THIS IS AN OFFICIAL REPORT OF THE MENTAL HEALTH REVIEW TRIBUNAL PROCEEDINGS IN RELATION TO MR ADAMS AUTHORISED BY THE PRESIDENT OF THE TRIBUNAL ON 25 JULY 2013

Mental Health Review Tribunal

This is an edited version of the Tribunal's decision issued pursuant to the Tribunal's Practice Direction dated 19 June 2013. The forensic patient has been allocated a pseudonym for the purposes of this Official Report.

FORENSIC REVIEW: **Mr Adams**

s46(1) Review of forensic patients

Mental Health (Forensic Provisions) Act 1990

TRIBUNAL:	**Daniel Howard SC**	**President**
	Rob McMurdo	**Psychiatrist**
	Diana Bell	**Other Member**
DATE OF HEARING:	**11 December 2012**	
APPLICATION:	**Conditional release**	

DECISION

The Tribunal has carefully considered the evidence before it and is satisfied that there are clearly reasonable grounds for believing that care, treatment and control of Mr Adams is necessary for his own protection from serious harm and the protection of others from serious harm. Having also had regard to the matters referred to in section 74 and the requirements of section 43 of the *Mental Health (Forensic Provisions) Act*, the Tribunal accordingly determines:

1. That Mr Adams has spent sufficient time in custody within the terms of section 74(e) of the *Mental Health (Forensic Provisions) Act 1990.*

2. That the Tribunal is <u>not</u> at this time satisfied that:
    a. The safety of the patient or any member of the public will not be seriously endangered by Mr Adams' release; and
    b. Other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to Mr Adams.

3. That there should be no change to Mr Adams' current order in relation to his detention, care or treatment.

4. That Mr Adams has not become fit to be tried for an offence.

RECOMMENDATIONS PURSUANT TO SECTION 76A

1. That the Community Justice Program within the Office of the Principal Officer in the Department of Aging, Disability and Home Care give consideration to further developing the proposed CJP SNRG Case Implementation plan, in respect to Mr Adams, so as to address the shortcomings of the current plan as identified in these reasons

2. That the Community Forensic Mental Health Service of Justice Health consult to and assist the CJP to further develop its proposed plan so as to address those shortcomings, and that CFMHS subsequently provide a report to the Tribunal as to the suitability of such plan for the purpose of the next Tribunal review of Mr Adams pursuant to section 46 of the *Mental Health (Forensic Provisions) Act 1990*.

REASONS

Mr Adams, a forensic patient under the *Mental Health (Forensic Provisions) Act 1990* ("the Act"), has applied to the Mental Health Review Tribunal ("the Tribunal), at this most recent review held on 11th December, 2012 and 5th March 2013, pursuant to section 46 of the Act, for conditional release into the community.

Mr Adams was charged with murder and was ultimately found unfit to be tried on that charge. After a special hearing a limiting term of X years was imposed. Mr Adams has spent X years in custody.

The present application raises for consideration an important legal question, namely, whether Mr Adams has spent 'sufficient time in custody' which is a factor that the Tribunal must have regard to when considering the release of a forensic patient who is subject to a limiting term, in accordance with the requirements of section 74(e) of the Act. There is no relevant legal authority as to the meaning of this provision. It is of such fundamental importance to the determination of this matter that it is appropriate that this question be considered at the outset of these reasons, as the determination of this issue will inform the due consideration of the evidence in this matter. Accordingly, this issue will be addressed first in these reasons. Thereafter, the evidence before the Tribunal in relation to the application will be considered and a determination made.

DOCUMENTARY EVIDENCE

The Tribunal considered documentary material and reports, an exhibit list of which is held on the Tribunal's files.

ATTENDEES

The hearing on 11 December 2012 was adjourned to enable further submissions to be presented from Mr Adams' legal team. Mr Adams attended the hearing in person represented by Mr Mark Ierace SC instructed by Ms Brae Sinclair, solicitor from the Mental Health Advocacy Service. Mr David Kell of counsel appeared for the Attorney General, instructed by Ms Giurastante. Also in attendance were members of Mr Adams' treating team, staff from the Community Forensic Mental Health Service, Corrective Services staff, staff from the Community Justice Program, the registered victims and members of Mr Adams' family.

