MHFPA allows the medical superintendent, authorised person or a police officer or person assisting these people to apprehend an escaped patient.

The Tribunal should be notified and staff can be contacted on the out of hours contact mobile number.

If a patient has been given leave, and does not return from leave, then this is treated as a breach of a condition of leave, and the Tribunal may issue an order under s. 68 of the MFHP.

The Tribunal's staff will contact any registered victims who have asked to be contacted in these circumstances.

Incidents on Leave or Release

If a significant incident occurs during a period of leave or release, outside of office hours, staff should contact the Tribunal's emergency contact number which has been provided to the mental health facilities, Corrective Services NSW, the Mental Health, Drug and Alcohol Office and Justice and Forensic Mental Health Network.

If a patient does not return from leave, the Tribunal may decide to issue an order under s. 68 of the MHFPA.

Physical Health Problems Requiring Out of Hours Treatment

The Director General or delegate can approve a leave of absence from a mental health facility where there is a medical emergency: s. 50(2) MHFPA. In a medical emergency, the Medical Superintendent of a mental health facility is delegated to authorise leave – see Part 4.7.2 of the [Forensic Policy Directive](#). There is no need to get prior approval or an order from the Tribunal to take a patient to hospital in a medical emergency.

The protocols to be followed for medical emergencies (including the obligations to provide an appropriate escort) are set out in the Para 4.7 of the [Forensic Policy Directive](#).

The Tribunal should be advised of the emergency leave as soon as practicable.

Special Circumstances Leave

The Director General can approve a leave of absence from a mental health facility in “special circumstances”, provided that the safety of the patient and the public will not be endangered: s. 50(1) MHFPA.

Special circumstances leave is appropriately used for regular medical appointments. There may be other special circumstances, such as attending key family events, where the Director General's delegate may consider it appropriate to grant special circumstances leave.

Para 4.7 of the [Forensic Policy Directive](#) sets out the processes to be followed in these circumstances.

The Tribunal should be advised of the emergency leave as soon as practicable.

ECT

If emergency ECT is required, the Tribunal can be contacted on the afterhours ECT mobile number. This number has been provided to mental health facilities.

Emergency Surgery

If a forensic patient or a correctional patient requires urgent surgery and is capable of consenting to the operation, there is no need to contact the Tribunal. (Surgery is defined in s. 98 of the MHA to mean “a surgical procedure, a series of related surgical operations or surgical procedures, and the administration of an anaesthetic for the purpose of medical investigation.)

If not, an authorised medical officer or the Director-General may consent to emergency surgery for a forensic patient or a correctional patient not suffering from a mental illness surgery: s. 99(2) MHA.

The authorised medical officer or Director General must be satisfied that:

- (a) the patient is incapable of giving consent to the operation, and
- (b) it is necessary, as a matter of urgency, to perform a surgical operation on the patient in order to save the patient’s life or to prevent serious damage to the patient’s health or to prevent the patient from suffering or continuing to suffer significant pain or distress.

The Tribunal and the patient’s designated carer(s) and principal care provider (if the principal care provider is not a designated carer) must be notified of the surgery as soon as practicable after it has taken place.

Emergency Special Medical Treatment

Special medical treatment is a treatment, procedure, operation or examination that is intended, or is reasonably likely, to have the effect of rendering the person permanently infertile.

Emergency special medical treatment does not require the prior approval of the Tribunal. A medical practitioner may carry out special medical treatment on a patient if of the opinion that it is necessary, as a matter of urgency, to carry out the treatment on the patient in order to save the patient’s life, or to prevent serious damage to the patient’s health

The patient’s designated carer(s) and principal care provider (if the principal care provider is not a designated carer) must be notified as soon as practicable after the special medical treatment has been carried out. The Tribunal should also be notified on fax 9879 6811 or email mhrtforensic@doh.health.nsw.gov.au, or call the Tribunal on 9816 5955 and ask to speak to a Senior Forensic Officer.

