

Questions of diagnosis

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mhrt

Mental Health Review Tribunal



For MHRT Member training only.

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Topics

In today's presentation, we will look at the following scenarios:

- when there is uncertainty about the person's diagnosis.
- when the MHRT may need to know the person's specific diagnosis.
- when the MHRT will need to know whether the person has a mental illness or an intellectual disability.
- when the MHRT can revoke a forensic order (mental health) and make a forensic order (disability).
- when the evidence suggests a person's original diagnosis was wrong.
- case law overview where these issues have been considered
- when a Tribunal-ordered examination may be useful.



What if there is uncertainty about the person's diagnosis?

How can that happen?

Doesn't the person first need a diagnosis to be on a TA or FO/TSO?

Poll question: Can a person be the subject of a TA, FO or TSO when the evidence before the panel shows some uncertainty about the person's diagnosis?



Treatment authorities

- Doctor can make a TA (s48, s49) if the treatment criteria apply. MHRT must revoke a TA if treatment criteria no longer apply (s421).
- Treatment criteria (s12) requires the person to have a mental illness.
- Mental illness (s10) is a condition characterised by a clinically significant disturbance of thought, mood, perception or memory. The decision that a person has a MI (diagnosis) must be made in accordance with accepted medical standards.
- The Act doesn't explicitly say that the specific MI must be identified.



Forensic orders / Treatment support orders

- The MHC makes an FO (mental health) or (disability) if it considers a FO 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 (s134).
- The MHC makes a TSO, if it considers a TSO, but not an FO, 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.
- Mental condition (Sch 3) includes a mental illness and an intellectual disability.
- MHRT must confirm FO (s442) or TSO (s473) on the same grounds.



When evidence of Dx is unclear

Poll question: Could the panel confirm the TA/FO(MH)/TSO despite the diagnosis not being certain in the following circumstances:



- It is the patient's first contact with mental health services and doctors agree that the person is experiencing a MI but they aren't certain about their diagnosis yet – they say they need more time to assess the person and see their response to medication before they are able to determine whether it is one MI or another.
- All the doctors have agreed that the person is suffering a MI, but the patient's first treating psychiatrist said they had schizophrenia and their current treating psychiatrist says they think it is more likely that the person has bipolar disorder.



When would a precise diagnosis be required?

- *For the review of a TA/FO/TSO, evidence of the exact diagnosis is not necessary.*
- In those circumstances, a TOE to clarify diagnosis or an adjournment for more evidence as to diagnosis would not be of any value.
- However, there may be some scenarios when a specific diagnosis is important evidence.
 - When having a diagnosis gives a clinician the ability to provide evidence as to likely risk factors, trajectory of illness, likely response to medication/treatments etc.
 - ECT hearings – to assess clinical merit.



Mental illness or intellectual disability



Poll question: When reviewing a TA/FO/TSO, does it matter if the person's symptoms arise from a MI or an ID?



Mental illness vs Intellectual disability

Yes, while it may not be necessary to have a specific diagnosis to confirm an authority or order, it is important to know whether the person has a MI or an ID.

- TA: Person must have a MI. If symptoms arise from ID alone, no MI so revoke TA.
- TSO: Only applicable to a person with a MI. If symptoms arise from ID alone, revoke TSO.
- FO(D): Only authorises involuntary care for an ID. Person would need a TA if treatment and care for MI required.
- FO(MH): A little more complicated.



Intellectual disability and FO(MH)

Poll question: If the treating team tells you the person ONLY has an ID, should the Tribunal revoke the FO on that basis?



FO(MH): MI vs ID

- Consider: *BAC* [2019] QMHC 4
- MHC held that:
 - *BAC* only had an ID and his behaviour that created risk to the community arose from that ID.
 - Mental condition includes MI and ID. Since *BAC* has an ID, he has a mental condition.
 - The Act contemplates that persons that only have an ID will receive care but not treatment (e.g. s8).
 - Conditions on the FO(MH) had to only be directed to care and not treatment.
 - The FO(MH) did not authorise the giving of involuntary treatment to *BAC*, only care.



Changing from an FO(MH) to an FO(D)

- So if a person with an ID can only receive care (and not treatment) on an FO(MH), why not just change the FO(MH) to an FO(D)?
- If only it were that easy!
- First we will look at the introduction of FO(D).



The introduction of FO(D)s

- There used to only be one type of FO.
- FO(D) introduced in 2011 when the *Forensic Disability Act 2011* commenced.
- Transitional provisions were also introduced to the MHA2000 which provided a mechanism for people subject to an FO with only an ID to apply to the Court to change their order to an FO(D).
- However, not everyone did.
- When the MHA2016 commenced, it assumed everyone who needed to be on an FO(D) already was, and so the mechanism was no longer required.