A further hearing was held on 5 March 2013. Mr Adams did not attend the hearing but was represented by Mr Mark Ierace SC instructed by Ms Brae Sinclair, solicitor from the Mental Health Advocacy Service. Mr David Kell of counsel appeared for the Attorney General, instructed by Ms Giurastante. Also in attendance, by telephone, were the registered victims.

THE SCHEME OF THE ACT RELATING TO THE DETERMINATION OF FITNESS AND THE IMPOSITION OF LIMITING TERMS

Part 2 of the Act relates to the determination of whether or not a person is fit for trial, if that issue is raised, and for the consequential procedures including the holding of a 'special hearing' and the imposition of a 'limiting term'. At the time of Mr Adams' court proceedings, an earlier version of the Act was in place, and it was then known as the *Mental Health (Criminal Procedure) Act 1990.* So far as is relevant to Mr Adams' present application, subsequent amendments to the Act have not materially altered the procedure that was and remains applicable in relation to the holding of fitness hearings, the holding of special hearings, and the imposition of limiting terms. Reference will accordingly be made to the current provisions except where otherwise indicated. The case law that is referred to below, insofar as it may deal with an earlier version of the Act, similarly remains relevant to the provisions of the current Act, except where otherwise indicated.

The scheme of the Act so far as it relates to persons who are unfit for trial, is set out in part 2 of the Act. If, pursuant to those provisions, a person has been found unfit to be tried and will not, within a period of twelve months from the finding of unfitness, become fit to be tried, the Act provides for a procedure known as a 'special hearing" to be conducted. Section 21 of the Act provides as follows:-

"Nature and conduct of special hearing

(1) *Except as provided by this Act, a special hearing is to be conducted as nearly as possible as if it were a trial of criminal proceedings.*

(2) *At a special hearing, the accused person must, unless the Court otherwise allows, be represented by an Australian legal practitioner and the fact that the person has been found unfit to be tried for an offence is to be presumed not to be an impediment to the person's representation.*

(3) At a special hearing:

(a) the accused person is to be taken to have pleaded not guilty in respect of the offence charged, and

(b) the Australian legal practitioner, if any, who represents the accused person may exercise the rights of the person to challenge jurors or the jury, and

(c) without limiting the generality of subsection (1), the accused person may raise any defence that could be properly raised if the special hearing were an ordinary trial of criminal proceedings, and

(d) without limiting the generality of subsection (1), the accused person is entitled to give evidence.

(4) At the commencement of a special hearing for which a jury has been constituted, the Court must explain to the jury the fact that the accused person is unfit to be tried in accordance with the normal procedures, the meaning of unfitness to be tried, the purpose of the special hearing, the verdicts which are available and the legal and practical consequences of those verdicts."

Section 22 of the Act stipulates the verdicts that can be made by a jury or the Court at a special hearing. This section provides as follows:-

"22 Verdicts at special hearing

(1) The verdicts available to the jury or the Court at a special hearing include the following:

(a) not guilty of the offence charged,

(b) not guilty on the ground of mental illness,

(c) that on the limited evidence available, the accused person committed the offence charged,

(d) that on the limited evidence available, the accused person committed an offence available as an alternative to the offence charged.

(2) A verdict in accordance with subsection (1) (b) is to be taken to be equivalent for all purposes to a special verdict that an accused person is not guilty by reason of mental illness under section 38.

(3) A verdict in accordance with subsection (1) (c) or (d):

(a) constitutes a qualified finding of guilt and does not constitute a basis in law for any conviction for the offence to which the finding relates, and

(b) subject to section 28, constitutes a bar to further prosecution in respect of the same circumstances, and

(c) is subject to appeal in the same manner as a verdict in an ordinary trial of criminal proceedings, and

(d) is to be taken to be a conviction for the purpose of enabling a victim of the offence in respect of which the verdict is given to make a claim for compensation."

