



New South Wales

Mental Health and Cognitive Impairment Forensic Provisions Bill 2020

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are as follows—

- (a) to provide for criminal procedures relating to offences where defendants or accused persons have mental health impairments or cognitive impairments,
- (b) to clarify procedures and Local Court powers when diversion of defendants with mental health impairments or cognitive impairments is raised in summary proceedings,
- (c) to replace the special verdict of not guilty by reason of mental illness with a special verdict of act proven but not criminally responsible,
- (d) to provide a statutory test for whether a defendant is fit to be tried,
- (e) to provide for the treatment, care and detention of forensic patients and prisoners who have a mental illness or other condition that may be treated in a mental health facility and the powers of the Mental Health Review Tribunal (the *Tribunal*) to review and make orders about those persons,
- (f) to re-enact provisions establishing a Victims Register for victims of forensic patients,
- (g) to provide for other miscellaneous related matters,
- (h) to update the *Crimes Act 1900* in relation to the offence and partial defence of infanticide and the partial defence of substantial impairment by abnormality of mind, including by updating terminology to refer to mental health impairments or cognitive impairments,
- (i) to make consequential amendments to other Acts and provide for savings and transitional matters as a consequence of the enactment of the proposed Act.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 defines certain words and expressions used in the proposed Act.

Clause 4 sets out when a person has a mental health impairment for the purposes of the proposed Act and excludes impairments caused by the temporary effect of ingesting a substance or a substance use disorder.

Clause 5 sets out when a person has a cognitive impairment for the purposes of the proposed Act.

Clause 6 provides for certain references to juries in the proposed Act to include references to judges where a matter is tried by a judge alone.

Part 2 Summary proceedings

Division 1 Preliminary

Clause 7 defines certain words and expressions used in the proposed Part and provides that a reference to an order in a Division of the proposed Part is a reference to an order made under that Division.

Clause 8 applies the proposed Part to certain criminal proceedings before a Magistrate, including summary proceedings, indictable offences triable summarily and related proceedings under the *Bail Act 2013*.

Clause 9 makes it clear that a Magistrate may make an order, on application or at the Magistrate's own initiative, under the proposed Part at the commencement of or any other time during the course of proceedings before the Magistrate.

Clause 10 provides that, for the purposes of the proposed Part, a Magistrate may inform himself or herself as the Magistrate thinks fit, but not so as to require a defendant to incriminate himself or herself.

Clause 11 provides that a Magistrate is to state the reasons for making a decision as to whether or not a defendant should be dealt with by an order under the proposed Part.

Division 2 Defendants with mental health impairments or cognitive impairments

Clause 12 provides that a Magistrate may make orders under the proposed Division or adjourn proceedings if it appears that a defendant has (or had at the time of the alleged commission of the offence) a mental health impairment or cognitive impairment, or both. The proposed Division will not apply to a mentally ill person or a mentally disordered person.

Clause 13 enables a Magistrate to adjourn proceedings, or make any other interim order the Magistrate considers appropriate, for the purposes of the proposed Division, to enable the defendant's mental health impairment or cognitive impairment to be assessed or diagnosed, to enable the development of a treatment or support plan or for other purposes.

Clause 14 enables a Magistrate to make an order to dismiss a charge and discharge the defendant, or take other action, including discharging the defendant into the care of a responsible person or on the condition the defendant attend on a person or at a place for assessment, treatment or support.

Clause 15 sets out the matters a Magistrate may consider in deciding whether it is appropriate to make an order, including the nature of the defendant's impairment, the nature of the alleged

offence and the suitability of the sentencing options available if the defendant is found guilty of the offence.

Clause 16 sets out the procedure if a defendant fails to comply with a condition of an order under the proposed Division, including enabling a Magistrate to deal with the charge as if the defendant had not been discharged if the failure occurs within 12 months of discharge.

Clause 17 permits a person who, in accordance with an order under the proposed Division, assesses or provides treatment to a defendant to report failures of the defendant to comply with a condition of the order and other associated information despite any other law (for example, any duty of confidentiality).

Division 3 Mentally ill or mentally disordered persons

Clause 18 provides that a Magistrate may make an order under the proposed Division if it appears that a defendant is a mentally ill person or a mentally disordered person.

Clause 19 enables a Magistrate to discharge a defendant (whether unconditionally or subject to conditions) into the care of a responsible person, make an order to detain a defendant in a mental health facility for assessment or, if the defendant is found on assessment not to be a mentally ill person or mentally disordered person, order the defendant be brought back before a Magistrate or an authorised justice.

Clause 20 enables a Magistrate to make a community treatment order in accordance with the *Mental Health Act 2007* if the requirements for the order under that Act have been met.

Clause 21 enables an authorised justice (within the meaning the *Bail Act 2013*) during the course of bail proceedings to make an order to detain a defendant in a mental health facility for assessment or, if the defendant is found on assessment not to be a mentally ill person or mentally disordered person, an order to have the defendant brought back before a Magistrate or authorised justice.

Clause 22 provides that a juvenile justice officer or correctional officer who is ordered to take a defendant to a mental health facility for a mental health assessment has the same functions in respect of a defendant (including powers to restrain, search and use reasonable force and safeguards applying to the use of those powers) as the officer otherwise has in respect of a juvenile detainee or adult inmate.

