

# NATIONAL STATEMENT OF PRINCIPLES RELATING TO PERSONS UNFIT TO PLEAD OR NOT GUILTY BY REASON OF COGNITIVE OR MENTAL HEALTH IMPAIRMENT

## CONTENTS

PREAMBLE.....	2
DEFINITIONS.....	2
OVERARCHING PRINCIPLES.....	3
TAILORED SERVICES AND CARE.....	3
COLLABORATION AND CONSULTATION.....	4
REASONABLE ADJUSTMENTS.....	4
CULTURALLY APPROPRIATE SERVICES.....	4
ORDERS.....	5
REASONS FOR DECISIONS.....	5
REVIEWS.....	6
LEAVE, RELEASE AND DISCHARGE.....	6
ALTERNATIVE DETENTION OPTIONS.....	6
TRAINING AND RESOURCES.....	7

## PREAMBLE

These principles have been developed by a cross-jurisdictional Working Group on the Treatment of People Unfit to Plead or Found Not Guilty by reason of Mental Impairment, established under the Law, Crime and Community Safety Council in November 2015.

The principles recognise the rights of persons with cognitive or mental health impairment and seek to identify safeguards throughout legal processes and during the period in which a person who is unfit to plead or not guilty by reason of cognitive or mental health impairment is subject to orders. Equally, the principles recognise the need to ensure community safety, the prevention of harm to others, and the rights of victims. The potential for the criminal justice system to assist persons with cognitive or mental health impairment *prior* to any finding the person is either unfit to plead, of unsound mind, or not guilty, such as through early intervention, prevention and diversionary programmes or referrals to health and community service providers, is acknowledged.

Recommendations and commentary of recent law reform reviews, conducted between 2012 and 2015, that analyse the issues of fitness to plead and the defence of mental impairment in Australian jurisdictions have informed the drafting of these principles. Each jurisdiction may determine how to best use and implement these guidance materials. While states and territories have responsibility for their respective criminal justice and mental health systems, this document identifies best practice principles to be considered as each jurisdiction continues to develop its own legislation, policy and practices, as necessary and appropriate.

These principles are to be understood and read together with other relevant principles, frameworks and documents collectively developed by Australian governments including, but not limited to, the National Framework for Recovery-oriented Mental Health Services, the National Forensic Mental Health Principles, and the National Framework for Reducing and Eliminating the Use of Restrictive Practices.

## DEFINITIONS

**Community based alternatives** includes compulsory treatment in the community through a conditional release order, community order or approved leave for forensic patients in the community. For people with cognitive impairment, community based alternatives may include secure management pathways by disability services or working with non-government agencies who provide more restrictive options, managed by statutory bodies such as the MHRT, and funding for disability related matters from National Disability Insurance Scheme.

**Detention** includes detention in a secure mental health facility, secure disability facility or in a correctional facility as an option of last resort.

**Order** includes a supervision or detention order made by a decision-maker following a finding that a person has been found unfit to plead, of unsound mind, or not guilty by reason of cognitive or mental health impairment or of unsound mind.

**Habilitation** refers to the process of supplying a person with the means to develop maximum independence and involvement in all aspects of life through the acquisition and enhancement of abilities and skills related to communication and activities of daily living including supported accommodation.

## NATIONAL STATEMENT OF PRINCIPLES RELATING TO PERSONS UNFIT TO PLEAD OR NOT GUILTY BY REASON OF COGNITIVE OR MENTAL HEALTH IMPAIRMENT

**Relevant agencies** include police, justice, corrections, parole boards, health, ageing, disability and housing departments, National Disability Insurance Agency, and any other agencies, both government and non-government, involved in supervising and caring for persons found unfit to plead, of unsound mind, or not guilty by reason of cognitive or mental health impairment.

**Reviewing authority** includes a court, mental health tribunal or relevant board.

**Care and Protection** does not imply a statutory child protection response, rather a general response of support for the person.

### OVERARCHING PRINCIPLES

- Policies, procedures and services should aim to recognise and reflect the distinction and interaction between the concepts of cognitive impairment and mental health impairment.
- The concepts of cognitive impairment and mental health impairment should be defined broadly, focusing in general on the effect of the impairment rather than on the inclusion or exclusion of particular conditions.
- Decision making should be guided by the least restriction of the rights of a person with cognitive or mental health impairment taking into account the risk of harm they may pose to themselves, victims or others.
- The setting in which people are detained should aim to be inclusive and recovery-orientated, acknowledging that there will be individual differences in the meaning of recovery or habilitation and what it may entail.
- Information about the rights of persons detained under orders and how they may be exercised should be readily available to relevant persons and their families, guardians and carers in a format and mode by which this information may be understood.
- People who are detained following an order are entitled to receive health care (including mental health care) and support at an equivalent level to that available to people in the community.
- Duty of care should be a primary consideration when treating young people with cognitive or mental health impairment. Young people should be provided with care, protection and all necessary individual assistance in view of their age, sex and personality and, if detained, young people should be separated from adults.

