NSW GOVERNMENT | Law Reform Commission
Attorney General & Justice

DISCUSSION PAPER: Forensic procedures

People with cognitive and mental health impairments in the criminal justice system

DATE: 9 October 2012

TIME: 10-12.30pm

VENUE: Level 14, 10 Spring St, Sydney

Questions to be addressed

1. Should a limiting term be set for those people found NGMI?

2. Where a person has been found UNA and a limiting term has been imposed, or a person has been found NGMI, should the court be required to refer the person immediately to the MHRT to make orders regarding:

    a. whether or not the person should be detained, and if so, the place of detention (having regard to the person's risk of harm), and

    b. the conditions that should be imposed if released?

3. How should the forensic system deal with people who are still a threat to the safety of the community at the end of a limiting term?

4. Review of forensic patients by the MHRT:

    a. Should patients have a right to request a review?

    b. If such a right were to be introduced, should it be constrained in any way, for example by limiting applications to situations where relevant new evidence or changed circumstances can be demonstrated?

    c. Should the present requirement of six monthly reviews be changed?

    d. In regulating reviews, how can a balance between the needs of defendants, victims, carers and others best be achieved?

Introduction

A feature which is common to those who are unfit and found to have committed the offence charged on the limited evidence available (that is unfit and not acquitted (UNA)), and those who are "not guilty by reason of mental illness" (NGMI) is the absence of established criminal responsibility. While both groups are managed largely in the same way by the Mental Health Review Tribunal (MHRT), there are significant differences in court powers in relation to these groups.

Where a person is UNA, the court must indicate whether, if the special hearing had been a normal trial against a person fit to be tried, it would have imposed a sentence of imprisonment.

If the court would not have imposed a sentence of imprisonment, the court "may impose any other penalty or make any other order it might have made on conviction of the person for the relevant offence in a normal trial". The person then ceases to be a forensic patient.

If the court would have sentenced the person to imprisonment, it must nominate a "limiting term", being the best estimate of the sentence the court would have imposed if the person had been fit to be tried and had been found guilty of the offence at an ordinary trial. Following this:

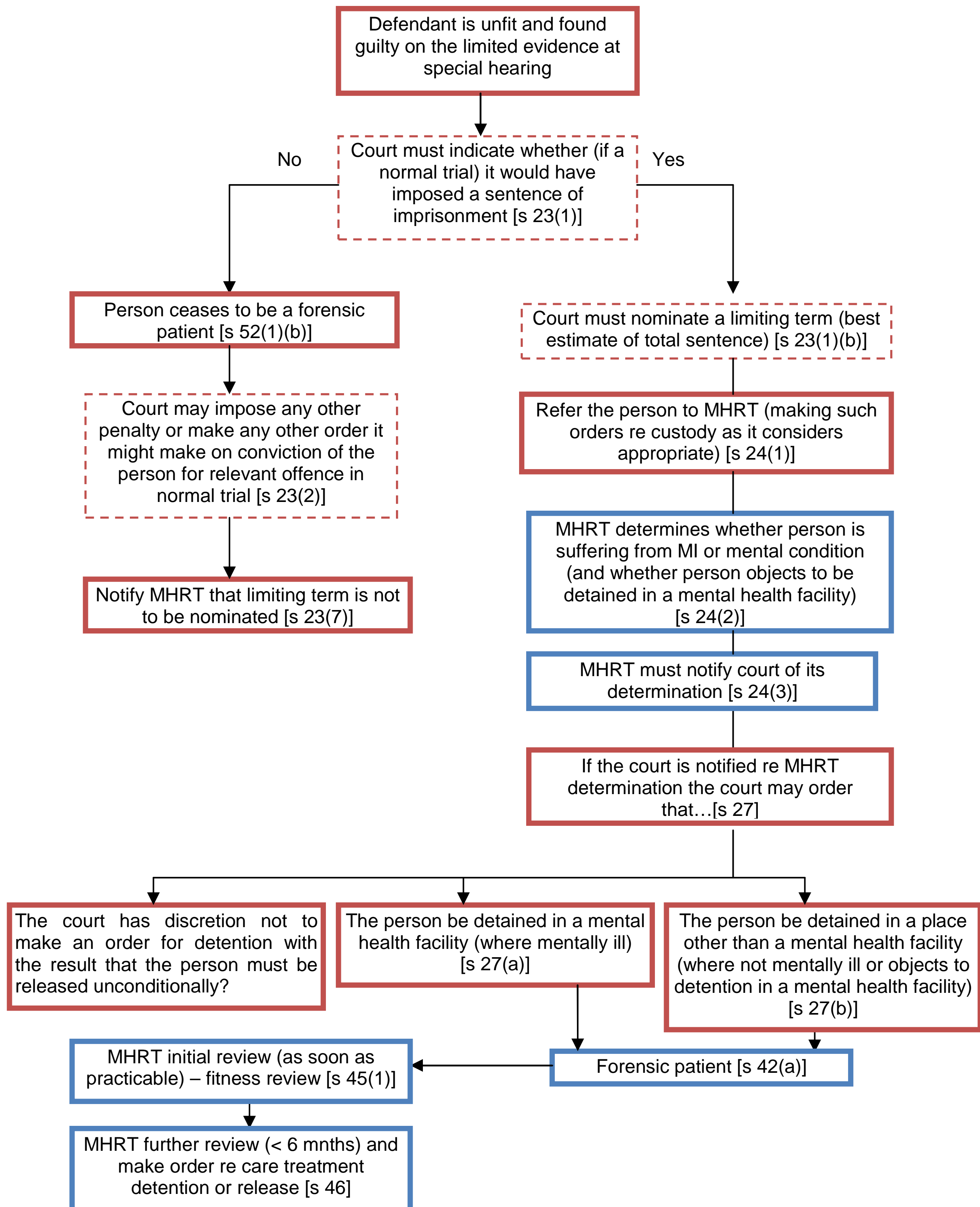
(1) The court must refer the person to the MHRT, making interim orders in relation to custody.

