

**THIS IS AN OFFICIAL REPORT OF THE MENTAL HEALTH REVIEW
TRIBUNAL PROCEEDINGS IN RELATION TO MR VIGO AUTHORISED BY
THE PRESIDENT OF THE TRIBUNAL ON 6 MAY 2020**



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

Concerning: Mr Vigo

MHRT NO: C/ CXXXXX

TRIBUNAL MEMBERS:

Maria Bisogni	Lawyer member
Kristin Kerr	Psychiatrist member
Peter Bazzana	Member

APPLICATION FOR:

s34 Mental Health Inquiry

DATE AND PLACE OF HEARING: [DATE], X Hospital

PRESENT AT THE HEARING

Mr Vigo attended the hearing and was represented by his lawyer, Ms Kim Wellard of MHAS. Also in attendance were:

- Dr A, Psychiatrist;
- Dr B, Psychiatry Registrar;
- Ms Lindy Rodrigues, Lay Advocate, Legal Aid;
- Medical Student; and
- Registered Nurse.

REASONS FOR DECISION

BACKGROUND

1. Mr Vigo is 46 years of age.
2. On [date], Mr Vigo was scheduled under the *Mental Health Act 2007* ('the Act'). On [date], Mr Vigo was brought before the Tribunal under section 35 of the Act for a determination as to whether he was a mentally ill person.
3. According to the material before the Tribunal, Mr Vigo was a forensic patient, [information on index offence and sentence].
4. On [date], whilst a forensic patient, Mr Vigo was reviewed by the Tribunal pursuant to section 46 and section 47(4) and (5) of the *Mental Health (Forensic Provisions) Act 1990*. The Tribunal made no change to his order for detention at the X Hospital and made a recommendation to the Court that he had become fit to be tried in relation to the aforementioned charges.

5. On [date], the Supreme Court of NSW extended Mr Vigo's limiting term pursuant to section 54A and cl. 6(5) of Sch.1 to the *Mental Health (Forensic Provisions) Act 1990* for a period of three months from the expiration of the limiting term.
6. On [date], the Supreme Court of NSW revoked the interim extension order made on [date].
7. On [date], the District Court found that Mr Vigo was fit to be tried. He was sentenced to [time]. The sentence was backdated to commence on [date] until [date].
8. At the Mental Health Inquiry, the Tribunal took into account the written material and the oral evidence at the hearing. On the day of the hearing, Ms Wellard provided the Tribunal with a written submission. Ms Wellard also made oral submissions. In light of the submissions, the Tribunal reserved its decision in order to further consider all the evidence and her submissions.

Application of the treating team

9. The treating team requested a 12 week involuntary patient order.

ISSUES UNDER CONSIDERATION

10. The Tribunal's functions at a Mental Health Inquiry are set out under section 35 of the Act. Under section 35(1) the Tribunal is to determine whether or not, on the balance of probabilities, the assessable person is a mentally ill person. Subsection 35(2) provides that the Tribunal is to consider the reports and recommendations of the authorised medical officer and other medical practitioners who examine the person under section 27 after the person's detention, and consider any other information put before the Tribunal.
11. A mentally ill person is defined under section 14 of the Act. Subsection 35(5) set out the orders available to the Tribunal if satisfied that the person is mentally ill, including an order that

"the person be detained in or admitted to and detained in a specified mental health facility for further observation or treatment, or both, as an involuntary patient for a specified period of up to three months, if the Tribunal is of the opinion that no other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available or that for any other reason it is not appropriate to make any other order under this subsection."

Applying each of the criteria under section 35

Is Mr Vigo mentally ill?

12. There was a written report by Dr B, Psychiatric Registrar, under the supervision of Dr A. Dr B stated that Mr Vigo has a mental illness, namely schizophrenia and a substance use disorder, the latter in remission in a controlled environment.

13. Dr B outlined Mr Vigo's history of mental illness, noting that he was diagnosed with a chronic psychotic illness in custody around [year] and that he had had multiple admissions to Y Hospital for acute psychosis during his incarceration (for [offence]) between [dates]. After his release on parole in [date], he was treated by the Z Community Mental Health Team. At the time of his arrest relating to the index events, he was on parole and on a CTO.
14. In summary, Dr B reported that Mr Vigo was "behaviourally settled" with no episodes of verbal or physical aggression. He continued "to present with positive symptoms in the form of delusional thought content related to conspiracy theories, negative symptoms and cognitive impairment." She also reported that his "insight into the interplay between the mental illness, substance use and offending behaviour remains impaired."
15. There were a number of handwritten progress notes from [dates]. Most of the entries were compiled by nursing staff. In the main, Mr Vigo's mental state was reported to be "settled" and "stable" with "appropriate behaviour" and compliance with medication and having no overt psychotic symptoms or denying same. There was an entry on 21 November 2019 by Drs B and A and also a nursing note. The former referred to Mr Vigo denying "current persecutory ideation though some evidence of underlying delusional beliefs with conspiratorial themes." The nursing note included the following exchange with Mr Vigo:

