MENTAL HEALTH COURT

CITATION:	*Attorney-General for the State of Queensland v GLH* [2021] QMHC 4
PROCEEDING:	Appeal
DELIVERED ON:	21 June 2021 (*ex tempore*)
DELIVERED AT:	Brisbane
HEARING DATE:	21 June 2021
JUDGE:	Wilson J
ASSISTING PSYCHIATRISTS:	Dr S J Harden and Dr E McVie
ORDER:	**Appeal dismissed**
COUNSEL:	A K Lossberg for the appellant L Falcongreen for the respondent S J Hamlyn-Harris for the Chief Psychiatrist P Morreau for the Queensland Human Rights Commission
SOLICITORS:	Crown Law for the appellant Legal Aid Queensland for the respondent Office of the Chief Psychiatrist Queensland Human Rights Commission

[1] This is an appeal by the Attorney-General against the decision of the Mental Health Review Tribunal on 13th of January 2021 to remove a condition from the respondent's forensic order (community category) which provided that he not have unsupervised contact with children. I am assisted today by Dr McVie and Dr Sundin.

[2] The Attorney-General has made written submissions and appears here today, where counsel has also made oral submissions. The Attorney-General's ultimate submission is that the condition that should be imposed is that the respondent must not have unsupervised interaction with children but carving out of that an exception that he is allowed to have unsupervised contact with his nieces and nephews.

[3] The Office of the Chief Psychiatrist has provided written submissions setting out some of the material to be considered but does not take any position on whether the condition should have been removed. Counsel for the Office of the Chief Psychiatrist appears here today.

[4] The respondent is represented by Mr Falcongreen, who is instructed by Legal Aid Queensland. The respondent's ultimate submission is that condition 7 (that the respondent not have unsupervised contact with children) is unnecessary to manage any risk the respondent poses. As such, condition 7 should not be part of his forensic order and the appeal should be dismissed.

[5] The respondent's written submissions went on to state that, if the Court considers condition 7 should be reimposed, then the respondent should still be allowed unsupervised contact with his nieces and nephews, but not other children under the age of 16 outside his kinship group. That alternate position has now been withdrawn, and the submission from Mr Falcongreen on behalf of the respondent is that condition 7 should not be reimposed in any form.

[6] I also have before me a statement from Ms Pietzner-Hagan. She is a solicitor at Legal Aid Queensland, who sets out some conversations that she has had with the respondent's sister and about him having contact with her children. I also have some updated reports from the treating psychiatrist dated the 22nd of April 2021 and the 14th of June 2021.

[7] On the 23rd of April 2021, the respondent filed a form 1 notice under the *Human Rights Act 2019* (Qld) ("*Human Rights Act*") providing that a question of law arose in relation to the application of the *Human Rights Act*. The question was what consideration the Mental Health Court must give to the *Human Rights Act* in conducting the review of the forensic order, specifically what consideration must be given to section 20 (protection of families and children) and section 28 (cultural rights of Aboriginal people and Torres Strait Islander people).

[8] The Queensland Human Rights Commission has intervened in these proceedings and has made submissions. Their ultimate submission is that the question for the Court on this appeal is whether the condition that the respondent must not have unsupervised contact with children is necessary to mitigate an otherwise unacceptable risk posed by him to their safety. If it is agreed the condition is unnecessary, the Tribunal's decision to remove it from the respondent's forensic order should be confirmed. That is consistent with the proper exercise of power in light of the fundamental principle of the *Mental Health Act 2016* (Qld) ("*Mental Health Act*") of adopting the least restrictive practices and the requirement to act compatibly with human rights. The respondent's family and cultural rights should be given due weight in the exercise of discretion, particularly, but not exclusively, due to their protective value where these rights are not inconsistent with the dictates of public safety.

[9] I have received submissions from the Attorney-General regarding both the appeal and the human rights issues, submissions from the Queensland Human Rights Commission, submissions from the Office of the Chief Psychiatrist and submissions from the respondent. I have considered them all.

Background

[10] In terms of the background to this matter, the respondent has a diagnosis of paranoid schizophrenia, with a secondary diagnosis of mental and behavioural disorders due to a multiple drug use and tobacco dependence syndrome.

[11] A formal assessment of his intellectual functioning conducted in 2007 returned results in the extremely low range. He lives in his own unit. He has a strong, supportive relationship with his mother, who lives in the same unit complex. He also visits his sister and her children (all below age 10) approximately twice a week, as well as his aunt and uncle.