Clause 23 provides that if a defendant is not brought before a Magistrate within 6 months after the date on which the defendant is dealt with by a Magistrate or authorised justice, the charge which gave rise to the proceedings is taken to have been dismissed.

Clause 24 provides that certain orders of a Magistrate under the proposed Division in relation to an offence are taken to be a decision to dispense with bail for the offence. The proposed section also enables a defendant, following a mental health assessment, to be taken to a police station for a police officer to decide whether or not to grant the defendant bail, instead of being taken before a Magistrate or authorised officer.

Division 4 General

Clause 25 enables a Magistrate to make appropriate orders to enable the transfer from a correctional centre or detention centre to a mental health facility of a person who is awaiting committal for trial or trial for an offence or summary disposal of the person's case.

Clause 26 enables regulations to prescribe the form of an order under the proposed Part.

Part 3 Defence of mental health impairment or cognitive impairment

Clause 27 applies the proposed Part to criminal proceedings in the Supreme Court (including summary proceedings) and criminal proceedings in the District Court.

Clause 28 establishes the defence of mental health impairment or cognitive impairment, replacing the previous defence of not guilty by reason of mental illness. A person who had a mental health impairment or a cognitive impairment, or both, at the time of carrying out an act (including an omission or a series of acts or omissions) constituting an offence will not be criminally responsible for the offence if the impairment had the effect that the person did not know the nature and quality of the act, or that it was wrong because the person could not reason with a moderate degree of sense and composure about whether the act was wrong. The question of whether the defence is established is to be determined on the balance of probabilities by the jury (or judge where there is no jury).

Clause 29 sets out matters the judge must explain to the jury if the defence of mental health impairment or cognitive impairment is raised, including the consequences of the defence being upheld and the circumstances in which the Tribunal may order the release of the defendant and that the jury should not be influenced by the consequences of upholding the defence.

Clause 30 requires a jury to return a special verdict (a *special verdict*) of act proven but not criminally responsible in respect of an offence if the jury is satisfied that the defence of mental health impairment or cognitive impairment has been established.

Clause 31 enables a special verdict to be entered by a court at any time in the proceedings if the defendant and the prosecutor agree that the proposed evidence in the proceedings establishes a defence of mental health impairment or cognitive impairment, the defendant is represented by an Australian legal practitioner and the court is satisfied that the defence is established.

Clause 32 makes it clear that there is no requirement to enter a special verdict in respect of an offence that is available as an alternative to an offence for which a special verdict has been entered.

Clause 33 empowers the court to make an order remanding a defendant for whom a special verdict is entered in custody, to order the defendant to be detained in a specified place or manner until released by due process of law, to order the release of the defendant from custody conditionally or unconditionally and to make other orders it thinks appropriate. Before making an order for release, the court may obtain a report from a forensic psychiatrist or other person prescribed by the regulations as to whether the release is likely to seriously endanger the safety of the defendant or any member of the public. The court must not order the defendant's release unless it is satisfied, on the balance of probabilities, that the release is not going to have that effect.

Clause 34 requires the court to refer to the Tribunal a defendant for whom a special verdict has been returned or entered, unless the court releases the defendant unconditionally.

Part 4 Fitness to stand trial

Division 1 Preliminary

Clause 35 applies the proposed Part to criminal proceedings in the Supreme Court (including summary proceedings) and criminal proceedings in the District Court.

Clause 36 sets out the test to be used to determine whether a person is unfit to be tried for an offence. A person will be unfit if, because the person has a mental health impairment or a cognitive impairment, or both, or for another reason, the person cannot understand or do things listed in the provision that are essential to the trying of a defendant. The things include not being able to understand the offence, plead to the charge, understand generally the nature of the proceedings as an inquiry as to whether the person committed the offence or make a defence or answer to the charge. The proposed section does not limit the grounds on which a court may decide that a person is unfit to be tried for an offence.

Clause 37 provides that the question of a person's unfitness to be tried for an offence should be raised before arraignment but enables the question to be raised at any time in proceedings, and more than once in the proceedings.

Clause 38 specifies that the question of a defendant's unfitness to be tried for an offence is to be determined on the balance of probabilities.

Clause 39 enables the court, the defendant and the prosecutor to raise the question of a defendant's unfitness to be tried for an offence.

Division 2 Procedure when question of unfitness to be tried raised

Clause 40 requires the court to determine whether an inquiry into the question of a defendant's unfitness to be tried (an *inquiry*) should be conducted before the hearing of proceedings if the question of unfitness is raised before arraignment. The court may determine there is no longer a need for an inquiry before the inquiry commences.

Clause 41 provides that submissions relating to an inquiry are to be made in the absence of the jury where the question of unfitness is raised after arraignment.

Clause 42 requires an inquiry to be held as soon as practicable after a court determines that an inquiry should be held (if the question of unfitness is raised before arraignment) or after the question is raised (if the question of unfitness is raised after arraignment). The court need not hold an inquiry if the question is not raised in good faith or the court decides that it is inappropriate to inflict any punishment because of the trivial nature of the charge or offence, the nature of the defendant's impairment or other matters that the court thinks it proper to consider.

Clause 43 enables the court to adjourn proceedings, make orders and take other actions before holding an inquiry, including making orders with respect to bail, custody and requirements for psychiatric or other examinations and reports.

