

Practice Direction



Mental Health
Review Tribunal

Procedures for fitness hearings and reviews of forensic patients

This Practice Direction is issued under s 160(3) of the *Mental Health Act 2007* and will apply to hearings listed from 27 March 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”).

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.

This Practice Direction supersedes previous Practice Directions relating to the Forensic Division of the Tribunal.

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.

Fitness reviews by the Tribunal

The Community Forensic Mental Health Service assesses defendants that are bailed and have a diagnosis of major mental illness in order to provide a report to the Tribunal. There is currently no agency responsible to provide a report to the Tribunal for defendants with a cognitive impairment.

1. When a defendant is referred to the Tribunal by the court following a fitness inquiry, the Tribunal must determine whether the defendant has:

- a. become fit to be tried for an offence
- b. not become fit to be tried for an offence and will not, during the period of 12 months after the finding of unfitness by the court, become fit to be tried for the offence.

The Tribunal makes this determination on the balance of probabilities, having regard to the presumption in s 45(a) of the Act: s 80(3).

2. Reports submitted to the Tribunal regarding the defendant's fitness to stand trial must be provided to the Tribunal no later than **2 weeks** before the hearing.
3. At the conclusion of the review, the Tribunal will notify the Court, the Director of Public Prosecutions and the defendant's lawyer of the outcome of the hearing: s 80(2).
4. A person's fitness to stand trial should also be considered in any Tribunal review of a forensic patient who:
 - a. has been found unfit and is remanded in custody;
 - b. is subject to a limiting term; or
 - c. is subject to an interim or final order extending the person's forensic patient status.

At any review of a forensic patient falling within one of these categories, the clinician(s) responsible for the forensic patient's care and treatment should address the question of fitness in their report.

5. Fitness does not need to be considered if a person has received a special verdict of act committed but not criminally responsible following a special hearing: *Ephram (No 2)* [2014] NSWMHRT 2.
6. If the patient's lawyer or treating team considers that a forensic patient has become fit to stand trial, they should contact the Tribunal registry and request a prompt review for the forensic patient.
7. If a forensic patient has become fit to stand trial, the Tribunal will advise the Court, the Director of Public Prosecutions and the patient's legal representative: s. 80(2) of the Act.

First Tribunal review after conclusion of the court proceedings

8. At the conclusion of the court proceedings, a forensic patient will be referred to the Tribunal: ss 34 and 65 of the Act.
9. The Tribunal will list a review as soon as practicable after receiving the referral from the court: s 78(a) and (c) of the Act.

Subsequent Tribunal reviews

10. Tribunal reviews will usually be listed at 6 month intervals, but may be listed at any time: ss 78(d) and 79 of the Act.
11. At a review, the Tribunal may grant an application to extend the review timeframe up to 12 months if the criteria in s 77 of the Act are met.
12. The Tribunal will list a review of the forensic 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: s 78(f) and (g) of the Act.
13. The Tribunal is not required to hold a hearing during the period in which a person is unlawfully absent from their place of detention: s 76 of the Act. A person is unlawfully absent if:
 - a. the Tribunal has issued an order for the person’s apprehension and detention under s 109 of the Act, but the person has not yet been apprehended
 - b. the person's apprehension has been directed by the authorised medical officer or delegate under s 111 of the Act, but the person has not yet been apprehended
 - c. the person’s apprehension has been requested under s 119 of the Act, but the person has not yet been apprehended.

Adjournments

14. A Tribunal panel may adjourn a review hearing for such reasons as it thinks fit: s 155 *Mental Health Act 2007*.
15. The President or Deputy President sitting alone may also adjourn a Tribunal review for reasons that they think fit: clause 5 *Mental Health and Cognitive Impairment Forensic Provisions Regulation 2021* (“MHCIFP Regs”). An adjournment application may be listed at the request of the forensic patient, the 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.

Requests for the Tribunal to consider a change of order

16. The Tribunal must be advised before the hearing of any proposed change to the forensic patient’s order. The Tribunal is notified through completion of a Notice of Intent. The Notice of Intent is available on the Tribunal’s website.
17. The Notice of Intent can be completed by the forensic patient (or their lawyer), a member of the treating team, the patient’s designated carer or principal care provider.
18. The treating team and the forensic patient’s lawyer will be advised of a forensic patient’s review **8 weeks** before a hearing. A blank copy of the Notice of Intent for each forensic patient will also be emailed to the treating team responsible for the forensic patient’s care **8 weeks** before the hearing date.
19. The Notice of Intent must be returned to the Tribunal at least **6 weeks** before the hearing date, but may be returned at any time earlier.
20. If the Notice of Intent seeks release, the person submitting the Notice of Intent must confirm that the report required under s 84(1)(b) of the Act will be available 2 weeks prior to the hearing.
21. If the Notice of Intent is not returned, or returned to the Tribunal later than 6 weeks before the hearing date, the Tribunal hearing will proceed on the basis that no change is sought to the Tribunal’s existing orders. The President (or Deputy President) of the Tribunal may allow the request for leave or release to be considered by the Tribunal in a late Notice of Intent in a particular case.

