THIS IS AN OFFIAL REPORT OF THE MENTAL HEALTH REVIEW TRIBUNAL PROCEEDINGS IN RELATION TO MR ONG AUTHORISED BY THE PRESIDENT OF THE TRIBUNAL ON 5 AUGUST 2015

Mental Health Review Tribunal

This is an edited version of the Tribunal's decision. The forensic patient has been allocated a pseudonym for the purposes of this Official Report

FORENSIC REVIEW: **Mr Ong**

S46 Mental Health (Forensic Provisions) Act 1990

TRIBUNAL:	**Anina Johnson**	**Deputy President**
	Rob McMurdo	**Psychiatrist**
	Diana Bell	**Other Member**

DATE OF HEARING: **18 June 2015 (Adjourned)**

PLACE: **Long Bay Hospital**

DETERMINATION

The review listed for 18 June 2015, including consideration of whether an order should be made under s. 53 of the *Mental Health (Forensic Provisions) Act 1990*, is adjourned to a date to be fixed.

Pursuant to s. 155 of the *Mental Health Act 2007* Mr Ong should continue to be detained at Long Bay Hospital for care and treatment.

Signed

Anina Johnson
Deputy President
Dated this day 22 June 2015

REASONS

This is the 9th review of Mr Ong who is currently detained in the Long Bay Hospital on an order of the Tribunal.

DOCUMENTARY EVIDENCE

The Tribunal considered the documents listed in the Forensic Patient Exhibit List dated 22 June 2015 annexed to these reasons.

[Further background information concerning Mr Ong's history was by the Tribunal considered.]

ATTENDEES

Mr Ong attended the hearing accompanied by his lawyers, Paul Coady, barrister and Todd Davis of the Mental Health Advocacy Service of Legal Aid NSW. Also in attendance were:

- Dr B, Psychiatrist
- Esther (no surname given), RN
- Georgina Wright, barrister for the Attorney General instructed by the Crown Solicitor's Office

INTRODUCTION

1. Mr Ong has a significant history of mental illness and substance abuse. In 2012 he was found, on the limited evidence available, to have committed the offence of sexual intercourse without consent.

2. A limiting term was imposed for this offence. That limiting term expires shortly.

3. As a forensic patient, Mr Ong is reviewed by the Tribunal at least every 6 months: ss. 46 and 47 of the *Mental Health (Forensic Provisions) Act 1990* ("MHFPA"). In conducting this review, the Tribunal has had regard to the important principles governing the way in which people with a mental illness or mental disorder should receive care and treatment in s. 68 of the *Mental Health Act 2007* ("MHA") and the objects referred to in s. 40 MHFPA. It has also considered the criteria in s. 74, which apply to all determinations made under Part 5 of the MHFPA.

4. Once a person is 6 months from the end of their limiting term, both the Tribunal and the Supreme Court have separate jurisdictions to consider if any further arrangements need to be made to manage the person's risk after the limiting term expires. The Tribunal can decide that a mentally ill person should be made an involuntary patient under s. 53 of the MHFPA. The Supreme Court can consider an application to extend the person's limiting term: s. 54A and Sch. 1 to the MHFPA.

5. In Mr Ong's case, the Tribunal had been aware for many months that one or both of these pathways might be pursued by the treating team and the Attorney General. The arrangements for the end of Mr Ong's limiting term were discussed at several Tribunal hearings prior to this one.

6. [The Tribunal noted that the Attorney General had recently filed a summons in the Supreme Court applying for an extension of Mr Ong's limiting term and that matter had been listed for a

preliminary hearing.]

7. On 15 June 2015, Mr Ong's treating psychiatrist asked the Tribunal to consider making an involuntary patient order at the review on 18 June 2015.