Refer to [Section 7 of the Tribunal's Civil Hearing Kit](#).

SECTION 7. COMMUNITY TREATMENT ORDERS FOR FORENSIC, CORRECTIONAL PATIENTS AND PRISONERS

A Community Treatment Order (CTO) is a legal order made by the Mental Health Review Tribunal. A CTO authorises compulsory care for a person not in a mental health facility. It sets out the terms under which a person must accept medication and therapy, counselling, management, rehabilitation and other services.

The MHFPA allows for a CTO to be made for:

- a forensic patient who is to be transferred to a correctional centre or other place
- a correctional patient ordered to be transferred to a correctional centre
- a person subject to an order for transfer under section 55 of the MHFPA who has not yet been transferred
- an inmate of a correctional centre.

The CTO continues to apply once a patient or inmate has been released.

More information about how to apply for a CTO under the MHFPA can be found in the Tribunal's [Forensic CTO Information Kit](#).

SECTION 8. SPECIAL CIRCUMSTANCES ORDERS

Financial Management Orders

On the first review after:

- A forensic patient is transferred to a mental health facility or
- A correctional patient is transferred to a mental health facility

The Tribunal must consider the patient's capacity to manage her/his financial affairs: s. 45 *NSW Trustee and Guardian Act 2009*. If the Tribunal is satisfied that the patient is not capable of managing his/her affairs the Tribunal can make a financial management order. A financial management order means that the patient's estate is managed by the NSW Trustee and Guardian.

An application can be made for a financial management order to be made by the Tribunal at any time. The application must be made by a person with a "sufficient interest". The following people can be applicants:

- a member of the treating team
- a designated carer(s) or a principal care provider (if the principal care provider is not a designated carer)
- a family member

The Tribunal will consider whether any other person seeking a financial management order has "sufficient interest" on a case by case basis.

An application should be made in writing and should be made at least four weeks before the review date.

An order made by the Tribunal can be revoked by the Tribunal if the Tribunal is satisfied that the person is now capable of managing their own affairs, or revocation is in the person's best interests: s. 88 *NSW Trustee and Guardian Act 2009*. See also *Stephens* [2015] NSW MHRT 5.

For more information on the information that is needed to support an application for financial management, see [Section 5 of the Civil Hearing Kit](#).

Change of Name

A forensic patient who has spent a period of time in detention following the initial Court Order and who wishes to change his or her name must first seek the Tribunal's approval : ss. 31 C and D of the *Births, Deaths and Marriages Registration Act 1995*.

The Tribunal can approve the application if it is satisfied that the application is necessary or reasonable in all of the circumstances, and is satisfied that the change of name would not:

1. affect the security, discipline or good order of any facility at which the patient is accommodated,
2. jeopardise the health or safety of the patient or another person,

3. be likely to be used to further an unlawful activity or purpose or to evade or hinder the patient's supervision.
4. the proposed name would not be reasonably likely to be regarded as offensive by a victim of crime or an appreciable sector of the community

To arrange a hearing to consider a change of name application, the patient's case manager should provide the Tribunal with:

1. A letter from the patient explaining why the patient wishes to change name.
2. A letter from the case manager or psychiatrist outlining the patient's current mental state and giving an opinion as to whether the wish to change name:
 - a. is attributable to the symptoms of mental illness,
 - b. would affect the security, discipline or good order of any facility at which the patient is accommodated,
 - c. would jeopardise the health or safety of the patient or another person,
 - d. is likely to be used to further an unlawful activity or purpose or to evade or hinder the patient's supervision.

This information should be provided to the Tribunal on 9816 5955 or email mhrtforensic@doh.health.nsw.gov.au. Any queries should be directed to the Tribunal on 9816 5955 and ask to speak to a Senior Forensic Officer.

A hearing will be held to consider the application. The patient and her or his case manager should attend.