Notification of hearings to registered victims

22. If there are victims registered through the Specialist Victims Register, the Tribunal will send a hearing notice to the Specialist Victims Support Service (SVSS) at the Department of Communities and Justice **5 weeks** before the hearing. The notice will advise the matters to be considered, as foreshadowed in the Notice of Intent. If a request to vary the order (that is not a grant of leave or release) is received less than 5 weeks before the hearing, the Tribunal will notify the SVSS of the request as soon as practicable after the Tribunal is notified.

Notification of hearings to Ministers

23. The Minister for Health and Medical Research, the Minister for Mental Health, and the Attorney General have a right to appear and make submissions at any review where leave, release or a review following apprehension under s 109 are being considered: s 147 of the Act. In any such review, the Ministers will be notified of the review hearing and the matters to be considered **5 weeks** before the hearing date.

Notification of hearings to carers

24. If the forensic patient is detained in a mental health facility, the authorised medical officer or delegate should take all reasonably practicable steps to notify designated carers and principal care providers if a forensic patient has a matter before the Tribunal: s 71 of the Act and s 78 of the MHA.

Notification of urgent hearings, including hearings listed under s 109(2) of the Act

25. If a forensic patient's circumstances require an urgent review, but the Minister for Health and Medical Research, the Minister for Mental Health, the Attorney General or registered victims have statutory rights of appearance under ss 76 or 76A(2), the Tribunal will provide at least **2 business days'** notice of any review hearing.

Provision of reports

26. Any reports or other material must be provided to the Tribunal no later than **2 weeks** before the hearing.

27. In any particular matter, the Tribunal may make specific directions about the provision of reports or other material.

Written submissions before the hearing – patient, Minister for Health and Medical Research, the Minister for Mental Health or Attorney General

28. If the forensic patient, the Minister for Health and Medical Research, the Minister for Mental Health or Attorney General wish to make written submissions to the Tribunal in a particular matter, they must file those submissions **one week** before the hearing.

29. The Tribunal will provide submissions to the participants listed in the clause above, if not already cross served.

30. Any written submissions in reply are to be filed **2 business days** before the hearing.

Written submissions before the hearing - victims

31. A victim may make a submission if the Tribunal is considering a grant of leave or release to a forensic patient (s 145(1) of the Act), or the amendment or removal of place restrictions or non-association conditions. The submission may contain:

- a. an application to impose or vary place restrictions or non-association conditions: s 146 of the Act.
- b. any of the matters set out in clause 11 of the MHCIFP Regs.

If a victim wishes to provide the Tribunal with a written submission, the submission must be filed **one week** before the hearing. Victims may also make their submissions orally to the Tribunal at the hearing. Two days' notice must be provided to make oral submissions.

32. A victim may request that the Tribunal not disclose part or all of their written submission to the forensic patient and/or the forensic patient's lawyer.

33. If a victim's submission contains information that they do not wish to be disclosed to the forensic patient or the forensic patient's lawyer, the victim must provide the Tribunal with two different copies of their submission:

- a. The full submission for the Tribunal to read, and
- b. An edited copy of their submission that the victim agrees may be disclosed to the forensic patient and/or the forensic patient's lawyer.

34. The Tribunal may hold a preliminary hearing to decide issues relating to the disclosure of a victim's submission if:

- a. The victim objects to part or all of their submission being disclosed to the forensic patient and the forensic patient asks for disclosure of the submission;
- b. The victim objects to part or all of their submission being disclosed to the forensic patient's lawyer and the forensic patient, through their lawyer, asks for greater disclosure of the submission; or
- c. The Tribunal considers that it is not in the interests of justice to agree to the victim's request.

The powers of the Tribunal in this matter may be exercised by the President or Deputy President.

35. If a victim has asked that their submission not be disclosed to the forensic patient, but the forensic patient is not legally represented, the Tribunal shall appoint an Australian legal representative to act on the forensic patient's behalf in relation to this issue only.

- a. The Tribunal will first invite the forensic patient to advise the Tribunal if the forensic patient objects to the Mental Health Advocacy Service representing the patient, and if so, why that is.
- b. If there is no reasonable objection, the Tribunal will ask the Mental Health Advocacy Service of Legal Aid NSW to act for the patient.
- c. The Tribunal may decide that it is appropriate to appoint another legal representative to act for the forensic patient.
- d. The powers of the Tribunal in this matter may be exercised by the President or Deputy President.