(2) The MHRT must determine whether the person is suffering from a mental illness, or mental condition for which treatment is available in a mental health facility.

(3) The MHRT must notify the court of its determination, and the court may make an order to detain the person and specify whether the person should be detained in a mental health facility or a place other than a mental health facility (for example, a prison).

The process following a finding of UNA is illustrated in Figure 1.

Figure 1: Court powers in relation to people who are UNA



Section 39 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) (MHFPA) provides for three types of order following a verdict of NGMI:

(1) detention

(2) conditional release, and

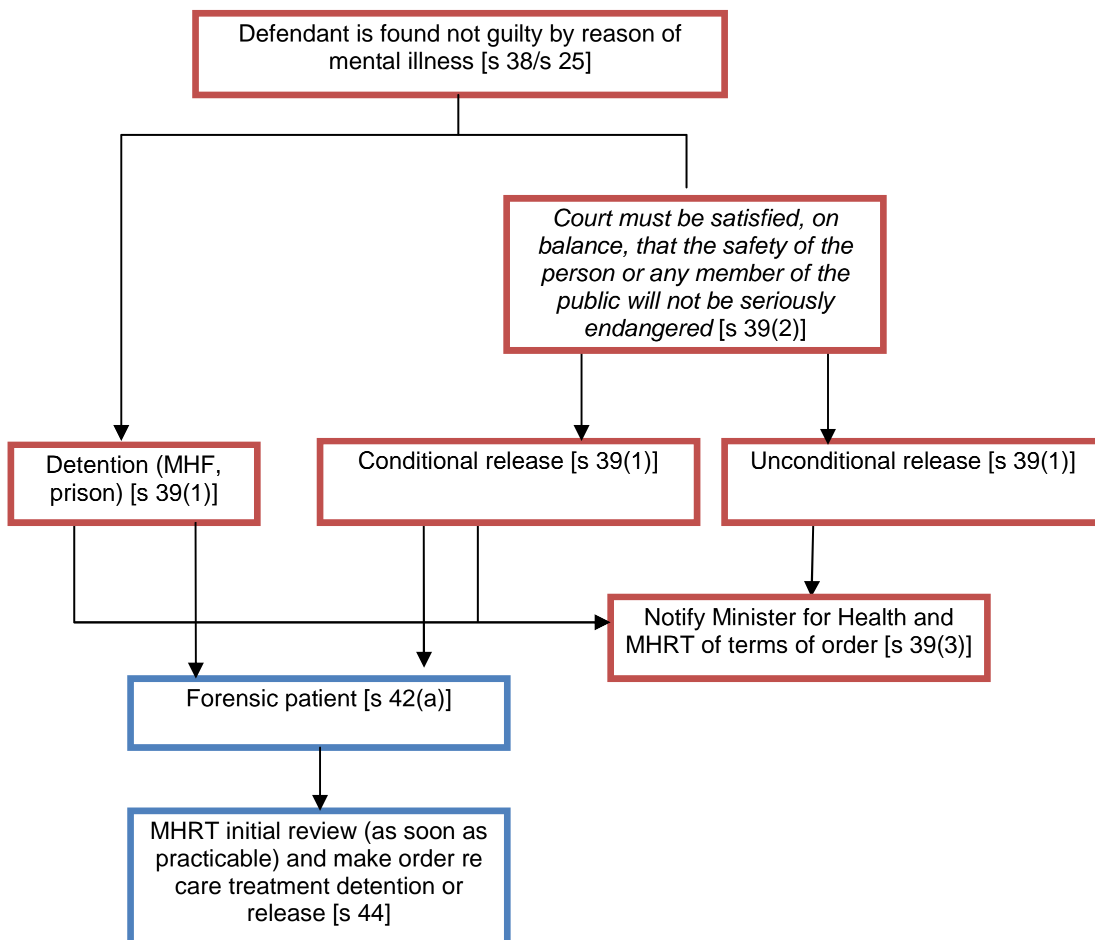
(3) unconditional release.

If the court makes an order for conditional release or an order for detention, the person becomes a "forensic patient" under the MHFPA, and is subject to the jurisdiction of the MHRT.

Judicial discretion whether to release the person, and if so, subject to what conditions, is generally unfettered by the MHFPA with the exception that the court must not order the release of a person found NGMI unless it is satisfied that the safety of the person or any member of the public will not be seriously endangered by the person's release.

As illustrated in Figure 2, this process is less complex than court processes following a finding of UNA.

Figure 2: Court powers following a finding of NGMI



Differences in court powers

Court powers in relation to people that are found UNA and NGMI differ in the following respects:

(1) **The relevance of sentencing principles:** Sentencing principles are taken into account when dealing with people that are UNA (in relation to whether to order conditional release or to detain, and the limiting term if detained) but not when dealing with people that are NGMI.