"Repeatedly stated "I'm not mentally ill" "I was but not anymore". Seeking explanation of his rights to be "let out" of the X Hospital. Writer advised he speak to the psych registrar as writer was not comfortable advising about legal matters. [Patient] accepting of same. Disclosed that he believed it "is a conspiracy theory that I'm back here" (referring to the X Hospital). Stated that he believes they can "digitally and electronically trace documents that have been sent to keep me in". Referred to Dr A not releasing (sic) he is not mentally ill, it had been "proven by six psychologists". Expressed paranoia that he is being "railroaded by the system" "but I'm not paranoid.... I'm just frustrated".
16. Dr B's report concluded that Mr Vigo is a mentally ill person and that he has "a continuing condition that is likely to worsen without appropriate supervision and treatment." Dr B stated that Mr Vigo "will benefit from continued inpatient rehabilitation to enhance his psychosocial functioning in preparation for integration into the community. Specifically, he will benefit from further work aimed at improving insight into his mental illness and harmful substance use, and the nexus between these factors and his offending behaviour."
17. Dr B also gave oral evidence that Mr Vigo has ongoing symptoms "mainly" by way of negative symptoms and cognitive impairment. The main concern were that if Mr Vigo was not to remain as an involuntary patient at this point in time, given his continuing symptoms and the fact that the majority of the last [X] years he has either been in custody or in the X Hospital, then going back into

the community is likely to be quite a stressful experience. Owing to his issues with substance use in the past, without a gradual transition with appropriate support in place, he would be at risk of relapsing into substance use, which could increase his risk of violence. The plan is to refer Mr Vigo to a medium secure unit so he can make that gradual and supported transition to the community.

18. Dr A also gave evidence that Mr Vigo continues to have significant positive symptoms and negative symptoms of cognitive impairment. He has improved over the last 11-12 months in the [X Hospital ward] but he was coming from a place of significant impairments where he has been in maximum security for [X] years and has spent his whole adult life in custody with assertive psychiatric care. If he were to be considered appropriate for lesser security a medium secure unit would be the “first downward step” as he is going to need structured and slow transition back to the community. Dr A said that Mr Vigo will require the structure of a CTO in the community but unfortunately that order “had failed spectacularly” on the last occasion. The system will have to think very carefully as to how to “structure things to be effective”. The next step is consideration of a medium secure unit, especially in light of his changed legal circumstances. Whilst Mr Vigo’s legal circumstances have changed his clinical picture or psychopathology have not.
19. There was a report by Dr C, Psychiatrist, dated [date], in relation to the State’s application to extend Mr Vigo’s forensic patient status. Dr C interviewed Mr Vigo on [date]. He noted that Mr Vigo had been on a Community Treatment Order (CTO) at the time of the index event and that he had been non-compliant with his medications for some weeks prior. Mr Vigo was also a heroin user and he had used heroin on the day of the index event.
20. Dr C also assessed Mr Vigo’s mental state and noted that Mr Vigo “has and had delusional ideas”; has had “hallucinations; showed “mild thought disorder; and negative symptoms to serious mental illness - blunting of affect, difficulty with concentration”. Dr C also noted that Mr Vigo “has a mental illness” which is partially treated with anti-psychotic medication and that “he is in a therapeutic, supported environment” and that

“outside this environment the manifestation of his illness could be triggered by stress, non-compliance or illicit drug use among many factors”.
21. In terms of risk of harm, Dr C noted that

“Mr Vigo has had numerous historical instances of behaviour which has caused psychological and physical harm to other people. He also has had over a period a pattern of such behaviour ending in homicide. He committed his index offence when on parole”.
22. Dr C added that antipsychotic medication had allowed Mr Vigo to “gain some mental stability...and insight” and that the “absence of illicit substances” had played a part in his improvement”.

