Implementing Recommendations of the Review of the *Mental Health Act 2000* (Qld): the Health and Other Legislation Amendment Bill 2007 (Qld)

On 23 May 2006, the Hon S Robertson MP, Minister for Health, announced a review of the Mental Health Act 2000 (Qld) (‘Act’). The review was undertaken by Mr Brendan Butler AM SC and a final report on the review was released in December 2006.

The key focus of the review was:

- the efficacy of legislative provisions and administrative arrangements that take account of the interests of victims and their families in circumstances where the alleged offence has been committed by a mentally ill person; and

- whether the Act and associated arrangements achieve an appropriate balance between strengthening the safety and protection of the community and the provision of rehabilitation opportunities for forensic patients under the Act.

The review made 106 recommendations for reform. This Research Brief considers the ten recommendations proposed to be implemented by amendments to the Act under the Health and Other Legislation Amendment Bill 2007 (Qld).

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EXECUTIVE SUMMARY

On 23 May 2006, the Hon S Robertson MP, Minister for Health, announced a review of the Mental Health Act 2000 (Qld) (‘Act’). The review was undertaken by Mr Brendan Butler AM SC (pages 2-5).

A final report on the review, Promoting Balance in the Forensic Mental Health System, was released on 11 December 2006, containing 106 recommendations for reform (page 4).

The Health and Other Legislation Amendment Bill 2007 (Qld) (‘Bill’) was introduced into the Queensland Legislative Assembly on 6 February 2007. This Research Brief considers one aspect of the amendments proposed by the Bill, namely amendments to the Act under Part 4 of the Bill to implement ten recommendations of the review.

The Research Brief considers the proposed amendments in the context of relevant provisions of the Act and the recommendations (pages 5-37). In summary, these amendments seek to:

- require that the protection of the community and the needs of victims be taken into account when a decision is made under the Act (pages 7-12);
- ensure that the purpose of the Act is stated to explicitly require the rights and freedoms of victims to be balanced with the rights and freedoms of other persons (pages 7-12);
- replace the narrow definition of ‘victim’ with a broader meaning that extends beyond direct victims of alleged offences and includes their immediate family members (pages 26-28);
- rephrase references to submissions to the Mental Health Court and Mental Health Review Tribunal by ‘non-parties’ to the proceedings to submissions by ‘victims or concerned persons’ (pages 28-32);
- state the purpose of submitting material to the Mental Health Court or the Mental Health Review Tribunal, and provide guidance on the content of submissions (pages 28-34);
- require the Mental Health Court to give reasons for taking, or not taking, into account such submissions (pages 28-32, 34-35);
- allow copies of submissions to the Mental Health Court to be provided to a patient’s authorised mental health service and the Mental Health Review Tribunal (pages 28-32, 35-36); and
- state that the role of the Attorney-General in the Mental Health Review Tribunal is to represent the public interest (pages 36-37).

Proposed amendments to the Act under Part 3 of the Bill relating to the Mental Health Court, including the appointment of one or more additional Supreme Court judges to that Court, are also mentioned (page 2).
1 INTRODUCTION

On 6 February 2007, the Hon S Robertson MP, Minister for Health, introduced the Health and Other Legislation Amendment Bill 2007 (Qld) (‘Bill’) into the Queensland Legislative Assembly.

This Research Brief considers proposed amendments to the Mental Health Act 2000 (Qld) (‘Act’) under Part 4 of the Bill to give effect to a number of recommendations made in the final report of the Review of the Queensland Mental Health Act 2000, Promoting Balance in the Forensic Mental Health System. In summary, these amendments seek to:

- require that the protection of the community and the needs of victims be taken into account when a decision is made under the Act;
- ensure that the purpose of the Act is stated to explicitly require the rights and freedoms of victims to be balanced with the rights and freedoms of other persons;
- replace the narrow definition of ‘victim’ with a broader meaning that extends beyond direct victims of alleged offences and includes their immediate family members;
- rephrase references to submissions to the Mental Health Court and Mental Health Review Tribunal by ‘non-parties’ to the proceedings to submissions by ‘victims or concerned persons’;
- state the purpose of submitting material to the Mental Health Court or the Mental Health Review Tribunal, and provide guidance on the content of submissions;
- require the Mental Health Court to give reasons for taking, or not taking, into account such submissions;


• allow copies of submissions to the Mental Health Court to be provided to a patient’s authorised mental health service and the Mental Health Review Tribunal; and
• state that the role of the Attorney-General in the Mental Health Review Tribunal is to represent the public interest.

Other amendments to the Act proposed under Part 3 of the Bill relate to the constitution of the Mental Health Court, and are not discussed in this Research Brief. The key changes are that:
• one or more additional Supreme Court judges may be appointed to the Mental Health Court;³
• the Court will consist of the President of the Court and other members of the Court;⁴
• the President will be responsible for the administration of the Court and for ensuring the orderly and expeditious exercise of the jurisdiction and powers of the Court;⁵
• the Governor in Council will appoint the President, and may appoint one of the other members as acting President;⁶ and
• arrangements will be in place to deal with the effect on proceedings if a member of the Court dies or becomes incapacitated.⁷

2 THE REVIEW OF THE MENTAL HEALTH ACT 2000 (QLD)

2.1 ANNOUNCEMENT OF THE REVIEW

On 23 May 2006, the Minister for Health announced a review of the Act (‘Review’).

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³ Currently, the Mental Health Court is constituted by a single Supreme Court judge sitting alone (Mental Health Act 2000 (Qld), s 382(1)). The proposed change was requested by the Honourable P de Jersey, Chief Justice of Queensland, to help address the rising workload of the Court (Health and Other Legislation Amendment Bill 2007 (Qld), Explanatory Notes, p 5).

⁴ Clause 11; Mental Health Act 2000 (Qld), proposed new s 381(3).

⁵ Clause 13; Mental Health Act 2000 (Qld), proposed new s 388A.

⁶ Clause 13; Mental Health Act 2000 (Qld), proposed new ss 388 and 388D.

⁷ Clause 15; Mental Health Act 2000 (Qld), proposed new s 415A.
The announcement followed considerable community concern and media reporting about the access by a particular patient the subject of a forensic order under the Act to ‘limited community treatment’, a form of leave which enables patients to undertake treatment or rehabilitation in the community.\(^8\)

Much of the community concern focussed on:

- the rights of victims and their families to be involved in decisions regarding the treatment of forensic patients, and to be suitably consulted and provided with certain information; and
- the appropriateness of limited community treatment for forensic patients, particularly if they have committed a murder or other violent offence.

On 14 June 2006, it was announced that Mr Brendan Butler AM SC, former chair of the Crime and Misconduct Commission, would conduct the Review. The terms of reference for the Review were also released.\(^9\)

### 2.2 TERMS OF REFERENCE

The terms of reference for the Review are reproduced in Appendix A to this Research Brief.

The two key aspects of the Review were to:

- examine the efficacy of legislative provisions and administrative arrangements that take account of the interests of victims and their families, and assess the need for amendment to further enable those persons to be involved in the decision making process; and
- consider whether the Act and associated arrangements achieve an appropriate balance between strengthening the safety and protection of the community and

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the provision of rehabilitation opportunities for patients under a forensic order.\textsuperscript{10}

\section*{2.3 REVIEW PROCESS}

An independent expert reference group including victims, mental health consumers and representatives of victim support services, carers, psychiatrists, the legal profession, law enforcement agencies, cultural groups and other community and government services assisted Mr Butler.\textsuperscript{11}

The Review process included:

\begin{itemize}
  \item a call for submissions on issues raised in a preliminary paper released on 14 July 2006;\textsuperscript{12}
  \item a discussion paper released on 29 September 2006;\textsuperscript{13}
  \item 84 written and verbal submissions received in response to these papers;\textsuperscript{14}
  \item face-to-face consultations with victims and their families, staff of authorised mental health services, mental health consumers, and staff of relevant government and non-government agencies;\textsuperscript{15} and
  \item the release of a final report on the Review (‘Final Report’) on 11 December 2006.\textsuperscript{16}
\end{itemize}

The Final Report contained 106 recommendations, which are reproduced in \textbf{Appendix B} to this Research Brief. The Bill proposes to implement ten of these

\begin{itemize}
\item\textsuperscript{10} Promoting Balance in the Forensic Mental Health System, Final Report, p 1.
\item\textsuperscript{11} Promoting Balance in the Forensic Mental Health System, Final Report, pp 24-25.
\item\textsuperscript{14} Promoting Balance in the Forensic Mental Health System, Final Report, p 2.
\item\textsuperscript{15} Promoting Balance in the Forensic Mental Health System, Final Report, p 2.
\item\textsuperscript{16} Promoting Balance in the Forensic Mental Health System, Final Report.
\end{itemize}
recommendations. The remaining recommendations are being considered by the Government as part of the 2007-08 State budget.

