Legal Aid Commission NSW: Criminal Law Conference 2019

NOT GUILTY BY REASON OF MENTAL ILLNESS: A DEFENCE PERSPECTIVE

Pauline David

Barrister, Samuel Griffith Chambers

1. As criminal lawyers we are all aware of the proportion of people we represent with cognitive and mental health impairments involved in the NSW criminal court system. The purpose of this paper today is to outline some aspects of the not guilty by reason of mental illness (NGMI) defence when acting for an accused in a trial, or a 'special hearing' after a finding the accused in found not fit to be tried.

2. Time is limited so this paper will not endeavour to cover every aspect of NGMI. To explore further the issues there are several recommended references papers at the end of this paper. I highly recommend the comprehensive text on these issues by Dan Howard and Dr Bruce Westmore, '*Crime and Mental Health Law in New South Wales',* to which I have referred frequently when preparing this presentation.

NOT GUILTY BY REASON OF MENTAL ILLNESS – THE SPECIAL VERDICT

3. The law in NSW provides for a 'special verdict' in circumstances where the accused is found to have been responsible for committing the relevant deed, but due to insanity, is to be dealt with differently and is 'not guilty by reason of mental illness.' The *Mental Health (Forensic Procedures) Act* 1990 (MHFPA) provides for a 'special verdict' at S 38(1) as follows:

> *(1) If, in an indictment or information, an act or omission is charged against a person as an offence and it is given in evidence on the trial of the person for the offence that the person was mentally ill, so as not to be responsible, according to law, for his or her action at the time when the act was done or omission made, then, if it appears to the jury before which the person is tried that the person did the act or made the omission charged, but was mentally ill at the time when the person did or made the same, the jury must return a special verdict that the accused person is not guilty by reason of mental illness.*
> *(i) If a special verdict of not guilty by reason of mental illness is returned at the trial of a person for an offence, the Court may remand the person in custody until the making of an order under section 39 in respect of the person.*

DEFINITION OF '*MENTALLY ILL* '

4. The common law definition of '*mentally ill'* applies in NSW and the term is not defined in the MHFPA. At common law it has long been accepted that persons who are mentally ill should not be held criminally responsible for a committing the relevant acts which constitute the elements of the crime but rather, due to their mental illness, they be dealt with differently. The applicable

definition in NSW derives from *Re M'Naghten's Case* (1843) 4 St Tr (NS) 847; 8 ER 718,[1] which is accepted as forming the basis for the relevant rule where there is evidence of defect of reason: *R v S* [1979] 2 NSWLR 1 at 61, O'Brien J (with whom Street CJ and Slattery J agreed) made a through historical survey of the defence of mental illness and stated:[2]

> *"… where there is evidence of a defect of reason from disease of the mind, the rule in M'Naghten's Case is the relevant rule, and the prosecution begins with the presumption that the accused is sane, and possessed of a sufficient degree of reason to know the nature and quality of the act he is doing, and that he is doing what is wrong until he proves the contrary, that his is not a mere evidential burden, but the persuasive burden of proof… ."*

ESTABLISHING THE DEFENCE OF MENTAL ILLNESS

5. When the defence of mental illness is raised, it is necessary first to consider whether the Crown has proved to the requisite standard whether the accused deliberately, or voluntarily, did the act or acts charged. If it is concluded that he or she did, it is then necessary to examine the evidence to determine whether the accused can be held criminally responsible for the act or acts.[3]

6. NGMI is a defence if it is proved on the balance of probabilities that at the time of commission of the offence the accused was labouring under such a defect of reason from disease of the mind that he did not know the nature and quality of the act or that he did not know that what he was doing was wrong. Accordingly, in order to sustain a verdict of NGMI, the jury must be satisfied that:

   i. The accused was labouring under a defect of reason caused by a disease of the mind.
   ii. As a result of which the accused did not know the nature and quality of his or her act; or
   iii. If he or she did know the nature and quality of the act, he or she did not know that it was wrong.