Clause 44 sets out procedures for inquiries. An inquiry is to be determined by a judge sitting alone and the defendant is to be represented by an Australian legal practitioner (unless the court otherwise allows). The court will be required to consider whether the trial procedures can be modified or assistance provided for the defendant, the length and complexity of the trial and whether the defendant has or can obtain legal representation in deciding whether the defendant is unfit to be tried for an offence.

Clause 45 contains statutory presumptions that a person who has been found unfit to be tried under the proposed Act continues to be unfit until the contrary is determined on the balance of probabilities and that a person who has been found fit to be tried under the proposed Act continues to be fit to be tried for the offence until the contrary is determined on the balance of probabilities.

Clause 46 provides for proceedings against a person to continue if the person is found to be fit to be tried for an offence following an inquiry.

Clause 47 requires the court to determine whether or not a defendant may, within the following 12 months, or will not during that period, become fit to be tried for an offence if the court finds after an inquiry that the defendant is unfit to be tried for an offence. The proposed section also confers powers on the court to adjourn proceedings and make orders and take other actions relating to a defendant, including orders with respect to bail and custody.

Clause 48 provides that a defendant is to be dealt with under the special hearing provisions if the court decides that the defendant will not become fit to be tried for the offence within 12 months, unless the court is required to release the defendant because the Director of Public Prosecutions (the *DPP*) has advised that further proceedings will not be taken.

Clause 49 requires a defendant to be referred to the Tribunal for review if the court decides that the defendant is unfit to be tried and may become fit to be tried for the offence within 12 months. After a review and a finding by the Tribunal that a defendant has become fit to be tried, the court may grant bail to the defendant for a period of up to 12 months.

Clause 50 provides for proceedings against a defendant to recommence or continue if the defendant is found to be fit to be tried for an offence following a review by the Tribunal, unless the court is required to release the defendant because the DPP has advised that further proceedings will not be taken. The finding does not mean that the court has to hold another inquiry into fitness.

Clause 51 provides that a defendant is to be dealt with under the special hearing provisions if the Tribunal decides on a review that the defendant will not become fit to be tried for the offence within 12 months, unless the court is required to release the defendant because the DPP has advised that further proceedings will not be taken.

Clause 52 applies to a defendant who was committed for trial, without a case conference, when the question of unfitness to be tried was raised at committal proceedings. The court will be able to remit the defendant (on the motion of the court or on application by the defendant) to a Magistrate for completion of committal proceedings if the defendant is found fit to be tried for an offence. If the defendant is sent back for committal proceedings, the proceedings are taken to be a continuation of the original committal proceedings as if committal had not occurred.

Clause 53 requires the court to obtain the advice of the DPP as to whether or not further proceedings will be taken in respect of an offence if the court or Tribunal determines that a defendant will not, or has not, become fit to be tried within the period of 12 months after a finding of unfitness. The advice must also be sought by the court if the Tribunal determines that a person has become fit to be tried. If the DPP advises that no further proceedings will be taken, the court must order the release of the defendant.

Division 3 Special hearings

Clause 54 defines a special hearing as a hearing for the purpose of ensuring, despite the unfitness of a defendant to be tried in accordance with normal procedures, that the defendant is acquitted unless it can be proved to the required standard of proof that, on the limited evidence available, the defendant committed the offence or another alternative offence.

Clause 55 requires a court to hold a special hearing as soon as practicable after the court or the Tribunal determines that a defendant will not become fit to be tried for an offence within the period of 12 months after the defendant is found unfit to be tried, unless the court is required to release the defendant because the DPP has advised that further proceedings will not be taken.

Clause 56 sets out the procedure for special hearings, including that the judge will determine the hearing unless an election is made to have the hearing determined by a jury. The defendant will be taken to have pleaded not guilty and must have legal representation, unless the court otherwise allows.

Clause 57 enables the DPP to amend the indictment to which a special hearing relates with the leave of the court or the consent of an Australian legal practitioner representing the defendant.

Clause 58 provides for elections to have special hearings determined by juries and applies the laws generally applying to juries to juries for special hearings.

Clause 59 specifies that the verdicts available at a special hearing are not guilty, a special verdict, that on the limited evidence available the defendant committed the offence and that on the limited evidence available the defendant committed an offence available as an alternative to the offence charged.

Clause 60 provides for a defendant who has been found not guilty at a special hearing to be dealt with as if the defendant had been found not guilty at an ordinary criminal trial.

Clause 61 provides that a special verdict reached at a special hearing is taken to be for all purposes a verdict reached at an ordinary criminal trial, including for making orders consequent on the verdict.

Clause 62 provides that a verdict at a special hearing that on the limited evidence available the defendant committed the offence or an alternative offence constitutes a qualified finding of guilt and is not a basis for a conviction for the offence but is taken to be a conviction for the purpose of a victim's compensation claim. The verdict may be appealed in the same manner as a verdict reached at an ordinary criminal trial.

Clause 63 enables the court to impose a limiting term (where a sentence of imprisonment would have been imposed at an ordinary criminal trial) or other penalties on a defendant found on the limited evidence available to have committed the offence or an alternative offence.

