

Practice Direction



Mental Health
Review Tribunal

Forensic Community Treatment Orders and reviews of correctional patients

This Practice Direction is issued under s 160(3) of the *Mental Health Act 2007* (MHA) and will apply to hearings listed from 20 December 2021.

Purpose

This Practice Direction deals with the procedures and timeframes which apply to review hearings held under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (the Act) in relation to correctional patients and applications for Forensic Community Treatment Orders (FCTO) made under s 99 of the Act.

This Practice Direction does not prevent the Tribunal from deciding that a departure from these procedures is appropriate in the individual circumstances of a particular case.

This Practice Direction should be read in conjunction with the Ministry of Health's Forensic Mental Health Services Policy Direction PD2012_050. This policy is based on the *Mental Health (Forensic Provisions) Act 1990*, and continues to apply where there is an equivalent provision under the current Act.

NOTE: In line with NSW Government policy, the Tribunal may be closed over the Christmas/New Year period. The timeframes set out in this Practice Direction may be adjusted by the Tribunal registry to accommodate the Tribunal's closure.

Forensic Community Treatment Orders

1. An application for a FCTO should be made on the form that is on the Tribunal's website and should be sent to the Tribunal by email. The application should be made **three weeks** prior to the requested hearing date.
2. Applications for a second or subsequent FCTO should be emailed to the Tribunal at least **three weeks** before the requested date for the hearing.
3. At least **five business days** before the hearing date, the applicant should provide:

- a. An individualised treatment plan.
 - b. A report from treating psychiatrist/doctor, including a report on the efficacy of the current or any previous CTO/FCTO (if relevant).
 - c. A report from psychiatric case manager, and other involved professionals e.g. primary nurse, social worker, occupational therapist.
 - d. Written submissions (if any) from the person, family or friends where available.
 - e. Background documentation, e.g. discharge summaries where available.
 - f. Copies of recent clinical entries in the Justice Health and Forensic Mental Health Network (the Network) file (if possible, at least 10 clinical reviews, including two psychiatric reviews).
 - g. Any relevant information from Corrective Services NSW, the Serious Offenders Review Council or the Parole Authority.
4. If the person concerned wishes to obtain legal advice or representation, the treating team should assist the person by contacting the Mental Health Advocacy Service of Legal Aid NSW, or their own lawyer.
 5. The treatment plan must be provided to the affected person with sufficient time to allow the person to prepare for the hearing and to seek legal or other assistance. If a person in custody refuses to physically accept the documents, personal service can be effected by leaving the treatment plan and hearing notice in the person's cell and informing them that they are served with an application for a FCTO.
 6. The Tribunal will provide the applicant with a 'Notice of Hearing' to serve on the affected person. A 'Confirmation of Service of Notice' form will be provided to the applicant. This should be completed with the details of how the 'Notice of Hearing' and Treatment Plan were served on the person. This should be returned to the Tribunal prior to the hearing.
 7. If the affected person is legally represented, the Tribunal will send notice to their lawyer, along with any material provided in support of the application.
 8. If a FCTO is made, the Tribunal will provide a copy of the order and signed treatment plan to the treating team as soon as practicable after the hearing. The treating team

should provide a copy of the order and signed treatment plan to the person who is the subject of the order.

9. If an application is made under s 99(5), for a forensic patient who is to be unconditionally released, any FCTO will commence on the date of the forensic patient's unconditional release.

FCTO reviews

Sections 100 and 78(e) provide that people who are subject to a FCTO and in a correctional centre or detention centre must be reviewed no later than three months after the FCTO has been made, and at least once every six months during the term of the order.