(i) defect of reason

[1] The issue arose in the prosecution of M'Nagthen who had shot and killed the private secretary to the then Prime Minister of England, Sir Robert Peel. The jury found him not guilty on the grounds of insanity on the basis that he suffered from persecutory delusions. The controversial verdict resulted in Parliament posing a number of questions about the law concerning the insanity defence to the House of Lords, Judges of the Supreme Court: *R v M'Naghten* (1843) 8 ER 229 in which the Court laid down three rules to be determined by a jury: at 233-234: Every man is presumed to be sane until the contrary is proven; to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from a disease of the mind, as not to know the quality and nature of the act he was doing; or if he did know it, that he did not know that what he was doing was wrong.

[2] See also Howard and Westmore, *Crime and Mental Health Law in New South Wales* (3rd Edition) p 431

[3] *Hawkins v The Queen* (1994) 179 CLR 500 at 517; [1994] HCA 28, R v Hadler (No 2) [2018] NSWSC 1804 at [203].

7. A disease of the mind is any disease which is capable of affecting the mind, irrespective of whether it has a mental or physical origin and irrespective of whether the defect of reason caused is temporary or permanent. The term ‘disease of the mind’ has been held to include a number of major mental disorders, including schizophrenia and severe mood disorders. It has also extended to physical diseases, such as epilepsy and hypoglycaemia (but not in every case) when they affect the soundness of the mental faculties.[4]

8. A disease of the mind does not include the transitory effects of some application of an external factor such as violence or drugs, or a psychological trauma to an otherwise healthy mind: see *R v Falconer* (1990) 171 CLR 30 at 75). It will not include certain temporary conditions such as transient alcohol or drug induced intoxication, although a finding of NGMI may be made in circumstances where drugs have acted as a trigger for an underlying disease of the mind predisposing the accused to a particular psychosis.[5]

9. It is a question of law for the trial judge as to whether any particular condition in question constitutes a disease of the mind and what is required to be proven is some diminution or malfunction of the normal capacity for rational thought caused by a ‘disease of the mind’.

(ii) nature and quality of the act

10. A person does not know the nature and quality of the act if he or she does not know the physical nature of what he or she is doing or the implications of it: see *R v Porter* (1933) 55 CLR 182 at 188, where Dixon CJ said:

    “A person does not know the quality and nature of their act if they do not appreciate the physical nature of the act they were doing. This encompasses such situations as where a person may have so little capacity for understanding the nature and destruction of life that to kill another is no more than breaking a twig or destroying an inanimate object’”.

(iii) did not know it was wrong

11. A person does not know what he or she was doing was wrong when he or she does not know that it is wrong according to ordinary standards of right and wrong adopted by reasonable persons: *Porter* at 190 and *Stapleton v R* (1952) 86 CLR 358 at 367. See the jury direction quoted in *Porter*, where Dixon CJ said at 189-190:

    “…If through the disordered condition of the mind he could not reason about the matter with a moderate degree of sense and composure it may be said that he could not know that what he was doing was wrong. What is meant by "wrong"? What is meant by wrong is wrong having regard to the everyday standards of reasonable people. If you think that at the time when he administered the poison to the child he had such a mental disorder or disturbance or derangement that he was incapable of reasoning about the right or wrongness, according to

[4] See Howard & Westmore, *Crime and Mental Health Law in NSW* (3rd Edition), Chapter 6.
[5] For a detailed review of the cases, see Howard & Westmore, Chapter 6.

ordinary standards, of the thing which he was doing, not that he reasoned wrongly, or that being a responsible person he had queer or unsound ideas, but that he was quite incapable of taking into account the considerations which go to make right or wrong, then you should find him not guilty upon the ground that he was insane at the time he committed the acts charged.'

ONUS AND STANDARD OF PROOF

12. In *McNaghten's* case it was established that the onus of proof of insanity was on the accused. In *Woolmington v DPP* [1935] AC 462, the House of Lords famously held that the burden of proof remained upon the Crown throughout a trial to establish both the *actus reus* and the *mens rea* of an offence, however, regarded the onus in respect of mental illness as being exceptionally placed upon the accused.[6]

13. The presumption of sanity is the well-established starting point of any trial, as per Dixon J (as he then was) in *R v Porter* (1933) 55 CLR at 182:

    "To begin with, every person is presumed to be of sufficient soundness of mind to be criminally responsible for his actions until the contrary is made to appear upon his trail. It is not the for the Crown to prove that any man is of sound mind; it is for the defence to establish inferentially that he was not of sufficient soundness of mind, at the time that he did the actions charge, to be criminally responsible."