This Research Brief considers the ten recommendations the subject of the Bill, together with relevant provisions of the Act necessary for understanding the proposed amendments.

3 PROVISIONS OF THE ACT AND PROPOSED AMENDMENTS

3.1 BACKGROUND TO THE ACT

One of the functions of the Act is to provide a framework for the determination, in certain circumstances, of a person’s mental state when they have been charged with a criminal offence.

Understanding some of the fundamental principles underlying the operation of the Act assists with a greater appreciation of the Act and the context of the Review.

The Final Report discusses the notion of criminal responsibility and mentally ill persons as follows:

Almost two centuries ago, English law accepted insanity as a defence to a criminal charge. It was decided that where, because of mental illness, persons did not know the nature or quality of their criminal act, or did not know what they did was wrong.
they were not to be held criminally responsible for that act. This concept was enshrined in the Queensland Criminal Code at the beginning of the last century.\textsuperscript{20}

Accordingly, to the extent that the Act curtails the freedoms of mentally ill persons who have committed an offence, the purpose of that curtailment is their treatment and the protection of the community, not punishment.

The Review noted the difficulties the community sometimes faces in accepting these concepts:

Some submissions have expressed the view that a finding of unsoundness of mind should not relieve an offender of legal responsibility for his or her actions. As already observed, the concept that a person lacking capacity due to mental illness is not criminally responsible for his or her acts is deeply ingrained in our criminal law. The Act has merely adopted the pre-existing Criminal Code ‘defence’ of insanity in this regard.

The Criminal Code defines criminal responsibility as meaning ‘liability to punishment for an offence’. The scheme of the [Act] is consistent with this criminal law concept. People who are found of unsound mind are not subject to punishment for the offence. This is so whether the issues of capacity and fitness are determined by a criminal court or by the Mental Health Court. The Terms of Reference do not permit the Review to consider whether a change should be made to this fundamental principle of our criminal law.

This approach does not ignore the nature and seriousness of the act committed but focuses on treatment of the person’s condition and protection of the person and others, rather than on punishment.

Some submissions to the Review have suggested that the Mental Health Court should set a minimum period during which the person on a forensic order cannot be released into the community. It has been argued that the adoption of a minimum period would assist victims by giving them time to comprehend what had happened and to become accustomed to the idea of the person’s return to the community.

The setting of a minimum time period in order to meet the needs of victims would amount to a form of punishment and therefore be inconsistent with the absence of criminal responsibility on the part of the patient. ... It is a concept inconsistent with the deeply entrenched principle in our criminal law that to be liable for punishment a person should be held criminally responsible, and is inconsistent with the scheme of the Act.\textsuperscript{21}

Some of these difficulties are likely to stem from the level of awareness in the community about mental illness. The Final Report states:

Community awareness and understanding of mental illness and its impact on people and their families has increased over the past decade as a result of a number of

\textsuperscript{20} Promoting Balance in the Forensic Mental Health System, Final Report, p 31.

\textsuperscript{21} Promoting Balance in the Forensic Mental Health System, Final Report, p 32.
national, state and territory developments. Despite these efforts, ongoing misconceptions about mental illness contribute to a lack of understanding of how and why the criminal justice system treats people with a mental illness differently from others. Increasing understanding of mental illness in the community is essential for promoting an understanding of the forensic mental health system.

While most people with a mental illness do not commit offences, when they do it may affirm inaccurate community perceptions that mentally ill people are dangerous and unpredictable. This stigma has the effect of further excluding people with mental illness from the community.\(^\text{22}\)

Coupled with this low level of awareness about mental health, the Review also noted a ‘high level of confusion and misunderstanding about the purpose of the Mental Health Court and the Tribunal’.\(^\text{23}\)

In addressing some of the concerns about mentally ill offenders, the Final Report provides a range of statistical and factual information, including statements that:

- only 4% of all homicide victims in Queensland between 1998-90 and 2005-06 were victims of homicides committed by persons who were considered mentally disordered; and
- the majority of victims will be family members, family friends or carers of the alleged offender who have a history of involvement with, and a level of understanding of, the alleged offender’s illness or disability.\(^\text{24}\)

### 3.2 Purpose of the Act

An awareness of the purpose of the Act and how it is to be achieved, together with the general principles applying to the administration of the Act and requirements about how powers or functions under the Act must be exercised, is important for understanding various aspects of the Review.

The purpose of the Act is:

> to provide for the involuntary assessment and treatment, and the protection, of persons (whether adults or minors) who have mental illnesses while at the same time safeguarding their rights.\(^\text{25}\)


\(^{23}\) Discussion Paper, p 18.

\(^{24}\) Promoting Balance in the Forensic Mental Health System, Final Report, p 37.

\(^{25}\) *Mental Health Act 2000 (Qld)*, s 4. Note that the Act does not deal with the voluntary treatment of mental illness, which should instead be treated and regarded in a similar way to other illness.
In this context, ‘mental illness’ means “a condition characterised by a clinically significant disturbance of thought, mood, perception or memory”. 26

3.2.1 How the purpose is to be achieved

The Act’s purpose is to be achieved by:

- providing for the detention, examination, admission, assessment and treatment of persons having, or believed to have, a mental illness;
- establishing the Mental Health Court, the work of which includes deciding the state of mind of persons charged with criminal offences;
- establishing the Mental Health Review Tribunal, the work of which includes carrying out reviews relating to involuntary patients and hearing applications to administer or perform particular treatments; and
- providing for the making of arrangements for the interstate transfer of involuntary patients and mentally ill persons. 27

3.2.2 General principles applying to the administration of the Act

A number of general principles apply to the administration of the Act in relation to persons with a mental illness. These are:

Same human rights:
- the right of all persons to the same basic human rights must be recognised and taken into account;
- a person’s right to respect for his or her human worth and dignity as an individual must be recognised and taken into account.

Matters to be considered in making decisions:
- to the greatest extent practicable, a person is to be encouraged to take part in decisions affecting the person’s life, especially decisions about treatment;
- to the greatest extent practicable, in making a decision about a person, the person’s views and the effect on his or her family or carers are to be taken into account;
- a person is presumed to have capacity to make decisions about the person’s assessment, treatment and choosing of an allied person.

Provision of support and information:

26 Mental Health Act 2000 (Qld), s 12.
27 Mental Health Act 2000 (Qld), s 5.
• to the greatest extent practicable, a person is to be provided with necessary support and information to enable the person to exercise rights under the Act, including, for example, facilitating access to independent help to represent the person’s point of view.

Achievement of maximum potential and self-reliance:
• to the greatest extent practicable, a person is to be helped to achieve maximum physical, social, psychological and emotional potential, quality of life and self-reliance.

Acknowledgment of needs:
• a person’s age-related, gender-related, religious, cultural, language, communication and other special needs must be taken into account.