8. The difficulty with both applications proceeding is that if the Tribunal makes a person an involuntary patient, the person immediately stops being a forensic patient: s. 52(2)(b) MHFPA. The Supreme Court can only extend a person's limiting term whilst the person is a forensic patient: s.52(2)(b) and Sch. 1. Therefore, if the Tribunal were to make an involuntary patient order following its review on 18 June 2015, the Supreme Court would not have jurisdiction to hear the proceedings which in the preliminary hearing.

9. The Attorney General's lawyers asked to appear at the review on 18 June to argue that the Tribunal should wait until after the preliminary hearing before considering whether to make an involuntary patient order. The Tribunal allowed the Attorney to appear, despite the objection by Mr Ong.

10. Both the Attorney and Mr Ong argued that the MHFPA established a scheme which bound the Tribunal to make a particular finding. The Attorney argued that:

    b. if Mr Ong's limiting term were extended by the Supreme Court, the Tribunal would lose its power to make an order under s. 53, and therefore the Tribunal should not do anything which might deprive the Supreme Court of an opportunity to extend Mr Ong's limiting term; and

    c. the Tribunal has a broad discretion to grant an adjournment and an adjournment is appropriate in this case.

    Mr Ong argued that:

    a. the Tribunal has a duty to make an involuntary patient order under s. 53, if the statutory tests for making that order are met.

    b. the fact that the Attorney had commenced proceedings is irrelevant to the Tribunal's consideration of whether or not to make an involuntary patient order.

11. The Tribunal was not convinced by the arguments of either the Attorney or Mr Ong. It follows that the Tribunal did not consider itself to be bound to reach a particular decision in these circumstances.

12. Ultimately then, the issue for the Tribunal was simply whether in all the circumstances, it was appropriate to adjourn the hearing until after the Supreme Court's preliminary hearing.

13. The Tribunal has a broad jurisdiction. It can consider matters which might touch on the care, detention and treatment of a forensic patient. It must consider the extent to which restrictions are needed to protect the patient or the public from serious harm. If there are concurrent Court proceedings on foot, the Tribunal commonly adjourns its reviews to allow those Court proceedings to conclude. In that way, the Tribunal has all the information before it when considering an appropriate care pathway for a particular patient.

14. The MHFPA confers broader powers on the Supreme Court than those which the Tribunal can exercise at the conclusion of a person's limiting term. The Court's decision in relation to how Mr

Ong's risk to others should be managed is relevant to the Tribunal's decision making process.

15. If the adjournment is not granted then the prejudice to the Attorney is significant, in that if the Tribunal makes an order under s. 53, the Supreme Court proceedings will be brought to an end.

16. There is no real prejudice to Mr Ong by allowing that hearing to continue. He will continue to receive care at the Long Bay Hospital. Regardless of the outcome of the Supreme Court proceedings, it is likely that he will be moved to the Forensic Hospital for further care and treatment. If an interim extension order is not granted, there will be time for the Tribunal to consider making an involuntary patient order before Mr Ong's limiting term expires.

17. For these reasons, which are explored in more detail below, the Tribunal determined to adjourn its proceedings to a date to be fixed.

Attorney General's Standing

18. The Attorney General asked to appear at the Tribunal's review hearing and to make submissions in favour of an adjournment of that review. Counsel for Mr Ong argued that the Attorney General did not have standing to appear. He said that the Attorney General's right of appearance before the Tribunal was limited to reviews considering leave, release, or a recommendation to vary or revoke an extension order: s. 76A(2) MHFPA.

19. Proceedings before the Tribunal are intended to be flexible. The Tribunal has broad powers to inform itself as it thinks fit, without regard to the rules of evidence: s. 151(1) and 160(1) of the MHA. For the purposes of a review under the MHFPA, the Tribunal is entitled to "communicate with any persons, take any action and make any recommendations it thinks fit.": s. 76A(1) MHFPA.