Registered victims will be notified of the forensic patient's proposal to change their name and may make submissions on whether the new name is offensive to them.

A review hearing for a change of name can be conducted by a Presidential member sitting alone, although sometimes a panel of three is convened.

If the change of name application is approved, the Tribunal will write and advise the case manager and the Registrar of Births Deaths and Marriages. The patient will then need to apply separately to the Registrar to change his or her name.

If the Registrar of Births Deaths and Marriages approves the name change:

1. The Registrar of Births Deaths and Marriages will notify the Tribunal.
2. All documentation generated by the Tribunal from that point onwards will refer to the patient by his or her new name.
3. The Tribunal will advise the Minister for Mental Health, the Attorney General, and any registered victims to update their records to the patient's new name.

NB a forensic patient who is a registrable person under the *Child Protection (Offenders Registration) Act 2000* will also have to seek the permission of the Commissioner of Police before changing their name.

If a person wishes to change their name to their spouse's name following their marriage, the Registrar of Births, Deaths and Marriages has advised that there is no need for a formal application to change the surname.

The patient may change their name with official entities (banks, Roads and Maritime Services, Border Force) using their birth certificate and marriage certificate. The Tribunal will change its records once it has been provided with a copy of the patient's marriage certificate and all available identification documents changed into the person's married name.

Classifying a limiting term patient or a correctional patient as an involuntary patient

Where a forensic patient is within six months of the end of their limiting term, the Tribunal has the option of classifying that person as an involuntary patient under s. 53 MFHPA. The Tribunal can only make an order classifying someone as an involuntary patient if the person meets the criteria for involuntary detention in the MHA.

Section 53(1A) provides that the Tribunal cannot classify a person as an involuntary patient unless both the Attorney General and the Minister for Mental Health have advised the Tribunal that they do not propose to apply for an extension order, or the Supreme Court has dismissed an application for extension of the person's forensic patient status

Treating teams should be aware of the end date of a forensic patient's limiting term. If the treating team expects that an involuntary patient order will be sought, it is helpful to foreshadow that possibility at earlier reviews. The Tribunal may ask the Ministers if they propose to make an application to extend a person's forensic patient status.

If the Ministers have advised the Tribunal that an application to extend the forensic patient's status will not be made (or the application has been dismissed by the Supreme Court) the treating team may advise the Tribunal in their Notice of Intent that it will seek an involuntary patient order. The Tribunal will then consider whether such an order is appropriate. The treating team's reports should address the statutory criteria in the MHA .

Once the Tribunal orders that a forensic patient be classified as an involuntary patient, the person ceases being a forensic patient. Their care and control is solely governed by the provisions of the MHA.

The Tribunal would expect that a person who is classified as an involuntary patient would be detained in a mental health facility to receive care and treatment, rather than a correctional centre.

Under s. 65 MHFPA, the Tribunal is also able to classify a correctional patient as an involuntary patient, if the correctional patient is within six months of the end of their sentence. Again, the person's condition would need to meet the criteria for involuntary detention under the MHA. An early review of a correctional patient can be requested if necessary. If an involuntary patient order is made, the person ceases being a correctional patient (ie a sentenced prisoner) and becomes an involuntary mental health patient instead.

Electro Convulsive Therapy (ECT)

If a mental health facility intends to administer ECT to a forensic or correctional patient, the Authorised Medical Officer must first apply to the Mental Health Review Tribunal for an ECT Administration Inquiry.

A forensic or correctional patient is considered to be an involuntary patient when applying the ECT provisions of the MHA.

The steps to be taken when a facility intends to administer ECT to an involuntary patient are set out in [Section 6 of the Civil Hearing Kit](#).

An application for ECT for a forensic patient should be faxed to the Tribunal (fax number 9879 6811) or emailed to mhrtforensic@doh.health.nsw.gov.au. Application forms are available on the MHRT website (www.mhrt.nsw.gov.au) or by phoning 9816 5955.