[12] He has a lengthy history with mental health services, dating back to 1999. There have been numerous admissions to hospital in the context of substance use and breaching the conditions of his forensic order. In terms of the circumstances of the offending, a forensic order was imposed on the respondent as a result of random and violent offending in 2002.

[13] In 2004, the Mental Health Court found the respondent of unsound mind and a forensic order was made. He was then an inpatient at a secure mental health rehabilitation unit for a period of time. He was transitioned to a community care unit, where his psychotic illness stabilised, and he ceased illicit substance use from 2007 to 2010.

[14] While in the community, the respondent had several inpatient admissions in the context of substance use. He has been relatively stable since 2014. There were two hospital admissions following positive urine drug screen results, with the last being in 2019, where it was noted that he was uncooperative and irritable.

[15] On the 23rd of April 2015, a report was prepared by the Community Forensic Outreach Services ("CFOS") as part of their annual risk assessment of special notification forensic patients. The report stated that the respondent often spent time at his sister's place. He got there by bus and train, helped her look after his nieces, and that he sometimes babysat the children. The report noted that he was good with children and had one of his own.

[16] One of the recommendations by CFOS was that the treating team may need to consider a review with the hospital child protection team about whether the situation with regards to unsupervised contact with the respondent's niece was appropriate, given his history of significant violence, chronic substance use, and ongoing low-level psychotic symptoms. Later in my reasons I will refer this as the "2015 CFOS report".

[17] About a month later, in May 2015, the Tribunal added a condition to the forensic order that the respondent not have unsupervised contact with children. On the 7th of July 2020, CFOS prepared a violence risk assessment report, partly due to differences of opinion between the treating team and CFOS regarding the degree of continuing psychotic symptoms and what that meant for managing the respondent in the community.

[18] The treating team prepared a clinical report dated the 27th September 2020. The hearing occurred on the 13th of January 2021.

[19] The contentious issue that is before me is whether the condition that the respondent not have unsupervised contact with children should be removed.

[20] The Tribunal effectively summarised the issues before it in a statement of reasons as follows. It stated:

> "The issue before the Tribunal was whether condition 7, relating to unsupervised contact with children, was necessary to manage the risk. [The respondent] wanted the condition removed so he could be a proper uncle and have unsupervised contact with the children.
>
> The treating team were aware of the opinion that the condition 7 was not required to manage the risk of harm to others. The Assessment and Risk Management Committee indicated that condition 7 was not warranted on the evidence before it, and based on [the respondent's] history and circumstances, Ms Nadu

> submitted there was insufficient evidence justify the condition was required to manage the risk and it was not reasonable or justified in terms of the *Human Rights Act*."

[21] The Attorney-General's representative submitted that condition 7 was required because the 2015 CFOS report suggested the condition was necessary due to the respondent's illicit substance use, violence, and chronic symptoms and, according to the July 2020 CFOS report, the respondent presented with symptoms similar to those present in 2015. It was submitted drugs and alcohol impaired his judgment, led to a deterioration of his mental state and impulsivity, and it was noted the victim of the offence was a 15-year-old girl.

[22] The Tribunal decided to remove condition 7, as it was not satisfied that it was required to manage risks of harm. A further condition was a limitation of the respondent's human rights and was not reasonable and justified.

[23] The statement of reasons noted and stated that the Tribunal accepted the treating psychiatrist's evidence that the removal of the condition would not pose a risk to the children or others. The treating team were of the firm belief that the respondent's mental state was stable. He was more engaged and there were no incidences of harm to children since the index offences, or of other aggressive behaviour since 2014.

[24] The Tribunal accepted the evidence that the treating team believed the condition was not necessary to manage risks of harm to the children or other. It reinforced the Tribunal's view that condition 7 was not necessary and could be removed. The Tribunal stated:

> "While one of the index offences involved a 15-year-old, this occurred when [the respondent] was unwell and not properly treated. He is now treated, closely monitored, and managed by the treating team. His family are also good supports and able to monitor his mental state and use of illicit substances. They are usually around when [the respondent] is with the children."

[25] The Tribunal accepted they are supportive of the respondent being able to have unsupervised contact with the children and reinforce his role as uncle to them. Given the strong family protective factors, close monitoring of the respondent's mental state, his stability and assurances that he would not be intoxicated or use substances at his sister's home, the Tribunal was satisfied that condition 7 was not necessary to manage risk of harm to the children or community generally.

[26] The Tribunal ultimately decided, on the 13th of January 2021, to revoke the condition of the forensic order preventing the respondent from having unsupervised contact with children.