14. The onus of proof for mental illness is on the accused on the balance of probabilities: *Mizzi v The Queen* (1960) 105 CLR 658, cited in *R v Pratt* [2009] NSWSC 1108 per Hulme J. The onus of proof remains the same whether the contention is raised by the accused, the Crown or put by the judge of his own motion. In *R v Ayoub* [1984] 2 NSWLR 511 the Court of Criminal Appeal rejected the appellant's argument that if the Crown raised the defence they must establish it beyond reasonable doubt (at 515).

CAN THE JUDGE OR CROWN RAISE NGMI

15. Currently in NSW the common law applies, and no legislation has been passed permitting the Crown to raise the issue. The common law position is that no matter how well-intentioned and fair the Crown may be, if the issue of insanity is not raised by the accused, it is not open to the Crown to lead evidence to establish that the accused was insane at the time of commission of the offence: see *R v Starecki* [1960] VR 141.

16. However, even if NGMI is not raised by the defence, if there is evidence which could support a defence of mental illness the Crown may raise it. In the case of *R v Joyce* [1970] SASR 184, the Court held:

[6] Howard & Westmore, *Crime and Mental Health Law in New South Wales* (3rd Edition) p 427

"….the Crown could not give evidence of an accused's insanity when the question of his state of mind is not raised by the defence; but if as a result of the defence putting forward evidence of the state of mind of the accused, either by calling witnesses or by cross-examination of prosecution witnesses (even though it may not be for the purpose of establishing the defence of insanity but for some other purpose), there is evidence on which a jury could properly find insanity, it is the duty of the trial judge to leave the question of insanity to the jury."

17. The present position, in accordance with s 37 MHPA, is that the trial judge is obliged to leave the defence to the jury where there is reasonable evidence of it, notwithstanding that it is not relied upon by the defence: *Hawkins v R* (1994) 179 CLR 500; 72 A Crim R 288 at 299; *R v Foy* (1922) 29 WN (NSW) 20; and *R v Shields* [1967] VR 706.

18. In the case of *R v Falconer* (1990) 171 CLR 30 at 62-3 the court observed, per Deane and Dawson JJ:

    "It used to be said that it was for the defence to raise a plea of insanity and not for the prosecution. That is probably still the case, but we think that the position has now been reached where it is only realistic to recognize that, if there is evidence of insanity, the prosecution is entitled to rely upon it even if it is resisted by the defence. In that regard, it is relevant to note that s. 653 of the Code refers to the case where "it is alleged or appears" (emphasis added) that the accused was not of sound mind. It may be anomalous for the prosecution to raise the matter initially because the prosecution should not commence proceedings if it is seeking an acquittal, even on the grounds of insanity. The responsibility for the protection of the community in those circumstances lies elsewhere than in the criminal law. But we can see no reason why, if there is evidence which would support a verdict on the grounds of insanity, the prosecution should not be able to rely upon it in asking for a qualified acquittal as an alternative to conviction."

19. If the Crown does have evidence in its possession on the issue of insanity, then the Crown should provide to defence counsel to be used as defence counsel see fit: *R v Dickie* [1984] 3 All ER 173 at 178

NGMI & CRIMES OF SPECIFIC INTENT

20. In some cases, directions on finding specific intent will necessarily involve the giving of directions concerning whether specific intent could have been informed in the context of evidence of mental illness. In *R v Minani* (2005) 63 NSWLR 490; [2005] NSWCCA 226, the Court discussed the approach to be taken by a Court in considering mental illness in an offence of specific intent (the matter concerned malicious wounding with intent to inflict grievous bodily harm). Hunt AJA (with whom Spigelman CJ and Howie J agreed), stated (at [32]):

