

**THIS IS AN OFFICIAL REPORT OF THE MENTAL HEALTH  
REVIEW TRIBUNAL PROCEEDINGS IN RELATION TO MS  
JONES BY THE PRESIDENT OF THE TRIBUNAL ON 19 January  
2017**



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

**FORENSIC REVIEW:** JONES, Sarah  
F2747 - Review

**SECTION 58  
OF MENTAL HEALTH (FORENSIC PROVISIONS) ACT 1990**

**TRIBUNAL:** Anina Johnson Deputy President

**DATE OF HEARING:** 29 September 2017

**PLACE:** MH Inquiries Room 1

**Lawyers** Todd Davis, Mental Health Advocacy Service for Ms Jones  
Michael Sterry, Forensic legal adviser, JHFMHN

**Attendees**

- Psychiatry Registrar
- Nurse Unit Manager
- Governor, Silverwater Women's Correctional Centre
- Statewide Clinical Director, JHFMHN
- Manager Security and Fire Safety, Mental Health Facility

**ORDER**

Pursuant to section 58 of the *Mental Health (Forensic Provisions) Act 1990*, Sarah Jones is to be transferred to Mental Health Facility B on or before 30 October 2017.

**REASONS**

**Summary**

1. Ms Jones is a woman who has been remanded in custody since March 2016. She is facing serious criminal charges of importing a commercial quantity of cocaine. Ms Jones' next court appearance will consider her fitness to stand trial.
2. Concerns have been raised about Ms Jones' mental state and its impact on her fitness for trial. The appropriate paperwork had been completed which allowed for Ms Jones to be transferred to a mental

health facility under the *Mental Health (Forensic Provisions) Act 1990* (MHFPA). The Psychiatrist and The Psychiatry Registrar consider that the best available mental health care for Ms Jones in the circumstances, would be at Mental Health Facility B.

3. The question at this review was whether the Tribunal had the power to order Ms Jones' transfer to Mental Health Facility B under section 58 of the MHFPA. With the help of submissions from Ms Jones' lawyer, and the lawyer for Justice Health and the Forensic Mental Health Network (JHFMHN), I concluded that the Tribunal does have the power to make that order.
4. There are some practical issues to be finalized before Ms Jones moves to Mental Health Facility B. Therefore, I ordered that Ms Jones is to be transferred to Mental Health Facility B on or before a specified date.

#### **Preliminary comments**

5. At the Tribunal review the Tribunal was satisfied that Ms Jones was a mentally ill person and that transfer to Mental Health Facility B was clinically appropriate. However, the question of whether the Tribunal had the power to order her transfer under section 58 was not determined. Before commencing this review, I read the material that was before the Tribunal on the last occasion and listened to the recording of that hearing.
6. Ms Jones did not attend this review. She was brought to the video link room at the Correctional Centre, but would not enter. She then held tight to a bookcase and refused to go any further. The Psychiatry Registrar said that she could not be brought to attend without significant use of force. He decided that was not appropriate and she returned to her cell. With Mr Davis' consent, I decided that the Tribunal could continue the section 58 hearing in her absence.

#### **Clinical evidence**

7. The Psychiatry Registrar told the Tribunal that there had been no change in Ms Jones' mental state since the last review. She refuses to speak to any mental health staff. She interacts with officers and other inmates in only a limited way. She will usually ask to return to her cell after about an hour in the common area. However, she has been seen to laugh and talk to herself, in ways that are difficult to explain.
8. There is no collateral information available from the **Czech Republic**. However, she has told another **Czech** speaking inmate that she believes her food is poisoned, although her weight seems to be at an acceptable level.
9. In other custodial settings, Ms Jones has continued to press for pregnancy tests despite regular negative results, feigned a seizure, refused to walk and required a wheelchair and attempted to assault nursing staff.
10. Two independent psychiatrists (Psychiatrist B and Psychiatrist C) have prepared court reports in which they conclude that Ms Jones is psychotic. Several psychiatrists from JHFMHN have reached the same view.
11. Because of the difficulty in engaging with Ms Jones (exacerbated by language barriers) the Psychiatry Registrar said that she needs close observation, which is not available in the correctional centre. This is available in Mental Health Facility B. It would also be best if an interpreter were able to regularly and easily visit. That is also not possible in a correctional centre, which generally relies on telephone interpreters.
12. The Tribunal was told that the current Mental Health Facility is a very restrictive environment for female inmates, because of the need for gender segregation. In addition, the Psychiatry Registrar said that while Ms Jones appears to be mentally very unwell, she is not causing a behavioural disturbance. Therefore, she will be a lower priority for admission to Mental Health Facility B.

## Legal issues

13. The Tribunal was asked by Mr Davis to consider making an order for Ms Jones to be transferred to Mental Health Facility B within 2 weeks of the Tribunal hearing.
14. The clinical evidence outlined above supported the making of a transfer order. The only issue was whether it had the power to make such an order, and if a time limit could be imposed.
15. In considering this issues, I had the benefit of very helpful submissions from Mr Davis and Mr Sterry.