Section 23 of the Act provides for the procedure to be followed after the completion of the special hearing and, where applicable, for the nomination of a "limiting term". Section 23 provides as follows:-

"23 Procedure after completion of special hearing

(1) If, following a special hearing, it is found on the limited evidence available that an accused person committed the offence charged or some other offence available as an alternative, the Court:

(a) must indicate whether, if the special hearing had been a normal trial of criminal proceedings against a person who was fit to be tried for the offence which the person is found to have committed, it would have imposed a sentence of imprisonment, and

*(b) where the Court would have imposed such a sentence, must nominate a term, in this section referred to as **a limiting term**, in respect of that offence, being the best estimate of the sentence the Court would have considered appropriate if the special hearing had been a normal trial of criminal proceedings against a person who was fit to be tried for that offence and the person had been found guilty of that offence.*

(2) If a Court indicates that it would not have imposed a sentence of imprisonment in respect of a person, the Court may impose any other penalty or make any other order it might have made on conviction of the person for the relevant offence in a normal trial of criminal proceedings.

(3) Any such other penalty imposed or order made, under subsection (2), is to be subject to appeal in the same manner as a penalty or order in a normal trial of criminal proceedings.

(4) In nominating a limiting term in respect of a person or imposing any other penalty or making any other order, the Court may, if it thinks fit, take into account the periods, if any, of the person's custody or detention before, during and after the special hearing (being periods related to the offence).

(5) A limiting term nominated in respect of a person takes effect from the time when it is nominated unless the Court:

(a) after taking into account the periods, if any, of the person's custody or detention before, during and after the special hearing (being periods related to the offence), directs that the term be taken to have commenced at an earlier time, or

(b) directs that the term commence at a later time so as to be served consecutively with (or partly concurrently and partly consecutively with) some other limiting term nominated in respect of the person or a sentence of imprisonment imposed on the person.

(6) When making a direction under subsection (5) (b), the Court is to take into account that:

(a) a sentence of imprisonment imposed in a normal trial of criminal proceedings may be subject to a non-parole period whereas a limiting term is not, and

(b) in a normal trial of criminal proceedings, consecutive sentences of imprisonment are to be imposed with regard to non-parole periods (as referred to in section 47 (4) and (5) of the Crimes (Sentencing Procedure) Act 1999).

(7) If the Court indicates that it would not have imposed a sentence of imprisonment in respect of a forensic patient, it must notify the Tribunal that a limiting term is not to be nominated in respect of the person."

Section 24 of the Act requires a court that has nominated a limiting term to refer the person to the Tribunal, which must determine whether or not the person is suffering from a mental illness or whether 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. The court also, pursuant to section 24(b) "may make such order with respect to the custody of the person as the court considers appropriate."

Section 27 of the Act deals with the powers of the court upon being notified by the Tribunal of the Tribunal's determination in respect of the person and is in the following terms:-

"27 Orders Court may make following determination of Tribunal after limiting term is imposed

If a Court is notified by the Tribunal of its determination in respect of a person under section 24 (3), the Court may:

(a) if the Tribunal has determined that the person is suffering from mental illness or that the person is suffering from a mental condition for which treatment is available in a mental health facility and that the person, not being in a mental health facility, does not object to being detained in a mental health facility—order that the person be taken to and detained in a mental health facility, or

(b) if the Tribunal has determined that the person is not suffering from mental illness or from a mental condition referred to in paragraph (a) or that the person is suffering from such a mental condition but that the person objects to being detained in a mental health facility—order that the person be detained in a place other than a mental health facility."

Section 28 of the Act deals with the effect on other proceedings of a finding at a special hearing and is in the following terms:-

"**28 Effect on other proceedings of finding on special hearing**

(1) If, following a special hearing, an accused person is found on the limited evidence available to have committed the offence charged or some other offence available as an alternative, the finding, except as provided by subsection (2), constitutes a bar to any other criminal proceedings brought against the person for the same offence or substantially the same offence.