### TAILORED SERVICES AND CARE

- A personalised case management plan should be developed, where possible, for all persons found unfit to plead, of unsound mind, or not guilty by reason of cognitive or mental health impairment who are the subject of orders, soon after the original order is made.
- The plan should be inclusive and where relevant, recovery oriented, outlining clinical oversight, treatment and care, support services, and pathways towards less restrictive arrangements.
- Ongoing consideration and planning is required to facilitate the provision of appropriate supports, accommodation and community based alternatives to detention.
- Tailored programs should be available to support the individual needs of people with cognitive or mental health impairment who are released from detention to reintegrate into

the community taking account of ethnicity, cultural background and social factors. Particular consideration should be given to the needs of Aboriginal and Torres Strait Islander people.

- Young people should be provided with care, protection and all necessary individual assistance in view of their age, sex and personality and if detained, should be detained separate from adults.

## COLLABORATION AND CONSULTATION

- Collaboration between government agencies and, where appropriate, relevant non-government service providers and professional associations, is necessary to develop and implement strategies to safeguard the rights of persons who are found unfit to plead, of unsound mind, or not guilty by reason of cognitive or mental health impairment.
- The individual management of persons who are the subject of orders should involve information sharing and collaboration amongst relevant agencies—including where such collaboration is required across jurisdictions.
- Relevant agencies should aim to develop and coordinate arrangements for ongoing treatment or care and support in the community when a person subject to a detention order is given leave or discharged.

## CULTURALLY APPROPRIATE SERVICES

- The needs of particular population groups, including Aboriginal and Torres Strait Islander people, and their understanding and experience of impairment, disability, health and wellbeing, should inform policy and practice relating to persons who are found unfit to plead, of unsound mind, or not guilty by reason of cognitive or mental health impairment.
- Culturally appropriate approaches, which may include the participation of elders, family and relevant agencies, should be considered when making orders in relation to Aboriginal and Torres Strait Islander people who are found unfit to plead, of unsound mind, or not guilty by reason of cognitive or mental health impairment.
- Jurisdictions should aim to make programs available that provide tailored support to assist the individual needs of people with cognitive or mental health impairment who are released from detention to reintegrate into the community taking account of ethnicity, cultural background and social factors e.g. Aboriginal and Torres Strait Islander people and migrants.

## REASONABLE ADJUSTMENTS

- People found unfit to plead, of unsound mind, or not guilty by reason of cognitive or mental health impairment should have access to tailored assistance, service pathways and reasonable adjustments, including those needed to facilitate their effective participation in the criminal justice system or forensic mental health system.
- Consideration should be given, where practical, to the implementation of specialist courts or specialist court lists to deal with proceedings relating to cognitive or mental health impairment.

## NATIONAL STATEMENT OF PRINCIPLES RELATING TO PERSONS UNFIT TO PLEAD OR NOT GUILTY BY REASON OF COGNITIVE OR MENTAL HEALTH IMPAIRMENT

- Consideration should be given to any reasonable adjustments or modifications to usual processes or assistance that may be necessary to facilitate the person's effective participation in the criminal justice system. This may include:
  - Modifications to court procedures, such as shorter sessions, additional breaks, or reducing the formality of proceedings
  - The discretion to require independent advice, including expert advice, and to hear parties making best interest representations, where appropriate
  - Providing access to specialist services, such as communication assistance schemes, to support a person with cognitive or mental health impairment to exercise their legal capacity with respect to proceedings while respecting their rights, will and preferences
  - Ensuring that information is accessible and communicated in a format and mode appropriate to the person with cognitive or mental health impairment, or
  - Any culturally relevant adjustments, including interpreters or support persons, as deemed necessary.

### REASONS FOR DECISIONS

- Any decision, order or condition relating to a person found unfit to plead, of unsound mind, or not guilty by reason of cognitive or mental health impairment should be accompanied by reasons and communicated in a format and mode appropriate to the person.

