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.

Matter:	Fitness for Trial Review
Attendees	
Patient:	Attended
Patient's Legal Representative:	Attended
Treating Psychiatrist:	Attended
Registrar:	Attended
Case Manager:	Attended
Attorney-General's Representative:	Attended
Decision	
Date of decision:	2020
Decision:	The patient is fit for trial.

The Tribunal's first fitness for trial hearing for the patient was adjourned, as the treating psychiatrist was on leave.

Summary of evidence

The patient is a single man diagnosed with depression. The patient is charged with a number of index offences, including, trafficking in dangerous drugs and receiving tainted property. A detailed summary of the patient's contact with public mental health services is outlined in reports before the Tribunal. In brief, the patient first contacted mental health services approximately three years ago and has had inpatient admissions since that time. The patient's public mental health service records indicate he has not been placed under involuntary treatment for long periods of time.

The patient was found temporarily not fit for trial, and he was placed on a treatment support order, inpatient category so that the treating team could obtain more information in order to appropriately manage his condition.

The patient was admitted to hospital earlier this year. Since his discharge, he has been reviewed twice by his treating psychiatrist in the community, and he has been reviewed fortnightly by his case manager. The patient has also fortnightly attended a private psychologist. The patient had also made an appointment to consult his private psychiatrist later in the year.

The patient independently attends to his own acts of daily living in the community. He resides with flat mates. The patient explained that he likes to speak on the telephone to a family every day for support and he mostly spends his time playing computer games and he also watches movies. The patient explained that some of his goals are to become more motivated. The patient also explained he had been out once with friends over the last few months. The patient has a child with whom he has no contact.

The treating psychiatrist diagnosed the patient with mild depression with mild symptoms, with no psychotic symptoms. The treating psychiatrist elaborated that during the patient's hospital admission, his medication was increased slightly and from observations on the ward the patient managed very well. The treating psychiatrist stated she was satisfied that the current medication regime is optimised and that the patient has been emotionally and mentally stable and well during his time in the community. The treating psychiatrist highlighted that the patient has demonstrated continued improvement in his mental state with improved mood, and ongoing participation in social activities with friends.

The treating psychiatrist explained that the patient's anxious response to his fitness for trial review, where he reported a one week decline in mood, interrupted sleep, exacerbation in negative cognitions, associated with ongoing suicidal ideation was without intent and without any deliberate self-harm. The treating psychiatrist opined that this pattern of increased stress response is not evidence of a relapse in major mental illness and that the patient's diagnosis remains that of a mild recurrent depressive episode, with co-morbid complex grief response, personality vulnerabilities and anxiety. The treating psychiatrist gave strong evidence that the patient adheres to his medication, he remains engaged with both his case manager and his private psychologist and is actively participating in recovery work around both cognitive and behavioural interventions. The treating psychiatrist reiterated that the patient has demonstrated an improvement in his depressive illness whilst being under this regime of care. The treating psychiatrist elaborated he has had improvements noted in mood, sleep, and suicidal ideation and that he has demonstrated no pervasive anhedonia, is engaging socially with friends and participating in computer games. The treating psychiatrist highlighted the patient's view that he does not believe he is yet ready to stand trial and opined he still

has negative cognitions around the trial and that given the nature of the patient's mental state, these cognitions, anxiety and associated somatic responses are not likely to quickly resolve or respond completely to pharmacotherapy. The treating psychiatrist outlined that the patient is likely to require long term psychotherapy to address his personality structure and grief and the impacts upon him. The treating psychiatrist continued that despite this, there is no evidence that these symptoms would prevent him from understanding and participating in the full length of the trial process, and also withstanding the trial's likely duration. The treating psychiatrist also opined that it is possible that further prolonging the legal process could have a detrimental effect on his mental state as he might continue to ruminate on the charges.

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 fitness for trial. Further reference will be made to these under "Application of evidence before the Tribunal to relevant provisions".

The issue for determination at the review was whether the patient was fit for trial.

Clinical Report

The patient received the clinical report and gave instructions to his legal representative.

Fitness for Trial requirements

Section 488 requires that the Tribunal consider the person's mental state and decide on the balance of probabilities whether the person is fit for trial.