Clause 64 specifies that a limiting term will take effect from when it is nominated, unless the court specifies an earlier date after taking into account periods of detention before and during the special hearing or a later date where the person is serving another limiting term or sentence of imprisonment.

Clause 65 requires the court to refer a defendant for whom a limiting term has been nominated to the Tribunal and enables the court, pending the Tribunal's review, to order the defendant's detention in a mental health facility, correctional centre, detention centre or other place.

Clause 66 enables the court to obtain and consider a report by a forensic psychiatrist or other person of a class prescribed by the regulations before making orders about a defendant following a verdict at a special hearing. The report is to be by a person who is not currently treating the defendant and is to be a report on the defendant's condition and whether release of the defendant is likely to seriously endanger the safety of the defendant or any member of the public.

Clause 67 requires the court to refer a defendant to the Tribunal if a special verdict has been entered, unless the court releases the defendant unconditionally.

Clause 68 provides that a verdict that, on the limited evidence available, the defendant committed the offence or an alternative offence constitutes a bar to criminal proceedings for the offence, unless the defendant becomes fit to be tried while still serving a limiting term or is subject to an order by the Supreme Court under proposed Part 6 extending the defendant's detention (an *extension order*). Any previous periods of detention relating to the offence are to be taken into account if the defendant is subsequently convicted of the offence or substantially the same offence.

Part 5 Forensic patients and correctional patients

Division 1 General principles and concepts

Clause 69 sets out the objects of the proposed Part.

Clause 70 applies the principles for care and treatment of patients under the *Mental Health Act 2007* to forensic patients and correctional patients and requires forensic patients who are ordered to be detained in a mental health facility, so far as practicable, to be detained in a facility that is appropriate to the patient's needs and that is appropriate with respect to the safety of the patient and other persons.

Clause 71 applies provisions of the *Mental Health Act 2007* relating to obtaining interpreter assistance, providing information about patient medication to forensic patients and other provisions relating to carers.

Clause 72 specifies the persons who are *forensic patients* for the purposes of the proposed Act. Persons who have been found unfit to be tried and who are detained are forensic patients. Persons for whom a limiting term has been nominated, who are subject to an extension order or who are the subject of a special verdict and who are detained in a mental health facility, correctional centre, detention centre or other place or have been released conditionally from a place of that kind are also forensic patients.

Clause 73 specifies the persons who are *correctional patients* for the purposes of the proposed Act. They are persons (who are not already forensic patients or involuntary patients in a mental health facility) who have been transferred from a correctional centre or detention centre to a mental health facility while serving a sentence of imprisonment, on remand or subject to a continuing or interim detention order as a high risk offender.

Clause 74 makes it clear that the provisions setting out the objects of the proposed Part and the principles for care and treatment that are applicable to patients do not create or confer on any person a right or entitlement that is enforceable at law.

Division 2 General provisions relating to reviews by Tribunal

Clause 75 requires the Tribunal, when determining what orders to make about a person under the proposed Act, to consider whether the person has a mental health impairment or cognitive impairment, whether there are reasonable grounds for believing that care, treatment or control of the person is necessary for the person's own protection from serious harm or the protection of others from serious harm and the continuing condition of the person, including any likely deterioration and the effects of deterioration.

Clause 76 makes it clear that the Tribunal does not have to review a patient if the patient is unlawfully absent from a mental health facility or other place in which the patient was detained.

Clause 77 enables mandated periods for the review of patients by the Tribunal to be extended up to a maximum period of 12 months if the Tribunal is satisfied that there are reasonable grounds to grant the application or there has been no change since the last review in the patient's condition and there is no apparent need for a change in existing orders or a review may be detrimental to the patient.

Division 3 Review of forensic patients by Tribunal

Clause 78 sets out when the Tribunal must carry out reviews of forensic patients, including as soon as practicable after a limiting term is nominated for a person or as soon as practicable after a person is found by a court to be unlikely to become fit to be tried within 12 months or a special verdict is entered, and every 6 months while a person is a forensic patient.

Clause 79 enables the Tribunal to carry out a review of a forensic patient at any time.

Clause 80 requires the Tribunal, on each review of a forensic patient who has been found unfit to be tried for an offence, to determine whether the person has or will become fit to be tried. The Tribunal must notify the court if, on a review of a patient who has been found unfit to be tried, it finds that the patient will not become fit to be tried within 12 months of the finding of unfitness.

Clause 81 confers jurisdiction on the Tribunal, on a review of a forensic patient, to make orders about the patient's detention, care or treatment in a mental health facility, correctional centre, detention centre or other place or the patient's unconditional or conditional release.

Clause 82 confers jurisdiction on the Tribunal, on a review of a forensic patient, to make an order transferring the patient to a mental health facility, correctional centre, detention centre or other place.

Clause 83 makes it clear that the Tribunal may order the release of a forensic patient despite any other provision of the proposed Act or any order of the court under the proposed Act. The Tribunal cannot order the release of a forensic patient who has been remanded in custody or make an order for the unconditional release of a person whose status as a forensic patient has been extended by an extension order.

Clause 84 sets out the matters for consideration by the Tribunal when deciding whether or not to order the release of a forensic patient. An order for release cannot be made by the Tribunal unless it is satisfied that the safety of the patient or any member of the public will not be seriously endangered by the release and that other care of a less restrictive kind is appropriate and reasonably available or that the patient does not require care.