Maintenance of supportive relationships and community participation:
• the importance of a person’s continued participation in community life and maintaining existing supportive relationships are to be taken into account to the greatest extent practicable, including, for example, by treatment in the community in which the person lives.

Maintenance of environment and values:
• to the greatest extent practicable, a person’s cultural and linguistic environment, and set of values (including religious beliefs) must be maintained.

Provision of treatment:
• treatment provided under this Act must be administered to a person who has a mental illness only if it is appropriate to promote and maintain the person’s mental health and wellbeing.

Confidentiality:
• a person’s right to confidentiality of information about the person must be recognised and taken into account.  

In addition, a power or function under the Act relating to a person who has a mental illness must be exercised or performed so that:
• the person’s liberty and rights are adversely affected only if there is no less restrictive way to protect the person’s health and safety or to protect others; and
• any adverse effect on the person’s liberty and rights is the minimum necessary in the circumstances.

28 Mental Health Act 2000 (Qld), s 8.

29 Mental Health Act 2000 (Qld), s 9.
3.2.3 Balance between patients’ needs and those of victims, their families and the community

A focus of the Review was the needs of victims of serious violent offences committed by persons of unsound mind or unfit to stand trial, and their family. A core criticism of the Act has been that it does not achieve an appropriate balance between patients’ needs and those of victims, their families and the community.

In relation to the Act’s purpose and the other accompanying provisions discussed above, the Review acknowledged:

> Those statements in the Act are an important protection against abuse, neglect and exploitation of mentally ill people who are one of the most vulnerable groups in our community.31

However, the Review also noted that:

- safety of the community is not mentioned in the Act’s purpose or statements about how it is to be achieved;
- community protection is “hinted at” in the provision stating how a power or function under the Act must be exercised or performed; and
- although other provisions do address risk assessment and community safety in the tests applied by the Mental Health Court and the Mental Health Review Tribunal, “it remains the case that all other provisions of the Act, including the forensic provisions, must be interpreted in light of the purpose of the Act which emphasises the interests of the patient without reference to the protection of others”.32

The Final Report states:

> The understanding the [Mental Health Court] and [Mental Health Review Tribunal] have of the purpose of the Act may affect the way in which each of those bodies construe specific provisions and exercise their discretion in making orders which impact on the interests of victims.33

Explicit recognition of the important balance between patients’ rights and those of victims, their families and the community was recognised by the Review as a means of contributing to public confidence in the forensic mental health system, which in turn would contribute to the integrity of the system:

33 Promoting Balance in the Forensic Mental Health System, Final Report, p 50.
Maintenance of public confidence is important to the integrity of the forensic mental health system and to the peace of mind of victims and patients. For there to be trust in the system the public need to be assured that their safety is given appropriate priority. Members of the public are entitled to expect that where mentally ill persons have committed criminal offences, particularly serious violent offences, the system will take the necessary steps to ensure treatment of the person has full regard to the need for public safety in managing the risk of re-offending. This means striking the right balance between the individual rights of the patient and those of the community.  

3.2.4 Recommendation and proposed amendment

Recommendation 3.1 provides:

That the provision stating how the purpose of the [Act] is to be achieved be amended to provide that community protection and the needs of victims be taken into account in decisions relating to forensic patients.  

Clause 29 seeks to implement recommendation 3.1 by proposing an amendment to section 5 (How purpose of Act is to be achieved) to insert the following statement:

The purpose of this Act is to be achieved in the following ways:

(e) when making a decision under this Act about a forensic patient, taking into account:

(i) the protection of the community; and

(ii) the needs of a victim of the alleged offence to which the applicable forensic order relates.

In addition, clause 28 proposes a related amendment to section 4 (Purpose of Act) to ensure that the rights and freedoms of patients will be balanced with those of other persons. The amended provision will state:

The purpose of this Act is to provide for the involuntary assessment and treatment, and the protection, of persons (whether adults or minors) who have mental illnesses while at the same time:

(a) safeguarding their rights and freedoms; and

(b) balancing their rights and freedoms with the rights and freedoms of other persons.

This proposed amendment is explained as follows:

34 Promoting Balance in the Forensic Mental Health System, Final Report, p 5.

The Mental Health Act conforms to the framework endorsed by all Australian Governments in 1992 in the National Mental Health Strategy which was developed to implement Australia’s commitment to adopting the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care. This framework places the humanitarian treatment of people with mental illness within the broader framework of individual and community rights and safety. In particular the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care recognises the need to balance the fundamental freedoms and basic rights of people with mental illness, with the fundamental rights and freedoms of others (United Nations, United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, GA Res 46/119 (1991)).

In discussing the Final Report:

- the Hon P Beattie MP, Premier, said:

  *This is perhaps the most sensitive and challenging area of Government because across several departments we must balance two competing, yet equally important interests; and*

- the Hon S Robertson MP, Minster for Health, said:

  *In reading [the] report, it is obvious that in looking after the needs of forensic mental health patients and their families, the system has left many victims feeling marginalised, frustrated and helpless and that is clearly not the intent of the Act.*

### 3.3 Decisions Concerning Soundness of Mind and Fitness to Stand Trial

The forensic provisions of the Act provide a mechanism:

- by which it can be decided whether a person charged with a criminal offence who appears to have a mental illness or intellectual disability was of unsound mind at the time of the alleged offence or is unfit to stand trial for the offence in the criminal courts; and

- for the detention, involuntary treatment and review of patients the subject of forensic orders under the Act.

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3.3.1 References of mental condition to Mental Health Court

The Mental Health Court is established under the Act\textsuperscript{38} and is constituted by a Supreme Court judge who is assisted by two psychiatrists.\textsuperscript{39}

The Court has power to do all things necessary or convenient to be done for, or in relation to, exercising its jurisdiction.\textsuperscript{40} In exercising its jurisdiction, it has wide powers to inquire into the matter before it and inform itself of any matter relating to the inquiry in any way it considers appropriate.\textsuperscript{41} Most hearings are open to the public.\textsuperscript{42}

A key aspect of the Court’s jurisdiction is deciding references of the mental condition of persons.\textsuperscript{43}

There are a number of ways in which a person’s mental condition relating to an offence may be referred to the Mental Health Court. These are discussed below.

If the Supreme or District Court orders a plea of not guilty

If at:

\begin{itemize}
  \item the trial of a person charged with an indictable offence\textsuperscript{44} who pleads guilty; or
  \item the sentencing of a person who has pleaded guilty to an indictable offence,
\end{itemize}

it is alleged or appears that the person is mentally ill, or was or may have been mentally ill when the alleged offence was committed, the Supreme or District Court before which the person appears may order that a plea of not guilty be entered for the person. On making such an order, the Court must adjourn the trial and refer the matter of the person’s mental condition relating to the offence to the Mental Health Court.\textsuperscript{45}

\begin{itemize}
  \item \textit{Mental Health Act 2000 (Qld)} (Qld), ch 11.
  \item \textit{Mental Health Act 2000 (Qld)}, s 382.
  \item \textit{Mental Health Act 2000 (Qld)}, s 384.
  \item \textit{Mental Health Act 2000 (Qld)}, s 383(2).
  \item \textit{Mental Health Act 2000 (Qld)}, s 413.
  \item \textit{Mental Health Act 2000 (Qld)}, s 383(1)(b).
  \item Indictable offences are criminal offences of a more serious nature tried before a jury in either the District or Supreme Courts. Examples include murder, rape and break and enter.
  \item \textit{Mental Health Act 2000 (Qld)}, ss 61-62.
\end{itemize}
If an involuntary patient is, or has been, charged with an offence

If a person is charged with a simple\textsuperscript{46} or indictable offence and they either already are, or later become, the subject of an involuntary treatment or forensic order, a procedure applies for:

- notice of the happening of this circumstance to be provided to certain persons including the Director of Mental Health, the administrator of the patient’s treating health service, the chief executive of the Department of Justice and Attorney-General, the Mental Health Review Tribunal (if the person is a forensic patient), the registrar of the court before which the person is to appear for the offence and the Commissioner of the Police Service or the Director of Public Prosecutions (as appropriate);
- the patient to be examined by a psychiatrist, who must give a report on the examination;
- consideration by the Director of Mental Health of the available information (including the psychiatrist’s report) and referral of the matter of the patient’s mental condition relating to the offence to either:
  - the Attorney-General, if the offence is a simple offence, or an indictable offence provided the Director is satisfied it is not of a serious nature having regard to any damage, injury or loss caused; or
  - the Mental Health Court, in any other case.\textsuperscript{47}

If the matter is referred to the Attorney-General, the Attorney-General must have regard to:

- the psychiatrist’s report;
- any recommendations of the Director of Mental Health;
- the nature of the offence;
- information about the patient’s mental condition both when the offence was committed and currently and, in particular, the patient’s fitness for trial; and
- information about the likely effect of a continuation of proceedings on the patient’s mental condition.\textsuperscript{48}

The Attorney-General must then decide that:

- proceedings against the patient for the offence are to continue or be discontinued; or

\textsuperscript{46} A less serious offence which is dealt with before a Magistrate in the Magistrates Court.

