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:	Forensic Order (Disability) Review
Attendees	
Patient:	Attended
Patient's Legal Representative:	Attended
Support Worker:	Attended
Psychiatrist:	Attended
Case Manager:	Attended
Attorney-General's Representative:	Attended
Decision	
Date of decision:	2021
Decision:	The forensic order is confirmed. The category of the forensic order is community. The conditions of the forensic order are as attached to the decision. The Tribunal approved that an authorised doctor may, at a future time, change the nature or extent of treatment in the community, received by the patient, to the extent and subject to the conditions decided by the Tribunal.

The patient was placed on a forensic order (disability) by the Mental Health Court in relation to a charge of indecent treatment of a child under 16 years. This hearing concerned a periodic review of the patient's forensic order. The patient was present at the hearing and provided the Tribunal with a written self-report, which was read aloud by his case manage, during the hearing.

Statutory Framework

Appendix A to these reasons is a summary of the provisions of the *Mental Health Act 2016* (**Act**) that are relevant when the Tribunal reviews of a person's forensic order.

Clinical Report

The Tribunal was satisfied that the patient had sufficient time to consider the clinical report to continue with the hearing. The patient was present at the hearing and confirmed that he was happy to proceed, as did his legal representative.

Matters to which the Tribunal must have regard

The Tribunal had regard to the factors in section 432 of the Act as follows.

The relevant circumstances of the person subject to the order

In reaching a decision, the Tribunal had regard to the patient's relevant circumstances.

The patient is an Aboriginal man. The clinical report noted that the patient continues to decline specific support from Indigenous mental health workers. Little information was able to be provided to the Tribunal about the patient's history of care with the Department of Child Safety prior to 18 years of age, however, it was suggested that he had not had assistance with maintaining links to, or an awareness of, his Indigenous culture. The patient reported to the Tribunal that he has a brother and that his parents are deceased, also noting that he was taken from his mob when he was young.

The clinical report noted that the patient was previously under the care a different mental health service and was transferred to the current team about 5 years ago. The patient has previously required admissions to mental health service inpatient units.

The clinical report stated that the patient has been diagnosed as having mild intellectual disability and a paraphilia (paedophilia). It noted a review conducted by the Mater Intellectual Disability and Autism Service (MIDAS) revealed scores reflecting general cognitive ability within the extremely low range of intellectual functioning, a need for ongoing 1:1 support within a 24/7 arrangement and that the patient will continue to struggle over time with many aspects of his intellectual, cognitive and adaptive functioning.

The patient's self-report, which was read aloud at hearing, noted that the patient knows he has brain damage, but disagrees that he has a mental illness. The patient believes he can make his own decisions regarding his mental health and that he would like his mental health treatment to stop so that he can be free.

According to the clinical report, the patient has had three-monthly reviews by a Psychiatry Consultant and monthly face-to-face reviews with a case manager. The treating team put an acute management plan and police and ambulance intervention plan in place. The patient is linked with a local general practitioner.

The patient is in receipt of a National Disability Support Scheme (**NDIS**) package and a disability support pension with the patient's finances managed by the Public Trustee. At the time of the hearing, the patient lived in supported accommodation with 24/7 support from a non-government organisation (**NGO**), Southern Cross Support Services. The NGO provider assists the patient with ongoing, regular structured activities within the home and community. The patient had previously tried living with a housemate, however, found that difficult and the co-tenant left the residence. While the patient has previously been reported as having a history of absconding, this was in the context of an extended inpatient admission and since living in the community has continued to engage with the treating team.

The report noted that the patient's presentation continues to be stable, stating that the patient has resided at the same property with the same support team for several years without further offending or significant difficulty. He is reported to be working on skill-building in relation to daily living skills. The patient previously attended some psychology sessions though these have ceased at the patient's election. The treating team recommended that these sessions would be beneficial to the patient to allow him to function optimally and safely within his home and the community.

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

The patient was charged with indecent treatment of a child under 16 in relation to events occurring more than a decade ago. At the time of the Mental Health Court hearing, the patient disputed the circumstances of the alleged offence.

The Tribunal notes that in addition to this charge, the patient has an extensive forensic history, including other offences of a violent and sexual nature. While the alleged offence occurred quite some time ago, the Tribunal notes that the Assessment and Risk Management Committee (**ARMC**) minutes note that the patient continues to be considered a high risk of sexual violence and that offending would likely involve children and be largely opportunistic.

Any victim impact statement given to the Tribunal under section 155 or 742 of the Act relating to the relevant unlawful act

No victim impact statement was provided to the Tribunal for consideration.