Clause 85 sets out conditions that may be imposed by the Tribunal on an order for release of a forensic patient, including conditions as to care, treatment and review, accommodation, conduct agreements and association or non-association with victims or members of victims' families.

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

Clause 86 enables the Secretary of the Ministry of Health (the *Secretary*) to make an order directing the transfer of a person imprisoned in, or a forensic patient detained in, a correctional centre or detention centre to a mental health facility on the basis of medical certificates as to the person's mental health.

Clause 87 limits the period for which a person may be transferred under the proposed Division from a correctional centre or detention centre to a mental health facility to 7 days. However, a longer period is permitted if the person is a mentally ill person or has a mental health impairment or other condition for which treatment is available in a mental health facility and appropriate care is not reasonably available in the correctional centre or detention centre. The person may also be transferred back at any time if these criteria cease to apply to the person.

Clause 88 enables a correctional patient or forensic patient to request the Tribunal to order a transfer to a correctional centre or detention centre from a mental health facility. The order is required to be made if the Tribunal is satisfied that the patient is not a mentally ill person.

Clause 89 requires the Tribunal to carry out a limited review of the case of a person awaiting transfer to a mental health facility if the transfer does not occur within a period prescribed by the regulations made under the proposed Act and each month after that until the patient is transferred.

Clause 90 requires the Tribunal to carry out a review of a correctional patient or forensic patient as soon as practicable after the patient is transferred to a mental health facility under the proposed Division.

Division 5 Reviews of correctional patients

Clause 91 requires the Tribunal to review a correctional patient as soon as practicable after the person is transferred to a mental health facility, every 6 months while the person is a correctional patient and as soon as practicable after being asked to do so by certain Ministers or the medical superintendent of the mental health facility.

Clause 92 requires the Tribunal, on the first review of a correctional patient, to determine whether the patient is a mentally ill person who should continue to be detained in a mental health facility or has a condition for which treatment is available in a mental health facility. The Tribunal may make orders as to the patient's continued detention, care or treatment or transfer.

Clause 93 enables the Tribunal to carry out a review of a correctional patient at any time.

Division 6 Leave of absence

Clause 94 confers jurisdiction on the Tribunal to make orders granting leave for forensic patients to be absent from mental health facilities and other places in which they are detained. An order may be conditional but cannot be made unless the Tribunal is satisfied, on the evidence available to it, that the safety of the patient, a registered victim of the patient or any other member of the public will not be seriously endangered if the patient is released.

Clause 95 enables the Commissioner of Corrective Services to allow a correctional patient to be absent from a mental health facility for the period and subject to the terms and conditions that the Commissioner thinks fit. The Commissioner must have regard to recommendations made by the Tribunal on a review of a correctional patient when deciding whether or not to grant leave.

Clause 96 enables the Secretary to allow a forensic or correctional patient to be absent from a mental health facility in an emergency or other special circumstances, unless the Tribunal or the Commissioner of Corrective Services has previously refused permission in the circumstances. The Secretary cannot allow the absence unless the Secretary is satisfied, on the evidence available to the Secretary, that the safety of the patient or any member of the public will not be seriously endangered if the leave of absence is granted.

Clause 97 provides for an appeal by a forensic patient or correctional patient to the Tribunal against a decision of the Secretary to grant or not to grant leave of absence.

Clause 98 makes it clear that the grant of leave of absence to a forensic patient or correctional patient does not affect the operation of a limiting term or sentence of imprisonment imposed on the patient.

Division 7 Community treatment orders

Clause 99 confers jurisdiction on the Tribunal to make community treatment orders for forensic patients, correctional patients who are ordered to be transferred to a correctional centre or detention centre and inmates awaiting transfer to a mental health facility or who are in a correctional centre or detention centre.

Clause 100 requires the Tribunal to carry out reviews of inmates who are subject to community treatment orders no later than 3 months after the community treatment orders are made and at least every 6 months during the term of each order.

Division 8 Termination of status as patient and other status changes

Clause 101 sets out when a person ceases to be a forensic patient, including on unconditional release, being found not guilty of an offence at a special hearing, being found guilty of an offence at a special hearing where no limiting term is imposed, being found to be fit to be tried for an offence and if charges against the person are dismissed.

Clause 102 provides that a period of time in which a person was unlawfully absent from a mental health facility or other place is not to be counted as part of the person's limiting term.

Clause 103 provides that a person's status as a forensic patient may be extended in accordance with proposed Part 6.

Clause 104 sets out when a person ceases to be a correctional patient, including on transfer to a correctional centre, detention centre or other place from a mental health facility or if the person's sentence expires or the person is released on parole or by order of the court.

Clause 105 enables the Tribunal, on a review, to classify a forensic patient detained after a special hearing or a correctional patient as an involuntary patient under the *Mental Health Act 2007* and to order that the patient be transferred to a mental health facility, if the patient is within 6 months of ceasing to be a forensic patient or correctional patient.

Clause 106 prohibits the Tribunal from classifying a forensic patient as an involuntary patient unless the Tribunal has been notified by the relevant Ministers that there will be no application to the Supreme Court under proposed Part 6 to extend the person's detention as a forensic patient or any such application has been dismissed.