\textsuperscript{47} Mental Health Act 2000 (Qld), ss 236-242.

\textsuperscript{48} Mental Health Act 2000 (Qld), s 247(4).
the matter of the patient’s mental condition is to be referred to the Mental Health Court.\textsuperscript{49}

References to the Mental Health Court generally

If there is reasonable cause to believe that a person alleged to have committed an indictable offence:

\begin{itemize}
  \item is mentally ill, or was mentally ill when the alleged offence was committed; or
  \item has an intellectual disability of a degree that issues of unsoundness of mind, diminished responsibility or fitness for trial should be considered by the Mental Health Court,
\end{itemize}

the matter of the person’s mental condition relating to the offence may be referred to the Mental Health Court by a number of persons including the person or their legal representative, the Attorney-General, the Director of Public Prosecutions, or the Director of Mental Health (if the person is receiving treatment for mental illness).\textsuperscript{50}

3.3.2 Inquiries on references to Mental Health Court

Currently the average time between the referral of a matter to the Mental Health Court and its subsequent hearing by the Court is ten months.\textsuperscript{51}

Decisions regarding soundness of mind or diminished responsibility

On the hearing of a reference of a person’s mental condition relating to an offence, the Mental Health Court must:

\begin{itemize}
  \item decide whether the person the subject of the reference was of ‘unsound mind’ when the alleged offence was committed; and
  \item if the alleged offence is murder and the Court decides the person was not of unsound mind, decide whether the person was of ‘diminished responsibility’ when the alleged offence was committed.\textsuperscript{52}
\end{itemize}

‘Unsound mind’ means “the state of mental disease or natural mental infirmity described in the Criminal Code, section 27, but does not include a state of mind

\textsuperscript{49} Mental Health Act 2000 (Qld), s 247(1).

\textsuperscript{50} Mental Health Act 2000 (Qld), ss 256-257.

\textsuperscript{51} Discussion Paper, p 36.

\textsuperscript{52} Mental Health Act 2000 (Qld), s 267.
resulting, to any extent, from intentional intoxication or stupefaction alone or in combination with some other agent at or about the time of the alleged offence”.  

Section 27 of the Criminal Code (Qld) states that a person is not criminally responsible for an offence if, at the time of the offence, the person was in such a state of mental disease or natural mental infirmity that they were deprived of the capacity to:

- understand what they were doing;
- control their actions; or
- know that they should not do the act or make the omission that constitutes the offence.

‘Mental disease or natural mental infirmity’ does not include a personality disorder or a situation where the mental disorder was caused by rage, jealousy or intoxication.  

‘Diminished responsibility’ means “the state of abnormality of mind described in section 304A of the Criminal Code”, namely:

... such a state of abnormality of the mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair the person’s capacity to understand what the person is doing, or the person’s capacity to control the person’s actions, or the person’s capacity to know that the person ought not to do the act or make the omission... .

When decision regarding soundness of mind must not be made

The Mental Health Court must not make a decision regarding whether a person was of unsound mind or diminished responsibility if it is satisfied that there is reasonable doubt that the person committed the alleged offence.  

In addition, the Court must not make a decision if it is satisfied a fact that is substantially material to the opinion of an expert witness is so in dispute that it would be unsafe to make the decision. In this instance, a ’substantially material fact’ may be:

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53 Mental Health Act 2000 (Qld), schedule 2.
54 Promoting Balance in the Forensic Mental Health System, Final Report, p 32.
55 Mental Health Act 2000 (Qld), schedule 2.
56 Mental Health Act 2000 (Qld), s 268(1)-(2). An exception to this is if the doubt exists only as a consequence of the person’s mental condition.
• something that happened before, at the same time as, or after the alleged offence was committed; or
• something about the person’s past or present medical or psychiatric treatment.  

**Decisions regarding fitness to stand trial**

If the Mental Health Court:
• decides a person was not of unsound mind; or
• was preventing from making a decision regarding soundness of mind,
it must decide whether the person is fit to stand trial for the alleged offence.  

A person is ‘fit for trial’ if the person is “fit to plead at the person’s trial and to instruct counsel and endure the … trial, with serious adverse consequences to the person’s mental condition unlikely”.  

If the Mental Health Court decides that a person is unfit for trial, it must also decide whether that situation is of a permanent or temporary nature.  

**3.3.3 Status of proceedings for alleged offence following Mental Health Court decision**

Following a decision of the Mental Health Court regarding the soundness of mind of a person when an alleged offence was committed, or their fitness to stand trial for the offence, the proceedings for the offence in the criminal courts may be:
• continued;
• stayed; or
• discontinued.

**Continuing proceedings and custody**

If the Mental Health Court decides that a person alleged to have committed an offence is not of unsound mind and is fit for trial, the Court must order that

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57 Mental Health Act 2000 (Qld), s 269.
58 Mental Health Act 2000 (Qld), s 270.
59 Mental Health Act 2000 (Qld), schedule 2.
60 Mental Health Act 2000 (Qld), s 271.
proceedings against the person for the offence be continued.\textsuperscript{61} It may also order that the person be:

- remanded in custody or that bail be granted or enlarged; or
- detained in a stated authorised mental health service until the person is granted bail or brought before a court for continuing the proceeding.\textsuperscript{62}

In 2004-05, about 38\% of findings of the Mental Health Court resulted in matters being returned to the criminal courts.\textsuperscript{63}

**Staying proceedings**

If the Mental Health Court decides that a person charged with an offence is not of unsound mind but is unfit for trial on a temporary basis, proceedings for the offence are stayed until, on review, the Mental Health Review Tribunal decides that the person is fit for trial.\textsuperscript{64}

**Discontinuing proceedings**

If the Mental Health Court decides that:

- a person charged with an offence was of unsound mind when the alleged offence was committed, proceedings against the person for the offence are discontinued and further proceedings must not be taken against them for the act or omission constituting the offence;\textsuperscript{65}
- a person charged with murder was of diminished responsibility when the alleged offence was committed, proceedings against the person for murder are discontinued but proceedings may be continued for another offence constituted by the same act or omission;\textsuperscript{66} and
- a person charged with an offence is not of unsound mind but is unfit for trial on a permanent basis, proceedings against the person for the offence are

\textsuperscript{61}ment 272.\textsuperscript{62}ment 273.\textsuperscript{63}Promoting Balance in the Forensic Mental Health System, Final Report, p 103.\textsuperscript{64}ment 280.\textsuperscript{65}ment 281(1). Note, however, that this is subject to the person exercising their right to elect to be brought to trial for the alleged offence (ment 281(2)).\textsuperscript{66}ment 282.
discontinued and further proceedings must not be taken against them for the same act or omission.67

3.4 FORENSIC PATIENTS

3.4.1 Making of forensic orders by Mental Health Court

The Mental Health Court may make a ‘forensic order’ that a person be detained in a stated authorised mental health service for involuntary treatment or care if the Court decides that a person charged with an indictable offence:
- was of unsound mind when the alleged offence was committed; or
- is unfit for trial for the alleged offence on a permanent basis.69

In deciding whether to make the order, the Court must have regard to:
- the seriousness of the offence;
- the person’s treatment needs; and
- the protection of the community.70

In the case of a person who is unfit for trial on a temporary basis, the Mental Health Court must make a forensic order that the person be detained in a stated authorised mental health service for involuntary treatment or care.71

Under a forensic order:
- the patient may be detained in an authorised mental health service until they cease to be a forensic patient;72
- a treatment plan must be prepared for the patient;73 and

67 Mental Health Act 2000 (Qld), s 283.

68 The Director of Mental Health may, by gazette notice, declare a mental health service, or part thereof, providing treatment and care of people who have mental illnesses to be an ‘authorised mental health service’ (Mental Health Act 2000 (Qld), s 495).

