Statement of Reasons

This is an edited version of the statement of reasons issued pursuant to section 756 of the *Mental Health Act 2016*. The patient and persons attending the hearing have been de-identified and, in some cases, may be allocated pseudonyms for privacy reasons. Other details that may lead to the identification of the patient may have also been modified or omitted. The modification or omission of these details does not affect its decision or its reasons for the decision.

Decision made prior to 1 January 2020 so *Human Rights Act 2019* not applicable

Matter:	Forensic Order Review
Attendees	
Patient:	Attended
Patient's Legal Representative:	Attended
Psychiatrist:	Attended
Case Manager:	Both case manager and team leader attended
Attorney-General's Representative:	Attended
Other attendees:	A forensic liaison officer, two representatives of a non-government organisation and a representative of the Office of the Public Guardian attended
Decision	
Decision:	The Forensic Order is revoked. No further order is made.

The reference to the Mental Health Court related to a significant number of alleged offences over three years and had been furnished under the now superseded *Mental Health Act 2000*. Consequently, a Forensic Order (Mental Health Court) was made under the provisions of the previous Act. The most serious of the offences involved the patient allegedly attempting to start a fire at his accommodation and threatening police.

The Mental Health Court found that the patient had a significant cognitive impairment and that he was permanently unfit for trial. The Court found that the Forensic Order was warranted because of the nature and number of the offences. The Court also noted that the community support offered at the time required the patient's engagement.

There is no suggestion that the Forensic Order was made to provide treatment for a mental illness. An independent psychiatrist diagnosed a significant cognitive impairment rather than a mental illness. The Forensic Order has served to provide care for the patient in the way that a Forensic Order (Disability) would under the current legislation.

The Forensic Order appears to have also assisted in attracting NDIS support and the patient has been living in supported accommodation for the last three years.

The patient attended the hearing. He was observed to be extremely frail, he struggled to move about and relied on a walking frame.

Statutory Framework and Issues to be determined by the Tribunal

Set out in Appendix A to these Reasons is a summary of the principal provisions of the *Mental Health Act 2016* (**Act**) that are relevant to the Tribunal's conducting a review of a person's Forensic Order. Further reference will be made to these under "Application of evidence before the Tribunal to relevant provisions".

The issues for determination at the review were:

1. whether the Forensic Order for the patient should be confirmed or revoked;
2. if the Forensic Order is confirmed and the category is inpatient, should limited community treatment be approved for the patient, or should an authorised doctor be able to change the category to community;
3. if the Forensic Order is confirmed and the category is community, should the authorised doctor be able to change the extent of treatment in the community to the extent and subject to the conditions set by the Tribunal;
4. what, if any, conditions should be imposed on the Forensic Order;
5. if the Forensic Order is revoked, is there a further order or authority to be made; and
6. have the person's relevant circumstances been considered, defined in Schedule 3 of the Act as including the following:
    a. the person's mental state and psychiatric history;
    b. any intellectual disability of the person;
    c. the person's social circumstances, including, for example, family and social support;
    d. the person's response to treatment and care and willingness to receive appropriate treatment and care; and
    e. if relevant, the person's response to previous treatment in the community.

Clinical Report

The patient's legal representative advised that her client received the clinical report within the statutory time frame. She confirmed she had been afforded adequate time to take instructions and provide advice.

Summary of evidence and findings

The Tribunal must confirm the Forensic Order if the Tribunal considers the Forensic Order is necessary, because of the person's mental condition, to protect the safety of the community, including from risk of serious harm to other persons or property.

1. The relevant circumstances of the person subject to the order

Mental state and psychiatric history

The clinical report records that the patient experienced some hallucinations and paranoid delusions. This was said to be part of his withdrawal from alcohol and delirium. Separately, there is some history of suicidal ideation years later.

The patient does not have a psychotic illness. He does not receive treatment for a mental illness other than perhaps his epilepsy. He receives a high level of care from his NDIS funded non-government organisation (NGO). According to the treating psychiatrist, the treating team have limited involvement in the patient's care. The patient's carers see that he takes medication to treat his epilepsy.