The legislative framework

[27] As Dalton J noted in *Re WAB* [2020] QMHC 3, this Court is a statutory court, not a court with plenary jurisdiction. The relevant statutory jurisdiction here is the hearing of an appeal from the Tribunal's review of the forensic order and its conditions. Section 639(2) of the *Mental Health Act* provides that, in exercising its jurisdiction, the Court must inquire into the matter before it and may inform itself in relation to a matter before it in any way it considers appropriate.

[28] The appeal is by way of rehearing under section 546(2) and is determined on the state of affairs at the time of the appeal hearing. There is no need to establish an error of law to succeed. The Court may either, pursuant to section 546(3):

(a) confirm the decision;

(b) set aside the decision and substitute another decision; or

(c) set aside the decision and return the matter to the Tribunal.

[29] Section 433 of the *Mental Health Act* requires the Tribunal to conduct periodic reviews every six months. In varying the conditions of a forensic order, the Tribunal must have regard to section 431 and the following factors:

(a) the relevant circumstances of the person subject to the order;

(b) the nature of the 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; and

(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.

[30] The relevant circumstances of the person, as defined in the dictionary to the Act, at Schedule 3 are:

(a) the person's mental state and psychiatric history;

(b) any intellectual disability of the person;

(c) the person's social circumstances, including, for example, family and social support;

(d) the person's response to treatment and care and the person's willingness to receive appropriate treatment and care; and

(e) if relevant, the person's response to previous treatment in the community.

[31] By section 442(1) of the Act:

> "The Tribunal must confirm the forensic order if it 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."

[32] Section 447 allows the Tribunal to vary the conditions of the order and it may:

(a) change or remove a condition to which the forensic order is subject; or

(b) impose a condition on the forensic order.

[33] I note the functions of the Tribunal on a review of forensic order exists in the context of the following provisions. The objects of the *Mental Health Act* are set out in section 3. Section 3(1)(c) of the *Mental Health Act* provides that one of the main objects of the

Mental Health Act is to "protect the community if persons diverted from the criminal justice system may be at risk to harming others".

[34] Section 3(2) states:

> "The main objects are to be achieved in a way that —
>
> (a) safeguards the rights of the person; and
>
> (b) is the least restrictive of the rights and liberties of a person who has a mental illness; and
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> (c) promotes the recovery of a person who has a mental illness, and the person's ability to live in the community, without the need for involuntary treatment and care."

[35] Section 3(3) of the Act provides that:

> "For subsection (2)(b), a way is the least restrictive of the rights and liberties of a person who has a mental illness if the way adversely affects the person's rights and liberties only to the extent required to protect the person's safety and welfare or the safety of others..."

[36] Section 5 of the Act provides that certain principles apply to the administration of this Act in relation to a person who either has or may have a mental illness, including the right of all such persons to the same basic human rights to be recognised and taken into account.

[37] Section 7 of the *Mental Health Act* provides that a person performing or exercising a power under the Act is to have regard to the principles that I have just referred to. The *Mental Health Act* provides more specific guidance to decisions about changing the category of a forensic order from an inpatient to community and allowing for community treatment, whether by the Court, the Tribunal, an authorised doctor or the Chief Psychiatrist. Such orders may only be made if the person's release is considered not to pose an unacceptable risk to the safety of the person or others.

[38] A congruent approach to the conditions of a forensic order means that they are only imposed if they limit human rights where this is necessary in order to reduce or maintain the risk posed by the person to a not unacceptable level.

[39] The scheme of the previous Act (the *Mental Health Act 2000* (Qld)), was described by Boddice J in *Re CMX* [2014] QMHC 4 in terms that are equally applicable to the *Mental Health Act* that I am working under now, if not more so in light of the *Human Rights Act*. His Honour held that:

> "[23] The scheme of the Act is to ensure that any mental health treatment imposed on an offender, pursuant to a forensic order, properly balances the protection of the community, and the needs of the victim of any alleged offence, against the patient's rights and freedoms, and the rights of others. Maximisation of the patient's potential and self-reliance is central to this scheme. The Act recognises the least restrictive practices should always be adopted in respect of patients."

[40] So the Court has jurisdiction to hear appeals from the Tribunal and, as I stated before, in exercising its jurisdiction, the Court must enquire into the matter before it and may inform itself in relation to the matter before it in any way it considers appropriate. I have set out the Court's appeal powers in section 546. The appeal is by way of rehearing.

[41] If the Court substitutes another decision, the Court's decision is taken to be a decision of the Tribunal. The Court stands in the shoes of the Tribunal and conducts a review of the original forensic order in accordance with section 442(1).