The current Act does not include the anomalous definition which was contained in the predecessor legislation, which included the requirement to determine whether the person could endure the trial, with serious adverse consequences to the person's mental condition unlikely. The Court of Appeal considered the (then prospective) change in the test in *Berg v Director of Public Prosecutions* (Qld) [2015] QCA 196 with respect to the Bill for the Act (at [54]) that Queensland would revert to the common law concept of fitness for trial. In the associated footnote, their Honours referred to the Explanatory Memorandum, which confirmed this was the intention of the new Act.

The Tribunal has applied the common law test, the principles and derivation of which were succinctly stated by the High Court in *Kesavarajah v The Queen* (1994) 181 CLR 230, 246, cited by the majority in *Berg's case* at [39-40]:

> "In *Regina v. Presser*, Smith J. elaborated the minimum standards with which an accused must comply before he or she can be tried without unfairness or injustice. Those standards, which are based on the well-known explanation given by Alderson J to the jury in *R. v. Pritchard*, require the ability (1) to understand the nature of the charge; (2) to plead to the charge and to exercise the right of challenge; (3) to understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused committed the offence charged; (4) to follow the course of the proceedings; (5) to understand the substantial effect of any evidence that may be given in support of the prosecution; and (6) to make a defence or answer the charge." (footnotes *omitted*)
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> [40] The plurality continued:

> "In the context of a trial, fitness to be tried is to be determined by reference to the factors mentioned by Smith J. in *Presser* and by reference to the length of the trial. It makes no sense to determine the question of fitness to be tried by reference to the accused's condition immediately prior to the commencement of the trial without having regard to what the accused's condition will or is likely to be during the course of the trial."

There are many considerations in the conduct of a criminal trial, including the provision of a fair trial, and the timely resolution of serious criminal charges for the community, the victim and the accused themselves. The test of fitness for trial is robust: as Haynes J stated in *Eastman v The Queen* [2000] HCA 29, 25 May 2000: "Properly understood these tests may not be very difficult to meet."

The elements which must be satisfied to find a person fit for trial as established in *R v Presser* [1958] VR 45 are:

1. *Does the patient have an understanding of the charges against them and are they able to enter a plea at their trial?*
2. *Does the patient have the capacity to understand their right to challenge a prospective juror and do they have the capacity to challenge a prospective juror?*
3. *Does the patient understand the proceedings are an inquiry into the offences allegedly committed by him/her and that the proceedings will determine their guilt or innocence? It is not necessary for the person to understand the purpose of the various court formalities.*
4. *Does the patient have a general understanding of what will occur in the court proceedings?*
5. *Does the patient have the capacity to understand the effect of the Crown's allegations against them, including the evidence given by witnesses?*
6. *Is the patient able to make a decision as to whether to give evidence and be able to give their own version to the Court and their legal representatives?*
7. *Is the patient able to instruct his/her legal representatives?*
8. *Does the patient have sufficient capacity to be able to make a decision as to the defence that will be relied upon?*

Summary of findings

1.
The patient indicated an understanding of the charges against him, that he needed to enter a plea and that he was aware of the fitness for trial process, but he also stated that he feels stressed and that he isn't ready for trial as the idea of going to jail stressed him. The treating psychiatrist explained her diagnosis of the patient remained the same. The treating psychiatrist highlighted that her team has observed no evidence of psychotic symptoms, no intellectual disability and no cognitive impairment. The treating psychiatrist said that she thought the patient can understand charges against him, is able to enter a plea and would cope with a trial that looks into the charges. The treating psychiatrist was very clear that her treating team have been able to communicate well with the patient and the team are confident the patient would be able to enter a plea and understand the charges he is facing. The treating psychiatrist's clinical report also noted that the patient responded appropriately to her questions around entering a plea at trial.

2.
The treating psychiatrist's view was that the patient has capacity to understand he would be able to challenge a prospective juror and that he would also have capacity to challenge a prospective juror. The treating psychiatrist reported that the patient successfully understood questions regarding these issues during his reviews with her and her treating team and that from these observations it is likely the patient would be able to understand the challenge process and withstand the time required for the trial to progress.