Any intellectual disability

The patient has an established diagnosis of unspecified dementia, significant cognitive impairment and epilepsy. The treating psychiatrist was of the view that the patient has a form of brain injury from numerous head injuries and poorly controlled epilepsy in the past. An independent psychiatrist noted in his reports that the patient's significant cognitive impairment rendered him permanently unfit for trial. That assertion was accepted by the Mental Health Court.

Social circumstances, including, for example, family and social support

The evidence at the hearing from the patient's NDIS funded carers was that the patient was in a safe and stable environment provided by the NGO. Alcohol use has continued but is currently well managed. It was reported that the patient typically attends the park with and consumes alcohol during the day. He returns home each night.

The treating psychiatrist reported that over the last six months the patient has remained at his accommodation each night. The fact that the patient was returning to his home every night was viewed by the treating psychiatrist as significant progress given the patient's history of choosing to stay at public parks consuming alcohol instead of returning to his accommodation. The treating psychiatrist was of the opinion that the safe and secure environment provided by his carers was contributing to this stability.

The treating psychiatrist remarked that the treating team were doing very little to support the patient and that the vast majority of supervision and care was being provided by the NGO.

Response to treatment and care and the person's willingness to receive appropriate treatment and care

It seems that in the past poor engagement has contributed to poor care for the patient. The Forensic Order has served to address that. After nearly three years of stability in supported accommodation, the patient appears to be in a stable routine. He uses alcohol with his social group during the day and returns to his carers at night. According to the treating psychiatrist and the case manager, the patient's consumption of alcohol has decreased because he prefers to return home each night rather than remain at the park.

A large part of the patient's care appears to address his physical needs. That was evident to the Members who observed the patient's carers assist him in and out of the hearing room. The patient's frailty as described by the treating psychiatrist was also very apparent to the Tribunal.

2. The nature of the relevant unlawful act and the period of time that has passed since the act happened

The index offences are alleged to have occurred over a period of three years. Perhaps the most serious incident involved the patient trying to light a fire and threatening a police officer. The balance of the index offences appear to be property type offending.

Since the offending, the patient's physical health and mobility have declined as described by the treating psychiatrist. She proposed that any risks posed by the patient were significantly or completely mitigated by his declining physical health and mobility, as well as his long-term stability.

3. Is the Forensic Order necessary, because of the person's mental condition, to protect the safety of the community, including from the risk of serious harm to other persons or property?

The evidence from the treating team overwhelming categorised the patient's risks as low or very low. The Tribunal gave significant weight to the patient's current circumstances. Although alcohol use continued, it had reduced and was managed and monitored by his carers. He was clearly a very frail man.

He was observed to be have been mentally stable over a long period and to be engaged in a routine that saw him returning to his home every night. There had been no offending behaviour for over two years and no recent reports of aggression.

When pressed, the treating psychiatrist and the members of the treating team struggled to propose any risks that the patient may pose to the safety of the community. There was a suggestion of occasional verbal abuse, but nothing recent.

The Tribunal had regard to the ARMC minutes. They show that over the preceding 12 months the CFOS representatives, forensic liaison officer, clinical director and treating psychiatrist have unanimously supported revocation of the current Forensic Order.

Having regard to the patient's relevant circumstances and the matters in section 432 of the Act, the Tribunal accepted that the evidence overwhelmingly supported a finding that the patient presented little to no risk to the safety of the community and little to no risk of serious harm to other persons or property. A finding to the contrary would necessarily be at odds with all of the relevant evidence before the Tribunal.

<u>Treatment Support Order</u>

The recommendation in the last two clinical reports has been to revoke the Forensic Order and replace it with a Treatment Support Order. After submissions were invited from the lawyers on this point, the Attorney-General's representative submitted that if the Tribunal is minded to revoke the Forensic Order, the Tribunal should make a Treatment Support Order as there have been recorded

absences from the supported accommodation in the past, and alcohol consumption continues.

The patient's legal representative submitted that her preference was for the Forensic Order to be revoked without further orders, but that a Treatment Support Order could be made.

Both lawyers were of the view that the Tribunal had the power to make a Treatment Support Order despite the fact that the patient does not receive any treatment for a mental illness.