36. If, following a hearing, the Tribunal decides that more of the submission should be provided to the patient or their lawyer, the Tribunal will give the victim an opportunity to withdraw the submission, or make other amendments to the submission.

Providing the victim's submission to a person treating the patient

37. The Tribunal may disclose all, part or a summary of the victim's submission to a person or persons who are treating the forensic patient. Before disclosing any part of the submission (or a summary) to a member of the treating team, the Tribunal will:

- a. Ask the victim, through the SVSS, if the victim objects to the information being disclosed;
- b. Consider the victim's view in deciding whether to disclose the submission; and
- c. Seek any treating team member's agreement not to disclose the information to the forensic patient.

The powers of the Tribunal in this matter may be exercised by the President or Deputy President.

Victim Impact Statements

38. The Tribunal receives Victim Impact Statements (VIS) from the Court that are made by or on behalf of a victim. The victim may, with the consent of the Tribunal, update the VIS: cl 12D(3) of the *Crimes (Sentencing Procedure) Regulation 2017*. The Tribunal will acknowledge the VIS at each hearing and take into account the statement before determining any application for leave or release.

39. A victim who wishes to update the VIS that was made to court may do so at any time. If the victim wishes to update the VIS:

- a. The victim should provide a copy of the proposed updated VIS to the Tribunal at least one week prior to any listed hearing.
- b. The Tribunal will provide a copy of the proposed updated VIS to the patient's lawyer for comment.
- c. The Tribunal will consider whether to consent to the victim's request to update the VIS.

For this purpose, the Tribunal will be constituted by the President, or a Deputy President nominated by the President.

40. The following clause applies to a VIS made to a court where the court has ordered that a VIS not be disclosed to the accused person or not read out to the court under s 30N(2) of the *Crimes (Sentencing Procedure) Act 1999*.

41. If the Tribunal receives a Notice of Intent asking the Tribunal to consider an application for the forensic patient's leave or release, the Tribunal will set a timetable for:

- a. Submissions from the patient's lawyer on whether the Tribunal should consider the VIS without a copy of that VIS being provided to the patient's lawyer.
- b. Any response from the registered victim.

Both the lawyer and the registered victim may comment on whether the interests of justice are met if the VIS is disclosed to the lawyer but not to the patient and the patient is instead given general information about the statement.

- c. This issue will generally be determined based on the above submissions. However, if there remains a dispute about whether the VIS should be disclosed, the Tribunal will list the matter for hearing to determine that issue.

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

42. If the Secretary has refused to grant leave to a forensic patient under s 96 of the Act, a forensic patient may make an oral or written appeal to the Tribunal. An appeal may be made by the forensic patient personally, or through their lawyer.

43. If the forensic patient makes an oral appeal, the Tribunal's registry staff will make a note of the basis on which the appeal is made.

44. If the forensic 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 forensic patient can obtain legal advice.

45. 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.

46. The appeal will be listed for review as urgently as possible. The Secretary and the forensic patient may both be legally represented.

Notification of outcome of hearings

47. Following a hearing, the Tribunal's orders and reasons will be provided within **6 weeks** of a Tribunal hearing. In most cases the reasons and orders will be distributed separately, and the Tribunal will provide the order within two weeks of the hearing.
48. Orders and reasons for all review hearings will be provided to the forensic patient's lawyers and the treating team. The Justice Health and Forensic Mental Health Network and Corrective Services NSW will be sent a copy of the order and reasons if they are responsible for the patient's care.
49. In reviews where leave or release were considered, or the hearing was conducted under s 109(4), the Minister for Health and Medical Research, the Minister for Mental Health, and the Attorney General, or their legal representatives will be provided with a copy of the Tribunal's order and reasons.
50. If leave or release is considered at a review where victims are registered through the Specialist Victims Register, the Tribunal will prepare particulars of its reasons for decision for the victim(s). These reasons will be provided to the SVSS and the forensic patient's lawyer.
51. If the Tribunal makes an order for conditional or unconditional release, the Minister for Police and Emergency Services will also be provided with a copy of the order for release: s 147(5) of the Act.

Hearings under section 109(4) to review persons apprehended under a breach order

52. At any review under s 109(4) of the Act, the Tribunal may decide to confirm conditional release, grant leave, detain the person and/or revoke their conditional release. These orders may be made even if not specifically foreshadowed in the Notice of Intent.
53. A report of the kind referred to in s 84(b) of the Act is not required for the Tribunal to confirm a forensic patient's release under s 109(4).
54. Despite clause 53, the Tribunal may request a report of this kind.

55. At a hearing under s 109(4) of the Act, a forensic patient's release can be confirmed, even if the presiding presidential member is not a current or former judicial officer.

Dated: 23 March 2021

His Honour Judge P I Lakatos SC

President