(2) Nothing in subsection (1) prevents other criminal proceedings referred to in that subsection from being commenced at any time before the expiration of any limiting term nominated in respect of a

person unless, before the expiration of the limiting term, the person has been released from custody as an inmate (within the meaning of the Crimes (Administration of Sentences) Act 1999) or discharged from detention as a forensic patient.

(3) If, pursuant to other criminal proceedings referred to in subsection (1), an accused person is convicted of the offence or substantially the same offence as that which, at a special hearing, the person was found to have committed, the periods, if any, of the person's custody or detention before, during and after the special hearing (being periods relating to the offence) are to be fully taken into account in determining any period of any sentence or the terms of any disposition consequent on the conviction."

Section 29 stipulates the action that is to be taken when the MHRT notifies the referring court that the person is fit to be tried and Section 30 provides for certain procedures after the completion of any further fitness inquiry held by the court pursuant to section 29.

The MHRT has the function of reviewing "forensic patients" pursuant to Part 5 of the Act. In relation to persons found unfit to be tried, the Tribunal conducts initial reviews under section 45 of the Act and, pursuant to section 46, must conduct reviews of each forensic patient every six months but may review the case of any forensic patient at any time.

Section 47 empowers the Tribunal to make orders at reviews as to the patient's continued detention, care or treatment in a mental health facility, correctional centre or other place, or the patient's release (either unconditionally or subject to conditions). At any review of a person who has been found unfit for trial, pursuant to section 47(4), the Tribunal must make a recommendation as to the fitness of the patient to be tried for an offence.

A few initial observations can be made about this legislative scheme. Pursuant to section 22 of the Act, one of the possible verdicts is "that on the limited evidence available, the accused person committed the offence charged" (or an offence available as an alternative to the offence charged). Pursuant to section 22(3)(a), such a verdict constitutes a "qualified finding of guilt and does not constitute a basis in law for any conviction for the offence to which the finding relates". Section 22(3)(c) provides that such a verdict "is subject to appeal in the same manner as a verdict in an ordinary trial in criminal proceedings". Section 22(3)(d) provides that such a verdict "is to be taken to be a conviction for the purpose of enabling a victim of the offence in respect of which the verdict is given to make a claim for compensation".

The scheme of the Act envisages that, if a person becomes fit prior to the expiration of any limiting term that has been imposed, then the proceedings brought against that person in respect of the offence are to recommence or continue in accordance with the appropriate criminal procedures, unless they are discontinued (see section 30(1)).

Pursuant to section 52(2)(a) a person whose limiting term expires thereupon ceases to be a forensic patient. They are accordingly then entitled to be released from detention. A limiting term therefore sets a "cap" on the period of time that a person who is unfit and who has had a limiting term imposed upon them, can be detained (either in a correctional centre or a mental health facility).

An appeal can be made pursuant to the *Criminal Appeal Act 1912* to the Court of Criminal Appeal against the severity of a limiting term. The definition of 'conviction' in section 2(1) of that Act "*includes a finding or verdict under or in accordance with section 14, 22 (1) (c) or (d) or 30 (2) of the Mental Health (Forensic Provisions) Act 1990 in respect of a person."*

SHOULD THE PURPOSES OF A LIMITING TERM BE EQUATED TO THE PURPOSES OF A SENTENCE, INCLUDING 'PUNISHMENT'?

This question is critical to a resolution of the meaning of the phrase "sufficient time in custody" which appears in sections 74(e) of the Act.