The Tribunal questioned the treating team about the need for a Treatment Support Order and the appropriateness of making one.

The Tribunal noted that at the ARMC revocation recommendation was without further orders. Then at the subsequent ARMC meeting, the proposal changed to recommend a Treatment Support Order be made. At that meeting, the clinical director is noted to have said *"No risks to community. No purpose to FO. Supportive of patient ceasing FO and being managed in primary care with NGO supports. This may need to [be] stepped down to satisfy the MHRT, but from a clinical point of view, this would achievable directly."*

When questioned about this, the treating psychiatrist withdrew the recommendation to make a Treatment Support Order. She said that it had been made in light of this Tribunal's previous reluctance to revoke the Forensic Order. She agreed there was no clinical basis or purpose for a Treatment Support Order beyond 'satisfying the MHRT'.

The Tribunal found that the suggestion that a Treatment Support Order be made is not supported by the evidence. This is not a case envisaged by section 450, where a Treatment Support Order becomes 'more appropriate' than a Forensic Order, in that the more restrictive structure of a Forensic Order is no longer required but some risks prevail. The patient's risk is so low that a Treatment Support Order cannot be warranted either.

Additionally, the Tribunal considered the appropriateness of making a Treatment Support Order in circumstances where the patient does not receive treatment for a mental illness. The legislation permits the making of Treatment Support Order upon revocation of a Forensic Order (Mental Health), however the appropriateness of doing so was carefully examined. *Treatment* and *care* are each defined in the Act. The definitions attracted judicial analysis by Dalton J *In the matter of BAC* [2019] QMHC 4. Her Honour considered the definitions in the context of the history of the legislation and found the current Act contemplates that persons who have only an intellectual disability will receive care, but not treatment.

In the treating psychiatrist's opinion, the patient does not have a mental illness and therefore does not receive any 'treatment'. The CFOS representative expressed a similar view which is noted in the ARMC minutes.

The name *Treatment Support Order* is suggestive of its purpose. Though it is not expressly defined, section 143(3) prohibits the Mental Health Court from making the order where unfitness for trial is because of an intellectual disability and the person does not need treatment and care for any mental illness.

The term *treatment* used in the legislation is ambiguous, however the Tribunal is guided by Dalton J's decision in *BAC*. On balance, the Tribunal declined to make a Treatment Support Order in circumstances where the patient was found to be unfit for trial because of a cognitive impairment and does not need treatment for a mental illness that presents any risk to the community.

Conclusions of the Tribunal

For those reasons, the Tribunal found on balance that the Forensic Order was no longer necessary

pursuant to section 442(1). The treating team, CFOS representatives, and forensic liaison officer do not identify any potential risks beyond some limited verbal aggression. The patient does continue to consume alcohol, but there was no evidence that his alcohol use creates risk to the safety of the community.

More significantly, the patient presents as a very frail man with limited mobility. He moved slowly and delicately in and out of the hearing room with assistance from the carers and a walking frame. The treating psychiatrist was unable to point to any risk of harm to other persons or property posed by the patient, in large part as he would not be physically able to inflict any such harm. Moreover, he was unlikely to try given the support and stability he now experiences from his NGO. These were the most significant factors in the Tribunal's deliberation.

The Forensic Order was revoked. There was no reason to make any further order.

Presiding Member

APPENDIX A
Statement of the law regarding Forensic Orders

The main objects of the *Mental Health Act 2016* (**Act**) are set out in section 3(2) and must be achieved in the way outlined in sections 3(2) and 3(3).

Chapter 12, Part 4 addresses the Mental Health Review Tribunal's (**Tribunal**) review of Forensic Orders (Criminal Code). The Tribunal must, within 21 days of receiving notice of the making of a Forensic Order (Criminal Code), conduct a hearing. At the hearing, the Tribunal must make a Forensic Order (mental health) unless the Tribunal considers:

(a) the person has an intellectual disability but does not have a dual disability; or
(b) the person has a dual disability but does not require treatment and care for their mental illness.

On the making of a Forensic Order (mental health) or Forensic Order (disability), the Forensic Order (Criminal Code) ends.

Section 433 provides that the Tribunal must conduct a **periodic review** of the Forensic Order –

(a) within 6 months after the order is made; and
(b) at intervals of not more than 6 months.