    > *"[32] Proof of the specific intention which the Crown must prove in such a case is not always an easy one where there is an element of mental illness involved. In Hawkins v The Queen (1994) 179 CLR 500 (at 510, 512-514, 517), the High Court held that, contrary to*

what had previously been thought to be the law in this State, evidence of mental illness is relevant to the question as to whether the accused's act was done with the specific intent charged. The High Court held that the order in which the issues should be determined in a case where there is evidence of mental illness is: (1) Was it the act of the accused which, in this case, caused the malicious wounding? (2) Was he criminally responsible for doing that act? (3) Was that act done with the specific intention required? The second question is resolved by a finding that mental illness had been established. The third question arises only if the second question is answered adversely to the accused and, in those circumstances, the evidence of mental illness (even though insufficient to make out the defence) is relevant to the issue of specific intent. That evidence is not, however, relevant to the issue as to whether the act of the accused was a deliberate one. The High Court said (at 515) that there was no necessary inconsistency between mental abnormality and the existence of a specific intent, but nevertheless the evidence of mental illness must be taken into account in determining whether there was that specific intent. As the judge found in the present case that the defence of mental illness had been established, it was unnecessary for him to make any finding of specific intent."

NGMI & STRICT LIABILITY

21. The defence of NGMI covers a broader concept of 'moral blameworthiness' and if the offence in question is not one where *mens rea* is required, the defence of mental illness may still have application: *R v Piper* (NSWDC, 2004, unreported).

22. This issue arose in the special hearing of *R v Sandoval* [2010] NSWDC 255; BD201040424, the question being whether the defence of NGMI was available to charges of dangerous driving causing grievous bodily harm pursuant to Section 52A Crimes Act. The accused believed demons were pursuing him and he drove over the Sydney Harbour Bridge on the wrong side of the road. A question for the court was whether the accused could rely upon the defence of NGMI where he was charged with offences that do not require proof that the accused knew he was driving dangerously. Judge Berman SC ultimately determined that the defence did apply, and his Honour returned a verdict of NGMI pursuant to Section 38 of the MHFPA and his Honour's judgement sets out comprehensively other decisions in the matter.

TRIAL OUTCOMES IS NGMI RAISED

23. Prior to July 2003, upon a finding of NGMI, there was no provision for release by the Court and it was generally accepted that a verdict of NGMI was contrary to the best interests of many clients as it resulted in indefinite incarceration regardless of the seriousness of the offence. However, now there is the possibility of a conditional or unconditional release and NGMI can be an appropriate option.

24. Section 39 MHFPA provides as follows:

(1) If, on the trial of a person charged with an offence, the jury returns a special verdict that the accused person is not guilty by reason of mental illness, the Court may order that the person be detained in such place and in such manner as the Court thinks fit until released by due process of law or may make such other order (including an order releasing the person from custody, either unconditionally or subject to conditions) as the Court considers appropriate.
(2) The Court is not to make an order under this section for the release of a person from custody unless it is satisfied, on the balance of probabilities, that the safety of the person or any member of the public will not be seriously endangered by the person's release.
(3) As soon as practicable after the making of an order under this section, the Registrar of the Court is to notify the Minister for Health and the Mental Health Review Tribunal (MHRT) the terms of the order.

25. Accordingly, if a person is found NGMI, the Court will order the person to be:

    i. Detained;
    ii. Released conditionally; or
    iii. Released unconditionally (neither Court nor MHT maintains supervision).

26. If the Court orders (i) detention or (ii) conditional release, the Court must advise the MHRT and the MHRT will thereafter make orders regarding treatment, care, detention and release of those persons, who become 'forensic patients.

27. When considering S39, the issue is not one of punishment: *R v Line* [2004] NSWSC 1148; BC200409025. If conditional or unconditional release is sought legal representatives should ensure the court has sufficient information to assess the criteria of safety, including reports from Justice Health and Forensic Mental Health Network.[7] The purpose of conditions are not as punishment but rather what is considered necessary for the protections of others and the community and welfare of the person: *Attorney-General of NSW v X* [2013] NSWSC 1392 [87]-[92]. The Court can, of its own volition order an expert report: S38A MHFPA

28. As observed in Howard & Westmore at p. 497:

    "Lawyers involved on both sides on such matters ought to do all they can to provide relevant reports as well as appropriate plans for ongoing management and, where applicable treatment. Corroborative witnesses may be required to establish factors such as risk, the residential arrangements proposed, employment etc. Adversarial integrity must be at its highest when specified inquiry into safety is being undertaken by the court and complete candour is required."