3.
The treating psychiatrist highlighted that her discussions with the patient demonstrated to her that he understood that the court process will try to work out whether he is guilty or not guilty. The treating psychiatrist's evidence indicated that the patient understood the consequences of being in court, that incarceration was possible, that the patient would need to deal with the outcomes of the court process and that the length of the trial could not be accurately estimated. The treating psychiatrist observed that the patient is likely to be able to concentrate, process the material during the trial and give his own responses. The treating psychiatrist reiterated that it would not be helpful for the patient to further avoid the stress of attending court and the treating psychiatrist voiced her concern that if the patient did not go trial it could prolong his mild symptoms which could then ingrain unhelpful behaviours. The treating psychiatrist opined that going to trial could be beneficial for the patient to address and deal with underlying stressors for him and she stated that further community treatment will not achieve a better outcome for the patient as his mental condition is stabilised.

4.
The treating psychiatrist's evidence indicated that the patient has a clear understanding of what occurs in court proceedings as he has previously attended court to face criminal charges and that he also understands the use of evidence in court. When asked about accommodations to assist the patient in attending the trial the treating psychiatrist recommended that it would be helpful for him to have more frequent breaks and it would also be helpful for him to have a support person attend court with him, should he wish for that to occur.

5.
The treating psychiatrist opined that the patient has capacity to understand the effect of the case against him as he knows that the Crown have electronic recordings that will be used in evidence against him and that they will be played to demonstrate what is alleged to have happened.

6.
The treating psychiatrist explained that the patient knows that he will be asked whether he intends to give evidence at trial, or not, and that he must decide about whether he does this or not. The treating psychiatrist explicated that from her own and her team's observations of the patient over the last three months, they believed he would be able to make this decision. The treating psychiatrist also elaborated that the trial may be stressful for the patient but that delaying the trial could be more detrimental to his mental health. The treating psychiatrist clarified that initially the patient reported he failed to recall the incidents pertaining to the charges, due to the more than five-year period that had passed since the charges were proffered. However, the patient was also able to identify to the treating psychiatrist that he has retained the same legal representative for the duration of the process related to these charges, he has instructed them previously and is seeking to speak with them again. The treating psychiatrist also highlighted the patient's comments that he believes the charges are exaggerated, in direct contrast to his initial report of having insufficient memory to comment on the charges.

7.
The treating psychiatrist opined that the patient has a good understanding of the role of his legal representatives and he identified that he has previously instructed lawyers and there is no evidence to suggest he would not be able to continue to instruct them.

The patient's legal representative questioned the treating psychiatrist about her views on whether the patient's mental health could potentially decline so seriously at trial that he could not continue to instruct his legal representative as the trial progressed. The patient's legal representative also asked

the treating psychiatrist's opinion regarding evidence in the transcript that the patient could potentially decompensate at trial due to a deterioration of his mental condition. The treating psychiatrist responded that the patient's symptoms are mild and that he had been stable for over a number of months in the community and that the observations demonstrated he was fit to stand trial. The treating psychiatrist answered she could not predict with certainty if the patient's symptoms would be triggered by the trial. However, the treating psychiatrist emphasised that the patient's treatment is now optimised and therapeutic. The treating psychiatrist said that if the patient has a support person and is permitted adequate breaks, he is more likely than not to be able to withstand the stress of the trial. The treating psychiatrist elaborated that it is very likely that the patient will be impacted by stress and anxiety at trial, however, stress and anxiety are not major mental disorders and it would be considered normal to experience stress and anxiety prior to and during a criminal trial.