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

No intervention programs were recommended by the Mental Health Court.

Summary of evidence and findings

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?

According to the clinical report, the patient had been assessed by his treating team as presenting as a low/moderate (chronically elevated) risk to others due to his history of sexual violence and deficits associated with his mild mental retardation. In addition, the patient's risks associated with vulnerability were listed as chronically elevated due to his intellectual disability. The patient was also noted as having an extensive history of self-harm, aggression, and low frustration tolerance. The clinical report stated that the patient's risk of non-compliance was low but that was due to his 24 hour, 7 days per week support arrangements.

The clinical report noted that the patient's risk of sexual violence continues to be high (without imminent risk), specifically stating that the patient is unable to recall and integrate learning from past psychological work to his current situation or to scenarios in which risk would increase. This was consistent with the ARMC minutes which noted that the patient continues to be a high risk of sexual violence and that other risks were identified as low only due to the current levels of supervision.

The clinical report noted that improvement in some dynamic risk factors over time had increased the patient's ability to function in the community (for example, stability of affect, stress tolerance, impulsivity, and reduced alcohol use). However, it remained unclear whether these improvements were stable and represented an enduring pattern of behaviour. The report suggested that it was likely that the external controls provided by his support workers had achieved greater stability, improved his overall functioning, and reduced the risk of re-offending.

The ARMC minutes noted that support staff had found evidence of internet searches involving pornography (teenage girls and young women) and the patient had been refusing to allow support staff to monitor compliance with general practitioner-provided medications. At the hearing, the Tribunal was informed that the police had searched the patient's phone for child pornography, and none was found. While the NGO support workers had expressed concerns there may have been illegal activities on his phone, it was reported that they no longer held those concerns. The Tribunal was also informed that the patient's refusal to have his medication supervised was at a time when he was feeling frustrated and angry and that this issue had been appropriately addressed and no further problematic behaviours had occurred.

As documented in his self-report, the patient firmly believes that he would not be at risk of harming himself or anybody else if the forensic order were to cease. He wants a chance to prove that he no longer poses a risk to anybody. The patient expressed to the Tribunal his want to travel around Australia and to be free of the forensic order. He also advised the Tribunal that he would rather go to gaol and do his time, than continue on the forensic order.

The clinical report noted that alcohol continues to be a significant factor for the patient in relation to aggressive behaviours. At the hearing, the patient confirmed that he did have some alcohol in his room which he purchased from the bottle shop, but he did not become aggressive from having the alcohol. The treating psychiatrist explained to the Tribunal that the patient had some cravings for alcohol and he purchased some cans of rum, in the context of issues with some support workers. The doctor also confirmed to the Tribunal that the team had assessed the patient and that there was no change in his behaviour and no concerns. He also confirmed that the patient understood that this incident constituted a breach of the conditions of his forensic order.

The treating team recommended confirming the forensic order on the basis that it provides a supportive framework to continue the management of the patient's behaviour and potential risks to the community. Recently, the ARMC (which included a representative of the Community Forensic Outreach Service) also supported continuation of the forensic order.

The Attorney-General's representative submitted that the forensic order should be confirmed to ensure ongoing care and the management of risk to the community. The patient's legal advisor told the Tribunal that while her original intention had been to submit that the forensic order should be confirmed with the same conditions, it was clear from the hearing that this submission did not reflect the patient's views and that the patient wanted the forensic order to be revoked. The legal representative also noted, however, that it was open to the Tribunal to confirm the forensic order on the same conditions.

The Tribunal had regard to the evidence from the treating team that the risks presented by the patient will generally increase without the appropriate supervision and that it is the external controls that reduce the risk of re-offending. The Tribunal noted that while the 24/7 supervision mitigates risk presented by the patient, there is a limit to the interventions NGO support workers can undertake (for example, if the patient insists on purchasing alcohol, they can discourage but not prevent). The Tribunal also had regard to the fact that the patient had breached the condition of his order prohibiting him from consuming alcohol. In considering the patient's views and his self-report, the Tribunal heard that he welcomed the opportunity to prove that he is not a risk to anyone and that he no longer wants the restrictions that come from the forensic order.