FORENSIC PATIENT AFTER NGMI

[7] Also see the MHRT decision of *Aloisi* [2015] NSWMHRT 13, as a helpful guide to possible conditions which might be ordered if a conditional release is appropriate.

29. In the case of persons found NGMI who are detained or released conditionally, the MHRT must review the case as soon as practicable, and make an order concerning the person's detention, care and treatment. Forensic patients are reviewed then every 6 months.[8] If the safety of the patient or the public will not be seriously endangered, the Tribunal may decide to release the patient either conditionally or unconditionally upon being satisfied that (in accordance with S43) that neither the safety of the person nor the safety of the community would be endangered. A person found NGMI remains a forensic patient until they are unconditionally released. The length of time varies depending on how each patient responds to treatment and rehabilitation and can vary from a few years to never being unconditionally released.

30. Prior to July 2003, upon a finding of NGMI, there was no provision for release by the Court and it was generally accepted that a finding of unfitness, or a verdict of NGMI was contrary to the best interests of the client, as both resulted in indefinite incarceration regardless of the seriousness of the offence. Furthermore, the 2009 amendments to the MHFPA has taken the release powers for forensic patients, which includes those clients found unfit for trial and/or NGMI away from the executive government and placed it into the hands of the MHRT. The Minister for Health and the Attorney General have a right of appearance before the Tribunal and a right of appeal in relation to the release of forensic patients.[9]

THE 'UNFIT' ACCUSED, NGMI AND THE SPECIAL HEARING

31. In *R* v *Presser* [1958] VR 45, Smith J set out the matters as the minimum standard for an accused to be fit for trial. What has become known as the *Presser* criteria was adopted in *Kesavarajah* (1994) 181 CLR 230) and is the criteria which is applicable when there is an inquiry into the fitness of an accused. The criteria are used to determine the fitness of the accused at the time of the trial not the time the offence was committed.[10]

32. An issue which does arise in relation to fitness is when the accused does not want to run the NGMI including because the accused does not consider he or she is mentally ill, or they do not want the possibility of an indeterminate outcome with a finding of NGMI. This issue has been canvassed in several decisions including *R v JH* (2009) NSWSC 551, and *R v Holt* 9 DCLR (NSW) 87. In *JH*, Buddin J found the Accused not fit for trial and said at [41]:

> *"In all the circumstances it appears to me that the accused lacks the necessary insight to understand that he was, and no doubt still is, suffering from a mental illness…In my view however, his condition deprives him of the capacity to give instructions concerning his mental state at the time of the offence. Moreover, if he lacks the insight to appreciate that the "defence" of mental illness is available to him, then it is axiomatic that he does not have sufficient capacity "to be able to decide what defence he will rely upon and to make his defence" or perhaps even what plea he should enter."*

[8] S46 MHFPA
[9] S76A & S77A MHFPA
[10] *Dennison* NSW CCA 3.3.1988.

33. Where a person is found "unfit to be tried" for an offence at an inquiry by a Judge[11] the Court must refer the matter to the MHRT[12] who must review the case as soon as practicable, and determine on the balance of probabilities whether the person is likely to become fit to be tried within the next twelve months.[13] If the MHRT determines the person is not likely to become fit within twelve months, the matter will proceed to a Special Hearing, unless the ODPP decides that no further proceedings will be taken, and in those latter circumstances the person is released.[14]

34. S21A provides for a judge to try a *special hearing* unless an election is made for a jury. Prior to 1 January 2006, a special hearing was held before a jury unless the accused person made a judge alone election. A legal representative is to make the election which overcomes the difficulties obtaining instructions.[15] The procedures for a special hearing are set out in S21 MHFPA and include the accused:

- must be represented: S21(2)
- is taken to have pleaded not guilty: S21(3)(a)
- can raise any defence which can properly be raised at a trial: S21(3)(c)
- is entitled to give evidence: S21(3)(d)

35. S21 requires that the special hearing proceedings be conducted as closely as possible as if it were a trial of criminal proceedings including that the accused arraigned. See: *R v Zvonaric* (2001) 54 NSWLR; [2001] NSWCCA 505 and *R v Minani* (2005) 63 NSWLR; [2005] NSWCCA 226.