### Transfer of inmates to a mental health facility

16. The transfer of a person detained in custody for the purpose of mental health treatment is dealt with under Div.3 of Part 5 of the MHFPA.
17. The process of transfer begins when two certificates are written under section 55 of the MFHPA. The certificates require two medical practitioners to certify that a person is  
*“a mentally ill person or suffering from a mental condition for which treatment is available in a mental health facility...”*  
One of the medical practitioners must be from a psychiatrist. This process is an approximation of the certification process that occurs under section 27 of the *Mental Health Act 2007* (MHA).
18. The phrase *“mentally ill person”* has the same meaning as it has in the MHA.
19. For the purposes of this review, it was said that Ms Jones was a mentally ill person. There is therefore no need to consider the legislative scheme for those who are said to have a mental condition.
20. If the Secretary of the Ministry of Health (or delegate) considers that a person is a mentally ill person on the basis of the information in the certificates, the Secretary can order that the person be transferred to a mental health facility: section 55(3).
21. Section 56 places an obligation on the Secretary’s delegate to promptly review a person who has been transferred and to continue to review that person, to see if they continue to require treatment in a mental health facility. That section provides that a person who is transferred to a mental health facility from a correctional centre must be transferred back within 7 days, unless the Secretary remains of the opinion that the person is a mentally ill person and that an appropriate kind of care would not be available in a correctional centre: section 56(2). A person who has been transferred to a mental health facility may also be transferred back to a correctional centre at any time if the person stops being a mentally ill person, or if there is other appropriate kind of care in a correctional centre: section 56(3).
22. If the person who has been transferred disagrees with the decision to transfer them to a mental health facility or to continue to detain them in a mental health facility, the person has the right to seek a review by the Tribunal: section 57 MHFPA. At a review under section 57, the Tribunal may order that the person is transferred back to a correctional centre. The Tribunal may also refuse to order the transfer back to a correctional facility, which would have the effect of maintaining the person’s detention in a mental health facility.
23. When exercising the powers under section 57, the Tribunal must be constituted by three members as required by section 73 MHFPA.

### Limited review under section 58

24. Section 58 provides for a “limited review” if a person has not been transferred within 14 days of the Secretary’s decision to transfer. That section says in full:

#### **58 Review by Tribunal of persons awaiting transfer to mental health facility**

- (1) *The Tribunal must conduct a limited review of the case of a person who is subject to an order for transfer to a mental health facility under this Division but who is not transferred within the period prescribed by the regulations*
- (2) *The Tribunal must carry out such a review each month until the person is transferred to a mental health facility or the Tribunal or the Secretary revokes the order.*
- (3) *On a limited review, the Tribunal may make an order as to the person’s detention, care or treatment in a mental health facility or other place.*

(4) For the purposes of a limited review, a report as to the person's condition and the reason for the delay in transfer is to be provided to the Tribunal by the Secretary and the Commissioner of Corrective Services

25. Clause 4 of the *Mental Health (Forensic Provisions) Regulation 2017* sets a 14 day time limit for the first review under section 58. Clause 4 also provides that a limited review under section 58 may be conducted by a Presidential member of the Tribunal sitting alone.

Scope of the power to order detention in a mental health facility under section 58(3)

26. As Mr Sterry submitted, the primary purpose of a review under section 58 appears to be to ascertain the reason for the delay in transferring a person to a mental health facility, when the Secretary has made an order for transfer. Subsections 58(1), (2) and (4) are all directed towards ascertaining the reasons why a person has not been transferred and to maintain a regular review of that situation.

27. Subsection 58(3) says that in conducting a review under section 58, the Tribunal "may" make an order as to a person's care, detention and treatment. In section 58(1) and (2) the word "must" is used.

28. There are other instances where the use of the word "may" in the MFHPA has been said to mean "must": *Director of Public Prosecutions v Khoury* [2014] NSWCA 15. However, when a similarly worded provision (section 47) was considered by Lindsay J in of *A (by his tutor Brett Collins) v Mental Health Review Tribunal (No 4)* [2014] NSWSC 31, his Honour found that in those circumstances "may" did not mean "must": at [109]. There, Lindsay J held that there may be reviews where the evidence compels a particular outcome. However, subject to that possibility the Tribunal has the discretion whether or not to exercise the decision making power.

29. Similarly, I do not think that section 58(3) requires the Tribunal to make an order at a section 58 review. A person who is being reviewed under section 58 is already subject to a direction to be transferred to a mental health facility. The review is only being conducted because the transfer has not yet taken place. If the Tribunal forms the view that a transfer to a mental health facility is appropriate, there is no benefit served by making another order.

30. What then is the purpose of section 58(3)? It must be to do something more (or something different) to what has already been ordered by the Secretary. In a practical sense, this opens up the possibility of the Tribunal having the power to order a transfer to a specified mental health facility, to a specified other place and perhaps within a specified time frame.