On balance, the Tribunal considers that the forensic order is necessary to protect the safety of the community. The patient was not open to accepting voluntary care from the treating team. He ceased participating in psychology sessions and has voiced his desire to be free from the forensic order. While the supervision provided mitigates risk, such supervision is dependent on ongoing funding arrangements and the alternative plan to mitigate risk, should the current level of supervision no longer be available, would be management by the mental health team as an inpatient. The Tribunal recognises that the patient lacks insight into the risks identified, the benefits provided by the forensic order and the role the forensic order plays in mitigating risk. The Tribunal found that without the forensic order:

- The patient would be unlikely to engage with the treating team, including the suggestions of further psychology sessions.
- The patient would not have the benefit of ongoing monitoring by ARMC and CFOS.
- The patient would lose the support of his forensic liaison officer and case manager.
- The treating team would no longer be able to compel inpatient care for the patient if the supervision arrangements were to reduce.

For these reasons, the Tribunal confirmed the forensic order.

Category and conditions of the forensic order

The case manager informed the Tribunal that the patient would continue with 24 hour per day, 7 day per week support from his current NGO support workers and that there would be three-monthly reviews by a doctor and six-monthly reviews by the consultant. While the treating psychiatrist advised that no one can actively stop the patient from purchasing and drinking alcohol, he did note that if there is a risk then the support worker can notify the treating team, who can call the police. The Tribunal was informed that the NGO support workers are aware that the patient was not supposed to drink.

The doctor confirmed that the patient's NDIS package was secure, and the team were aware of the need for the funding to continue. The oral evidence from the treating team at the hearing confirmed that without 24 hour, 7 day per week supervision, The patient's presentation of risk would elevate to high. The doctor confirmed that if the supports presently available were reduced, and the risk did change to high, the team would have to consider a change of category to inpatient.

The case manager informed the Tribunal that the patient's rent had recently increased, and it was too high for him to continue to live alone. The doctor suggested that it would likely be possible to find an appropriate person to share the accommodation.

The Attorney-General's representative submitted that the category of the order should be community and there should be no change to conditions. The patient's legal representative noted that it was open to the Tribunal to confirm the order as community category with the same conditions.

The Tribunal was satisfied that, given the comprehensive supervision arrangements, the patient's current living arrangements and support provided by the treating team and NGO support workers, there would not be an unacceptable risk for him to continue to reside in the community. The Tribunal also considered each of the conditions attached for the patient's order and found that they remained necessary to manage the risks identified.

Human Rights

The Tribunal acknowledged that, as a public entity, it must act compatibly with the *Human Rights Act 2019* (**HRA**) and give proper consideration to human rights. The Tribunal considered that the following rights were potentially relevant to the Tribunal's decision in respect of the patient:

- s17(c): involuntary treatment – in confirming the patient's forensic order, the Tribunal accepted that he was receiving care that is essentially being given without consent. However, the Tribunal considered that the care was necessary to monitor and manage risks to the community.
- s19: freedom of movement – confirming the patient's forensic order made him subject to conditions attached to the order, including that the psychiatrist must approve where he lives or where he travels. The patient is not permitted to leave his residence without supervision and is required to attend for appointments as directed by the psychiatrist. Again, the Tribunal considered that these limitations were required to monitor and mitigate risk to the community.
- s25: privacy and reputation – the Tribunal was satisfied that accessing the patient's personal information was lawful under the Act and was not done in an arbitrary manner because it was done for the purpose of determining whether the patient met the criteria to remain an involuntary patient and to ensure a fair hearing
- s28: Aboriginal and Torres Strait Islander peoples – the Tribunal considered that this right was engaged but not limited by the Tribunal's decision. The patient has been offered engagement with Indigenous mental health workers but has not engaged with them.
- s31: Fair hearing – the Tribunal was satisfied that the patient was afforded a fair hearing. He was provided with legal representation. He received the relevant material late, but the Tribunal was satisfied that the patient had sufficient time to consider the clinical report. The patient confirmed that he wished to proceed, as did his legal representative. The patient was present at the hearing and able to express his views, wishes and preferences.
- s37: Health services – the Tribunal considered that this right was engaged but not limited.

The Tribunal was satisfied that the limitations on the patient's human rights as a result of the decision of the Tribunal were lawful, proportionate to the circumstances and compatible with the HRA. The human rights engaged were balanced against the risks to the community that are likely to eventuate if the patient was not receiving care under the forensic order.

Conclusions of the Tribunal

For these reasons, the Tribunal has decided to confirm the patient's forensic order, community category with no change to the existing conditions attached to the 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).

Below are extracts of sections from the Act relevant to the Tribunal's review of a forensic order.

432 Matters to which tribunal must have regard

(1) In making a decision under this part in relation to a review of a forensic order (mental health) or forensic order (disability), the tribunal must have regard to the following:
   (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.

   Examples of decisions in relation to a review of a forensic order:
   - deciding whether to confirm or revoke the order
   - deciding whether to confirm or change the category of the order
   - deciding whether the person is to receive any treatment in the community
   - deciding whether to change or remove a condition to which the order is subject or to impose a condition on the order.