36. The following are possible 'special hearing' verdicts:

    i. Not guilty so an acquittal as in a normal trial.
    ii. On the limited evidence available, the accused person committed the offence charged (s22(1)(c)), or an available alternative offence (s22(1)(d)). This constitutes a qualified finding of guilt.
    iii. Not guilty on the ground of mental illness (NGMI) under s22(2) is by is equivalent to the 'special verdict' provided for in s38 of the MHFPA after a normal trial where NGMI is raised: s25 MHFPA.

RAISING NGMI AT A SPECIAL HEARING

37. As referred to above, prior to July 2003, upon a finding of NGMI, there was no provision for release by the Court and it was often not in the client's best interest to raise NGMI given it resulted in indefinite incarceration regardless of the seriousness of the offence. However, now

[11] S11 MHFPA
[12] S14 MHFPA
[13] S16 MHFPA
[14] S19 MHFPA
[15] S21A MHFPA

there is available options for conditional or unconditional release, NGMI may be an appropriate option, including for an accused who has been found unfit. A question that often arises in the minds of legal practitioners appearing for clients in special hearings is whether they can or should raise NGMI if it is available.

38. Counsel is entitled to raise NGMI in a special hearing over objection of client: *Dezfouli* [2007] NSWCCA 86 at [44]-[46]:

> *[44] During the course of the special hearing Mr Toner informed the Court:*
> *I'm in a somewhat unusual situation in this hearing, given that – albeit that I'm here to represent the best interests of Mr Dezfouli, I'm not bound by his instructions, but as I indicated to your Honour at the commencement of the proceedings, I would do my best to reflect Mr Dezfouli's wishes if I could accommodate both obligations under the Act, to the Court and to him. Now this morning, Mr Dezfouli indicated a number of things ... he is not at all that keen for me to communicate it to you at all because of his view, that you and I and the Crown are part of a broad conspiracy in relation to him ... (T 162).*
>
> *[45] In his closing address to the jury, Mr Toner said this:*
> *What I will be saying to you are things Mr Dezfouli would not like me to say, but have to be said. He doesn't think he is insane and what I am saying to you is that there is no doubt that he is (T 427.11)*
>
> *[46] The scheme of the Act is designed to ensure that an accused person's interests are protected in circumstances in which it is recognised that because of mental illness or incapacity he or she lacks the capacity to make reasoned forensic decisions. The special hearing was conducted by Mr Toner in an endeavour to advance the appellant's interests as he perceived them to be. Counsel was not required to follow the appellant's instructions.*

39. Consideration can be given to what the accused communicates on the issue, bearing in mind *R v Smith* [1999] NSWCCA 126 that all decisions about the conduct of the accused person's defence are not to be made by the legal representatives, to the exclusion of the accused, if they can communicate those wishes. In *R v Smith*, the issue was whether the trial judge had erred in allowing an accused in a special hearing to give evidence over objection by his counsel on the basis that "*the power to make decisions on behalf of the accused is exclusively vested the accused's legal representatives*". In that case James J (with whom Barr J and Carruthers AJ agreed) concluded:

> *[54] I do not consider that the Act provides that a respect in which a special hearing is not to be conducted as if it were an ordinary trial, is that all decisions about the conduct of the accused person's defence at the special hearing are to be made by the counsel or solicitor of a legally represented accused, to the exclusion of the accused. If an accused person at a special hearing is able to communicate and communicates that*

> *he wishes to give evidence (or make a statement), then I do not consider that the judge at the special hearing makes an error of law, if he permits the accused person to give evidence (or make a statement), even though counsel for the accused person is opposed to such a course.*

40. Even if you do not run the NGMI as a defence, mental illness as a causal factor in the commission of a crime is still relevant on sentence in assessing the objective seriousness and moral culpability. In *Elturk* v R [2014] NSWCCA 61 [35]-[39] the CCA upheld an appeal on the basis that the trial judge was in error when he stated evidence that the applicant was mentally ill at the time of the offence was not relevant because he had chosen not to avail himself of the available defence.