[42] I should also note that section 5(g) of the *Mental Health Act* states that certain principles apply to the administration of the Act regarding people with mental illness. Those include the principle that the unique cultural, communication and other needs of Aboriginal people and Torres Strait Islanders must be recognised and taken into account. Aboriginal people and Torres Strait Islanders should be provided with treatment, care and support in a way that recognises and is consistent with Aboriginal tradition or Torres Strait Islander custom, mental health and social and emotional wellbeing, and is culturally appropriate and respectful.

[43] Section 4(f) of the *Human Rights Act* states that:

> "The objects of the Act are to be achieved primarily by requiring courts and tribunals to interpret statutory provisions, to the extent possible that is compatible with their purpose, in a way compatible with human rights."

[44] Section 13 of the *Human Rights Act* sets out that:

> "A human right may be subject under law only to reasonable limits … in deciding whether a limit on a human right is reasonable and justifiable, a number of factors may be relevant."

[45] One of those factors is whether there are any less restrictive and reasonably available ways to achieve that purpose.

[46] Section 28 of the *Human Rights Act* recognises that "Aboriginal people and Torres Strait Islanders hold distinct cultural rights". Section 28(2)(c) states that "Aboriginal peoples must not be denied the right, with other members of their community, to enjoy, maintain, control, protect and develop their kinship ties".

[47] In considering whether to reimpose condition 7, it is necessary for the Court to consider the compatibility of any decision with the human rights contained within the *Human Rights Act*. In my view, the provisions of section 5 of the *Mental Health Act* are already compatible with the *Human Rights Act*, despite being expressed in slightly different terms.

[48] In considering whether there should be any amendment to "of any condition of a forensic order", it is important to consider whether the safety of the community is exposed to unacceptable risk. That requirement that any limit be the least restrictive of the right and limited to only what is necessary to address an unacceptable risk to safety has been developed to be protective of the underlying rights to the greatest extent possible.

[49] I note the submissions from the Queensland Human Rights Commission that sets out there has been a number of authorities in Victoria reaching a human rights compatible meaning in different contexts in the assessment of "unacceptable risks". These authorities establish that the question is not whether there is no risk – because there is always some risk – but whether the risk is unacceptable. It is the overall effect of the multiplicity of considerations in the individual facts and circumstances of the case must be considered. There must be sufficient likelihood of the occurrence of the risk in combination with the magnitude of harm if the risk eventuates and any other relevant circumstance which make the risk unacceptable.

[50] Consequently, even a relatively high risk of reoffending may be reduced to a risk that is not unacceptable when other circumstances (for example, the extent of the limit and the strength of the case brought) are considered. The emphasis of the phrase's flexibility means that it can be calibrated to the nature and degree of the risk in particular cases, and the imposition of conditions that can address the risk must be proportionate or no more onerous in the extent of their limitation upon human rights than required.

[51] The Victorian Court of Appeal decision in *Nigro v Secretary to the Department of Justice* [2013] 41 VR 359 referred to the interaction between human rights and the evaluation task in discerning unacceptable risk. The Court, discussing the interaction between the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) stated:

> "[103] The evaluative task in determining an "unacceptable risk" necessarily involves consideration of the values accorded to liberty at common law and the values ascribed to the rights in Pt 2 of the Charter. Those considerations are intrinsic to the notion of an unacceptable risk, which requires those values to be balanced against the risk. Were it otherwise, any risk would be unacceptable. The threshold test in s 9(1) provides for the manner in which the court may strike a balance between protection of the community and the restriction of the offender's human rights. Although the impact on the offender of the making of an order is excluded from the test, the conceptual value of individual liberty and other human rights remain to be weighed in the balance. Though the test of unacceptable risk involves no prediction of the impact of an order on the particular individual, it necessarily involves consideration of the value which is placed on liberty and other human rights. The legislative framework for s 9 contemplates that the nature of any order that is made and its effects upon the offender, including its impingement upon his rights, are matters to be taken into account when exercising the discretion under subs (7). So much was not in issue on the appeal. The legislature thus seeks to achieve a balance between the offender's rights and the right of members of the public to be protected against the risk of the offender committing further sexual offences. When the degree of risk and its nature makes it unacceptable has been left to the courts to determine."

The Tribunal's decision

[52] The Tribunal's decision took into account a number of CFOS reports and a number of other reports, including: the CFOS report dated the 23rd of April 2015; the CFOS report dated the 7th July 2020; the report of the treating psychiatrist dated the 22nd of September 2020; and the risk management committee minutes dated the 13th of October 2020. Those reports are relevant to my decision today. I have also been provided with an updated report by the treating psychiatrist dated the 22nd of April 2021, which I have considered and also a further updated report in June.