69 Mental Health Act 2000 (Qld), s 288(1)-(2).

70 Mental Health Act 2000 (Qld), s 288(3).

71 Mental Health Act 2000 (Qld), s 288(4).

72 Mental Health Act 2000 (Qld), s 293.

73 Mental Health Act 2000 (Qld), s 296.
• an authorised psychiatrist must carry out regular assessments of the patient.\textsuperscript{74}

At 1 December 2006, there were 461 patients in Queensland on a forensic order.\textsuperscript{75}

### 3.4.2 If a forensic order is not made

If the Mental Health Court does not make a forensic order for a person charged with a personal offence\textsuperscript{76} who was of unsound mind when the alleged offence was committed or is unfit for trial for the alleged offence on a permanent basis, the Court may make a ‘non-contact order’ against the person requiring one or more of the following:

• the person not contact the victim of the alleged offence or, if the victim is deceased as a result of the offence, a relative of the victim, for a stated time;
• the person not contact someone who was with the victim when the alleged offence was committed (‘associate’), for a stated time;
• the person not go to a stated place, or within a stated distance of a stated place, for a stated time.\textsuperscript{77}

The time stated in such an order must be no longer than two years.\textsuperscript{78}

A non-contact order must not be made against a person unless the Court “is satisfied it is appropriate in all the circumstances”. In making this decision, the Mental Health Court must consider:

• the views of:
  – the victim of the alleged offence, or a relative if the victim is deceased as a result of the alleged offence;
  – an associate; and
  – the person themselves;
• the viability of making the order in circumstances in which contact may be unavoidable;

\textsuperscript{74} Mental Health Act 2000 (Qld), s 298.

\textsuperscript{75} Promoting Balance in the Forensic Mental Health System, Final Report, p 103.

\textsuperscript{76} ‘Personal offence’ means an indictable offence committed, or alleged to have been committed, against the person of someone (Mental Health Act 2000 (Qld), schedule 2).

\textsuperscript{77} Mental Health Act 2000 (Qld), ss 313A and 313B.

\textsuperscript{78} Mental Health Act 2000 (Qld), s 313B(2).
• the person’s criminal history; and
• the terms of any other order relating to the person and the victim, associate or relative, such as an order under the Family Law Act 1975 (Cth) or the Domestic Violence and Family Protection Act 1989 (Qld). 79

If the Mental Health Court decides to make a non-contact order against a person, a copy of the order and written reasons for making it must be given to the Commissioner of the Police Service and also to persons in whose favour the order is made and the person against whom the order is made. 80

3.4.3 Limited community treatment for forensic patients

Under a forensic order for a patient, the Mental Health Court may decide to do one or more of the following:
• order that the patient have ‘limited community treatment’ subject to the reasonable conditions the Court considers appropriate;
• approve limited community treatment for the patient subject to the reasonable conditions the Court considers appropriate;
• revoke an order or approval for limited community treatment for the patient. 81

‘Limited community treatment’, for a patient, means “undertaking some treatment or rehabilitation in the community”. 82 It is “designed to provide an opportunity for recovering patients to make a supported transition back to the community”. 83

A condition attaching to an order or approval for limited community treatment may be that the patient not contact a stated person, such as a victim of an offence they are alleged to have committed. 84 Other possible conditions include where the patient can go, where they can live, who should accompany them and when they must return. 85

79 Mental Health Act 2000 (Qld), s 313C.
80 Mental Health Act 2000 (Qld), s 313D.
81 Mental Health Act 2000 (Qld), s 289(1).
82 Mental Health Act 2000 (Qld), schedule 2.
84 Mental Health Act 2000 (Qld), s 289(2).
In deciding whether to order or approve limited community treatment, the Mental Health Court must have regard to:

- the patient’s mental state and psychiatric history;
- the offence leading to the making of the forensic order;
- the patient’s social circumstances; and
- the patient’s response to treatment and willingness to continue treatment.\(^{86}\)

Limited community treatment must not be ordered or approved unless the Court is satisfied the patient does not represent an unacceptable risk to the safety of the patient or others, having regard to the patient’s mental illness or intellectual disability.\(^{87}\)

For a patient who is unfit for trial on a temporary basis, limited community treatment must not be ordered or approved unless the Mental Health Court is satisfied that there is not an unacceptable risk that the patient would, if the treatment were undertaken in the community, not return to the authorised mental health service when required, commit an offence, or endanger the safety or welfare of the patient or others.\(^{88}\)

Limited community treatment was described by the Review as follows:

> [Limited community treatment] usually occurs in a graduated way. Initially, a patient may be allowed escorted leave on the grounds of the authorised mental health service, graduating, with appropriate approval, to unescorted leave outside the grounds and, if appropriate, residence in the community. Due to the nature of their mental illness, some patients’ access to the community remains very limited. These decisions are based on a range of factors related to the risk that the patient represents to himself or herself and the wider community.\(^{89}\)

The Review recognised that the approval of limited community treatment for violent offenders “has attracted negative publicity and highlighted community concerns about whether certain forensic patients should have [access to such treatment], and if so, when and where it should take place”.\(^{90}\)

The Review acknowledged these concerns:

\(^{86}\) *Mental Health Act 2000* (Qld), s 289(6).

\(^{87}\) *Mental Health Act 2000* (Qld), s 289(4).

\(^{88}\) *Mental Health Act 2000* (Qld), s 289(5).


\(^{90}\) Promoting Balance in the Forensic Mental Health System, Final Report, p 110.
Public concern has been expressed about a number of high profile cases where forensic patients have had [limited community treatment] approved for community visits or to live in the community. These concerns should not be lightly dismissed. The expression of these concerns is an indication of the way a few high profile cases can affect public confidence in the provision of forensic mental health services.91

3.5 MENTAL HEALTH REVIEW TRIBUNAL

The Mental Health Review Tribunal is established under the Act92 and consists of the president of the Tribunal and other members.93

The jurisdiction of the Tribunal includes:
- reviewing the application of treatment criteria for patients;94
- reviewing the mental condition of forensic patients;
- reviewing the fitness for trial of persons unfit for trial on a temporary basis; and
- deciding applications for notification orders.95

Tribunal hearings are generally not open to the public.96

3.5.1 Reviews of mental condition of forensic patients

The Mental Health Review Tribunal must review a forensic patient’s mental condition:
- within six months after the forensic order is made, and afterwards at least every six months; and
- on application for the review by either the patient, a person on behalf of the patient or the Director of Mental Health.97

92 Mental Health Act 2000 (Qld), ch 12.
93 Mental Health Act 2000 (Qld), s 436.
94 ‘Treatment criteria’ is defined in Mental Health Act 2000 (Qld), s 14.
95 Mental Health Act 2000 (Qld), s 437. ‘Notification orders’ are discussed in section 3.5.2 of this Research Brief.
96 Mental Health Act 2000 (Qld), s 460.
97 Mental Health Act 2000 (Qld), ss 200-201.
The Tribunal must conduct a hearing for the review. As already mentioned, this hearing is not open to the public; however, the patient and the Attorney-General have a right to appear in person at the hearing.