THE LIMITING TERM OR OTHER PENALTY

41. If a person is found on the limited evidence available to have committed the offence, the court must indicate whether, if it had been a normal criminal trial, a sentence of imprisonment would have been imposed: S23 MHFPA.

42. If the Court determines imprisonment would have been imposed, the court must nominate a 'limiting term', being the best estimate of the sentence, the court would have imposed if a sentence after trial: s23(1)(b). The limiting term is not divided into a minimum and additional term akin to a non-parole period. Periods of custody or detention related to the offence may be taken into account (s23(4)) and the term can be back dated or future dated to run consecutively or partially concurrently with another limiting term: s23(5).

43. The limiting term is an estimate of the total sentence is the period beyond which a person cannot be detained. In *R v Mailes* (2003) 142 A Crim R 353 (NSWSC at [32], the limiting term was expressed as consistent with a person on whom a limiting term has been imposed not having been convicted of any offence, that term "*is not to punish the person who has not been convicted of any crime, but to ensure that he or she is not detained in custody longer than the maximum the person could have been detained if so convicted following a proper trial".* A person can be released prior to expiry of limiting term because of 6 monthly reviews: *R v Mitchell (1999) 108 A Crim R 85 at [30]-[32] (NSWCCA); R v Mailes.*

44. If the court determines that imprisonment would not have been imposed, the court may impose any other penalty it considers appropriate under the *Crimes (Sentencing Procedure Act) 1999*, although not for example terms home detention etc, because it only arises after a determination imprisonment would have been imposed. If there is a breach of non-custodial option, the matter is dealt with under the MHFPA: *R v Smith* (2007) 1969 A Crim R 265; [2007] NSWCCA 39, where a limiting term was imposed after a breach of a S9 bond.

CONSEQUENCES OF NOMINATING A LIMITING TERM

45. Where a person was unfit to be tried and then found guilty on the limited evidence at a special hearing and a limiting term set, the MHRT must review the person's case as soon as practicable and they become a 'forensic patient'. Section 24 provides:

(1) If in respect of a person a Court has nominated a limiting term, the Court:
(a) must refer the person to the Tribunal, and
(b) may make such order with respect to the custody of the person as the Court considers appropriate.
(2) If a Court refers a person to the Tribunal, the Tribunal must determine whether or not:
(a) the person is suffering from mental illness, or
(b) the person is suffering from a mental condition for which treatment is available in a mental health facility and, where the person is not in a mental health facility, whether or not the person objects to being detained in a mental health facility.
(3) The Tribunal must notify the Court which referred the person to it of its determination.

46. The Tribunal must inform the Court as to whether the person is suffering from a mental illness, or from a mental condition which can be treated in a hospital. The Tribunal also continues to monitor the person's fitness to stand trial. A person on a limiting term will be released from the forensic order at the end of their limiting term unless released earlier by the Tribunal.

IS THE LIMITING TERM A BAR TO PROCEEDINGS?

47. Section 28 MFPA provides that if at a special hearing, on the limited evidence available, the accused committed the offence charged (or an alternative offence), that constitutes a bar to further criminal proceedings for the same offence or substantially the same offence IF such proceedings are not commenced before the expiration of any limiting term nominated, OR IF the person has been released from custody as a prisoner or discharged from detention as a forensic patient.

48. Section 29 provides that if a person found unfit is found by the MHRT to have become fit (whether before or after a special hearing), it is to notify the court which then obtain DPP advice as to whether further proceedings will be taken. If the DPP decide to further proceed, a further fitness inquiry will be held. If the DPP take no further proceedings they must notify the Minister for Health and the MHRT and he must be released from detention. If there are further proceedings, any sentence or other disposition of the matter must take into account any periods of detention referrable to the offence.