(2) **The orders of the court:** The range of orders that the court has at its disposal vary depending on whether a person is NGMI or UNA.

(3) **Safety of the person and the public:** The court cannot release someone found NGMI into the community unless satisfied that the safety of the person or any member of the public will not be seriously endangered by the person's release. Safety of the person and the public is not a prerequisite to release of a person found UNA. (However, it is taken into account insofar as community safety is one issue, among others, considered when sentencing.)

(4) **Role of the MHRT**: There is a requirement to obtain a determination from the MHRT regarding the nature of a person's mental illness or mental condition after a person is found UNA and a limiting term is imposed but prior to making orders in relation to detention – there is no such requirement for people found NGMI.

(5) **Limiting term:** Unlike the situation regarding people who are UNA, the court has no power to set a limit on the length of time for which the conditions may apply, or for which the person may be detained as a forensic patient in relation to people found NGMI.

(6) **Supervision of the MHRT:** A person will not be a forensic patient if an order for conditional release is made following a finding of UNA, however a person who is found NGMI will become a forensic patient following an order for conditional release.

Issues arising

We have identified the following issues for discussion at this roundtable:

- Whether or not a limiting term should be applied to people found NGMI.
- Whether the court should refer people found UNA or NGMI to the MHRT for imposition of orders relating to detention and/or conditions.
- How to manage the issue of forensic patients who are due for release but still present a significant risk of harm to others.
- Who should be able to initiate patient reviews by the MHRT, and how frequent should they be?