23. Dr C supported the extension of Mr Vigo's forensic order and expressed the view that Mr Vigo's management as an involuntary patient under the Act did not "provide sufficient safeguards". Dr C further stated that Mr Vigo should go to a medium secure unit from the X Hospital where he would require "on average [x] years in such a unit, for graded community reintroduction and rehabilitation" with "many years of careful community follow-up and risk management". Dr C recommended an extension of the limiting term to [x] years.
24. Mr Vigo also addressed the Tribunal. He said that he did not set unrealistic goals. He felt that he had gone as far as he could at the [X Hospital ward]. He has been there for a year. He said that he recognises the signs and symptoms of his illness. He has not been tempted by anything small, not even cigarettes or other drugs.
25. Asked about the role and effect of the medication, Mr Vigo said that it was "alright" as it "balanced me out". He was not "so paranoid". He agreed that his thinking was clearer. His mood was 8 out of 10. He was getting on with everyone and he doesn't hold grudges and "let's things go".
26. Asked about his rehabilitation needs at a medium secure unit, Mr Vigo stated that he needed to address his social skills, how to use an Opal Card and how to do his banking.
27. Mr Vigo also said that there have been no fights and he has had no aggression. He said that he was not a threat to himself or the public. His violent crime was in the past. He asked the Tribunal to take into consideration that he was now wiser, more understanding, and more empathic to people and that he could continue in the community. Mr Vigo stressed that his recent history has not been violent.
28. On the evidence provided, including from Dr B, Dr A and Dr C, the Tribunal was satisfied that Mr Vigo is a mentally ill person. The medical evidence was clear that Mr Vigo continues to have positive symptoms of his illness that have only partially responded to treatment. He is more settled and his condition appears to be stable. However, his stability has been achieved through intensive psychiatric support in conditions of maximum security and a lack of access to illicit substances.

Owing to his mental illness were there reasonable grounds for believing that care, treatment or control were necessary for his protection or the protection of others from serious harm?

29. Mr Vigo has a concerning history of violence to others when mentally unstable. The index event involved serious violence. This was in the context of him being on a CTO in the community and prior to that having served [x] years imprisonment for [offence]. He was also on parole at the time of the index event.
30. The Tribunal was persuaded that this criterion was met. The Tribunal considered that it is necessary to address Mr Vigo's substance abuse disorder and improve his understanding of his illness and the connection between his substance abuse and his offending behaviour, as well as the need for

ongoing medication, in an inpatient setting to enhance his prospects of a successful discharge to the community and to protect others from his risk of further serious harm.

31. Whilst Mr Vigo's mental state has been relatively stable in a high secure setting, he remains symptomatic, and he appears to only have a partial understanding of his rehabilitation needs. In this regard, his judgement is incomplete. Without ongoing intensive care and treatment, he is likely to deteriorate further and pose a risk of serious harm to others. There is considerable work to do on addressing his issues and risks.

Is there less restrictive care, consistent with safe and effective care that is appropriate and reasonably available?

32. In her report, Dr B related that the treating team intend to refer Mr Vigo to a medium secure unit to facilitate and continue therapeutic work in an environment of lesser restriction. Until this can be facilitated, according to Dr B, the X Hospital was the less restrictive placement option currently available to Mr Vigo that is consistent with safe and effective care.
33. In her oral evidence, Dr B confirmed the plans to refer Mr Vigo to a medium secure unit "this week" with an expectation that he would be assessed in the New Year.
34. Asked as to whether Mr Vigo should be transferred to a medium secure unit immediately, Dr B said that it depended on bed availability.
35. Dr A said that it "wasn't clear" to him that Mr Vigo could be managed at a medium secure unit from a risk management perspective. However, it was reasonable to refer Mr Vigo to such units so that they can make an assessment. Dr A said that he didn't think it was an appropriate placement because of the less structured environment at such units. If Mr Vigo was appropriate for lesser security, a medium secure unit would be the first step.
36. Dr A added that Mr Vigo has significant positive and negative symptoms, namely a cognitive impairment, although he has improved over the last 12 months. If Mr Vigo were to be transferred to a medium secure unit, there would need to be a slow and structured transfer back to the community. Any transfer to the community would also have to be planned very carefully. Dr A also said that although Mr Vigo's legal circumstances have changed his clinical circumstances have not.
37. Asked why Mr Vigo was not appropriate, Dr A said that he understood that a medium secure unit is appropriate in cases where persons can be stepped back into the community within 2 years. It was not clear to him that this would be the case with Mr Vigo. Dr A added that the units may have different views and it was reasonable to refer Mr Vigo so they have an opportunity to assess his suitability. If he is assessed as appropriate then Dr A would be happy to support this.