On the review, the Tribunal must decide whether to confirm or revoke the forensic order for the patient. If it confirms the order, it may decide to make a number of other orders, including:

- that the patient have limited community treatment subject to the reasonable conditions the Tribunal considers appropriate;
- that limited community treatment for the patient subject to the reasonable conditions the Tribunal considers appropriate is approved; or
- that an order or approval for limited community treatment is revoked.

In making such a decision, the Tribunal must have regard to:

- the patient’s mental state and psychiatric history;
- each offence leading to the patient becoming a forensic patient;
- the patient’s social circumstances; and
- the patient’s response to treatment and willingness to continue treatment.

The Tribunal must not revoke a forensic order, or order or approve limited community treatment, unless it is satisfied “the patient does not represent an unacceptable risk to the safety of the patient or others, having regard to the patient’s mental illness or intellectual disability”.

### 3.5.2 Notification orders

In relation to forensic patients, the Mental Health Review Tribunal may make an order (‘notification order’) about a patient that a person be given notice of various matters including:

- when a review for the patient is to be carried out; and

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98 Mental Health Act 2000 (Qld), s 200(6).

99 Mental Health Act 2000 (Qld), s 450. The role of the Attorney-General at this hearing is discussed in section 3.7 of this Research Brief.

100 Mental Health Act 2000 (Qld), s 203(2).

101 Mental Health Act 2000 (Qld), s 203(6).

102 Mental Health Act 2000 (Qld), s 204(1).
• a decision of the Tribunal at a six-monthly review of the mental condition of the patient.103

An application for a notification order about a forensic patient will be refused if the Tribunal is satisfied that it is frivolous or vexatious.104 In addition, the Tribunal must not make a notification order unless it is satisfied that the person for whom the order is being made has a ‘sufficient personal interest’ in receiving the notice. Examples of persons satisfying this requirement include victims or, if they are deceased as a result of the alleged offence, their relatives.105

In deciding whether a person has a sufficient personal interest, the Tribunal must consider:

• whether the patient represents a risk to the safety of the person;
• whether it is likely that the patient will come into contact with the person; and
• the nature and seriousness of the offence leading to the patient becoming a forensic patient.106

In deciding whether to make a notification order, the Tribunal must consider:

• the grounds of an application for the order;
• whether, as a consequence of the order, the patient’s treatment or rehabilitation is likely to be adversely affected;
• the patient’s views; and
• other matters the Tribunal considers appropriate.107

The applicant for a notification order has a right to appear in person at the hearing by the Tribunal of the application for the order, as does the patient.108

Since 2002, there have been 23 applications for a notification order, 18 of which were granted.109
Persons who receive information under a notification order are prohibited from publishing the information to others. A maximum penalty of two years’ imprisonment or 200 penalty units ($15,000) applies for a contravention.\textsuperscript{110}

3.6 **ROLE OF VICTIMS IN MENTAL HEALTH COURT AND MENTAL HEALTH REVIEW TRIBUNAL PROCEEDINGS**

3.6.1 *Provision in the Act for victims*

A number of provisions of the Act are directed at providing victims of forensic patients and their families with an opportunity to put their views forward and have them considered by the Mental Health Court and the Mental Health Review Tribunal.

The Review stated that this occurs “in a manner roughly equivalent to the opportunities provided to victims to make a victim impact statement at the sentencing of an offender in a criminal court”.\textsuperscript{111}

In summary, a victim can:

- provide information to the Mental Health Court that is relevant to its decision, unless the information is already before the Court;
- submit material to the Mental Health Review Tribunal for consideration in cases where the information is relevant to the decision; and
- apply for a notification order.\textsuperscript{112}

*Who is a ‘victim’?*

‘Victim’, of an alleged offence, is currently defined in a relatively narrowly way as “the person against whom the alleged offence is alleged to have been committed”.\textsuperscript{113} In comparison, the *Criminal Offence Victims Act 1995* (Qld), for example, defines the term broadly:

\textsuperscript{110} *Mental Health Act 2000* (Qld), s 527. *Penalties and Sentences Act 1992* (Qld), s 5.

\textsuperscript{111} Promoting Balance in the Forensic Mental Health System, Final Report, p 48.

\textsuperscript{112} These points are summarised from Promoting Balance in the Forensic Mental Health System, Final Report, pp 48-49.

\textsuperscript{113} *Mental Health Act 2000* (Qld), schedule 2.
A victim is a person who has suffered harm from a violation of the State’s criminal laws:

(a) because a crime is committed that involves violence committed against the person in a direct way;

(b) because the person is a member of the immediate family of, or is a dependant of, a victim mentioned in paragraph (a); or

(c) because the person has directly suffered the harm in intervening to help a victim mentioned in paragraph (a).\textsuperscript{114}

Despite this narrow meaning, the Act does extend various entitlements to a wider group of people than simply the person against whom the offence was alleged to have been committed. For example, notification orders may be granted in favour of persons with a ‘sufficient personal interest’ in the matter, and material may be submitted to the Mental Health Court and the Mental Health Tribunal by any person on the basis of its relevancy to the matter.

3.6.2 Proposed amendment

Clause 43 proposes a new definition for ‘victim’ and the insertion of new terms for ‘direct victim’, ‘immediate family member’ and ‘direct victim’.\textsuperscript{115} These amendments seek to “recognise the emphasis placed by the [Review] on the broader group of people that may suffer harm from the alleged criminal actions of a person suffering a mental illness”.\textsuperscript{116}

The proposed new definitions are:

‘Victim’, of an alleged offence, means:

(a) a direct victim of the alleged offence; or

(b) an immediate family member of a direct victim of the alleged offence.\textsuperscript{117}

‘Direct victim’, of an alleged offence, means a person against whom the alleged offence was allegedly committed.

\textsuperscript{114} Criminal Offence Victims Act 1995 (Qld), s 5.

\textsuperscript{115} Mental Health Act 2000 (Qld), schedule 2. Note that clauses 30, 31, 32, 37 and 38 propose consequential amendments to sections 223, 228B, 228C, 313B and 313C respectively to give effect to these new definitions.

\textsuperscript{116} Explanatory Notes, p 28.

\textsuperscript{117} The amended definition is adopted from the definition of victim in the Criminal Offences Victims Act 1996 (Explanatory Notes, p 28).

3.6.3 Submissions to Mental Health Court and Mental Health Review Tribunal

Submissions to Mental Health Court

The Act provides for the submission to, and the consideration by, the Mental Health Court of material by persons who are not parties to the hearing (‘non-parties’).\(^{118}\)

The effect is that, in making a decision on a reference concerning a person’s soundness of mind or fitness for trial, the Court may receive in evidence material submitted by a person who is a ‘non-party’ if:

- the material is sworn and not otherwise already before the Court; and
- the Court is satisfied that the material is relevant to the decision.\(^{119}\)

By way of example, the provision states that ‘relevant material’ would include a statement by a victim that is not otherwise before the Court about the mental condition of the alleged offender when the offence was committed or the risk that the victim believes the alleged offender represents to them or their family.\(^{120}\)

Currently, in its decision on the reference, the Mental Health Court must give reasons for receiving in evidence, or refusing to receive in evidence, material submitted to the Court under in this manner.\(^{121}\)

Submissions to Mental Health Review Tribunal

The Act also provides that in making a decision in a proceeding, the Mental Health Review Tribunal may take into account material submitted by a person who is not a party to the proceeding if:

- the material is not otherwise before the Tribunal; and

\(^{118}\) Mental Health Act 2000 (Qld), s 284. Use of the ‘non-party’ terminology is discussed below and in section 3.6.4 of this Research Brief.

