Overview

Patients who are acquitted on insanity grounds – or found unfit to stand trial – deserve effective, ethical care and management. The Royal Australian and New Zealand College of Psychiatrists (RANZCP) is concerned that these vulnerable patients are subject to laws and detention conditions that may violate their human rights and cause long-term harm. It is of major concern that many people with mental illness in Australia and New Zealand are being held in jails or corrective services custody despite having never been convicted of a crime or placed on remand (NSW Law Reform Commission, 2013). Furthermore, the conditions of release are becoming increasingly severe and punitive. These restrictions can last for life.

The RANZCP seeks to remove the stigma surrounding mental illness and disability to create a more accepting and equal society. As effective treatment and support for insanity acquittees or those unfit to stand trial is vital in order to overcome this stigma, the RANZCP’s Faculty of Forensic Psychiatry has identified six principles to inform advocacy and clinical practice in this important area. These principles balance considerations of human rights, effective treatment and community safety.

Definitions

The principles in this document address the needs of forensic patients, defined as persons who are:

- insanity acquittees (those found not guilty of an offence by reason of mental illness or cognitive disability), or
- unfit to stand trial (either permanently or temporarily).

The definitions of forensic patient differ across Australia and New Zealand, as do the legal tests to determine if an accused person belongs in that category, but some generalisations can be made.

A person cannot be held criminally responsible for an act if a mental impairment rendered them unable to know what they were doing, or unable to comprehend that it was wrong, this is the rationale for the insanity defence and it has been fundamental to the common law for centuries.

A related principle is that a person unable to plead to a criminal charge or comprehend the proceedings to mount a defence is unfit to stand trial (Allnutt et al., 2007). If a finding of unfitness is made, the accused cannot be lawfully convicted but a special hearing may be held to test the evidence.

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1Insanity’ is used throughout this document as it is the common legal term.
2Cognitive disability includes intellectual disability, acquired brain injury and other organic brain syndromes.
3In New Zealand the term ‘special patient’ is used instead.
4This test draws on M’Naghten’s Rules, which were developed after M’Naghten’s Case (1843).
These legal tests are fairly uniform when compared to the variety of laws governing the detention and release of forensic patients. Depending on where the offence was committed, the period spent in detention can vary enormously and detention may occur in a dedicated section of a prison, a stand-alone forensic mental health facility or a general mental health ward. In Queensland and New Zealand, persons with an intellectual disability who have been charged or convicted of a criminal offence can be housed at stand-alone forensic disability facilities.5

The power to order release may be held by ministers, courts or tribunals. Due to wide variations in the resources provided by governments, forensic patients may be forced to endure long periods in prison waiting for accommodation at a forensic facility to become available. Access to psychiatric treatment and other clinical care also varies widely, with implications for the experience and recovery prospects of forensic patients (Hanley and Ross, 2013; Human Rights Commission New Zealand, 2010).

**Human rights of forensic patients**

Australian and New Zealand governments have made a number of international commitments to protect the human rights of forensic patients. According to the *Standard Minimum Rules for the Treatment of Prisoners*, also known as *The Mandela Rules*, (United Nations General Assembly, 2015):

> ‘persons who are found to be not criminally responsible, or who are later diagnosed with severe mental disabilities and/or health conditions, for whom staying in prison would mean an exacerbation of their condition, shall not be detained in prisons, and arrangements shall be made to transfer them to mental health facilities as soon as possible.’

States are also obliged to ‘ensure if necessary the continuation of psychiatric treatment after release and the provision of social-psychiatric aftercare.’

According to the *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care* (United Nations General Assembly, 1991), ‘all persons have the right to best available mental health care’ and ‘every patient shall have the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient’s health needs and the need to protect the physical safety of others.’

The Australian Health Ministers’ Advisory Council has reaffirmed these principles and expanded upon them in the *National Statement of Principles for Forensic Mental Health* (‘the National Statement’; Australian Health Ministers’ Advisory Council, 2006), acknowledging that ‘in terms of service planning and development, forensic mental health has been neglected and reform has lagged behind mainstream mental health services.’

The National Statement highlights that forensic patients should not be detained for longer periods than their non-forensic counterparts, and release decisions must be made by a court or tribunal (instead of a political process). The document also addresses the care and management of patients, stating that forensic facilities should be geographically and organisationally separate from mainstream prisons, patient confidentiality should be respected, forensic facilities should be linked to housing and community mental health services and involuntary treatment should be subject to the same safeguards as those applying to other patients. The principle of individualised care is affirmed, requiring special efforts to accommodate vulnerable groups such as children and adolescents, culturally linguistically diverse populations and Aboriginal and Torres Strait Islander peoples.