The MHRT has an ongoing management role in relation to most people found NGMI and some people found UNA. A range of issues are discussed in CP 6, chapter 7.

1. Should there be a limiting term for people found NGMI?

While a person is a forensic patient, the constraints on his or her liberty are significant. However, forensic patients are reviewed regularly by the MHRT, and there is an established regime for treatment and re-integration into the community in a way that protects the safety of the patient and community. Nevertheless those constraints may apply indefinitely in respect of forensic patients who have been found NGMI, but only up to the end of a sentencing-based time limit (the "limiting term") for forensic patients who are UNA.

The question therefore arises as to whether it is appropriate to provide for a limiting term in relation to people who are NGMI.

Arguments in favour of a limiting term:

- It is unjust for a person who is not criminally responsible for particular conduct to be subject to restrictions for longer than a comparable convicted offender who is responsible in law. Limiting terms were introduced for people found UNA for this reason.
- Consistency – forensic patients are subject to the same general legislative arrangements irrespective of whether they were initially UNA or NGMI and the same time limits on detention should apply.
- Indeterminate orders mean that people may remain in the forensic system for longer than they would have been imprisoned if tried and convicted under traditional criminal justice processes.
- Indeterminate orders may affect a forensic patient's self esteem and confidence which may negatively influence therapeutic outcomes
- Indeterminate orders appear to deter people with mental impairments from relying on the defence of mental illness, even though this option is open to them and may be the most appropriate course of action. This has a negative impact on the interests of justice, public safety, or the person's treatment needs.
- Ongoing concerns regarding the safety of the patient and community at the end of a limiting term should be addressed by options such as transferring the person into the civil mental health system, or, in exceptional cases, through procedures discussed below.

Arguments against imposing a limiting term:

- Public safety – time-limited orders inevitably lead to the result in some cases that the person continues to pose a risk of harm to others but must nevertheless be released, unconditionally, at the end of the time limit (however, the same is true of sentenced offenders).
- The forensic system is not directly comparable to the criminal justice system – therefore comparisons with sentenced defendants are of little relevance.
- NSW already has in place a system whereby forensic patients are regularly reviewed by an independent tribunal that monitors the person's treatment and support arrangements and re-integration into the community when it is safe to do so. The forensic system should maintain a health focus, taking into account individual patient needs and other factors such as diagnosis, responsiveness to treatment and rehabilitation instead of an arbitrary cap.

- A cap will be set at the time of sentencing, when the progress of the defendant's treatment and rehabilitation is hard to predict. The tribunal process is more responsive, and may result in earlier release for some people, than a limiting term.

Question 1

Should a limiting term be set for those people found NGMI?

2. Should people found UNA or NGMI be referred to the MHRT for imposition of orders relating to detention and/or conditions

The range of orders available to the court and the principles which apply to deciding what order to make are significantly different, depending on whether the person is UNA or NGMI.

Orders available to the court

Currently, when a person is found UNA and a limiting term is imposed, the court will refer the person to the MHRT for a determination regarding whether the person is suffering from a mental illness, or a mental condition for which treatment is available in a mental health facility. The court may then make an order that the person be detained, and may specify the place of that detention, either in a mental health facility or "a place other than a mental health facility", which is usually a prison. Conditional release is not available to the court following the imposition of a limiting term.

When a person is found NGMI, the court may order detention in a mental health facility or place other than a mental health facility, or order that the person be conditionally or unconditionally released into the community. The MHFPA does not specify the types of conditions the court may attach to an order for conditional release. In cases where courts have ordered that the person be released, the factors that were considered included the person's diagnosis and response to and compliance with treatment before and after the offending conduct, the recommendations of treating and other psychiatrists, accommodation arrangements, as well as a range of other matters.

Is the court well placed to make orders?