10. The Tribunal's Registry will fix the FCTO review date and advise the treating team.
11. One week prior to the hearing date, the treating team must provide the Tribunal with:
 - a. a psychiatric report outlining whether or not the FCTO should continue and why (one page recommended); and
 - b. a copy of the clinical notes since:
 - i. the date on which the FCTO was made; or
 - ii. the last review of the FCTO.
12. The treating team must advise the person who is the subject of the FCTO that the FCTO will be reviewed, and ask the person whether they wish to:
 - a. obtain legal advice before the review hearing;
 - b. participate in the review hearing; and
 - c. be legally represented at the hearing.
13. If the person concerned wishes to obtain legal advice or representation, the treating team should assist the person by contacting the Mental Health Advocacy Service of Legal Aid NSW, or their own lawyer.
14. The treating team must advise the Tribunal in writing if either:
 - a. the person wishes to participate in a hearing for the review of the FCTO; or

- b. the treating team wishes to participate in a hearing for the review of the FCTO.
15. If neither the treating team nor the person concerned wishes to participate in the review hearing, the review will be conducted on the papers.
 16. If the hearing is not conducted on the papers, the treating team should supply the material requested in clause 11 and attend the hearing with the affected person.
 17. A review hearing may be conducted by a single Presidential member: clause 9 of the *Mental Health and Cognitive Impairment Forensic Provisions Regulation 2021* (MHCIFP Regs).
 18. Following the review, a copy of the Tribunal's determination will be provided to the affected person's legal representative (if applicable) and the treating team. If the affected person is not represented, the treating team should ensure that the affected person receives a copy of the Tribunal's determination.
 19. The review period for a FCTO may be extended by the Tribunal for a maximum of 12 months: s 77. The person subject to the FCTO, their designated carer, or their treating team may request this of the Tribunal, or the Tribunal may extend the review on its own motion.

FCTO variations

An application to vary a FCTO can only be made if: the person is released or proposed to be released from a correctional centre; there has been a substantial or material change in the circumstances surrounding the making of the order; or relevant information has become available that was not available when the order was made.

20. An application for a FCTO variation should be made on the form that is on the Tribunal's website and should be sent to the Tribunal by email.
21. The treating team is responsible for ensuring the affected person is provided with a copy of the treatment plan and a completed 'Notice of application and hearing to vary a Forensic Community Treatment Order' form (available on the Tribunal's website). Page 2 of this form should be returned to the Tribunal to confirm how the Notice and treatment plan were served to the affected person.

22. The Notice and treatment plan must be provided to the affected person with sufficient time to allow the person to seek legal or other assistance. If the affected person wishes to speak to a lawyer, the treating team should assist them contact the Mental Health Advocacy Service of Legal Aid NSW, or their own lawyer.
23. If the affected person is legally represented, the Tribunal will send notice to their lawyer, along with any material provided in support of the application.
24. The Applicant should organise a report be provided to the Tribunal in support of the application (one page recommended).
25. If the patient is linked to the Community Transition Team (CTT) within Justice Health and Forensic Mental Health Network, and neither the treating team nor the person concerned wishes to participate in the review hearing, the review will be conducted on the papers.
26. If the variation is granted, the Tribunal will provide a copy of the order and signed treatment plan to the treating team as soon as practicable after the hearing. The treating team should provide a copy of the order and signed treatment plan to the person who is the subject of the order.

Adjournments

27. A Tribunal panel may adjourn a FCTO hearing for such reasons as it thinks fit: s 155 MHA.
28. The President or Deputy President sitting alone may also adjourn a FCTO review for reasons that they think fit: clause 5 of the MHCIFP Regs. An adjournment application may be listed at the request of the affected person, their treating team or the Tribunal's own motion. An adjournment review may be conducted on the papers, without the need for attendance of any participants.

Review of a person awaiting transfer to a mental health facility

The Tribunal Registry is to be advised by the Justice Health and Forensic Mental Health Network when an order to transfer a person from a correctional/detention centre to a mental health facility has been made or revoked (s 86). If a person has not been

transferred within 14 days of the s 86 order being made, the Tribunal will proceed to arrange a hearing under s 89 of the Act.