Clause 107 requires a person who has ceased to be a forensic patient or a correctional patient to be discharged from a mental health facility, correctional centre, detention centre or other place of detention, unless the person has been classified as an involuntary patient. A person cannot be discharged from a correctional centre or detention centre if the person has ceased to be a forensic patient because the person has been found fit to be tried for an offence or is otherwise lawfully required to be detained.

Clause 108 makes it clear that the proposed Part does not prevent action being taken under the voluntary detention provisions of the *Mental Health Act 2007* with respect to a person who ceases to be a forensic patient or correctional patient.

Division 9 Enforcement

Clause 109 enables the President of the Tribunal to order the apprehension (an *apprehension order*) of a person who breaches an order for conditional release, an order for release following a special verdict or a condition of leave of absence or whose condition has deteriorated after being granted conditional release or leave of absence. Orders for assessment and treatment of the person may also be made and a person must be reviewed by the Tribunal after apprehension.

Clause 110 requires police officers to carry out apprehension orders and confers powers on police officers for that purpose.

Clause 111 authorises the authorised medical officer of a mental health facility to apprehend, or direct the apprehension of, a person who fails to return at the end of a period of leave of absence or to comply with a condition of leave of absence.

Clause 112 gives a person apprehended under the proposed Part the right to ask the Tribunal to investigate the basis on which the apprehension was made. The Tribunal may make any order it thinks fit about the detention or release of the person on a reconsideration.

Clause 113 makes it an offence to release or attempt to release a person who is being conveyed to or detained in a mental health facility. It will also be an offence for a medical superintendent or any other person employed in a mental health facility to intentionally or negligently permit a person to escape from a mental health facility or to aid a person detained in a mental health facility to escape or attempt to escape from the facility.

Clause 114 enables a Magistrate to issue an order for the apprehension of a person who has escaped from a mental health facility and is outside the State or is the subject of an apprehension order.

Division 10 Miscellaneous

Clause 115 empowers the Secretary to order the transfer of a forensic patient or correctional patient detained in a mental health facility to another mental health facility. The proposed section also sets out other arrangements that may be made for the transport of forensic patients or correctional patients.

Clause 116 provides for detention in a mental health facility or other place, following a transfer under the proposed Part, to be taken to be detention in a correctional centre or detention centre if the person detained is serving a sentence of imprisonment. Detention in a mental health facility does not prevent the granting of parole to a person so detained.

Clause 117 provides for the Secretary to determine security conditions for a forensic patient detained in a mental health facility or other place that is not a correctional centre or detention centre. Security conditions for a correctional patient, or a forensic patient detained in a correctional centre or detention centre, are to be in accordance with relevant legislation and any protocol agreed between the Secretary, the Commissioner of Corrective Services and the Secretary of the Department of Communities and Justice.

Clause 118 requires the authorised medical officer of a mental health facility to take all reasonably practicable steps to consult the carers for a forensic patient who is to be released or given leave of absence, and to consult with relevant agencies, carers and dependants of the patient, when planning the patient's release. All reasonably practicable steps are to be taken to provide information about follow-up care to patients who are released or given leave of absence.

Clause 119 enables a forensic patient or correctional patient who escapes from a mental health facility to be apprehended at any time by the medical superintendent of a mental health facility, a police officer or a person authorised by the Secretary or a medical superintendent.

Clause 120 makes it clear that the proposed Part does not limit the application of the *Mental Health Act 2007* to a person granted conditional release or leave of absence under the proposed Part.

Part 6 Extension of status as forensic patient

Division 1 Extension orders

Clause 121 confers jurisdiction on the Supreme Court to make an order to extend a person's status as a forensic patient.

Clause 122 prohibits an extension order from being made unless the Supreme Court is satisfied to a high degree of probability that a forensic patient poses an unacceptable risk of causing serious harm to others if the patient ceases to be a forensic patient and the risk cannot be managed by other less restrictive means.

Division 2 Application for extension orders

Clause 123 enables a Minister administering the proposed Act to apply to the Supreme Court for an extension order.

Clause 124 limits applications to patients who are subject to limiting terms or existing extension orders. Applications can only be made within the 6 months before the limiting term or extension order expires.

Clause 125 requires an application for an extension order to be accompanied by a report by a qualified psychiatrist, registered psychologist or registered medical practitioner that assesses the risk of the patient causing serious harm to others and looks at the need for ongoing management and why management by less restrictive means will not be adequate to prevent the harm.

Clause 126 sets out pre-hearing procedures for proceedings for extension orders, including a requirement to serve notice of the application on the affected forensic patient within 2 days of the application, to hold a preliminary hearing within 28 days and to disclose relevant documents to the forensic patient. The Supreme Court is to appoint 2 persons who are psychiatrists, psychologists or medical practitioners to assess the forensic patient if it is satisfied after the preliminary hearing that matters in the supporting document would justify an extension order. If no such finding is found, the application must be dismissed.

Division 3 Determination of application

Clause 127 sets out matters that the Supreme Court must consider when deciding an application for an extension order, including the safety of the community, the assessments obtained by the Court, the forensic patient's level of compliance and the views of the court that imposed the limiting term or existing extension order on the patient.

Clause 128 provides for the term of an extension order to commence when it is made, or when an existing limiting term or extension order applying to the forensic patient ends, and to end on the end of the period specified by the Court in the order. The period cannot be longer than 5 years.