The MHRT expressed concern in its submission to this inquiry that the court is not provided with objective evidence regarding the level of risk when making the orders referred to above, and that there is an under reliance on medical or other expert evidence regarding risk. The MHRT observed that where there is expert evidence, it is often provided by experts who are not directly involved in the forensic mental health system which means that advice "can be theoretical rather than practical, which does not assist the Court in determining the appropriate order which can be implemented in a particular case".

Some stakeholders recommended that the court receive advice from the MHRT before imposing relevant orders. Stakeholders also suggested that a service could be made available to provide the court with information such as available services and appropriate orders.

Referral to the MHRT to make orders

The Court is not well placed to impose conditions directed at care and treatment and assess the risk associated with release, especially taking into account available services. The nature of the conditions imposed by the MHRT can include the appointment of case managers, care and treatment, medication as well as accommodation and other conditions. The information required before reliably imposing such conditions is not insubstantial. This may not be an effective use of court resources; particularly noting that the MHRT is required to review forensic patients as soon as practicable after the court imposes its orders, maintain an ongoing management role with respect to the patient, and already has wide ranging powers and expertise in relation to detention, conditions and release of that patient.

It may be more appropriate for the court to simply refer a person found UNA (following the imposition of a limiting term) or NGMI to the MHRT to make relevant orders. We seek your comment on this option.

Question 2

Where a person has either been found UNA and a limiting term has been imposed, or found NGMI, should the court be required to immediately refer the person to the MHRT to make orders regarding:

(a) whether or not the person should be detained, and if so, the place of detention (having regard to the person's risk of harm), and

(b) the conditions that should be imposed if released?

3. Forensic patients who are due for release but present a significant risk of harm to others

A person who is UNA ceases to be a forensic patient when his or her limiting term expires. We have discussed above the introduction of limiting terms for those found NGMI.

In some cases, a person may still present a significant risk of harm to themselves or others when their release date is imminent. It may be possible to transfer that person to the civil mental health system as a voluntary or involuntary patient. However, this is not possible in all cases. For example, the person may have a cognitive impairment or personality disorder and may therefore not meet the civil criteria for involuntary detention in a mental health facility. Furthermore, there may not be appropriate services to support this person (for example, secure facilities for cognitive impairment) resulting in the release into the community of a person that may still have ongoing or unmet treatment needs and is dangerous.

Similar issues arise in relation to sentenced inmates who reach the end of their sentence, although their cognitive and/or mental health status and needs may be somewhat different.

There are several ways to deal with the issue of forensic patients who are due for release but present a significant risk of harm:

(1) MHRT proposal: The MHRT has proposed a system of detention for those considered "serious risk patients", that is, people who are UNA, have reached the expiry of their

limiting term and present a significant risk of serious harm to others – but who do not meet civil criteria for involuntary detention. Under this proposal an initial order (a Compulsory Supervision Order) would be made for detention (and treatment if possible). The MHRT would regularly review these cases and would have the option to release a serious risk patient into the community, as well as to release the person from his or her status as a serious risk patient

(2) **Sentencing Council proposal**: The NSW Sentencing Council has recommended a model of post-custody detention or supervision for high risk violent offenders (HRVO). These are offenders who:

a) are convicted of a serious indictable offence that involve the use of, attempted use of, or show a propensity towards, serious interpersonal violence, and

b) have been assessed as presenting a high risk of violent re-offending in accordance with the most accurate risk assessment tools available at the time of assessment, in conjunction with an individual case-by-case clinical assessment.

A post-custody management scheme could include both continuing detention and extended supervision. Continuing detention would be only available in cases where the offender cannot be managed in the community. Any “post-custody management order” should:

- Be determined by the court.
- Be narrowly confined to the definition of HRVO.
- Have the key aim of “resolving the risk”.
- Balance community protection against the right of the person to be released from custody.
- Require periodic review.
- Be reviewed, if an indefinite post-custody management order, to assess if a change has occurred rendering the order appropriate for a finite term.
- Be subject to review on application of the offender on the basis that a change of circumstance means they are no longer HRVO.
- The authorizing legislation should be subject to a three year review.

(3) **Remove the limiting term:** Removal of a limiting term would mean that a person would be managed for as long as is required to ensure the safety of the public – the arguments canvassed above in relation to NGMI would apply.