If your application is urgent you should phone the Tribunal after faxing or emailing the application form and ask to speak to a Senior Forensic Officer to confirm receipt. The Tribunal has a dedicated out of hours ECT telephone number, which has been provided to all mental health facilities in the event of a person needing urgent ECT .

Surgery and Specialist Medical Treatment

For information about how to manage emergency surgery – see Emergencies above.

Non-Urgent Surgery

If the surgery is not an emergency and a forensic or correctional patient can and has given informed consent, the surgery may proceed on the basis of that consent.

If a patient is incapable of consenting to surgery, and is detained in a mental health facility, a designated carer should be given 14 days to consider whether s/he consents to the surgery. If the designated carer consents in writing, an Authorised Medical Officer may apply for consent from the delegate of the Director General by contacting the Mental Health and Drug and Alcohol Office by telephone on 9391 9953 or by fax on 9391 9041.

If the designated carer:

- does not put their consent in writing
- disagrees
- is unsure
- does not respond within 14 days

the Authorised Medical Officer should apply to the Tribunal for consent.

If the patient's designated carer cannot be identified, then the Authorised Medical Officer should approach the Tribunal to seek consent to the surgery.

The Tribunal and the Director General have no legal authority to hear the application until 14 days have elapsed after written notification is provided to the designated carer unless the Authorised Medical Officer is of the opinion that the urgency of the circumstances requires an earlier determination or the person notified indicates that the person does not object: s. 101(5) MHA .

The process of applying to the Tribunal for consent to surgery is set out in [Section 7 of the Civil Hearing Kit](#).

An application for surgery for a forensic patient should be faxed or emailed to the Tribunal (fax number 9879 6811 or emailed to mhrtf forensic@doh.health.nsw.gov.au.) Application forms are available on the MHRT website (www.mhrt.nsw.gov.au) or by phoning 9816 5955.

If your application is urgent you should phone the Tribunal after faxing or emailing the application form and ask to speak to a Senior Forensic Officer to confirm receipt .

Special Medical Treatment

Special medical treatment is a treatment, procedure, operation or examination that is intended, or is reasonably likely, to have the effect of rendering the person permanently infertile. A termination of pregnancy is not classified as a special medical treatment under the MHA.

A correctional or forensic patient is considered to be an involuntary patient for the purposes of the MHA provisions about special medical treatment. The process for applying for non-emergency special medical treatment is set out in [Section 7 of the Civil Hearing Kit](#).

As soon as you are aware that you will need to apply to the Tribunal for consent to a surgical procedure, or to a special medical treatment, you should start making the necessary arrangements. You can make a tentative booking with the Tribunal before the end of the 14 day notice to the designated carer, to ensure that the preferred time slot will be available.

You will need to contact the Tribunal directly. To book a hearing for an individual patient/client you will need to fax or email an application form to the Tribunal (fax number 9879 6811 or email mhrtf forensic@doh.health.nsw.gov.au). Application forms are available on the MHRT website (www.mhrt.nsw.gov.au) or by phoning 9816 5955.

The Tribunal has a roster of when panels visit mental health facilities where forensic and correctional patients are detained. If you need to have a hearing before the next panel is due to visit, please contact the Tribunal so that alternative arrangements can be made.

If your application is urgent you should phone the Tribunal after faxing or emailing the application form and ask to speak to a Senior Forensic Officer to confirm receipt.

SECTION 9. ABBREVIATIONS

CFMHS	Community Forensic Mental Health Service
CTO	Community Treatment Order
FCTO	Forensic Community Treatment Order
Forensic Policy Directive	Ministry of Health Practice Directive for Forensic
MHA	<i>Mental Health Act 2007</i>
MHFPA	<i>Mental Health (Forensic Provisions) Act 1990</i>
The Tribunal	Mental Health Review Tribunal