Section 3A of the *Crimes (Sentencing Procedure) Act 1999* provides as follows:

3A Purposes of sentencing

The purposes for which a court may impose a sentence on an offender are as follows:

(a) to ensure that the offender is adequately punished for the offence,

(b) to prevent crime by deterring the offender and other persons from committing similar offences,

(c) to protect the community from the offender,

(d) to promote the rehabilitation of the offender,

(e) to make the offender accountable for his or her actions,

(f) to denounce the conduct of the offender,

(g) to recognise the harm done to the victim of the crime and the community

Section 74 sets out the matters that a Tribunal must give consideration to when determining what orders to make about a person under Part 5 of the Act and is in the following terms:-

74 Matters for consideration

"Without limiting any other matters the Tribunal may consider, the Tribunal must have regard to the following matters when determining what order to make about a person under this Part:

(a) whether the person is suffering from a mental illness or other mental condition,

(b) whether there are reasonable grounds for believing that care, treatment or control of the person is necessary for the person's own protection from serious harm or the protection of others from serious harm,

(c) the continuing condition of the person, including any likely deterioration in the person's condition, and the likely effects of any such deterioration,

(d) in the case of a proposed release, a report by a forensic psychiatrist or other person of a class prescribed by the regulations, who is not currently involved in treating the person, as to the condition of the person and whether the safety of the person or any member of the public will be seriously endangered by the person's release,

(e) *in the case of the proposed release of a forensic patient subject to a limiting term, whether or not the patient has spent sufficient time in custody"*

The Tribunal can make orders for release of forensic patients pursuant to section 47(1)(b) and section 43 of the Act stipulates criteria for release and matters that must be considered by the Tribunal in relation to any proposed release. Section 43 is in the following terms:-

*"**43 Criteria for release and matters to be considered by Tribunal***

The Tribunal must not make an order for the release of a forensic patient unless it is satisfied, on the evidence available to it, that:

(a) the safety of the patient or any member of the public will not be seriously endangered by the patient's release, and

(b) other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the patient or that the patient does not require care.

***Note.** See section 74 for matters that the Tribunal must consider in deciding what orders to make under this Part. Section 75 sets out conditions that may be imposed on release."*

It is clear, then, that section 74(e) requires the Tribunal to have regard to whether or not the patient has spent "sufficient time in custody" when it is considering the proposed release of a forensic patient who is subject to a limiting term.

There is no express guidance in the Act as to what the phrase "sufficient time in custody" means, although it is instructive to consider other provisions of the legislation, the legislative history and the relevant case law.

The *Mental Health Legislation (Forensic Provisions) Amendment Act 2008* ("the 2008 Amendment Act"), which commenced operation on 1 March 2009, introduced some major changes to the forensic mental health system in NSW. Significantly that Act vested the power to release forensic patients (either

conditionally or unconditionally) in the Tribunal. Prior to that Act, the Tribunal had the power only to make recommendations to the Minister in relation to release matters.

The relevant legislation on this aspect was contained in the now repealed *Mental Health Act 1990* in sections 83 and 84 which provided as follows:-

"83 Notice of recommended releases

(1) On receiving a recommendation under section 80 or 82 for the release of a person, the Minister must notify the Attorney General of the recommendation and at the same time furnish a copy of the notification to the Director of Public Prosecutions.

(2) The Director of Public Prosecutions must, within 21 days after the date of any such notification, indicate to the Attorney General whether the Director intends to proceed with criminal charges against the person concerned.

84 Release of persons after review

(1) If, within 30 days after the date of being notified under section 83 of a recommendation for the release of a person, the Attorney General has indicated an objection to the person's release on the ground that:

(a) the person has served insufficient time in custody or under detention, or

(b) the Attorney General or the Director of Public Prosecutions intends to proceed with criminal charges against the person,

the prescribed authority may not order the person's release.

(2) If, within 30 days after the date of any such notification, the Attorney General has not indicated any such objection to the person's release, the prescribed authority may, subject to the regulations, make an order (either unconditionally or subject to conditions) for the person's release.

(3) Before ordering the person's release, the prescribed authority must inform the Minister for Police of the date of the person's release.

(4) If a recommendation is made under section 81 for a person's release, the prescribed authority may, subject to the regulations, make an order (either unconditionally or subject to conditions) for the person's release."

Accordingly, under the previous scheme, the Attorney General was empowered to object to a person's release on the ground that the person had served *insufficient time in custody or under detention*.