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5 *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003* (NZ) and *Forensic Disability Act 2011* (Qld).
In New Zealand, similar principles are upheld in the *Guidelines to the Mental Health (Compulsory Assessment and Treatment) Act 1992* and the *Code of Health and Disability Services Consumers’ Rights* (1996).

Australia and New Zealand have recently ratified the *United Nations Convention on the Rights of Persons with Disabilities* (2008) which commits states to take all necessary measures to combat stigma and enable disabled people to fully participate in society. The Convention applies to forensic patients and the United Nations has highlighted ways in which Australia has fallen short of compliance (‘Disability rights now’, 2012). The rights to justice and freedom from arbitrary detention have been breached by the indefinite incarceration of forensic patients and the lack of needed treatment, support and planning for their return to the community. The right to freedom from cruel and degrading treatment may have been compromised by detention in prison due to lack of forensic facilities, the excessive use of solitary confinement (seclusion) to control forensic patients and the lack of effective legal remedies for mistreatment.

The RANZCP strongly supports these human rights principles and calls on governments to pursue them consistently. Forensic patients must only be treated in dedicated mental health facilities – outside of prison environments – that are suitable for their clinical needs and risk management. Forensic patients should not be treated as convicted criminals. Prisons are not hospitals and should never be viewed as such.

**Mental illness, offending and forensic orders**

It is necessary to consider the role of a mental health condition in the behaviour of the accused, in their ability to conduct a defence and in the decision as to what forensic order should apply (this is a common term for the dispositional order the court makes). Forensic psychiatrists are responsible for advising courts and juries as to how the symptoms contributed to the offending behaviour and how treatment and risk management ought to be undertaken (Allnutt et al., 2007).

The RANZCP supports the insanity defence, the determination of fitness to stand trial and the principle that forensic patients should not be subject to punishment. The RANZCP calls for the expert opinion of psychiatrists – and other health professionals as appropriate – to be respected in assisting courts, tribunals and ministers to make the ultimate decisions.

**Principles for the treatment of persons acquitted in an insanity finding or found unfit to stand trial**

Despite the absence of a criminal conviction, and human rights commitments made and restated by governments, forensic orders in Australia and New Zealand often impose detention periods and monitoring conditions that may amount to punishment (Boyd-Caine et al., 2005).

Moreover, forensic patients are regularly held in prisons – as forensic mental health and disability facilities lack the resources to accommodate them – and aftercare services that help prevent reoffending are often minimal or non-existent (Hanley and Ross, 2013; Human Rights Commission (NZ), 2010). This is despite the fact that forensic psychiatry interventions have been shown to reduce rates of reoffending (Morgan et al., 2012). Being placed among general prison populations on the other hand, leaves forensic patients acutely vulnerable to violence and abuse from other prisoners and subject to the excessive use of disciplinary measures such as segregation because correctional officers are rarely trained to accommodate the complex needs of forensic patients (Barriers to Justice, 2016).

Whilst laws and service levels are always likely to differ, the RANZCP believes that a consistent approach to forensic orders and treatment will benefit both patients and the broader community. Drawing on the guidelines and human rights instruments listed above, the RANZCP has developed six key principles based on the National Statement that enable effective and ethical management of forensic patients. The RANZCP advocates the adoption of these principles across all Australian and New Zealand jurisdictions.
Principle 1: Forensic patients must receive equity of access to health care and legal representation

- The right of all forensic patients to respect for their individual human worth, dignity and privacy must not be waived in any circumstance, regardless of a patient’s history of offending or their status as a forensic patient.
- Forensic patients have the right to a quality of service or treatment equivalent to their non-offender or convicted offender counterparts.
- Forensic patients must have their civil rights protected to the same degree as all other persons. This right includes competent legal representation as required.
- Health care should be provided based on the individual forensic patient and their changing needs and preferences, taking into account the entirety of their biological, psychosocial, cultural and spiritual circumstances.
- Forensic patients should have equity of access to disability support funds and services to enable effective rehabilitation and recovery.