\(^{119}\) Mental Health Act 2000 (Qld), s 284(1).

\(^{120}\) Mental Health Act 2000 (Qld), s 284(1).

\(^{121}\) Mental Health Act 2000 (Qld), s 285.
• the Tribunal is satisfied that the material is relevant to the decision.\textsuperscript{122}

In deciding the weight to be placed on the material, the Tribunal must take into account:
• whether the person the subject of the proceeding has had sufficient opportunity to examine and reply to the material;
• material previously submitted by the person;
• for a forensic patient – the circumstances of the offences leading to the patient becoming a forensic patient; and
• any other matter the Tribunal considers appropriate.\textsuperscript{123}

If a non-party submits material to the Tribunal, the Tribunal must, after making its decision, and if asked, give reasons for taking or not taking into account the material.\textsuperscript{124}

\textit{Review comments on victim submissions}

In 2004-05, only three submissions were made by victims for 220 references heard by the Mental Health Court. In 2005-06, five submissions were made by victims for 217 references heard by the Court.\textsuperscript{125}

Some of the experiences of victims in relation to the Mental Health Court and the Mental Health Review Tribunal which were provided to the Review included:
• most feeling that their experiences and views were not acknowledged;
• most believing their rights and needs were devalued and the rights and needs of the defendant were viewed as much more important;
• some feeling that they were discouraged from attending the Mental Health Court hearing;
• others commenting on the lack of acknowledgment of the situation of victims;
• some feeling their central involvement in the offence which resulted in the Mental Health Court hearing was discounted and left feeling distressed by the depersonalisation of the victim that occurred at the hearing; and

\footnotesize{\textsuperscript{122} Mental Health Act 2000 (Qld), s 464(1)-(2). Note that, in making non-contact orders, the Tribunal must take into account the material providing the victim’s etc views (see section 3.4.2 of this Research Brief).

\textsuperscript{123} Mental Health Act 2000 (Qld), s 464(3).

\textsuperscript{124} Mental Health Act 2000 (Qld), s 465.

\textsuperscript{125} Discussion Paper, p 40.}
• the victims of very disturbing and violent crimes generally feeling unacknowledged, unsupported, uninformed and unable to meaningfully contribute to the process. 126

The Review made the following statement about the importance of victims having an opportunity to convey their experiences to the Court and the Tribunal:

*Many victims have a fundamental need for their own recovery to tell their story and for the impact of the offence on them to be acknowledged and affirmed. The introduction of Victim Impact Statements in the criminal courts and the victim provisions in the Mental Health Act 2000 are an attempt to meet this need in the criminal justice system and the forensic mental health system.* 127

The Review was, however, critical of submissions by victims and persons associated with victims being referred to as ‘non-party submissions’. 128

*The Mental Health Act 2000 refers to material submitted by ‘non-parties’. This has resulted in the common use of the expression ‘non-party submission’. It has been suggested by a number of stakeholders that use of the term ‘non-party’ makes victims feel marginalised in the proceedings and that their experiences and interests are peripheral.*

The Review also noted that, in terms of submissions to the Mental Health Court (and also the Mental Health Review Tribunal), the Act does not contain a statement about the purpose of these submissions:

*The Review considers it would be helpful both to the Court and the victim or interested person for the Act to contain more guidance on the purpose of the statement and on what matters the statement should include. The views of the victim or interested person on matters relevant to the decisions of the Court should be the focus of the statement. The ‘views’ of a victim or interested person will incorporate both information and representations which the victim or interested person may wish to provide or make.*

*The amendment of [the Act] to outline the purpose of a statement and what it may contain will remove the need to include an explicit test of relevance. In addition, the new provision should not prohibit the inclusion of information already before the Court.* 129

In terms of submissions to the Mental Health Review Tribunal specifically, some of the concerns victims have with making such submissions are that:

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126 These points are taken from Promoting Balance in the Forensic Mental Health System, Final Report, pp 40-42.


• although they might receive notification about the occurrence of the review, they are not informed about the matters to be determined at the review and find it difficult to prepare meaningful submissions; and
• as a result, some victims feel compelled to lodge submissions for each review and having to do so every six months is re-traumatising and stressful.  

The Review also recognised the importance of victims and other persons who make a submission to the Mental Health Court (and to the Mental Health Review Tribunal) being provided with reasons for their material being received, or refused to be received, in evidence:

This is an important provision for victims – it is a formal way for their views as well as the harm that was done to them to be acknowledged, particularly as the main focus of proceedings in the Court is on the mental state of the defendant rather than the facts of the case, which have already been agreed upon by the parties.  

3.6.4 Recommendations and proposed amendments

Recommendations 3.18, 3.19 and 3.20 of the Review are directed at clarifying and improving the provision of victim impact statements to the Mental Health Court. Recommendations 3.41, 3.42 and 3.43 are directed at making similar changes in respect of these statements in the Mental Health Review Tribunal.

Rephrasing references to ‘non-party’ submissions

Recommendation 3.18 provides:

That the [Act] be amended to delete reference to the term ‘non-party’ and instead refer to a statement by a victim or an interested person, in recognition of the particular position of victims of crime.  

Similarly, recommendation 3.41 provides:

That, in relation to Mental Health Review Tribunal proceedings, the [Act] be amended to delete reference to the term ‘non-party’ and instead refer to a statement by a victim or interested person, in recognition of the particular position of victims of crime.  

130 Promoting Balance in the Forensic Mental Health System, Final Report, p 41.


133 Promoting Balance in the Forensic Mental Health System, Final Report, p 75.
The Bill seeks to implement these recommendations by proposing amendments to various provisions to replace references to submissions by ‘non-parties’ with references to submissions by ‘victims or concerned persons’.\footnote{See clauses 33, 34, 35 and 36, in relation to submissions to the Mental Health Court, and clauses 41 and 42 in relation to submissions to the Mental Health Review Tribunal.}

Stating a purpose for the submissions to the Mental Health Court and the Mental Health Review Tribunal

\textbf{Recommendation 3.19} provides:

\textit{That ... the [Act] be amended to provide that a victim or an interested person may make a statement to the Mental Health Court for the purpose of assisting the Court in making a decision on a reference, including a decision:}

\begin{itemize}
  \item whether or not the person was of unsound mind or is unfit for trial;
  \item whether or not to make a forensic order;
  \item whether to order, approve or revoke limited community treatment;
  \item as to any conditions the Court may impose on an order for limited community treatment.\footnote{Promoting Balance in the Forensic Mental Health System, Final Report, p 63.}
\end{itemize}

In seeking to implement this recommendation, \textbf{clause 34} proposes amendments\footnote{These amendments are proposed to the \textit{Mental Health Act 2000} (Qld), s 284.} to:

\begin{itemize}
  \item remove the requirement of relevancy of the material to be submitted, and the requirement that the material not already be part of the evidence before the Court;
  \item state that the material may be submitted by a victim of the alleged offence or another person who is not a party to the hearing of the reference; and
  \item specifically state that the purpose of the material being submitted to the Court is to help the Court in making a decision on a reference, including, for example, deciding:
    \begin{itemize}
      \item whether the person to whom the reference relates was of unsound mind when the alleged offence was committed;
      \item whether the person to whom the reference relates is unfit for trial;
      \item whether to make a forensic order;
      \item whether to order, approve or revoke limited community treatment; or
    \end{itemize}
\end{itemize}
what conditions the court should impose on an order or approval for limited community treatment.

Recommendation 3.42, in a similar manner, provides:

*That ... the [Act] be amended to provide that a victim of crime or other interested person may make a statement to the Mental Health Review Tribunal for the purpose of assisting the Tribunal in making a decision on a review for a forensic patient, including a decision:

− whether to revoke a forensic order;
− whether to order, approve or revoke limited community treatment;
− as to any conditions the Tribunal may impose on an order for limited community treatment.*

Clause 41 seeks to implement this recommendation by proposing amendments similar to those proposed in relation to recommendation 3.19. In particular, it will be specifically stated that the purpose of submitting the material to the Mental Health Review Tribunal is to help the Tribunal in making a decision in a proceeding, including, for example:

- whether to revoke a forensic order;
- whether to order, approve or revoke limited community treatment; or
- what conditions the Tribunal should impose on an order or approval for limited community treatment.

