12. Fitness for Trial Review

This flowchart outlines the process of reviewing a decision by the Mental Health Court that a person is temporarily unfit for trial.

Unless otherwise specified, references to sections (s) are in relation to the *Mental Health Act 2016* (Qld).

A person's criminal charges may be referred to the Mental Health Court for determination of whether the person should be given a defence due to their mental illness or intellectual disability. This can result in a finding that a person is not fit for trial. Refer to the flowcharts 'What happens to criminal charges if a patient has a mental illness/intellectual disability?"

Parties to a review are

- the person,
- the administrator of the authorised mental health service and chief psychiatrist, if they are responsible for the person
- The Forensic Disability Service and Director of Forensic Disability, if they are responsible for the person
- Attorney-General

S 487, s 736

Attendance at hearing

- the patient is encouraged to, but does not have to attend the hearing.
- The person will be appointed a free legal representative, unless already represented or patient waives right to representation, s740.
- Patient can bring a support person, s 739
- One or more members of the patient's treating team must attend the hearing.
- Hearings can be attended in person, by phone or, if available, by videoconferencing.

Evidence considered by MHRT

- Documents
 - Clinical report
 - Most recent decision from the MHRT
 - Hearing Notice
 - Dossier (Mental Health Court order, and other relevant documents) the Mental Health Court and any reports)
 - If applicant review— application form
 - Any other documents submitted by doctor applicant or patient (including patient self-report)
- Oral information given by people attending the hearing.

There is no criteria for fitness for trial in the *Mental Health Act 2016*. The MHRT uses the criteria from *R v Presser* [1958] VR 45 (the *Presser* test) to make a decision about fitness. The *Presser* test states that for a person to be fit for trial, they must be able to do all of the following:

- Ability to understand the charge this involves a basic understanding of the essential facts of the charge and the elements of the offence.
- 2. Ability to plead to the charge and to exercise the right of challenge the client must understand that a plea of guilty is an acceptance that the essential facts and elements of the offence are established.
- 3. An understanding of the nature of the proceedings, namely, that it is an inquiry as to whether he/she committed the offence charged the client must understand that he/she is involved in a formal process inquiring into his/ her responsibility for the matter alleged and be aware of the potential consequences of that process.
- 4. Ability to follow the course of proceedings so as to understand what is happening in court in a general sense, though not necessarily understand the purpose of all the various court formalities — this involves following the proceedings and understanding the roles of the various participants.
- 5. Ability to understand the substantial effect of the evidence that may be given the client must have an awareness of the implications of the prosecution evidence.
- 6. Ability to make a defence or answer to the charge the client must be able to give the court a basic version of the facts as he/she claims them to be, if necessary through his/her lawyer, by entering the witnesses box and responding to questions in evidence-in-chief and cross-examination.

From Legal Aid Queensland—Criminal Law Duty Lawyer Handbook, Ch 14

Mental Health Court finds that a person is not fit for trial in relation to criminal charges

Permanently not fit for trial.

Charges are discontinued. S 122

Court <u>may</u> make a forensic order or treatment support order if necessary, because of the person's mental condition, to protect the safety of the community.

Temporarily not fit for trial.

The proceedings are suspended until MHRT decides the person is fit for trial. S 121
The Mental Health Court <u>must</u> make a
Forensic Order or Treatment Support Order.
s 132, 133

A person's fitness for trial will be reviewed by the MHRT:

- During the first year: every 3 months (periodic review)
- After the first year: every 6 months (periodic review)
- By Application to the MHRT at any time (Applicant review)
- On the MHRT's initiative (Tribunal review)

S 486

Before the hearing:

- Notice of hearing to be given to parties, at least 7 days before hearing; s 487
- Clinical report to be given to MHRT and patient at least 7 days before the hearing; s723
- Other documents to be submitted to MHRT and other parties at least 3 days before the hearing; s 738

Timeframes can be shortened if parties agree. MHRT Practice Direction 1/2017.

MHRT hearing to review Fitness for Trial

The MHRT must decide whether a person is fit for trial.

At the fourth review (and all subsequent reviews), MHRT must also consider whether the patient is likely to be fit for trial in a reasonable time. s 488

Other involuntary orders the person is on (eg, Forensic Order, Treatment Support Order or Treatment Authority) may be reviewed at the same time by the MHRT, but not always.

MHRT decides:

Person is fit for trial

Criminal proceedings are no longer suspended. S 121

MHRT informs Director of Public Prosecutions of the decision, who within 7 days informs the relevant court and prosecuting authority (s 496).

The court must list the matter for mention within 7 days or as early as possible. (s 497)

The forensic order/treatment support order ends at the person's appearance at the mention. (s 497)

Person is not fit for trial

MHRT informs Director of Public Prosecutions who decides in 28 days whether to discontinue criminal proceedings (s 490)

Criminal proceedings are automatically discontinued:

- for offences which might incur life imprisonment — After 7 years
- For other offences—after 3 years. (s 491)

If criminal proceedings are discontinued, then the person cannot be prosecuted again for the relevant offence and MHRT hearings to review a person's fitness for trial end. (s 492)

The forensic order/treatment support order continues in force until revoked by the MHRT on review.

After an MHRT hearing

- Parties receive notice of decision within 7 days, s 755
- Person can request statement of reasons from MHRT, s 756
- Person can appeal decision to the Mental Health Court within 60 days of receiving written notice of the MHRT's decision, schedule 2