(4) **Reverse the current presumption of detention when the limiting term is reached:** Currently, the MHFPA does not permit the MHRT to order release of a forensic patient unless the safety of the patient or any member of the public will not be seriously endangered by the patient’s release (and appropriate care in the community is available). This requires the MHRT to order that a forensic patient continue to be detained unless it is positively established that it is safe to release the person (a presumption of detention) or the limiting term expires. Another approach could be to reverse this presumption when the limiting term expires, meaning that a person should be released after their limiting term unless it is positively established that the safety of any member of the public will be seriously endangered by the patient’s release (a

presumption of release). The person would not cease to be a forensic patient at the end of the “limiting term”. This would mean that people:

(a) will generally be released at or before the expiry of their limiting term (with or without continuing MHRT supervision depending on whether conditions are imposed at release),

(b) can continue to be forensic patients in the community after the limiting term has expired and therefore supported and managed by the MHRT – allowing for continuing ‘step down’ if required, and

(c) can be detained as forensic patients beyond the limiting term if they present a clear risk to the public.

Question 3

How should the forensic system deal with people who are still a threat to the safety of the community at the end of a limiting term?

4. Reviews: who can trigger them and how frequent should they be?

As soon as practicable after a court makes an order for the detention or conditional release of a person, the MHRT must review the person’s case and make an order as to the person’s care, treatment, detention or conditional or unconditional release. After the initial review, the MHRT may review the person’s case at any time, but must, in any event, review the person’s case at least every six months.

Additionally, the MHRT must review the person’s case if he or she is apprehended following breach of a condition of leave or release, and whenever it is requested to do so by certain authorities (for example, relevant Ministers or the medical superintendent of the mental health facility in which the person is detained). There is, however, no provision for the forensic patient to apply for a review.

On a review, the MHRT may make an order as to the patient’s continued detention, care or treatment in a mental health facility, correctional centre or other place, or order the patient’s release, either conditionally or unconditionally. The MHRT also has the power to grant periods of leave from any place where a person is detained, but only if satisfied that it is safe to do so. Otherwise, it must order that the person be detained or continue to be detained.

Patient initiated review

Stakeholders were broadly in support of allowing forensic patients to apply for review. For example, the NSW Council for Civil Liberties noted that the power to apply for review is an important protection for forensic patients where issues in relation to conditions arise between reviews. However, there was also significant concern about the possible consequent increase in groundless applications.

Stakeholders suggested that a balance could be struck by limiting the number of reviews or by requiring that there has been substantial or material change or new information available, before a review is conducted.

However, the Homicide Victims' Support Group (HVSG) did not support the change, noting that reviews already occur frequently enough to achieve the MHRT's objectives. Periodical reviews are stressful on victims and families who are confronted by the person who committed the - for HVSG members - fatal act. Victims argue that forensic patients receive "more liberties at every review", while families and victims are given little consideration.

The MHRT submitted that while it was happy to permit forensic patients to express a desire for review, the MHRT should not be compelled to review on patient request, as some patients may request very frequent reviews in the absence of any change in circumstances.

Frequency of reviews

The MHRT has suggested that the review cycle be modified for forensic patients found NGMI or UNA as follows:

- Tribunal to review as soon as practicable and consider treatment plan.
- Conduct formal three member panel reviews at least once every 12 months.
- Hold "directions" style hearings between formal reviews, by a single member (either the President or Deputy President). This would provide the opportunity to check the patient's progress and monitor any issues identified at formal hearings. Formal reports would not be required, simply oral evidence or brief updates.

The MHRT submitted that this would give it the opportunity to redirect resources.

The importance of allowing patients to apply for review would increase if the review cycle was reduced in accordance with the MHRT's suggestion.

Question 4

(1) Should patients have a right to request a review?

(2) If such a right were to be introduced, should it be constrained in any way, for example by limiting applications to situations where relevant new evidence or changed circumstances can be demonstrated?

(2) Should the present requirement of six monthly reviews be changed?

(3) In regulating reviews, how can a balance between the needs of defendants, victims, carers and others best be achieved?