Guidance on the content of submissions to the Mental Health Court and the Mental Health Review Tribunal

Recommendation 3.20 provides:

*That the [Act] be amended to provide that a statement by a victim or an interested person contain the views of the victim or interested person on:

− the conduct of the person the subject of the proceeding and the impact of that conduct on the victim or the interested person;
− the risk the victim or interested person believes the person the subject of the proceeding represents to the victim or the interested person or another person;
− any matters relevant to the decisions the Court may make.
*The Court should give the statement such weight as it considers appropriate.*

137 Promoting Balance in the Forensic Mental Health System, Final Report, p 75.

138 These amendments are proposed to the *Mental Health Act 2000* (Qld), s 464.

139 *Mental Health Act 2000* (Qld), proposed new section 464(1A).

140 Promoting Balance in the Forensic Mental Health System, Final Report, p 63.
Similarly, **recommendation 3.43** provides:

> That the [Act] be amended to provide that a statement by the victim or interested person is to contain the views of the victim or interested person on:
> 
> − the conduct of the person the subject of the proceeding and the impact of that conduct on the victim or interested person;
> 
> − the risk the victim or interested person believes the person subject to the proceeding represents to the victim or interested person or another person;
> 
> − any matters relevant to the decisions that the Mental Health Tribunal may make.

*The Tribunal should give the statement such weight as it considers appropriate.*

**Clause 34** seeks to implement recommendation 3.20 by including a statement that the material submitted by the person may include the views of the person about:

- the behaviour of the person to whom the reference relates and the impact of the behaviour on the person submitting the material;
- the risk the person submitting the material believes the person to whom the reference relates represents to the person submitting the material; or
- any other matter relevant to the decision on the reference.

In addition, **clause 34** proposes to include a statement that “if the court takes the material into account, it may place the weight it considers appropriate on the material”.

**Clause 41** proposes similar amendments in terms of the Mental Health Review Tribunal.

**Reasons for Mental Health Court taking, or not taking, into account submissions**

**Recommendation 3.22** provides that:

> That ... the [Act] be amended to require the Mental Health Court, in its decision on a reference, to give reasons for:
> 
> − taking into account a victim statement or an interested person statement and how the statement was taken into account;
> 
> − refusing to take into account a victim statement or an interested person statement.

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141 Promoting Balance in the Forensic Mental Health System, Final Report, p 75.

142 *Mental Health Act 2000* (Qld), **proposed new s 284(1B)**.

143 *Mental Health Act 2000* (Qld), **proposed new s 284(1C)**.

144 *Mental Health Act 2000* (Qld), **proposed new ss 464(1B) and (1C)**.

145 Promoting Balance in the Forensic Mental Health System, Final Report, p 64.
Clause 35 seeks to implement this recommendation by stating that:

- the Mental Health Court must, as soon as practicable after making its decision on the reference, give the person who submitted the material and persons who were parties to the hearing of the reference:
  - reasons for taking the material into account or refusing to take the material into account; and
  - if the material was taken into account by the Court – a statement about how it was taken into account;
- however, a confidentiality order of the Court may displace the requirement to give the reasons or statement to the person to whom the reference relates.\(^\text{146}\)

**Ability for copy of submission to Mental Health Court to be provided to authorised mental health service and Mental Health Review Tribunal**

The Review noted that:

> In compiling [a report on the patient], the treating team do not receive information about the victim’s concerns or needs.

> Often, the treating team will have limited access to information placed before the Mental Health Court and may not have sufficient information about the details of the original offence.

> [A report on an earlier review of the Act] recommended that victim statements provided to the Mental Health Court should become part of the patient’s record. There does not appear to be any process in place to ensure this occurs. The Mental Health Court registry has confirmed that it does forward any victim statements to the Mental Health Review Tribunal but not to treating teams. However, there is no explicit power in the Act to enable the registry to provide victim statements to either the Tribunal or the treating teams.

> Clinicians have told the Review that information from the victim could assist the treating team when considering [limited community treatment] options. If the treating team is aware of specific issues that the victim is concerned about, the treating team will be in a better position to request that appropriate conditions be placed on the patient’s [limited community treatment]. On the other hand, some victims who are concerned about their safety may not feel comfortable sharing personal information with the patient’s treating team.\(^\text{147}\)

**Recommendation 3.23** provides:

> That the [Act] be amended to enable the Mental Health Court registry to provide a copy of any victim or interested person statement to the authorised mental health

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\(^{146}\) *Mental Health Act 2000 (Qld), proposed new s 285.*

\(^{147}\) Promoting Balance in the Forensic Mental Health System, Final report, p 64.
service and to the Mental Health Review Tribunal, unless the court orders to the contrary. 148

In implementing this recommendation, clause 36 proposes to insert a new provision which states as follows:

286A Notice about material submitted by victim or concerned person
(a) This section applies if, under section 284(1), a victim of an alleged offence to which a reference relates or a concerned person submits material to the Mental Health Court.
(b) Subject to subsection (3), the registrar may after the court makes its decision on the reference give a copy of the material to:
   (a) the administrator of the authorised mental health service responsible for the care and treatment of the person to whom the reference relates; or
   (b) the tribunal.
(3) The court may order that a copy of the material not be given under subsection (2).
(4) If the court makes an order under subsection (3), the court must in its decision on the reference give reasons for making the order.

3.7 ROLE OF ATTORNEY-GENERAL AT MENTAL HEALTH REVIEW TRIBUNAL REVIEWS

As noted above, 149 the Attorney-General has a right to appear at the hearing of a review by the Mental Health Review Tribunal into the mental condition of a forensic patient or the mental condition of persons who are unfit for trial on a temporary basis. 150

The Review stated that:

... the Act does not specify the role of the Attorney-General in these proceedings. However, the role of the Attorney-General is fundamental and derives from the traditional functions of the Attorney-General at common law. These functions include acting to protect the public interest as a representative of the Crown. In doing so, the Attorney-General must balance a range of competing public interests. In the context of Tribunal proceedings for a review of a forensic order, the Attorney-General must weigh up the public interest in the appropriate treatment and rehabilitation of people with mental illness and the protection of their rights and the public interest in the protection of the community.

148 Promoting Balance in the Forensic Mental Health System, Final Report, p 64.

149 See section 3.5.1 of this Research Brief.

150 Mental Health Act 2000 (Qld), s 450.
For the purpose of clarity, it would be beneficial for the Act to include a brief statement of this traditional role.151

3.7.1 Recommendation and proposed amendment

Recommendation 4.22 provides that:

That the [Act] be amended to provide that the role of the Attorney-General in the Mental Health Review Tribunal is to represent the public interest.152

Clause 40 proposes to implement this recommendation by stating that in circumstances where the Attorney-General has a right of appearance at a review before the Tribunal, the Attorney-General’s role at the hearing is to represent the public interest.153


153 Mental Health Act 2000 (Qld), proposed new s 450(4).
APPENDIX A
SOURCE: REVIEW OF THE QUEENSLAND MENTAL HEALTH ACT 2000, TERMS OF REFERENCE

APPENDIX B
SOURCE: REVIEW OF THE QUEENSLAND MENTAL HEALTH ACT 2000, RECOMMENDATIONS

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RBR2000/04  The Queensland Mental Health Bill 2000: Involuntary Assessment and Treatment Procedures (QPL, April 2000)

RBR2000/02  The Queensland Mental Health Bill 2000: Reforms to Victims’ Rights in Relation to Proceedings and Notification Orders (QPL, April 2000)