The patient's legal representative asked the treating psychiatrist whether it was premature to find the patient fit for trial as he was found not fit for trial around four months ago and also reported suicidal ideation. The treating psychiatrist responded that further treatment will not improve the patient's mental state as his medication regime is optimised, he is engaging in psychological interventions, he reports he is not using substances, and despite his reported passive suicidal ideation there has been no plan and no intent made of the suicidal ideation, therefore he is stable. The patient provides urinary drugs screens (UDS) and the treating team's evidence was that they understood that there had been no positive UDSs. The treating psychiatrist highlighted that the patient's mild symptoms do not require further treatment as he is adhering to his medication, engaging with the treating team, seeing a private psychologist, and abstaining from substances. Furthermore, the treating psychiatrist noted that after reviewing the patient she has no plans to change his treatment. The treating psychiatrist stated that the charges are from over 5 years ago and not dealing with them may have a counter-therapeutic effect for him. The treating psychiatrist also stated that the patient has not had problems explaining his views to the treating team, that he had done very well during his brief admission, that he is well engaged with treatment, and that the patient is stable on his current treatment regime. The treating psychiatrist highlighted that the patient expressed no negative side effects from his medication and the treating psychiatrist reiterated that further treatment was not required as his medication and treatment was now optimised. The treating psychiatrist explained that further waiting and not knowing the outcome will aggravate his mild depression. His symptoms are mild, with no psychotic symptoms, no cognitive or intellectual disability so I think if he is found not fit for trial it is going to worsen his illness and it is not in his best interests. It is better for him to instruct his lawyer and go to trial and he is likely to be able to cope with this well and I think he would be able to concentrate and focus and endure the trial process. The treating psychiatrist further elaborated that the patient has been successfully living in the community, that he is functioning well, he chooses to focus his time on computers, his mental state is stable, he is adhering to treatment and as he has chosen not to use substances over the last few months.

The patient's legal representative submitted that the Tribunal should order a section 721 Tribunal Ordered Examination (TOE) due to the potential impact, on the patient, of the stress from attending a criminal trial and that he may not be able to instruct his legal team due to a potential decompensation of his mental state. The treating psychiatrist responded to the patient's legal representative's question that the patient's illness is a mild depressive disorder and that his stress could be adequately managed in court with a support person and requesting extra breaks. The treating psychiatrist further explained that the treating team cannot remove all stress for the patient, he has no other symptoms for the treating team to target, and that if the trial is prolonged it will not reduce the risk of him decompensating. The treating psychiatrist described the patient as pleasant at reviews, he engages in activities, there were no incidents of self-harm, and perhaps the complex presentation is more about his personality. The treating psycahitrist's view was that a TOE was not necessary as the patient's mental illness was stable as he was complying with treatment. The

Attorney General's representative submitted that based on the treating psychiatrist's evidence it was not appropriate for the Tribunal to order a TOE.

The Tribunal decided that the treating psychiatrist adequately addressed the patient's legal representative's questions regarding the likely potential for the patient to decompensate due to the stress of proceedings. The Tribunal gave weight to the decision of the Mental Health Court. The Tribunal gave greater weight to the more recent update from the treating psychiatrist's treating team, her reading of the inpatient psychiatrist's notes of the patient's admission, and the patient's own evidence that he has decided to abstain from substances and has done so in the community. The patient's decision to abstain from substances was also noted by the treating team as a factor contributing to his ongoing stability. The patient's expressed determination to abstain from all substances (and recent abstinence) is likely a stabilising factor for the patient. Another difference is that the patient is now actively engaging with treatment since discharge and he has attended psychological interventions under the direction of his treating team. The Tribunal observed that during the hearing the patient was not visibly upset, agitated or distressed. Indeed, the patient participated in the Tribunal process calmly and logically.

The Tribunal was persuaded by the treating psychiatrist's response to the patient's legal representative's questions. The treating psychiatrist reiterated that the patient was now stable and more likely to be able to handle the stress of the trial and that there could be accommodations made to support him such as requesting extra breaks, if needed, and having a support person to accompany him, if he wanted. The treating psychiatrist forcefully stated her opinion that the patient was likely to be able to participate in the trial in relation to the *Presser* elements and that it was unlikely that his ability to participate would be compromised during the trial. In summary, the treating psychiatrist's opinion was that the patient could withstand the stressors of the trial without losing focus and memory and he could follow proceedings and make decisions. The treating psychiatrist articulated that the patient has received and maintained the treatment he requires, and his mental state is stable. The Tribunal found this evidence compelling.

In response to the patient's legal representative's question around whether the patient required more time in the community prior to being found fit for trial, the treating psychiatrist emphatically disagreed indicating the patient was stable and his treatment was optimised. The treating psychiatrist further elaborated that if the trial were to be delayed, she was concerned that the delay itself could lead to a deterioration in the patient's symptoms in the long run, thus hindering the patient's ongoing recovery journey. This evidence was persuasive. Therefore, in response to the patient's legal representative's question regarding a request for a TOE the Tribunal was more persuaded by the Attorney-General's representative's submission that based on the treating psychiatrist's robust evidence it was not appropriate to seek a TOE as the patient was stable, engaging in treatment, no longer using substances and was likely to withstand the stress of a trial.