[53] The treating psychiatrist's report dated the 22nd of April 2021 stated that he was the respondent's current treating psychiatrist and has been so since October 2019. In preparing his April report, he had access to the CIMHA database, advice from the Indigenous liaison officer, discussions with the respondent's case management team and an interview with the respondent on the 15th of April 2021.

[54] His current treatment is case managed by an extended hours, seven days a week service, the Mobile Intensive Rehabilitation Team. The respondent is supported by an advanced Aboriginal mental health worker, under the care of a full-time psychiatrist with regular, frequent reviews. He is reviewed by the Assessment and Risk Management Committee, the forensic liaison officer and has face-to-face reviews annually by CFOS while under the forensic order, and he also has a family liaison. Medication is provided by way of a depot to ensure compliance. It is administered by mental health staff and there are reviews of his medical issues with support to see a general practitioner. There were no significant changes since the last mental health review.

[55] In relation to specific clinical issues, particularly risk factors bearing upon the grounds of the appeal, the issue of relevance is access to children. In his April report, the treating psychiatrist said there was no recent history of issues with police or antisocial behaviour. There were no known recent or current issues with inappropriate contacts, behaviour or failure to provide care to children. He is not known to have been violent or inappropriate around children since the index offences, which occurred whilst he was untreated and psychotic in 2002, where he punched a girl and threatened a girl and her mother. He does not access child pornography. He likes to see his sister, who has children.

[56] He has current access to his nieces. They come to visit his mother every week and he sees them at that time. He never uses substances around children. If he is going to use, he goes to an "adult place". He does not use ice in his own unit or allow others to use in his unit. He says that if people want to use nicotine or marijuana, for instance, they cannot do it in his unit. If his family thought he was intoxicated or behaving strangely, they would not allow him access to the children. He sees his role as a father and uncle, and that means "doing good" by his nieces. He believes he has to protect them from harm until he dies.

[57] The indigenous community's views have been set out in that report as well. The respondent's advanced Aboriginal mental health worker was asked to look at the risk issues around unsupervised access to children from the view of his family and community. He was able to interview family members. His email reads as follows:

> "I have talked with [the respondent's] aunt… and she states that she has no problems with [the respondent] being around children. His

> Aunty has informed me that … they have big family gatherings where a lot of his nieces and nephews and other children attended, and there was no issues or risk at all in terms of [the respondent] being a risk to harm children. If anything, [the respondent] displayed protective factors and takes pride in being an uncle. [The respondent] has been in her presence on numerous occasions and talks to his nieces and nephews on FaceTime, and she states that she can see how much the children love him.
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> [The respondent] has never been under the influence of illicit drugs during these family gatherings and doesn't seem a risk at all. Other members of [the respondent's] immediate family are also supportive of this, and if they notice [the respondent] was unwell or under the influence of illicit drugs, then they would not allow him to be in the presence of children by himself and would encourage him to seek the appropriate help regarding his mental health.
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> [The respondent] is acknowledged in his family as an uncle, and not permitting him to have access to his nieces and nephews, culturally isolating him would have a negative effect on his mental health. His family are very supportive of [the respondent], and although they understand [the respondent] has a mental health diagnosis, he's made big improvements and is managing his mental health and she can see the positive effects it has on [the respondent] in terms of his healing and maintaining his wellness."

[58] Mr Falcongreen notes in his submissions that, if the condition that was being proposed by the Attorney General was imposed, then that would have an impact upon the respondent seeing his extended family, as has been set out by his aunt in this material. It was noted by the treating psychiatrist in the April report that the respondent's mental health is stable and has been so for many years. He is not coming to the attention of police or the community and is well-supported by his family, who are well-aware of his illness. There have been no reports of aggression or violence in any sense since he has moved to a different area in 2014.

[59] There was a recent admission in 2019 in the context of breaches of the forensic order in respect of substance use. The admission did not change his use. There was no evidence of acute psychosis and his mental state became worse with confinement. He continues to use illicit substances in an intermittent pattern in breach of his order, including buprenorphine. He says he does not drink alcohol, he smokes cigarettes, but says he does not smoke marijuana. Urine drug screens sometimes find benztropines, but otherwise match his self-report. He says that he uses amphetamines every now and then, which he usually drinks. It does not get him into trouble, and he does not drive.

[60] The treating psychiatrist noted that the use of drugs does not lead to higher risk of note in respect of children. He does not use in his unit, does not use around children and his community would not allow him to look after children if there were signs of intoxication.