Clause 129 makes it clear that the making of an extension order or interim extension order for a forensic patient does not affect an existing order relating to the patient's care, detention, treatment or release from custody.

Division 4 Interim extension orders

Clause 130 confers jurisdiction on the Supreme Court to make an interim extension order if the limiting term or existing extension order will expire before application proceedings are determined and the matters in the supporting documentation, if proved, would justify the extension order.

Clause 131 provides for the term of an interim extension order to commence on the day fixed by the order or, if no day is fixed, when it is made and to end on the end of the period specified by the Court in the order. The period cannot be longer than 3 months but an interim extension order may be renewed by further orders for a total period of up to 3 months.

Clause 132 confers jurisdiction on the Supreme Court to order a forensic patient to be detained for a further period of up to 24 hours to enable assessment under the *Mental Health Act 2007*, if an application for an extension order is dismissed by the Court.

Division 5 Extension order or interim extension order may be varied or revoked

Clause 133 enables the Supreme Court to at any time vary or revoke an extension order or interim extension order, on the application of the Minister or on the recommendation of the Tribunal. An order may be revoked if circumstances have changed so that it is no longer necessary or on other grounds.

Division 6 Supreme Court proceedings

Clause 134 provides that proceedings for extension orders to be civil proceedings and are to be conducted accordingly.

Clause 135 provides for a right of appeal to the Court of Appeal on a question of law, a question of fact or a question of mixed law and fact within 28 days after a decision to make, refuse, vary or revoke an extension order. Among other things it may do on an appeal, the Court of Appeal may remit a matter to the Supreme Court for decision and may make an interim order revoking or varying the extension order pending the Supreme Court's decision.

Clause 136 prohibits an order for costs being made against a forensic patient in relation to extension order proceedings and appeal proceedings under the proposed Part.

Clause 137 makes it clear that the proposed Part does not limit the jurisdiction of the Supreme Court.

Division 7 Miscellaneous

Clause 138 enables a Minister administering the proposed Act to make an order requiring a person to provide a document, report or other information relating to the behaviour, or physical or mental condition, of a forensic patient who is subject to a limiting term, extension order or interim extension order. The Minister may also request a court or the Tribunal to provide those things. A document or report provided will be admissible in proceedings under the proposed Act.

Clause 139 enables Ministers administering the proposed Act to share information.

Clause 140 excludes persons and the State from liability for acts or omissions done or omitted in good faith for the purposes of, or in connection with, the administration or execution of the proposed Part.

Clause 141 makes it clear that the proposed Part does not affect the usual rights of parties to proceedings, such as the right to have legal representation and to call witnesses and cross-examine witnesses.

Clause 142 provides that the *Bail Act 2013* does not apply to or in respect of a person who is the subject of proceedings under the proposed Part.

Clause 143 enables rules of court to be made for the purposes of proceedings under the proposed Part.

Clause 144 defines who is a qualified psychiatrist for the purposes of the proposed Part.

Part 7 Tribunal proceedings

Division 1 Provisions relating to proceedings

Clause 145 enables a victim of a forensic patient to make submissions to the Tribunal if the Tribunal is considering the release of the patient or granting the patient leave of absence.

Clause 146 enables a victim of a forensic patient to apply to the Tribunal for an order varying a condition of release of the patient relating to the persons with whom the patient may associate or the places the patient may frequent or visit.

Clause 147 contains various provisions relating to Tribunal procedures, including a provision conferring rights on the Minister for Health and Medical Research and the Attorney General to appear before the Tribunal in matters relating to the release or grant of leave to a patient, the revocation of extension orders and other reviews.

Clause 148 constitutes the Forensic Division of the Tribunal to exercise the Tribunal's functions under the proposed Act and prevents an order being made for the release of a forensic patient unless the Tribunal is constituted by at least 1 member who is the holder or former holder of a judicial office.

Division 2 Appeals

Clause 149 is an interpretative provision construing a reference in the proposed Division to a matter of law as including a reference to a matter relating to the jurisdiction of the Tribunal.

Clause 150 enables a forensic patient, correctional patient or a person who is on bail who is a party to a proceeding before the Tribunal to appeal, by leave of the Supreme Court, to the Court on a question of law or another question (other than a determination as to release). The Minister for Health and Medical Research may also appeal, as of right, to the Supreme Court on a question of law or another question against a determination of the Tribunal (other than a determination as to release). A registered victim who is a party to proceedings before the Tribunal may also appeal, by leave of the Court, against a determination of the Tribunal.

Clause 151 enables a person to appeal, by leave of the Court of Appeal, to the Court on a question of law or another question against a determination of the Tribunal as to the release of a person. The Minister for Health and Medical Research may also appeal, as of right, to the Court of Appeal on a question of law or another question against a determination of the Tribunal as to the release of a person. The Attorney General may also appeal, as of right, to the Court of Appeal on a question of law against a determination of the Tribunal as to the release of a person.

Clause 152 sets out the period within which appeals must be made and requires the appeals to be made in accordance with the rules of the court to which the appeal is made.

Clause 153 enables a court which hears an appeal against a Tribunal decision to make an order that it thinks the Tribunal should have made or to remit its decision to the Tribunal and order the matter to be reheard by the Tribunal. A determination may be suspended by the Tribunal or the court pending the determination of an appeal.