8.
The patient agreed that he has a mental illness and that his treatment helps him to be stable. He explained that his medication helps him to sleep, to be motivated and helps him to settle down as he sometimes hears the voice of a deceased family member. The patient explained he knows he needs to maintain his treatment. When asked about his prior history of poor engagement with treating teams the patient said he can acknowledge that was before, but that he knows he needs help now. When asked about his early warning signs, the patient said if he was becoming unwell, he would hear his family member's voice more in his head and feel jittery. The patient said he would tell his case manager about this, or family members. The patient explained that he does not drink alcohol anymore.

The treating psychiatrist emphasised that the patient has a mild depressive illness with mild symptoms. The treating psychiatrist stated that her starting point is that he has had mild symptoms, and he does not have a major mental disorder. Her observations indicate no enduring pathological change in his mood, therefore this is not a major mental disorder. He has not lost functionality, he is able to live well independently in the community, there has been no self-harm and I do not think he would become unfit for trial when he is dealing with the stressors of the trial. The treating psychiatrist explained that the patient has sufficient capacity to make decisions as to the defence he would rely upon. Furthermore, the treating psychiatrist expanded that if the patient was found fit for trial, her treating team would not be seeking a treatment authority as the patient does not meet criteria for involuntary treatment under the Act.

The patient stated he did not believe he was fit for trial. However, the Tribunal found the treating psychiatrist's detailed and balanced evidence more persuasive. The Tribunal noted the patient's preference for his diagnosis was different to the treating psychiatrist's. However, the Tribunal placed greater weight on the treating psychiatrist's evidence and that regardless of the difference of opinion, the patient acknowledges he has a mental illness and that he requires treatment and he voiced plans to continue to engage in this treatment and to continue to abstain from substances. The Tribunal found that the patient is actively engaged in treatment, is adhering to medication, he did not explain any negative side effects of treatment and he plans to continue to abstain from substances as he has insight into the deleterious effect of substances on his mental health. The Tribunal found that the patient is independently and successfully living in the community and his treatment is optimised and he is currently stable.

Human Rights

The Tribunal acknowledged and considered the human rights set out in the *Human Rights Act* 2019 (**HRA**) that were relevant to the decision regarding the patient's fitness for trial. In particular, the Tribunal considers that the following human rights under the HRA are potentially engaged and limited by the decision of the Tribunal: sections 17(c), 21, 25, 26, 27, and 31.

Considering the following, the Tribunal is satisfied that the limits imposed by the Tribunal's decision regarding the patient are lawful, proportionate to the circumstances, reasonable and demonstrably justifiable in accordance with section 13 of the HRA for the following reasons:

- the criteria of the relevant tests under the Act were met, thus the decision to find the patient fit for trial is lawful and within the jurisdiction of the Act;
- the patient was afforded procedural fairness and a fair hearing as the patient received the relevant material according to the statutory timeframes and attended the hearing with his legal representative. The patient's personal details were provided in accordance with the Act for the purpose of undertaking the patient's fitness for trial (sections 25 and 31 HRA);
- the Tribunal considered the current involuntary treatment to be necessary to support the treatment of the patient's mental illness as that is what the Mental Health Court ordered. The limitations on the patient were deemed proportionate and necessary in response to the potential risks for which the patient's treatment support order was made. The limitations also ensure the protective obligations of the treating team. (section 17(c);
- the Tribunal provided the patient the opportunity to speak freely about his views around treatment (section 21);
- in the community, the patient is able to interact with support people and friends or family. If the patient wished to, he could also choose to spend time on religious or cultural pursuits (sections 26 and 27 HRA); and

- the human rights engaged have been balanced against the risk to the patient's health and wellbeing that is likely to eventuate if he does not receive treatment and care under the Act. The involuntary treatment in the community is reasonable, the least restrictive way to receive care and improves the patient's stability, health outcomes and reduces the patient's potential risks to himself and others. (section 17(c) HRA). (s 3, 5, 21, 28, 409, Part 6, Division 1, 705, 723,740, 748 Act)