29. At the first review under s 89, the Justice Health and Forensic Mental Health Network must provide the Tribunal with a copy of the two certificates issued under s 86(2) of the Act.
30. The Tribunal will endeavour to list the first review under s 89 within a month of the s 86 order being made.
31. The Tribunal will list a further review under s 89 if the person remains subject to a s 86 order and has not been transferred in the intervening period.
32. Where a review under s 89 is listed, the Justice Health and Forensic Mental Health Network must arrange for the person concerned to access advice or representation from Legal Aid NSW, or their own lawyer, if they wish to do so.
33. The Tribunal will advise the patient's lawyer, Justice Health and Forensic Mental Health Network, and Corrective Service NSW of the hearing date for a review under s 89.
34. A review hearing may be conducted by a single Presidential member: clause 7 of the MHCIFP Regs.
35. At any review under s 89 of the Act:
 - a. The Justice Health and Forensic Mental Health Network must provide a report from a psychiatrist outlining the patient's current mental state and whether there is an ongoing need for transfer
 - b. A letter from the Commissioner of Corrective Services is required as to the reason for the delay in the transfer.
36. Following the hearing, a copy of the Tribunal's decision will be provided as soon as practicable to the patient's lawyer (if applicable), the Justice Health and Forensic Mental Health Network, and Corrective Services NSW.
37. If the affected person is not represented, the treating team should ensure that the affected person is advised of the Tribunal's determination.

Reviews after transfer to a mental health facility

Sections 90 and 91 of the Act provide that a correctional patient must be reviewed by the Tribunal as soon as practicable after they have been transferred and at intervals of six months during the period that the person is a correctional patient.

38. The Tribunal will endeavour to list a review of a correctional patient within **three weeks** following assessment under s 87(2) that the person is to remain in a mental health facility.
39. The Tribunal will list a review of a correctional patient as soon as practicable after being requested to do so by the Minister for Health and Medical Research, the Minister for Mental Health, the Attorney General, the Minister for Counter Terrorism and Corrections, the Secretary of NSW Health or delegate (the Secretary) or the medical superintendent of the mental health facility in which a patient is detained.
40. The Tribunal will notify Legal Aid NSW and the Justice Health and Forensic Mental Health Network, and any other participants, of the hearing date no later than **two weeks** prior to the hearing.
41. Any reports or other material must be provided to the Tribunal no later than close of business **three days** before the hearing.
42. In any particular matter, the Tribunal may make specific directions about the provision of reports or other material.
43. Following a hearing, the Tribunal's orders and reasons will be provided within **three weeks** of a Tribunal hearing. The reasons and orders may be distributed separately.
44. Orders and reasons for all review hearings will be provided to the correctional patient's lawyer and treating team.
45. If a hearing has been requested by the Minister for Health and Medical Research, the Minister for Mental Health, the Attorney General, the Minister for Counter Terrorism and Corrections, the Secretary or the medical superintendent of the mental health facility, then a copy of the Tribunal's decision will also be provided to the person requesting the hearing.

Advising carers of hearings under sections 90 and 91

46. The Authorised Medical Officer or delegate should take all reasonably practicable steps to notify designated carers and principal care providers if a correctional patient has a matter before the Tribunal: s 71 of the Act and s 78 of the MHA.

Appeal against a decision of the Secretary to refuse to grant leave

47. If the Secretary has refused to grant leave to a correctional patient under s 96 of the Act, a correctional patient may make an oral or written appeal to the Tribunal. An appeal may be made by the correctional patient personally, or through their lawyer.
48. If the correctional patient makes an oral appeal, the Tribunal's registry staff will make a note of the basis on which the appeal is made.
49. If the correctional patient makes the appeal personally, the Tribunal will provide a copy of the written appeal (or note of an oral appeal) to Legal Aid NSW so that the correctional patient can obtain legal advice.
50. Within **one business day** of receiving the appeal, the Tribunal will ask the Secretary to provide the Tribunal with a report under s 97(4). The report should be provided within **two business days** of the Tribunal's request.
51. The appeal will be listed for review as urgently as possible. The Secretary and the correctional patient may both be legally represented if they wish.

Adjournments

52. A Tribunal panel may adjourn a review hearing for such reasons as it thinks fit: s 155 MHA.
53. The President or Deputy President sitting alone may also adjourn a Tribunal review for reasons that they think fit: clause 5 MHCIFP Regs. An adjournment application may be listed at the request of the correctional patient, their treating team or the Tribunal's

own motion. An adjournment review may be conducted on the papers, without the need for attendance of any participants.

Dated: 1 December 2021

His Honour Judge P I Lakatos SC

President