[61] The updated report of the treating psychiatrist dated the 14th of June 2021 states that the respondent is still managed by the Mobile Intensive Rehabilitation Team, who report no concerns or issues that need to be raised. The Indigenous liaison officer has no issues or concerns. The treating psychiatrist has reviewed the respondent on 15 April and 31 May

2021 and reports that the focus of latter appointments were on helping to address his need to attend an ophthalmology clinic. There have been no concerns from family, police or community. There has been no change in his mental state.

The parties' submissions

[62] The Attorney-General submits that the respondent should not have unsupervised contact with children and that should be reinstated in the forensic order. Although previously they took a blanket approach, they now state that, taking into account the affidavit that has been provided by the Legal Aid solicitor which refers to the conversations that she has had with the respondent's sister, it would be open on the evidence to carve out from this order that he could have contact with his sister's children.

[63] The Attorney-General says that his treating psychiatrist stated that the respondent will not consume substances at his home or around children. The Indigenous mental health worker stated that the respondent's family would not allow him to take care of the children unsupervised if there were concerns about intoxication. It was noted that the case manager stated the respondent's sister and mother had no concerns with him having unsupervised contact with the children.

[64] The Attorney-General's written submissions stated that, however well-intentioned those assurances are, the onus in determining his current mental state, level of intoxication, and potential risks rely heavily on the respondent and his sister, and it is questionable how effective it would be for the respondent, whose insight and judgment are impaired, to assess his own level of intoxication or risk to others if he began feeling unwell.

[65] As I said before, the Attorney-General seems to have walked back a little bit on that submission and states that it could be open on the evidence to have a carve out in relation to me reimposing the order to let him to have contact with his sister's children. It is the risk to other children that the Attorney-General is specifically concerned with. Their written submissions stated that, in addition to leaving the risk management decision to the respondent and his sister, the Tribunal failed to address the risk to other children that the respondent may come into contact with and whose parents may be unaware of the respondent's forensic history and risk profile. This may include the children of his friends, neighbours, and associates, and there are risks to the others, particularly children, that are associated with the respondent's psychotic symptoms and the nature of his mental illness, paranoid schizophrenia, antisocial personality, poor insight, and illicit substance use.

[66] The 2020 CFOS report considered that there was a high risk of violence. While that risk profile is sufficient to warrant adding a condition to protect children, the risks to children are not narrowly confined to violence. There are also the risks of neglectful acts and misadventure arising from his impaired judgment, insight, and capacity. Children are in a vulnerable position due to their age, especially if they do not have the protection of a responsible supervising adult present to intervene.

[67] Despite not having offended against children in recent years, the Attorney-General submits that it is nevertheless too great a risk to take to allow the respondent to have unsupervised access to children. The Attorney-General highlights the gravity of the index offending, which demonstrates the potential serious harm that may be caused when he is

unwell and the unpredictability of reoffending or risky behaviours due to the mixture of substance use and any deterioration in his mental state.

[68] Further, the Attorney-General submits that it was not the time to remove such a condition when the CFOS had concerns the patient was exhibiting an increased symptom burden and there was a deterioration in his mental state, with psychotic symptoms similar to those present at the time of the index offences. The Attorney-General submits that it is necessary to have a condition requiring that any interaction that the respondent has with children be supervised. That would be for any child that the respondent interacts with and would ensure that there would be preventative and intervening measures taken if there were early warning signs of deterioration and/or if he becomes aggressive or engages in risk-related behaviour.

[69] The Attorney-General submits that the condition makes it clear to the respondent and his family what is required. It is also there for his treating team as part of their reviews and monitoring in determining what contact he has with children and whether to alert others who should be aware of such a condition. The condition will not and has not interfered with him having contact with his sister's children, as reflected in the material. The condition is the least restrictive option for managing the risks, and it is a reasonable condition for the protection of vulnerable children that he be prohibited from having unsupervised contact with children. He has recently exhibited concerning psychotic symptoms and continues to use illicit substances on a regular basis and, given the gravity of the index offending, which demonstrates the potential serious harm that may be caused when he is unwell and the unpredictability of reoffending or risky behaviours due to the mixture of substance use and deterioration his mental state, the Tribunal should not have removed the condition.

[70] It is clear that the respondent is still using drugs. The last drug urine screen that we had was in May of this year, which returned a positive result for methylamphetamine and buprenorphine.

[71] In light of that context of drug use, counsel for the Attorney-General has referred me to the CFOS report of July 2020 that has been signed off by two psychiatrists and a psychologist. In this report it was said that:

> "Given the circumstances at the time of the index offences, significant contributing factors to the risk of violence include positive psychotic symptoms, in particular, beliefs about risk to others that lead to a perception he has to act in a pre-emptive manner to prevent harm. And when such beliefs are associated with distress and negative affect, this is likely to increase [the respondent's] risk of violent action. Use of alcohol and illicit substances would also be contributing factors that are causing a deterioration in symptoms of mental illness, as well as having a disinhibiting effect, increasing arousal, distress and impairing his judgment."