Conclusions of the Tribunal

The Tribunal considered the patient's relevant circumstances, his history of mental illness at both public and private mental health services and his most recent treatment under the Act. The patient said a trial would cause him stress. However, the Tribunal found that the patient is fit for trial and on the balance of probabilities is likely to be able to withstand the stress of a criminal trial and it is likely his mental state will not be compromised during court processes due to the optimisation of his current treatment regime. The Tribunal also acknowledged that it would be open to the court to allow the patient extra accommodations at trial (such as requesting extra breaks during the trial and requesting a support person to sit with him).

1. The Tribunal noted the patient participated calmly and coherently during the Tribunal hearing and was able to give clear and logical responses. The Tribunal inferred this was because the patient had received adequate and focused follow up from the mental health services. The Tribunal concluded that the patient is stable and functioning independently and well in the community. He spends his days concentrating and focusing on computers, watching movies and speaking on the telephone with his family. The patient attends to his own shopping, manages his finances and he has the functional dexterity and attentiveness to pursue his chosen leisure activities each day. The patient did not report negative side effects of medication and said he plans to engage in more sessions with his private psychologist. Based on the patient's current stability, the Tribunal was persuaded the patient is fit for trial and likely to be able to concentrate during the trial. Even though the trial will likely be stressful for him, with the measures outlined by the treating psychiatrist, the patient is likely to be able to endure the stress of a trial. The Tribunal was provided with overwhelming evidence that the patient is fit for trial and that the fitness was likely to be sufficiently resilient to be sustained throughout the trial period.

2. The Tribunal was persuaded that the patient's treatment and medication has been optimised and that the patient is actively making decisions to sustain his stable mental health. The patient clearly articulated he is engaging with treatment and plans to continue to do so. The Tribunal considered the patient's legal representative's question around the patient's passive suicidal ideation. However, the treating psychiatrist's evidence was persuasive that the patient has made no suicidal plans, nor voiced intent and there have been no acts of self-harm during his recent care under mental health services.

3. The Tribunal noted that the treating psychiatrist said she did not read all pages of the Mental Health Court transcript within the dossier. However, the treating psychiatrist adequately responded to the patient's legal representative's questions regarding key points within the transcript. The treating psychiatrist forcefully explained that the patient's treatment is now optimised and that there is no further treatment her team could provide to the patient, at this stage, as there has been a significant decrease in his symptomatology. The Tribunal noted that the patient is attending a psychologist, where he is receiving both cognitive and behavioural interventions. Furthermore, the patient is adhering to his medication regime, is continuing to be medically reviewed, and he is seeing his case manager as well.

4. The Tribunal considered the patient's legal representative's submission that the patient required a longer period in treatment prior to being found fit for trial. The treating psychiatrist disagreed and noted that the patient's treatment is now optimised, therapeutic and nothing further could be gained from him remaining under a treatment support order. Indeed, the treating psychiatrist also opined that if the patient was found fit for trial that the patient's illness could be managed voluntarily as the patient is engaged in treatment and can see the benefits of ongoing treatment. The treating psychiatrist's evidence was that the patient is now therapeutically treated and has mild symptoms and he had not engaged in self-harm nor voiced suicidal ideations to the treating team. The treating psychiatrist's evidence that the patient had the capacity and insight to consent to further treatment prior to facing trail and that he was likely to be able to withstand the stress of the trial was compelling. The Tribunal was persuaded by the treating psychiatrist's reiterations that the patient's treatment is currently optimised and that it was normal for him to feel stress around a future trial. The treating psychiatrist highlighted the patient's personality structure could decompensate in the lead up to trial but that this was not likely as the patient had remained stable during community treatment and he was in a good position now to endure the stress of a trial.

5. The Tribunal gave weight to the transcript and psychiatrists' letters within the dossier material. The Tribunal noted that this material predates the patient's inpatient treatment earlier this year under another treating psychiatrist. It also predates the recent community treatment under the treating psychiatrist's treating team. Therefore, the Tribunal concluded that on the latest evidence, the patient is now both mentally and emotionally stable and well, with mild depressive symptoms. The Tribunal noted the risk that the patient's mental state may destabilise at trial, but the Tribunal concluded that in comparison to previous treatment regimes, the patient's current treatment has been optimised and he is likely fit to withstand the stress of trial and he is likely to endure the stress of trial.