(2) Subsection (1) does not limit any other provision of this part that requires the tribunal to have regard to a stated matter

433 When reviews are conducted

(1) The tribunal must review (a periodic review) the forensic order:
   (a) within 6 months after the order is made; and
   (b) at intervals of not more than 6 months after the review under paragraph (a) is completed.

(2) Also, the tribunal must review (an applicant review) the forensic order on application by:
   (a) the person subject to the order; or
   (b) an interested person for the person mentioned in paragraph (a); or
   (c) the Attorney-General; or
   (d) if an authorised mental health service is responsible for the person—the chief psychiatrist; or
   (e) if the forensic disability service is responsible for the person—the director of forensic disability.

(3) Further, the tribunal may at any time, on its own initiative, review (a tribunal review) the forensic order.

(4) If the tribunal receives written notice under section 213(3) of the amendment of the forensic order, the tribunal must review (also a tribunal review) the order within 21 days after receiving the notice.

(5) This section is subject to sections 434 to 437 and chapter 16, part 2, division 6, subdivision 2.

441 Decisions

(1) On a periodic review of the forensic order, the tribunal must decide to:
   (a) confirm the order; or
   (b) revoke the order.

Notes:

1 See subdivision 2 for the orders the tribunal may make if it confirms the order.

2 See subdivision 3 for the orders the tribunal may make if the order is a forensic order (mental health) and the tribunal revokes the order.

(2) On an applicant review of the forensic order, the tribunal:
   (a) must decide whether to make the orders sought by the applicant; and
   (b) may make the orders under this division it considers appropriate.

   Example for paragraph (b):

If an applicant seeks an order changing the category of the forensic order from inpatient to community, the tribunal may decide not to change the category of the order, but may order that the person have limited community treatment of a stated extent.

(3) On a tribunal review of the forensic order, the tribunal:
   (a) must decide any particular matter stated in the notice given under section 439(3); and
   (b) may make the orders under this division it considers appropriate.

442 Requirement to confirm forensic order

(1) The tribunal must 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.

(2) Also, during any non-revocation period for the forensic order, the tribunal is taken, for section 443, to have confirmed the order.
   Note:
   The tribunal must not revoke the forensic order during the non-revocation period for the order. See section 452.

(3) Subsection (2) does not apply if the forensic order is a forensic order (mental health) and the tribunal decides to revoke the order under section 457.

444 Change or confirmation of category

(1) The tribunal may change the category of the forensic order.

(2) However, the tribunal may change the category of the forensic order to community, or confirm the category of the order as community, only if the tribunal is 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.

(3) This section is subject to section 445.

445 Inpatient category – orders about treatment in the community

(1) This section applies if the tribunal:
   (a) confirms the category of the forensic order as inpatient; or
   (b) changes the category of the forensic order to inpatient.

(2) The tribunal must do 1 of the following:
   (a) order that the person have no limited community treatment;
   Note:
   An order made under paragraph (a) may not be amended by an authorised doctor. See section 212(2).
   (b) approve that an authorised doctor under section 212 or a senior practitioner under the Forensic Disability Act, section 20 may, at a future time:
      (i) authorise limited community treatment for the person, to the extent and subject to the conditions decided by the tribunal; or
      (ii) change the category of the order to community, subject to the conditions decided by the tribunal;
   (c) order that the person have limited community treatment:
      (i) of a stated extent; and
      (ii) subject to the conditions decided by the tribunal, including whether, or the extent to which, an authorised doctor under section 212 or a senior practitioner under the Forensic Disability Act, section 20 may amend the forensic order in relation to treatment in the community.

(3) The tribunal may make an order under subsection (2)(b) or (c) only if the tribunal is 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.

(4) In deciding whether the tribunal is satisfied of the matters mentioned in subsection (3), the tribunal must have regard to:
   (a) the purpose of limited community treatment; and
   (b) the fact that:
      (i) if an authorised mental health service is responsible for the person—an authorised doctor may increase the extent of treatment in the community for the person only if satisfied of the matters mentioned in section 212(3); or

(ii) if the forensic disability service is responsible for the person—a senior practitioner under the Forensic Disability Act may authorise treatment in the community for the person only if satisfied of the matters mentioned in the Forensic Disability Act, section 20(2).

446 Community category – orders about treatment in the community

(1) This section applies if the tribunal:
   (a) confirms the category of the forensic order as community; or
   (b) changes the category of the forensic order to community.