[72] Counsel for the Attorney-General states that, given that he is using drugs, he should not be having unsupervised contact with children, considering the matters that have been set out in this CFOS report. Counsel for the Human Rights Commission has helpfully set out in their written submissions the interaction of the *Human Rights Act* and the

considerations that I should take into account in relation to this appeal by applying the *Mental Health Act*. As counsel for the Commission stated, the principal matter that I have to look at is assessing unacceptable risk. As they said, I have to take into account the matters that affect the respondent's human rights, and I have so done that.

[73] The respondent submits that the conditions which the Attorney-General is seeking, even if you have that carve out that allows him to have unsupervised contact with his own sister's children, would prohibit him from having contact with his extended family.

[74] The Chief Psychiatrist does not take a position on whether the condition should have been removed.

Advice from the assisting psychiatrists

[75] I have been assisted here today by Dr McVie and Dr Harden. The advice given to me by Dr McVie and Dr Harden has materially contributed to my decision in this matter.

[76] The advice given to me by Dr Harden is that the forensic order that was imposed on the respondent was when he was extremely unwell. The respondent presents with a risk of general violence. He presents with a risk of deterioration of psychosis. He presents a risk of violence that is associated with substance use. Dr Harden says he cannot find any specific risk to young people, that the respondent may present as a general risk to everybody, but he cannot see, upon his review of the material, why the last paragraph in the 2015 report stated that:

> "The treating team may need to consider review with the hospital child protection team whether the situation with regards to unsupervised contact with [the respondent's] nieces is appropriate, given his history of significant violence, chronic substance use and ongoing low-level psychotic symptoms."

[77] Dr Harden cannot see the basis for making such a recommendation. There seems to be an ongoing debate between the CFOS and the treating team. In Dr Harden's opinion, the condition that the Attorney-General wishes to reimpose does not make sense. Dr Harden does not actually understand why the Tribunal, in fact, imposed such a condition. He sees it as untenable. The risk to children, in his view, is no greater than the risk to other people in the community.

[78] To be clear, Dr Harden states that the respondent does require a forensic order but, from a clinical point of view, there is no material that supports reimposing the condition which the Attorney-General so seeks. In terms of the 2020 CFOS report, which is a significant factor which the Attorney-General relies upon, Dr Harden's view is that this is just really looking at a general risk. But there is no data on the material before me to support that there is an increased risk to children.

[79] Dr McVie agrees with Dr Harden's view. Since 2002, when the index offences were committed, the respondent has not committed any offences in the same vein. There's no evidence of ongoing concerning behaviour, despite the drug use.

[80] The advice of Dr McVie was that she has considered the risks and she can't identify any that affect children specifically. The updated CFOS report does not make any recommendations for such a condition. It is important that the respondent should have

access to his family's children. If there was a condition which the Attorney-General is seeking, it would be very difficult to manage because he could, just by everyday behaviour, have unsupervised contact with children by just having contact when he sees people. The condition that the Attorney-General seeks, in Dr McVie's view, is not required.

Determination

[81] I note that the forensic order was imposed in 2004 on the respondent as a result of alleged violent offending by the respondent in 2002.

[82] On the 23rd of April 2015, after a report was prepared by CFOS as part of their annual risk assessment of a special notification forensic patient. One of those recommendations was that the treating team may need to consider a review with the hospital child protection team with regards to whether unsupervised contact with the respondent's nieces was appropriate given his history of significant violence and chronic substance use and ongoing low-level psychotic symptoms. About a month later, in 2015, the Tribunal added a condition to the forensic order that he shall not have unsupervised contact with children.

[83] On the 7th of July 2020, CFOS prepared a violence risk assessment, partly due to differences of opinion between the treating team and CFOS regarding the degree of continuing psychotic symptoms and what that meant for managing the respondent in the community. That report stated:

> "At the time of the previous CFOS report on the 18th of February 2020, [the respondent's] long-term risk of violence was assessed as high with his HCR20 risk factors weighted across historical clinical and future risk management items.
>
> In particular, he continued to use illicit substances and there was considered to have been a deterioration in his mental state with content of psychotic symptoms similar to that present at the time of the index offences. And, based on his presentations at the time of CFOS reviews and in November 2019 and February 2020, when compared with previous CFOS annual reviews, there was thought to have been an increase in his symptom burden.
>
> This prompted CFOS recommendations about optimised biological treatment considerations and threshold for in-patient admission. For the purposes of the current CFOS assessment, we updated the clinical and risk management items of the HCR20, these items are largely unchanged when compared with the assessment in February 2020. Given [the respondent's] static risk factors and given the continuing dynamic risk factors, we considered [the respondent] to remain in a high range for future risk and general violence.
>
> The CFOS violence risk assessment report in March 2020 notes early warning signs that would indicate a deterioration in [the respondent's] mental illness. Other indicators would include the carrying of a weapon such as a knife or if there was evidence that he was approaching perceived persecutors. Such early warning signs and behavioural indicators should be incorporated into a

> monitoring plan and inform the need for in-patient treatment. Given the current threshold for admission includes evidence of mental state deterioration rather than as evidence of illicit substance use by itself, we believe that [the respondent's] presentation to CFOS on February 2020 would represent a mental state that should prompt the need for admission.
>
> At the time of the more recent CFOS assessment, unfortunately, [the respondent] had engaged to only a limited extent, although he gave some indication of ongoing concern about others' safety. Subsequent assessments by the treating team have not revealed any overall deterioration in mental state."

[84] The treating team prepared a clinical report dated the 22nd of September 2020. The Tribunal hearing occurred on the 13th of January 2021 and, as I stated before, the contentious issue was whether the condition that the respondent have no unsupervised contact with children should be removed. The Tribunal removed that condition. The Attorney-General appeals this decision.

[85] The respondent's treating psychiatrist is aware of the issues of this appeal, that is, the removal of the no unsupervised contact condition. I note that the treating psychiatrist states that the respondent's mental state has stabilised since 2014 with family supports, depot medications, and assertive management.

[86] He continues to use substances despite education and assistance, but that use is not leading to objective risks, in part because the treating psychiatrist considers access to his nieces and nephews as a protective factor, as the respondent does not use when he is in their presence and ensures he is not intoxicated when he is in their presence. Of concern is that he is unable to fulfil part of his obligations in his community as an uncle, and he finds the inability a source of frustration, as it demeans his role and his character in the community.

[87] The latest report of the treating psychiatrist states that there has been no concern from family, police, or community, and there has been no change in his mental state, and a blanket direction preventing him from having unsupervised access to children would be counterproductive. It is more likely to do harm to an Indigenous man who takes his role as uncle seriously.

[88] The treating psychiatrist gave evidence in this appeal here today, and I accept his evidence. I also take into account the affidavit that has been prepared by the respondent's solicitor. The treating psychiatrist was clear. He supports the condition being removed.

[89] Since the index offences, there have been no issues with children. It is a protective factor that he is with children because he has a view that he has to protect them. There have been no social issues. The treating team has been in contact with the immediate family. There has been no inappropriate behaviour, no violence, and we were dealing with someone who offended 19 years ago when he was psychotic.

[90] There has been no violence involving threats or verbal abuse for 14 years; he really has not been a concern. The treating psychiatrist noted that people who know him well do not have the same view that has been presented at the CFOS review, and he stated that "none of us" see the information that is being acted upon in the CFOS report.

[91] The respondent has been drug tested every month. The last one came back being positive for amphetamines and buprenorphine, and that was in May 2021. There has been no cannabis detected in tests going back for some time. There has been no issue of concern raised by anybody, and the treating psychiatrist referred to the police and Indigenous communities and the only issue that has been raised is that in the CFOS report. If there were risk factors, then the treating psychiatrist would be worried. However, he cannot identify any risk factors and he specifically asked his team about whether there were any risk factors that he should be aware of. The treating psychiatrist noted that having access to nieces and nephews is a protective factor. He states that the respondent has not acted on his odd beliefs for a long time, and the things that happened back in 2002 have not reoccurred and he has had no recent contact with child protection services.

[92] Taking into account the treating psychiatrist's evidence and taking also into account the advice that has been given to me from a clinical point of view from the assisting psychiatrists, I am not satisfied that there is an unacceptable risk for if the respondent has unsupervised contact with children.

[93] I take into account a matter that Dr Harden raised; that the risk is more in a general sense and the risk to children is no greater than the risk to other people in the community. Dr Harden could not find any specific risk in the material which is addressed to young people. As he stated, it was a general risk to everybody. So, in terms of the material that is before me, and especially taking into account the evidence of the treating psychiatrist, I am not satisfied that there is an unacceptable risk for the respondent to have unsupervised contact with children.

[94] Having reached the conclusion that there is not an unacceptable risk, I would confirm the decision and dismiss the appeal.