6. The Tribunal also noted another difference between the patient's previous treatment and current treatment regime was that prior reports were concerned the patient may abuse substances if the patient's mental state deteriorates. However, the patient gave clear evidence that he does not intend to do this and that he has not used substances since discharge from hospital as he now understands the deleterious impact of substances on his mental state.

7. The Tribunal considered the patient's legal representative's submission that a TOE was required for the patient. The Attorney-General's representative submitted this it was not appropriate due to the strength of the treating psychiatrist's evidence that a TOE would not achieve greater clarity around the patient's illness as he had been stable, with mild symptoms and engaged in treatment. The Tribunal concurred that the treating psychiatrist's evidence was robust and adequate and that a TOE would not provide further clarity.

8. On the evidence, the Tribunal decided it is more likely than not that the patient will be able to concentrate, be able to process material, maintain focus and reflect on material and maintain the capacity to give instructions to his legal representative during a criminal trial. The Tribunal was persuaded that the *Presser* elements were made out and that based on the patient's current stability he is likely to maintain the capacity to give instructions to his legal representatives and also follow the court proceedings.

9. The treating psychiatrist reiterated the patient's index offences are over 5 years old and she expressed concern that it may cause additional stress to the patient's mental illness to not

deal with these charges. The treating psychiatrist opined it is better for the patient to deal with the criminal trial and to deal with his pending charges. The treating psychiatrist opined that if the patient did not go to trial this could prolong his symptoms which could further ingrain unhelpful behaviours and cause more harm to the patient's ongoing recovery and current stability.

Presiding Member

ANNEXURE A
Statement of the Law regarding Fitness for Trial

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).

Part 6 of Chapter 12 of the Act sets out provisions relating to reviews of the mental condition of persons to decide fitness for trial by the Mental Health Review Tribunal (**Tribunal**).

Section 484 of the Act relevantly provides that Division 1 of Part 6 of Chapter 12 applies where a finding of unfitness has been made in relation to the person, the person has not been found fit for trial and the proceeding against the person for the offence has not been discontinued under this Act or otherwise.

Section 486 of the Act sets out the times the Tribunal must or may review the person's mental condition under Part 6. The Tribunal must review the patient's mental condition (**periodic review**) at least every 3 months for a year starting on the day of the Mental Health Court's (**MHC**) decision or jury finding and afterwards, at intervals of not more than 6 months.

The Tribunal must also review the person's fitness of trial on application by the person, an interested person for that person, the chief psychiatrist or the director of forensic disability (**applicant review**). Further, the Tribunal may, on its own initiative, review the person's fitness for trial (**tribunal review**).

Section 488 provides that on the hearing of a periodic review, the Tribunal must consider the person's mental state and decide whether the person is fit for trial. If, on the last review conducted under section 486(1)(a), or on a review conducted under section 486(1)(b), the Tribunal decides the person is unfit for trial, the Tribunal must also decide whether the person is likely to be fit for trial in a reasonable time.

No other guidance is provided in the Act to the Tribunal for assessing a patient's fitness for trial. However, the Tribunal must be satisfied of the following elements in order to find fitness for trial as outlined in the reported decision of *R v Presser* [1958] VR 45:

- The patient has an understanding of the charges against him and is able to enter a plea at his trial.
- The patient has the capacity to understand, if informed, of his right to challenge a prospective juror and has the capacity to do so.
- The patient understands that the proceedings are an inquiry into the offences allegedly committed by him and to determine guilt or innocence. (It is not necessary for the patient to understand the purpose of the various court formalities).
- The patient has a general understanding of what will occur in the court proceedings.
- The patient has the capacity to understand the effect of the Crown allegations against him including the evidence given by the Crown witnesses.
- The patient is able to make the decision as to whether to give evidence and be able to give his own version and to relay the facts of the alleged offences to both the Court and to his legal representatives.
- The patient is able to instruct counsel and legal representatives.
- The patient has sufficient capacity to be able to make a decision as to the defence that will be relied upon.