Ms Wellard's submissions

38. Ms Wellard handed the Tribunal a written report by Dr C in relation to the High Risk Supreme Court proceedings in which Dr C had said that Mr Vigo should go to a medium secure unit for graded rehabilitation.
39. Ms Wellard stated that Mr Vigo's treating team had given evidence that the Unit 1 or the Unit 2 would be appropriate. These Units have the facilities to provide gradual integration to the community.
40. Ms Wellard submitted that Mr Vigo has been ready for transfer to a medium secure unit since July 2019. She then referred to the Tribunal's determination by [Tribunal member] dated [date]. The reasons of that determination referred to a mental state examination of Mr Vigo in [date] and the treating team's decision to refer him to the medium secure units. Ms Wellard submitted that Dr C's report and the treating team's decision to refer Mr Vigo were evidence that he was not being detained in the least restrictive environment.
41. Ms Wellard submitted that the objectives of the Act in section 3 and the principles of care and treatment in s 68 required that Mr Vigo be moved to a least restrictive environment to promote his recovery and to allow him to access appropriate care.
42. Ms Wellard noted that Mr Vigo had been in custody since 2012; first in Y Prison Hospital and then, after a limiting term was imposed, he was transferred to the X Hospital on [date]. Prior to that, Mr Vigo was in custody for 18 years. Ms Wellard submitted that Mr Vigo now needs a gentle step down, graduated transition towards living in the community, and this cannot be done from the X Hospital.
43. Ms Wellard further submitted that if the Tribunal found that Mr Vigo was a mentally ill person, he should be transferred to a medium secure unit or a civil mental health facility other than the X Hospital, as the least restrictive option available for safe and effective care. She said that Mr Vigo had spent considerable time at the X Hospital, was on clozapine and was stable. Any further adjustments in relation to medication could be achieved at the medium secure unit.
44. Ms Wellard also submitted that the use of the word "specified" when referring to a mental health unit in section 35 meant that the Tribunal could specify a medium secure unit as the place of detention.

CONSIDERATION

45. The only substantive point of contention at the hearing related to the second limb of the criterion in section 35 (5) (c), that is, whether Mr Vigo's ongoing detention at the X Hospital provided less restrictive care, that was safe and effective, and "appropriate and reasonably available". Ms Wellard contended that there was evidence that a medium secure unit and not the X Hospital was that option. Mr Vigo's treating team disagreed.

46. Plainly, medium secure units provide a less restrictive setting for the ongoing care and treatment of persons who are mentally ill, such that in appropriate cases community transition can be planned. However, the second limb also requires that the care is consistent with safe and effective care and “is appropriate” and “reasonably available”.
47. Ms Wellard’s submission that the treating team had indicated in their evidence that it was “appropriate” was, on consideration, incorrect. At its highest level of support, the treating team only considered that a referral to a medium secure unit should be pursued to obtain a view from other clinicians at medium secure units, to assist to determine if the care offered would be appropriate. In fact, Dr A considered that a medium secure unit may not be appropriate to manage Mr Vigo’s risks and that for the present time, until assessed as such, his care should continue at the X Hospital.
48. Dr C’s report appeared to support Dr A’s view. Read in its entirety, Dr C’s report indicated that Mr Vigo was being cared for in the most suitable and therapeutic environment. Dr C had interviewed Mr Vigo at X Hospital. The reference to care and treatment in a medium secure unit, that Ms Wellard relied upon as evidence of an appropriate alternative, appeared to be in the context of Dr C’s conception of an overall future care plan for Mr Vigo to move from the X Hospital to the community.
49. In any event, Dr C was not purporting to conduct an assessment on behalf of a medium secure unit. His report was prepared for an entirely different purpose, being an independent assessment in relation to whether Mr Vigo’s high risk offender status should be continued. Dr C’s report corroborated the need for a structured and slow progression to the community, via a medium secure unit and his report also identified the serious harm issues that Mr Vigo posed owing to his partially treated illness.
50. The Tribunal accepted that Mr Vigo has ongoing positive and negative symptoms of mental illness that are partially treated in a highly restricted environment with considerable supports. He also has a significant drug and alcohol history and has only achieved abstinence in the Hospital. He has a long history of violence to others. His clinical picture is complicated by his cognitive impairment. He had recently disclosed to nursing staff that he was not mentally ill and his understanding of his illness and rehabilitation needs were rudimentary. The Tribunal was persuaded that Mr Vigo’s hospital containment in the X Hospital was necessary to address Mr Vigo’s illness and vulnerability to substance misuse and relapse, which historically have led to episodes of serious physical violence to others.
51. At the time of this hearing, there was no evidence that a medium secure unit would be appropriate, in the sense of, providing a level of care, treatment and control that would contain Mr Vigo’s illness and protect others from serious harm. Had Mr Vigo been assessed as suitable by a medium secure unit, then Ms Wellard’s submission would have been more persuasive. However, there was no such evidence at this hearing.