FORENSIC PATIENTS

49. The Mental Health Tribunal (MHRT) is a quasi-judicial body constituted under the *Mental Health Act 2007*. It reviews the cases of detained patients in both the civil and forensic systems. The MHRT is required to conduct its hearings with as little formality and technicality as a proper consideration of the matters before it allows. Participants at hearings usually

include the patient and their lawyer, primary carers and members of the treating team and or case managers. In forensic review hearings it is also not uncommon for victims to attend.[16]

50. The *Mental Health Legislation Amendment (Forensic Provisions) Act 2008* which came into effect on 1 March 2009 retitled the *Mental Health (Criminal Procedure) Act 1990* as the *Mental Health (Forensic Provisions) Act 1990* (MHFPA). The MHFP Act abolished the system of determinations previously made by the Minister for Health and Governor for the treatment, care, detention and release of persons found NGMI or unfit for trial. It made the MHRT, constituted by a special Forensic Panel, the determining authority in such matters. The Panel must be presided over by a current or former judge when considering release matters.[17]

51. A forensic patient includes a person who has been:
    - Found unfit to be tried and in detention. (If on bail they are not a forensic patient)
    - Found guilty on the limited evidence at a special hearing and a limiting term nominated.
    - Found NGMI.
    - Found NGMI and released into the community subject to conditions.

52. Following the amendments in 2009, the MHRT is required to review the cases of correctional patients and forensic patients including the cases of persons found NGMI as soon as practicable after the finding is made and must make orders as to the person's care, detention, treatment or release.[18] Thereafter the Tribunal conducts regular six monthly reviews of the cases of every forensic patient.[19] In some circumstances the MHRT can extend the review period up to 12 months. When the Tribunal conducts further reviews of persons found unfit to be tried, it must consider the fitness issue at each review. If a patient is ready to be released into the community with conditions, in these cases the MHRT can vary the conditions including increasing the time period of the conditional release ordered by the court: *Attorney General of NSW v X and Another* [2013] NSWC 1392.

53. The Tribunal may make orders to permit leave and release for forensic patients from mental health facilities, correctional centres or other places and may make orders which would have the effect of terminating the status of a person as a forensic patient: ss 51-53. A person stops being a forensic patient when:

    - an order for unconditional release is made: s51(1)(a)
    - A person is found not guilty at a special hearing: s52(1)(a)
    - A person who is conditionally released after special hearing qualified finding of guilty and the conditions expire with the effluxion of time: s51(1)(b)

[16] John Feneley (Deputy President MHRT), '*Applying the Amended Mental Health (Forensic Provisions) Act 1990 and Rethinking the Defence of Mental Illness*' Public Defender's Papers, July 2009.
[17] S73(3) MHFPA
[18] S44 MHFPA
[19] S46(1) MHFPA

- A person who is not placed on a limiting term but rather sentenced to another penalty after a special hearing, for example a s9 bond or a fine: s52(2)(a)
- Upon expiry of limiting term or forensic patient status, if not extended: s52(2)(a) and (a1)

References

- Dan Howard & Bruce Westmore, *Crime and Mental Health Law in New South Wales*, (3rd Edition) Lexis Nexis
- John Feneley (Deputy President MHRT), '*Applying the Amended Mental Health (Forensic Provisions) Act 1990 and Rethinking the Defence of Mental Illness*' July 2009 https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Papers%20by%20Public%20Defenders/public_defenders_applyingamended_mentalhealthrethinkingdefence.aspx
- Sophia Beckett (Public Defender), *'Appearing for the mentally impaired: Not guilty mental illness*', Conference to in-house solicitors Legal Aid NSW February2018 https://www.publicdefenders.nsw.gov.au/Documents/Not%20guilty%20mental%20illness.pdf
- Chris Bruce SC (Public Defender), '*Ethics and The Mentally Impaired'*, Public Defenders Conference 2011 https://www.publicdefenders.nsw.gov.au/Documents/Ethics%20and%20the%20Mentally%20Impaired.pdf
- Craig Smith (Public Defender), *'Mental Health and the Criminal Law'* 2013 https://www.publicdefenders.nsw.gov.au/Documents/mental%20health%20and%20the%20criminal%20law%20jan%202013.pdf