The presence of the requirement to have regard to whether the forensic patient has spent "sufficient time in custody" within section 74(e) of the current Act clearly indicates an intention by Parliament that this requirement has particular work to do beyond the matters to which regard may be had in section 43(a) and (b) of the Act, as well as beyond the matters in section 74(a) - (d). The concept of "sufficient time in custody" therefore cannot simply be equated with whether or not the forensic patient poses a serious danger to himself or herself or to the public. The difficult question for determination, therefore, is what work is intended for the requirement of "sufficient time in custody" to do? If a patient otherwise meets the requirements of section 43 and of section 74, and if a patient does not pose a serious danger to himself or herself or to any member of the public, what further time in custody is necessary to make such time "sufficient" in relation to a person subject to a limiting term? What purpose does the legislation envisage might be achieved by additional time in custody?

There are some particular provisions in the Act that suggest that a limiting term might properly be regarded as a form of 'punishment' in the broad sense of that term. There is also some important case law that appears to support this view.

Section 10 of the Act deals with the procedure on raising a question of unfitness and the holding of fitness inquiries. Interestingly, section 10(4) of the Act provides as follows (emphasis added):-

> ***"10 Procedure on raising question of unfitness***
>
> *4) If, in respect of a person charged with an offence, the Court is of the opinion that it is inappropriate, having regard to the trivial nature of the charge or offence, the nature of the person's disability or any other matter which the Court thinks proper to consider, to* ***inflict any punishment****, the Court may determine not to conduct an inquiry and may dismiss the charge and order that the person be released."*

This appears to be the only provision in the Act where the specific word "punishment" appears. This provision was the subject of consideration by the Court of Criminal Appeal in the case of *Newman v R* (2007) 173 ACRIM R1;[2007] NSWCCA 103. Spigelman CJ, with whom Bell and Price JJ concurred, stated at [36] – [41]:-

> *"36 Section 10(4) is expressly directed to the appropriateness of the infliction of punishment. A judgment that punishment would be "inappropriate" leads to the result that the inquiry called for would not occur and the charge will be dismissed. Significant weight is to be attached to this consequence. A person charged with crime will never be tried.*
>
> *37 The use of the word "punishment" indicates, in my opinion, that what the Parliament had in mind was an end result in which the person accused was in fact convicted, either expressly or by special hearing, of the relevant offence. This section is not, in my opinion, concerned with the*

possibility of a finding of not guilty, whether simpliciter or on the grounds of mental illness at the time of the offence. Nevertheless, the result of the process is that the proceedings are dismissed without trial.

38 I do not share any of the difficulties of interpretation identified by Meagher JA in DPP v Mills at [3]-[8]. The two circumstances in which an issue of "punishment" arises can only be either as a result of conviction after a normal trial, where the person has been found fit to plead, or as a result of a finding of guilty of the offence "on the limited evidence available", following a special hearing within the meaning of s 22(1). The latter finding is identified in s 22(3) as a "qualified finding of guilt". Upon such a finding the court can determine under s 23 a "limiting term" of imprisonment or some other penalty or make any other order which the court could have made "on conviction … in a normal trial of criminal proceedings".

39 In my opinion, s 10(4) has in mind both situations i.e. where a person is found fit to plead and is convicted and where the qualified finding of guilt is made after a special hearing. The principal purpose of the subsection is to avoid the unnecessary delays, costs and complications of the special procedure, which arises only in the case where an issue of unfitness to plead has arisen at or about the time of trial and which operates irrespective of whether or not any mental illness was pertinent at the time of the commission of the offence.

40 The principal purpose of the fitness hearing is to facilitate the administration of criminal justice. The administration of criminal justice would not be enhanced in any manner, whether from the point of view of an accused or from that of a victim or from the point of view of the public interest, if the considerable added expense and delay of a fitness hearing is to be undertaken in circumstances where the court would, in the event, not inflict any punishment.