20. Of course, the Tribunal may only consider matters that are relevant to the exercise of its jurisdiction. But, the forensic jurisdiction of the Tribunal is a broad one. Lindsay J in *A (by his tutor Brett Collins) v Mental Health Review Tribunal (No 4)* [2014] NSWSC 31 gave detailed consideration to the breadth of the Tribunal's jurisdiction. It is clear that the Tribunal may consider any matters that impact upon the detention, care or treatment of a forensic patient. The issues in a review may extend to any and every aspect of a patient's "case": cf [84], [91]. The Tribunal's jurisdiction cannot be reduced to a checklist of issues gleaned from any one statutory provision. It should be informed by the broader purpose of the legislation, including the status of a person as a forensic patient and the practical realities that have led there: at [144] - [165].

21. In short, the Forensic Division of the Tribunal has a broad jurisdiction and a broad discretion to inform itself about how it might exercise that jurisdiction.

22. The Attorney General's request for an adjournment related to a matter that could have a significant impact on Mr Ong's future. The merits of the Attorney General's position could only be properly considered if the Attorney General was able to appear. The Tribunal decided that it was appropriate to hear the Attorney's arguments, but only on the question of whether an adjournment should be granted.

23. For logistical reasons, the Tribunal decided that at the 18 June 2105 review hearing, it would also hear the evidence from the treating team on the question of whether an involuntary patient order should be made. The Attorney General did not wish to make submissions about whether there was evidence to support the making an involuntary patient order. Counsel for the Attorney agreed that any opposition to the making of an involuntary patient order would rely on the same arguments put forward in favour of an adjournment. In those circumstances, the Tribunal decided that it would not allow the Attorney General to participate in the substantive hearing in relation to making of an involuntary patient order.

The Tribunal should not make an order under s. 53 once the Attorney has commenced proceedings to extend Mr Ong's limiting term

24. Ms Wright, for the Attorney, argued that the Tribunal loses its power to make an order under s. 53 as soon as interim (or final) extension order has been made by the Court. Consequently, it would be inappropriate for the Tribunal to attempt to exercise its power under s. 53 once Supreme Court proceedings to extend the limiting term had been commenced.

25. The Attorney relies on cl. 12 of Sch.1 which provides that only the Supreme Court is able to vary or revoke an extension order: cl. 12. However, the Tribunal thinks that making an involuntary patient order is different to "revoking" an extended limiting term. The only express fetter on the Tribunal's power over a patient whose limiting term has been extended is found in s. 47(2A) MHFPA. Section 47(2) provides that the Tribunal may not unconditionally release a patient who is subject to an extension order. This suggests that a revocation by the Court is the equivalent of an unconditional release order by the Tribunal. Either order removes all restrictions on the person's liberty.

26. An involuntary patient order is not the equivalent of a revocation. It does restrict the liberty of the patient, by ordering their detention in a mental health facility.

27. A person who is the subject of an extension order is a forensic patient and can otherwise be dealt with by the Tribunal as it would any other forensic patient: s. 42 and cl. 9 of Sch. 1 to the MHFPA. The Tribunal considers that would include the option of making an involuntary patient order under s. 53.

28. Ms Wright put forward an alternative argument. She said that the opening words of s. 53, refer to the Tribunal's power arising after a person is *detained following a special hearing*. This suggests that the power cannot be exercised after a limiting term is extended, because then the person is detained following a Supreme Court order under Sch. 1. The Tribunal does not agree.

29. It is a prerequisite to an application to extend a limiting term that the person was initially detained following a special hearing. The fact that their ongoing detention might have been because of a Court order does not detract from this.

30. The words used in s. 52(2)(a1), support the Tribunal's view. They provide "A person who has been detained … following a special hearing ceases to be a forensic patient if … any extension

order or interim extension order … expires or is revoked and a subsequent extension order has not been made against the person."

31. The Attorney's arguments did not persuade the Tribunal that it must grant an adjournment.

The Tribunal has a duty to exercise its power under s. 53

32. Counsel for Mr Ong argued that the Tribunal had a duty to consider the s. 53 application at the review hearing on 18 June, and that it would commit an error of law if it did not do so. At the hearing, Mr Coady suggested that once the question of making an order under s. 53 was raised, the only question for the Tribunal was whether the statutory criteria were met.