Clause 154 makes it clear that the Tribunal must not, on a rehearing, proceed in a manner or make an order or decision that is inconsistent with the appeal court's decision. Fresh evidence, or evidence in addition to or substitution for the evidence on which the original determination was made, may be given on a rehearing.

Clause 155 excludes the Tribunal and members of the Tribunal from liability for costs relating to a determination of the Tribunal, or the failure or refusal of the Tribunal to make a determination, in respect of which an appeal is made and from liability for the costs of an appeal.

Part 8 Victims Register

Clause 156 establishes a Victims Register which is to include the names of victims of forensic patients (for whom a special verdict has been entered or who are subject to a limiting term) who seek to be included in it for the purpose of notice of reviews of forensic patients. The Register is to be kept by the Commissioner of Victims Rights.

Clause 157 requires the Commissioner of Victims Rights to give notice to a registered victim of a forensic patient of a mandatory review of the patient, an application by the patient for release or leave of absence, an order for release or a grant of leave for the patient, when the patient ceases to be a forensic patient and when the patient is unlawfully absent or appeals against a decision of the Tribunal.

Part 9 Miscellaneous

Clause 158 requires each Minister administering the proposed Act to be informed of the date on which a limiting term or extension order for a forensic patient will expire, at least 6 months before the expiry date.

Clause 159 requires the Secretary of the Ministry of Health, the Commissioner of Corrective Services, the Secretary of the Department of Communities and Justice, the Commissioner of Victims Rights, the Executive Director, Juvenile Justice, Department of Communities and Justice and other government Departments and agencies to use their best endeavours to comply with requests of the Tribunal so long as the requests are consistent with the discharge of their responsibilities and do not prejudice the discharge of their functions.

Clause 160 requires a court or the Director of Public Prosecutions to notify the Tribunal if relevant charges against a forensic patient or correctional patient are dismissed, or if the patient is no longer being proceeded against for the charges.

Clause 161 provides for information sharing arrangements between the Secretary of the Ministry of Health, the Commissioner of Corrective Services and the Secretary of the Department of Communities and Justice relating to information concerning forensic patients and correctional patients. The proposed section also enables the Commissioner of Victims Rights and the President of the Tribunal to exchange information for the purposes of the Victims Register and other matters related to victims.

Clause 162 makes it clear that the Commissioner of Corrective Services and the Secretary of the Department of Communities and Justice may exercise security functions in relation to forensic patients or correctional patients detained in correctional centres or detention centres despite the provisions of the proposed Act or orders made under the proposed Act. The proposed section also enables the Secretary of the Department of Communities and Justice to delegate functions under the proposed Part to the Executive Director, Juvenile Justice, Department of Communities and Justice.

Clause 163 provides for offences under the proposed Act to be dealt with summarily before the Local Court and for the offence relating to aiding or permitting an escape from a mental health facility to be dealt with on indictment.

Clause 164 enables the Minister and the Secretary of the Department of Communities and Justice to delegate functions conferred under the proposed Act.

Clause 165 enables the Commissioner of Corrective Services and the Secretary of the Department of Communities and Justice to detain or transfer persons in any correctional centre or detention centre if they have been ordered by a court, the Tribunal or the Secretary of the Ministry of Health to be detained in or transferred to a specified correctional centre or detention centre.

Clause 166 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 167 repeals the *Mental Health (Forensic Provisions) Act 1990* and the *Mental Health (Forensic Provisions) Regulation 2017*.

Schedule 1 Medical certificate as to examination of inmate

Schedule 1 contains a certificate for use for transferring inmates from correctional centres on the grounds that a person is a mentally ill person.

Schedule 2 Savings, transitional and other provisions

Schedule 2 contains savings, transitional and other provisions consequent on the enactment of the proposed Act.

Schedule 3 Amendment of Acts

Schedule 3.1–3.6, 3.8–3.11 and 3.13–3.19 update references.

Schedule 3.7 Crimes Act 1900 No 40

Schedule 3.7[1] inserts definitions of persons who have mental health impairments or cognitive impairments. The definitions are the same as the definitions in the proposed Act.

Schedule 3.7[2] updates the offence of infanticide so that it may apply to a woman who had a mental health impairment when she caused the death of her child.

Schedule 3.7[4] replaces the ground of impairment caused by an abnormality of mind on which a person may be convicted of manslaughter instead of murder with a ground of impairment caused by a mental health impairment or a cognitive impairment. **Schedule 3.7[3] and [5]** make consequential amendments.

Schedule 3.12 Criminal Appeal Act 1912 No 16

Schedule 3.12[1] and [2] update definitions.

Schedule 3.12[3] inserts a definition of *special verdict of act proven but not criminally responsible*.

Schedule 3.12[4] and [5] apply provisions relating to rights to appeal to persons for whom a special verdict of act proven but not criminally responsible has been entered instead of persons acquitted on the ground of mental illness.

Schedule 3.12[6] updates references to findings and penalties.

Schedule 3.12[7] applies a provision that enables a person to be acquitted on appeal on a ground of being mentally ill instead to a person who is found to be a person for whom a special verdict of act proven but not criminally responsible could have been entered.