Principle 2: Forensic patients must be managed by mental health services not correctional services

- Whenever a person is classified as a forensic patient, the person must be immediately released from prison or custody and transferred to an appropriate health-care facility. The mental health service must be beyond the geographic boundary of a prison and be run independently from any correctional service.
- Mental health services for forensic patients must be staffed by mental health personnel employed by a health service. Specialist inpatient forensic mental health services (secure facilities) should be owned, funded and staffed by the jurisdictional health directorate, preferably co-located with other health services. Security staff, where required, should be employed by health services.

Principle 3: Decisions regarding detention, release or transfer must be made by courts or independent statutory bodies

- Decisions to detain, release or transfer forensic patients must be made by courts, tribunals or independent statutory bodies, not by political processes or the Governor/Administrator in Council.
- These decisions must be made through processes that are transparent, accountable and accessible to families, carers, victims and appropriate support services. The only basis for these decisions should be the applicable legal tests and the advice of suitably qualified mental health practitioners. Appeals must be readily available to all parties.
- In relation to any court or tribunal hearing, forensic patients must be afforded the same protection for the confidentiality of their clinical information as other mental health patients.
- States and territories need to enable planned movements of forensic patients by making consistent cross-border agreements (Carroll et al., 2009).

Principle 4: Treatment must be in the least restrictive environment appropriate, consistent with individual circumstances and the safety of the community

- Inpatient care should not be mandatory, and if it is deemed necessary, it must not be longer than necessary to assess and treat clinical issues and ensure that risk can be properly managed. Forensic patients must not be subject to greater restrictions or longer periods of confinement than their non-offender counterparts based purely on their forensic status.
- Treatment decisions must remain the responsibility of the treating team. The public, and in particular victims, are entitled to demand accountability from the system charged with the task of rehabilitating forensic patients, but they do not have the right to stipulate punishments or excessively restrictive treatment in hospital or the community. Courts or tribunals must not order specific intervention programs but should be able to recommend specific treatments suggested by the treating or assessing team.
• Attributes of any aftercare system should include accountability, transparency of process, meaningful inclusion of patient, family, public and victims’ interests, and the presence of appeal mechanisms (Skipworth et al., 2006).

Principle 5: The level of security required for any individual should be based on a valid professional risk assessment

• Forensic mental health services are dually tasked with facilitating patient recovery and protecting the public. Security measures imposed on any individual should be based on a professional risk assessment that considers patients’ treatment needs, their victims and the safety of the community.
• Seclusion and restraint are interventions, not treatments, and should only be used as safety measures of last resort where all other interventions have been tried, considered and/or excluded. Seclusion and restraint must never be used as methods of punishment.
• Forensic patients must never be automatically placed on a Child Protection Register or Sex Offender Register. Where this is a consideration due to the offence or offences that led to the person becoming a forensic patient, a formal application should be made to a court to determine the need for that person to be placed on such a register.

Principle 6: Rehabilitation and effective treatment is required to decrease recidivism

• Effective treatment is the best method to decrease recidivism in mentally ill offenders. Forensic mental health services must promote positive mental health and minimise negative impacts on patients’ mental health.
• Effective treatment includes access to treatment for alcohol and substance dependence, criminogenic needs, psychosocial rehabilitation and pre-release planning. These services must be integrated with aftercare and community housing, and be appropriately resourced (Baldry et al., 2015).
• Aboriginal and Torres Strait Islander peoples and Māori are over-represented in the criminal justice system and require clinically and culturally competent services to respond to complex support needs.
• Improved facilities should be developed for the safe, effective care and management of forensic patients (including suitable facilities for adolescents, women and older people, people from culturally and linguistically diverse backgrounds, and Lesbian, Gay, Bisexual, Transgender and Intersex patients).
• People with cognitive impairment and other developmental disabilities require additional models of care, and must have access to appropriate facilities.

Recommendations

• The RANZCP supports the insanity defence, the determination of fitness to stand trial and the legal principle that those found not guilty or not fit to stand trial must not be subject to punishment.
• The RANZCP advocates the adoption of these principles in all Australian and New Zealand jurisdictions. The RANZCP will continue to advocate that all forensic patients receive treatment in accordance with these principles.

References


Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996 (NZ).


M’Naghten’s Case (1843) 8 ER 718.


Disclaimer
This information is intended to provide general guide to practitioners, and should not be relied on as a substitute for proper assessment with respect to the merits of each case and the needs of the patient. The RANZCP endeavours to ensure that information is accurate and current at the time of preparation, but takes no responsibility for matters arising from changed circumstances or information or material that may have become subsequently available.