33. If that argument were correct, then the word "may" in s. 53 would need to be construed as meaning "must". The Tribunal does not agree.

34. The word "may" ordinarily refers to a power that may be exercised or not, at discretion: s. 9 *Interpretation Act 1987*. There are occasions in the MHFPA when the word "may" is construed as "must": see *Director of Public Prosecutions v Khoury* [2014] NSWCA 15. As Basten JA said in *Khoury* at [38]:

> "The term "may" is commonly used to confer a power which is discretionary in the sense that, even if engaged, it need not be exercised. Indeed, that may be its primary use: *Interpretation Act 1987* (NSW), s 9(1). However, a contrary intention may be indicated in a specific statutory context: *Interpretation Act*, s 5(2). That qualification is important: in any specific context, a purposive approach should be adopted so that a construction that promotes the purpose or object of the particular Act shall be preferred to one that does not: *Interpretation Act*, s 33. There are in fact many circumstances where the conferral of a power is accompanied by a duty to exercise it once the preconditions for its engagement are fulfilled: *Julius v Bishop of Oxford* (1880) 5 App Cas 214; *Ward v Williams* [1955] HCA 4; 92 CLR 496; *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* [1971] HCA 12; 127 CLR 106; cf *Samad v District Court of New South Wales* [2002] HCA 24; 209 CLR 140."

35. However, there are a number of reasons why the Tribunal considers that s. 53 confers a discretion, but not a duty, to consider whether to exercise the power. The first is that, there is no clear determinant of when the duty arises. There is no statutory process of making "applications" under the MHFPA. The Tribunal's practice is to ask both the treating team and the patient to foreshadow any issues that they would like considered in advance of the hearing. However, other issues may arise for consideration at the hearing itself. The Tribunal is also able to put forward issues that it thinks need consideration.

36. If any of these events give rise to a duty to consider the exercise of s. 53 trigger and the statutory criteria are met, must the Tribunal make an order? The Tribunal does not think so. Instead, the Tribunal considers that the statutory scheme contemplates a discretionary power that can be exercised, but need not be.

37. Unlike the arrangements considered by the Court in *Khoury*, it is not uncommonly the case where the Tribunal has an entitlement to exercise its power under s. 53, but it is not appropriate to exercise that power at a particular point in time. Mr Ong's own situation is a useful illustration.

The issue of a discharge plan for Mr Ong had been raised at the Tribunal hearings in October 2014, March 2015 and May 2015. At each point, the evidence was such that the Tribunal had the power under s. 53 to order that Mr Ong become an involuntary patient. However, an external mental health facility had not yet accepted Mr Ong for admission. Therefore, the Tribunal decided not to exercise its power under s. 53.

38. Consideration of the principles in s. 68 do not assist. The availability of a less restrictive form of care does not confer a right on a patient: s. 195 MHA. It is a powerful consideration but it does not mandate a particular outcome.

39. In any event, questions of what might be a less restrictive option for Mr Ong's longer term safe and effective care require careful consideration. There are less restrictions attached to an involuntary patient order than a limiting term. However, the option of providing for a highly regulated conditional release may allow Mr Ong to return to community living earlier than if his conduct were only able to be supervised by a CTO. The pathway of least restriction is a matter of speculation. But, it serves to illustrate the point that the application of the principles in s. 68 do not lead inevitably to one conclusion.

The instigation of the extension order proceedings is not a relevant consideration

40. Mr Coady submitted that Sch. 1 of the MHFPA does not provide the Attorney General with a right worthy of protection. The proceedings commenced by the Attorney General have not yet been heard, even in part. Mr Coady says that the Tribunal is not obliged to take into account the fact that proceedings have commenced, nor should the Tribunal try to predict the outcome of those proceedings. At the hearing, Mr Coady went further. He suggested that consideration of the Supreme Court proceedings was irrelevant to the Tribunal's decision about whether or not to make an order under s. 53.