### ORDERS

- When making orders, people should be detained for the minimum period necessary to address the risk they pose to themselves, victims or others.
- Where time limits on orders apply, jurisdictions should avoid time limits that exceed the maximum term of imprisonment that could have been imposed if the person had been convicted of the offence charged.
- The purpose of the order is to provide support and intervention that addresses the individual needs of the person with cognitive or mental health impairment while managing and addressing the risk a person may pose to themselves and others. In particular:
  - Measures should be taken that aim to support the independence and participation of persons with cognitive or mental health impairment in all aspects of daily life in their place of detention
  - Habilitation, rehabilitation or other appropriate programs should be tailored to reflect the individual needs of persons with cognitive or mental health impairment
  - Order conditions and programs should take into account the particular needs and disadvantages that may be faced by particular population groups e.g. Aboriginal and Torres Strait Islander people; and
  - Mechanisms to monitor the use of restrictive practices should exist with a view to recording and minimising the use of these practices.
- Once the Court has found a person unfit to plead or not guilty by reason of cognitive or mental health impairment, decisions about the detention, care, treatment or release of the

## NATIONAL STATEMENT OF PRINCIPLES RELATING TO PERSONS UNFIT TO PLEAD OR NOT GUILTY BY REASON OF COGNITIVE OR MENTAL HEALTH IMPAIRMENT

person should be made by the relevant reviewing authority or court, informed by relevant experts, or referred to an independent body with relevant expertise, as appropriate.

- Detention of persons found unfit to plead, of unsound mind, or not guilty by reason of cognitive or mental health impairment should occur in facilities appropriate to the person's needs.
- All relevant parties should be given the opportunity to make submissions to the reviewing authority relevant to the care, treatment, conditions or release of a person the subject of an order.
- Relevant parties may include a person subject to an order or their representative, health practitioners, carers and support services (including accommodation providers), and any victim/s or their family (where appropriate).

### REVIEWS

- Any decision, order or condition relating to a person found unfit to plead, of unsound mind, or not guilty by reason of cognitive or mental health impairment should be subject to mechanisms of review.
- A clinical review of persons found unfit to plead, of unsound mind, or not guilty for reason of cognitive or mental health impairment should be conducted by relevant experts at regular intervals, with individual case management plans updated accordingly.
- Orders relating to persons found unfit to plead, of unsound mind, or not guilty for reason of cognitive or mental health impairment should be reviewed by a reviewing authority at regular intervals, with a person having a right to apply for review outside of any review date set by the reviewing authority.
- There should be independent oversight of places of detention for people being involuntarily detained, including but not limited to Official Visitors. This is a key safeguard to ensure the rights and responsibilities in relation to people involuntarily detained are upheld.

### LEAVE, RELEASE AND DISCHARGE

- Persons subject to detention orders should be informed about ways in which they can secure their leave or release.
- Criteria for leave and release from detention should have regard to a person's recovery, program participation, treatment progression or habilitation, risk of harm the person poses to themselves or the community, including victims and not reflect punitive principles such as whether the person has spent sufficient time in detention.
- Decision makers should have flexibility in extending and suspending leave or release, and in imposing leave or release conditions.

### ALTERNATIVE DETENTION OPTIONS

- A person should be entitled to treatment and/or support in the least restrictive environment that will protect against serious risk of significant harm to the person or to others.

## NATIONAL STATEMENT OF PRINCIPLES RELATING TO PERSONS UNFIT TO PLEAD OR NOT GUILTY BY REASON OF COGNITIVE OR MENTAL HEALTH IMPAIRMENT

- Detention of persons found unfit to plead, of unsound mind or not guilty by reason of cognitive or mental health impairment should occur as far as possible in facilities appropriate to the person's needs.
- Step down accommodation options should be available to facilitate transition to the community for persons with mental health or cognitive impairment who are discharged from detention.
- Forensic systems should build capacity across high, medium, low secure and community environments to ensure that people can recover and transition to life in the community. Forensic mental health and cognitive impairment systems should be continuously improving and offer evidence based interventions that address risk.

### TRAINING AND RESOURCES

- Training and resources should be provided to build the skills and capacity of relevant agencies and reviewing authorities to work with people who are found unfit to plead, of unsound mind, or not guilty by reason of cognitive or mental health impairment. This should include specialist training in adolescent mental health for staff working with young people.
- Courts and the legal profession should have access to information about reasonable adjustments and the supports and services available to persons with cognitive or mental health impairment through appropriate means—such as practice notes or an equal treatment bench book.
- Victims, their families and support groups should have access to information about processes and procedures for determining people to be unfit to plead, of unsound mind, or not guilty by reason of cognitive and mental health impairment and the appropriate supports and treatment those people require and why.