31. Similarly worded provisions in the MHFPA have been broadly interpreted. Section 47(1)(a) of the MHFPA provides that:

*the Tribunal may make an order as to:*

*(a) the patient's continued detention, care or treatment in a mental health facility, correctional centre or other place ...*

32. In *A (No 4)* Lindsay J considered the expression "continued detention, care or treatment" together with the use of the word "may" in section 47. His Honour held that the Tribunal's discretion was not unfettered but to be guided by the statement of objects in section 40 and the statement of principles in section 68 of the MHA: [102] to [111]. Both those provisions are equally applicable to section 58 review section. In the exercise of this broad power, Lindsay J said that the nature of the Tribunal's decision may take colour from the subject matter of a particular decision: at [115].

33. The Tribunal has previously determined that sections 46 and 47 MHFPA, when read together with section 68 of the MHA empower the Tribunal to make an order for transfer within a specified time frame: *Hallam* [2014] NSWMHRT 1.

34. The Tribunal's power in relation to forensic patients is far broader than for correctional patients. However, the approach to the breadth of the power conferred by the use of similar phrases in section 58(3) and section 47(1)(a) is persuasive.

35. Mr Davis relied on the decision in *A (No 4)* in support of the view that the Tribunal's power under section 58(3) MHFPA is a broad one. Both Mr Davis and Mr Sterry agreed that the Tribunal had the power under section 58(3) of the MHFPA to transfer a person imprisoned in a correctional centre to a

named mental health facility, within a specified time frame.

36. I agree. I consider the purpose of section 58 is to review the reasons why a particular person has not been transferred in accordance with the Secretary's order. Section 58(3) is broadly expressed. The ordinary meaning of the words allow the Tribunal a discretion whether or not to make an order for a person to be transferred to a mental health facility or other place. If the Tribunal considers that some alternative order is needed (either as to place of detention or as to time frame for detention) then section 58(3) gives the Tribunal that discretion.
37. In deciding whether to make an order, the circumstances under consideration colour the Tribunal's discretion. In this case, I think it is relevant to compare the mental health facility to which the person will be transferred under the Secretary's order (the Mental Health Facility) with the nature of the mental health care and restrictions available at alternative facilities ( Mental Health Facility B). The Tribunal can also consider any likely delays in admission to the different mental health facilities legitimately available. The Tribunal should have regard to the fact that the person has been remanded in custody, and consider the nature of the security available at the various mental health facilities that are under consideration.

### **Logistical considerations**

38. The Tribunal was told that if transferred, Ms Jones would be the first adult correctional patient to be transferred to Mental Health Facility B.
39. The Governor from Corrective Services NSW and the Manager of Security from JHFMHN both told the Tribunal that they had met on the day prior to the Tribunal hearing. There is broad agreement about how the security arrangements will work for inmates who are transferred to Mental Health Facility B as correctional patients. However, the details of those arrangements needs to be finalised and then approved by the Commissioner of Corrective Services and the Chief Executive of JHFMHN.
40. As an example, the Governor said that if Ms Jones were to need urgent medical treatment at the Prince of Wales Hospital, it has been agreed that Corrective Services would provide the security during any hospital stay. However, they still need to decide the details of exactly how to ensure that the right number of Corrective Services officers will attend Mental Health Facility B and transport Ms Jones (with or without an ambulance) if the need should arise.
41. The Tribunal accepted that these details are an important part of ensuring that the security for Ms Jones is maintained. They should be in place before the transfer takes place.
42. The Manager of Security and the Governor both said that this would take 4 weeks. I accepted that this was a realistic time frame for documenting these arrangements, circulating them for comment, including changes and submitting them for approval to the Commissioner and Chief Executive.
43. Mr Sterry suggested that it would be better if a novel transfer of this kind took place on a Monday, rather than a Friday. In that way clinical and administrative staff will be available to resolve any difficulties that might arise unexpectedly. I agreed and accepted Mr Sterry's submission that the transfer should therefore take place on or before Monday 30 October 2017.

### **Conclusion**

44. For these reasons, I am satisfied that in a review under section 58(3), the Tribunal is empowered to transfer a person detained in a correctional centre to a specified mental health facility, within a particular time frame.
45. Before making that order, the Tribunal must be satisfied that the person is a mentally ill person. The evidence here is that Ms Jones is showing sustained irrational behaviour suggesting that she is experiencing delusional beliefs, hallucinations and potentially disordered thought form. These experiences jeopardise her fitness to stand trial as well as appearing to be very distressing to her. There are times when she has also jeopardized the safety of others when appearing to act on these beliefs. Taken together, I am satisfied that Ms Jones is a mentally ill person.
46. The Secretary's order is that she be transferred to the Mental Health Facility. I consider that her circumstances justify an order under section 58(3) for a transfer to the Mental Health Facility B. She

needs the level of holistic care, treatment and observation that is available there, as well as ready access to an in-person interpreter. Her needs would not be well met at either the Correctional Centre nor as a correctional patient at the Mental Health Facility.

47. I am satisfied that certain practical arrangements need to be made before the transfer takes place, and for this reason will make an order that the transfer should take place by 30 October 2017.

**SIGNED BY:**

Anina Johnson  
Deputy President  
**ON** 4 October 2017