41. The Tribunal considers that both the Court and the Tribunal have an equal and distinct role to play as the end of a forensic patient's limiting term approaches. Both have powers which are only available 6 months before the end of a forensic patient's limiting term. Although in different terms, both require a balancing of the safety to the community, whilst considering the least restrictive means for safely managing any risk.

42. But that does not mean that the Tribunal's power under s. 53 is exercised in a vacuum.

43. The Supreme Court has a comprehensive balancing exercise to undertake. It can consider not only whether an involuntary patient order could be made, but whether such an order would adequately manage a person's risk.

44. The Tribunal has a broad remit when determining the appropriate arrangements for the care, treatment and detention of a forensic patient: *A (No 4)*, cf [84] to [86]. It is often the case that the outcome of separate court proceedings (for example, in relation to other charges) is relevant to the Tribunal's consideration of the appropriate arrangements for the care, treatment and detention of the forensic patient.

45. The fact that the Supreme Court's proceedings are independent of the Tribunal's processes does

not make them irrelevant to the Tribunal's decision about whether it is appropriate to make an order under s. 53.

Should the Tribunal grant the adjournment?

46. Section 155 confers a broad power on the Tribunal to adjourn its proceedings, for "reasons that it thinks fit". In exercising that power, the Tribunal is still bound by the limits of its statutory jurisdiction and can only take into account relevant considerations.

47. If Tribunal makes an involuntary patient order, the Supreme Court would be deprived of jurisdiction to consider whether to extend Mr Ong's limiting term. That jurisdiction involves the balancing of important issues of community safety and Mr Ong's liberty.

48. It would be a perverse result if the outcome of that balancing exercise were circumvented simply because the Tribunal review was listed for hearing 8 days before the Supreme Court was listed to hear the matter.

49. Mr Codey argued that if the legislature had intended that Supreme Court proceedings should take precedent over the Tribunal's powers under s. 53, then it would have said so expressly. However, it might equally be said that the legislature could not have intended that an accident of the timing of two hearings would determine the outcome of these important issues.

50. The Tribunal has an interest in ensuring that questions of community safety and the least restrictive form of care for Mr Ong at the conclusion of his limiting term are thoroughly assessed. The Supreme Court has the statutory responsibility for the assessment of those issues. If the Court determines that an extension of the limiting term is not appropriate, the Tribunal will still be able to exercise its jurisdiction under s. 53 MHFPA before the end of Mr Ong's limiting term.

51. The Tribunal considers that it is appropriate to grant an adjournment of its review hearing and to wait until a later date before deciding whether to make an order under s. 53 MHFPA.

Is an involuntary patient order available on the evidence?

52. In circumstances where it might be difficult to convene a further face to face Tribunal hearing if the adjournment had been refused, the Tribunal proceeded to hear evidence from Dr Bhattacharyya, and consider the reports from the treating team. The Tribunal's views on that evidence will be useful to a future Tribunal panel if the Supreme Court does not grant an interim extension order. It may also be useful to the Court in reaching its decision.

53. [The Tribunal considered the evidence of Dr B and concluded that Dr B's evidence, considered together with the material on the Tribunal's files, would allow an involuntary patient order to be made.]

54. The Tribunal notes that Concord Hospital would not accept Mr Ong as a patient. Therefore, the appropriate pathway was for him to go to the Forensic Hospital. The Forensic Hospital will ensure that a bed is available for Mr Ong. That pathway will be the same, regardless of whether Mr Ong is subject to an involuntary patient order under s. 53 or his limiting term is extended.

CONCLUSION

55. The Tribunal will adjourn its review under s. 46, including consideration of whether to make an involuntary patient order under s. 53.