(2) The tribunal must:
   (a) order that an authorised doctor or a senior practitioner under the Forensic Disability Act must not change the category of the order to inpatient; or
   (b) approve that an authorised doctor under section 212 or a senior practitioner under the Forensic Disability Act, section 20 may, at a future time, change the nature or extent of treatment in the community received by the person, to the extent and subject to the conditions decided by the tribunal.

   Example of a change of extent of treatment in the community:
   changing the category of the forensic order from community to inpatient, with or without limited community treatment

447 Conditions

(1) The tribunal may:
   (a) change or remove a condition to which the forensic order is subject; or
   (b) impose a condition on the forensic order.

(2) Without limiting subsection (1), the tribunal may impose a condition that the person must not contact a stated person, including, for example, a victim of the relevant unlawful act.

(3) However, the tribunal may not impose a condition on the forensic order that requires the person to take a particular medication or a particular dosage of a medication.

450 Making of treatment support order

(1) The tribunal must decide to make a treatment support order for the person if the tribunal considers a treatment support order, but not a forensic 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.

(2) For making a treatment support order under subsection (1), sections 144 and 145 apply as if:
   (a) a reference in the sections to the Mental Health Court were a reference to the tribunal; and
   (b) a reference in the sections to the person the subject of the reference were a reference to the person subject to the forensic order.

451 Making of treatment authority or no further order

(1) If the tribunal considers that neither a forensic order nor a treatment support 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, the tribunal may:
   (a) make no further order for the person; or
   (b) make a treatment authority for the person.

(2) The tribunal may make a treatment authority for the person under subsection (1)(b) only on the recommendation of an authorised psychiatrist who considers, after examining the person, that:
   (a) the treatment criteria apply to the person; and
   (b) there is no less restrictive way for the person to receive treatment and care for the person's mental illness.

(3) The treatment authority must state the following:
   (a) the category of the authority;
   (b) the authorised mental health service responsible for the person;
   (c) the nature and extent of any limited community treatment the person is to receive;
   (d) any conditions the tribunal considers necessary for the person's treatment and care, other than a condition requiring the person to take a particular medication or a particular dosage of a medication.

(4) The tribunal may decide the category of the treatment authority is inpatient only if the tribunal is satisfied that 1 or more of the following can not reasonably be met if the category of the authority is community:

(a) the person's treatment and care needs;
(b) the safety and welfare of the person;
(c) the safety of others.

(5) However, if the person is a classified patient, the tribunal must decide the category of the authority is inpatient.

(6) In deciding the nature and extent of any limited community treatment under subsection (3)(c), the tribunal must have regard to the purpose of limited community treatment.

(7) If the tribunal decides the category of the treatment authority is community, the tribunal must decide whether an authorised doctor may, at a future time, reduce the extent of treatment in the community received by the person.

(8) The treatment authority is taken to be a treatment authority made under section 49 by the authorised psychiatrist mentioned in subsection (2).

(9) Despite subsection (8) and section 413(1), the tribunal must review the treatment authority:
(a) within 6 months after the authority is made; and
(b) within 6 months after the review under paragraph (a) is completed; and
(c) at intervals of not more than 12 months after the review under paragraph (b) is completed.

(10) Sections 53 and 59 apply to the treatment authority as if a reference in the sections to the authorised doctor were a reference to the authorised psychiatrist mentioned in subsection (2).

(11) As soon as practicable after the treatment authority is made, the authorised psychiatrist mentioned in subsection (2) must decide the nature and extent of the treatment and care to be provided to the person under the authority.

452 Orders with non-revocation period

(1) The tribunal must not revoke a forensic order under division 4 during any non-revocation period for the order.

(2) Subsection (1) is subject to section 457.

453 Order for person temporarily unfit for trial

(1) This section applies to a person subject to a forensic order if:
(a) a finding of unfitness has been made in relation to the person; and
(b) the proceeding against the person in relation to which the finding of unfitness was made has not been discontinued under section 490 or 491.

(2) The tribunal must not revoke the forensic order unless a treatment support order is made for the person under section 450.
Note:
If, on a review under part 6, the tribunal decides the person is fit for trial, the forensic order ends on the person's appearance at the mention of the proceeding for the relevant offence. See section 497(2).

454 Order for person charged with prescribed offence

(1) This section applies if a forensic order for a person was made on a reference in relation to a prescribed offence allegedly committed by the person.

(2) The tribunal must not revoke the forensic order unless:
(a) the person has been examined, under an order made under section 721, by an examining practitioner; and
(b) the tribunal has obtained and considered the examining practitioner's written report on the examination.

(3) This section is subject to section 452.