Section 457 – Person with dual disability

- The only mechanism under MHA2016 for the Tribunal to change from an FO(MH) to an FO(D) is s457.
- Note: If the person appeared before the MHC on new charges, the MHC could change the order.
- Section 457:
 - states that it applies to a person who is subject to an FO(MH) and has a dual disability.
 - requires the MHRT to revoke the FO(MH) and make an FO(D), if satisfied the person no longer requires involuntary treatment and care for their MI.
- Dual disability (Sch 3) means the person has a MI AND an ID. So if the person only has an ID, they don't have a dual disability and the section will not apply.
- The MHC confirmed this interpretation in BAC.



So what do we do if the person on an FO(MH) only has an ID?

- The MHRT cannot change the FO(MH) to an FO(D).
- The AMHS responsible for the FO(MH) remains responsible for the person with the ID.
- The AMHS may submit that they do not have the training, resources, supports to assist the person because they only have an ID.
- Unfortunately, this isn't something that the MHRT can do much about. The Act requires this to be the case.
- MHRT must apply the test in the Act. Must confirm the FO if the FO is necessary to protect safety of the community. Note: would be the same test whether it was FO(MH) or FO(D).
- Conditions: must only refer to 'care' and not 'treatment'.



When might we revoke an FO?

- The MHRT does not need to revoke an FO(MH) simply because the person only has an ID.
- However, there may be some circumstances in which the FO(MH) or FO(D) is no longer justified.
- Consider Appeal to MHC 035:
 - the FO was revoked by the MHC because it considered the FO was not justified (necessary) in relation to protecting the public.
 - the risks had reduced compared to the time of the offending. The mitigating factors were not related to the FO but other circumstances in the person's life.
 - the FO was not doing anything to protect the safety of the community.



What has the MHC said about the FO regime?

Consider Appeal to MHC 038.

- “A forensic order is, of course, not designed to take away hope. It is imposed when a person has committed serious criminal offences whilst seriously mentally unwell, and it reflects the law’s recognition that a seriously unwell person ought not to be held criminally responsible for their crimes and ought not to be punished by, for example, lengthy terms of imprisonment which would have been imposed on a person without mental illness who committed those crimes.”
- “But the fact that a person has committed crimes whilst unwell and has put the public at risk can’t simply be ignored or excused. The law, as expressed in the Mental Health Act, requires oversight and control of such a person **until they are healed from their illness, or at least healed to the extent to which they pose no risk of serious harm to the community**. In that sense, forensic orders are intended to compel engagement with mental health professionals for the purposes of healing the person subject to them so that ultimately, they are no longer necessary.”



What if the evidence is now that the original diagnosis was wrong?

- We have looked at the situation where there is uncertainty in the exact diagnosis, but the evidence is that the person has a MI.
- What if the evidence is now that the person never actually had a MI at all - the original diagnosis was wrong.
- TA: would be revoked, person has to have a MI.
- What about FO or TSO?

Poll question: Does the MHRT need to revoke the FO/TSO when the evidence shows that the person never had a MI?



It depends...

- This situation can be difficult to navigate.
- MHC case law can help but doesn't provide certainty.
- We will have a look at some cases that considered this issue.



SWZ

- The MHC said that a person's current existing mental condition, while an important consideration, is but one of a number of matters which must be considered when deciding whether to revoke or confirm an FO.
- This is despite the words "because of the person's mental condition" appearing in the test.
- The MHRT's decision was that the person did not have a MI, but the MHC found that it was more likely remission.



Appeal to MHC020

- The MHC found that it could not be satisfied that the person had a mental condition at the time of the offending.
- MHC noted that the safety of the community was compromised whether or not the person was subject to an FO.
- The MHC referred to SWZ and said that while the patient's offending was serious, it was not as serious and did not give rise to the same level of concern as the index offence in SWZ.
- Note: MHC specifically said in its reasons that this was a peculiar case that cannot be readily applied to other cases.



Appeal to MHC025

- In this case, the MHC gave some commentary about the source of the risk.
- It found that the family law and domestic violence legislation were more appropriately positioned to address certain risks, rather than the FO.
- This case can assist members to identify if the risks being considered are relevant to the FO or not – having regard to the nature of the risk, rather than the person's MI or ID.



When may a TOE be useful?

- The MHRT can make an order that a person subject to an examination by an examining practitioner (s721).
- The order must state the matters on which the examining practitioner must report to the MHRT via a written report.
- A Tribunal-ordered examination (TOE) report may be useful in providing the MHRT with an independent opinion on:
 - whether the person has a MI, an ID, or both and the diagnosis.
 - whether s457 may be applicable.
 - whether the person's MI is currently in remission.
 - whether the person ever had a MI.



Questions for the examining practitioner

- Ask specific questions that address the information the MHRT will need.
- You can give context or a short explanation to inform the practitioner why you are asking the questions.
- You can refer the practitioner to the relevant sections of the legislation.





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