The Tribunal must also review the Forensic Order on application (an **applicant review**) by the forensic patient, an interested person for the patient, the Attorney-General, the chief psychiatrist or the director of forensic disability. Section 433(3) provides that the Tribunal may, on its own initiative, review a Forensic Order (a **tribunal review**).

Section 432(1) provides that the Tribunal must have regard to the following when reviewing a Forensic Order (mental health) or Forensic Order (disability):

(a) the relevant circumstances of the person subject to the order;
(b) the nature of the relevant unlawful act and the period of time that has passed since the act happened;
(c) any victim impact statement given to the Tribunal under section 155 or 742 relating to the relevant unlawful act;
(d) if the Mental Health Court made a recommendation in the order about an intervention program for the person – the person's willingness to participate in the program if offered to the person.

Section 438 provides that an application for an applicant review must state the orders that are sought and such order/s must be an order mentioned in Division 4 or 6 and are subject to any non-revocation period that may have been made by the Mental Health Court under section 137 (as required by section 442).

Section 441(1) provides that on a periodic review, the Tribunal must decide to confirm or revoke the Forensic Order for the patient. Section 441(2) provides that on an applicant review, the Tribunal must decide whether to make the orders sought and may make orders under Division 4 that it considers appropriate. Section 441(3) establishes that on a tribunal review, the Tribunal must decide any matter that was stated in a notice given under section 439(3) and may make orders under Division 4 that it considers appropriate.

Section 442 requires the Tribunal to confirm the Forensic Order if the Tribunal considers the order is necessary, because of the person's mental condition, to protect the safety of the community, including from the risk of serious harm to other persons or property. Also, during any non- revocation period for the Forensic Order, the Tribunal is taken to have confirmed the order.

If the Tribunal confirms the Forensic Order, the Tribunal may change the category of the Forensic Order. However, the Tribunal may change the category of the order to community only if satisfied there is not an unacceptable risk to the safety of the community, because of the person's mental condition, including the risk of serious harm to other persons or property.

Under section 445, if the Tribunal confirms the category of the Forensic Order as inpatient or changes it to inpatient, the Tribunal must:

- order that the person have no limited community treatment; OR
- approve that an authorised doctor or senior practitioner may authorise limited community treatment to the extent of, and subject to, the conditions decided by the Tribunal OR change the category of the order to community; OR
- order that the person have limited community treatment of a stated extent and subject to conditions.

Limited community treatment may only be approved or ordered if the Tribunal is satisfied there is not an unacceptable risk to the safety of the community arising from the person's mental condition.

Section 446 provides that if the Tribunal confirms the Forensic Order as community category or changes the category to community, the Tribunal must order that an authorised doctor or senior practitioner must not change the category to inpatient OR approve that they may at a future time or extent of treatment in the community to the extent and subject to the conditions of the Tribunal.

Chapter 12, Division 5 (sections 452 – 455) establishes that the Tribunal must not revoke a Forensic Order:

- during any non-revocable period of the Forensic Order;
- while a person remains unfit for trial (temporarily), unless the Tribunal makes a Treatment Support Order for the patient under section 450
- for Forensic Orders of patients charged with prescribed offences, the Tribunal must not revoke such a Forensic Order unless the Tribunal has obtained and considered an independent report.

If the Tribunal decides to revoke a Forensic Order (mental health), the Tribunal may make a Treatment Support Order or Treatment Authority for the patient if the Tribunal considers that a Treatment Support Order or Treatment Authority is necessary to protect the safety of the community, including from risk of serious harm to other persons or property. However, the Tribunal may only make a Treatment Authority for a patient on the recommendation of an authorised psychiatrist that the treatment criteria apply to the patient and that there is no less restrictive way for the person to receive treatment and care.

For a person who has a dual disability and is subject to a Forensic Order (mental health), if the Tribunal is satisfied the person no longer requires involuntary treatment and care for their mental illness. The Tribunal must revoke the Forensic Order (mental health) and make a Forensic Order (disability) for the person (section 457).

If the Tribunal decides to revoke a Forensic Order (disability), no further order may be made.