52. As the Tribunal was satisfied that Mr Vigo's care at the X Hospital was the appropriate place for him at this point in time, it could be argued that the Tribunal had no need to consider if any other care was "reasonably available". However, it is important to comment on Ms Wellard's submission that the term "reasonably available" should be given a "wide interpretation". Ms Wellard's submissions appeared to suggest that a "theoretical" availability would suffice. The Tribunal disagrees.
53. As far as the Tribunal is aware the term as used in section 35 of the Act has not been judicially defined or considered. Nor is the term likely to be defined satisfactorily with any great specificity. The meaning of the word "reasonably" is not axiomatic and is value laden and its meaning and breadth will often depend on its context and purpose. However, in attempting to give effect to its plain and ordinary meaning it would include care that was "likely" or "probably" available. While not attempting to provide an exhaustive definition of the term, the Tribunal does not consider that a "mere possibility" of availability will suffice. In addition, in this case before the Tribunal, it must be borne in mind that a very significant factor in determining "reasonably available" is that medium secure units have their own powers and discretions in determining the availability of placements depending on factors such as their assessments of the suitability and needs of individual patients, the unit's resources and their priority of placement. In the circumstances of this case, where no medium secure unit has considered Mr Vigo's case or expressed any view on his suitability or the availability of a place for him, it is not possible to conclude that such placement is reasonably available. At best it was a possibility, a potential outcome, but no more than that.
54. In short, the Tribunal could not be satisfied on the available evidence that a medium secure unit was a less restrictive option consistent with safe and effective care, or that it was appropriate and reasonably available.
55. As the Tribunal determined that there was no other appropriate or less restrictive alternative to the X Hospital, then it was unnecessary to determine whether the Tribunal had the power to "specify" the place of detention. However, a plain reading of the provision suggests that the Tribunal may make such an order.

Is a financial management order under the NSW Trustee and Guardian Act required?

56. Ms D, Social Worker, in a report dated 29 November 2019, noted that Mr Vigo manages his own finances and that there have been no reported difficulties in this area.

DETERMINATION

57. The Tribunal accepted that for the present time, the care and treatment offered Mr Vigo at the X Hospital, was necessary for the ongoing treatment of his illness and the safety of others. The Tribunal was satisfied that the treating team is making enquiries of medium secure units. The Tribunal was also satisfied that there was no less restrictive option consistent with safe and effective care that was appropriate and reasonably available when the following matters were taken into account: the

events that led to the imposition of Mr Vigo's limiting term; his lengthy history of prior offending, mental health treatment and incarceration; the failure of a CTO to keep the community safe; the treating team's evidence and views; and the fact that Mr Vigo had not been assessed and accepted by any medium secure units as yet. Therefore, Mr Vigo remains in the least restrictive environment consistent with safe and effective care and it is necessary for him to remain there to prevent a significant risk of serious harm to others.

58. The Tribunal recommends that Mr Vigo's referral to medium secure units should be made at the earliest opportunity. To his credit, Mr Vigo has remained compliant with treatment and is behaviourally settled. It would appear that he has not engaged in any acts of physical violence since the index event. In light of his changed legal status the Tribunal considers that it is appropriate that he be assessed for medium security. Mr Vigo had an expectation that this would have occurred after his August hearing and he is understandably perplexed. Of course, should he be favourably assessed, then the treating team would be obliged to transfer him in accordance with their obligations under section 12 of the Act. He has now spent one year in the [X Hospital ward], which is generally considered to be the least restrictive ward at the X Hospital and usually the last step before transfer to a medium secure unit.
59. On [date], the Tribunal determined that Mr Vigo was a mentally ill person for which there is no other less restrictive care that was appropriate and reasonably available. The Tribunal ordered that he remain detained at the X Hospital up until [date].
60. There was no evidence that Mr Vigo was incapable of managing his financial affairs. Accordingly, the Tribunal did not make an order for his financial affairs to be managed by the NSW Trustee.

Signed

Maria Bisogni
Deputy President

Dated 20 December 2019