41 The reference to "any punishment" in s 10(4) would, in my opinion, extend to the recording of a conviction which, of itself, without any additional penalty, has effects such as consequential effects on prospects of employment, loss of licences or a range of statutory consequences and, possibly, public opprobrium. (On public opprobrium see Ryan v The Queen (2001) 206 CLR 267 esp at [52]-[54]; [123]; c/f [177].) On other adverse consequences of a conviction see R v Lancaster (1991) 58 A Crim R 290; Application by the *Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act (No 3 of 2002) (2004) 61 NSWLR 305; [2004] NSWCCA 303 at [114]; R v Rhodes (NSWCCA Unreported 20 November 1996) .) In my opinion, the recording of a conviction is itself a "punishment" within s 10(4) of the Act. In any event, it is well established that the orders of the court after a special hearing constitute punishment. (DPP v Mills at [38]-[39]; Smith v The Queen* [2007] NSWCCA 39 *at [61]-[63].)"*

The Chief Justice's reference to the "difficulties of interpretation identified by Meagher JA in *DPP v Mills* refer to Meagher JA's judgment in that case at paragraph [3] - [8] which is set out below:-

"3 The Statute is, quite clearly, in drastic need of amendment. In the first place, whilst it has provisions in the event that a jury finds an accused person fit to be tried, and other provisions in the event that a jury finds an accused person unfit to be tried, there is no provision for the situation which emerged in the instant case, viz., when a jury is unable to agree on the question of fitness to plead.

4 Even more urgent is the need for the legislation to tell us what exactly is meant in s.10(4) by the words "it is inappropriate...to inflict any punishment."

5 It is clear enough that the process envisaged by s.10(4), a process of dismissing the charge and ordering a release, is one which must take place, if at all, before any trial takes place.

6 However, except in Alice in Wonderland, and possibly in the Republic of China, no question of punishment can arise until there has been a trial resulting in a conviction.

7 There is therefore, something a little odd about speculating on the appropriateness of punishment before any question of punishment can arise.

8 The only solution to this problem I can envisage is to read the subsection as if it said "inappropriate...on the assumption that the accused had been found fit to plead, tried and convicted, to inflict any punishment". And "punishment" (which, needless to say, has no statutory definition) I should think refers to imprisonment or other custodial sentence or pecuniary penalty."

It is clear that Meagher JA in *Mills v DPP* took a very different view as to the meaning of "punishment" in section 10(4) and Spigelman CJ clearly had regard to Meagher JA's remarks when he, in effect, disagreed. This background adds considerable force to Spigelman CJ's conclusion in paragraph 41 of *Newman v R* (set out above) that "it is well established that the orders of the Court after a special hearing constitute punishment." In citing *DPP v Mills* at [38] to [39], His Honour is referring to the judgment in *Mills* of Handley JA who, at [38] to [39] stated :-

"38 This submission also fails to give proper effect to the Act. Accepting, without deciding, that the detention required by s 39 for persons found not guilty on the ground of mental illness is not a punishment, the same cannot be said of the orders the Court is authorised to make if the verdict is that, on the limited evidence available, the accused person committed the offence charged. In that event s 23(1) requires the Court to nominate a limiting term being its best estimate of the sentence the court would have imposed if the special hearing had been a normal trial and the person had been found guilty. Section 23(2) provides that if the court would not have imposed a sentence of imprisonment or penal servitude, it may impose "any other penalty" lawfully available. Any such "penalty" is subject to appeal in the ordinary way (s 23(3)), and sub s (4) provides:

> *"In nominating a limiting term in respect of a person or imposing any other penalty or making any other order, the court may, if it thinks fit, take into account the periods, if any, of the person's custody or detention before, during and after the special hearing (being periods relating to the offence)".*

39 It is clear from the use of the expression "any other penalty" in s 23(2), (3) and (4) that the nomination of a limiting term is treated as a penalty. If this were not so the phrase "any other penalty" in those provisions would have been quite inappropriate. This is supported by s 84(1)(a) of the Mental Health Act 1990, previously referred to, which enables the Attorney General to prevent the release of a forensic patient which would not seriously endanger his safety or that of any member of the public if he considers that he "has served insufficient time in custody or under detention". This shows that a limiting term not only deprives the forensic patient of his liberty, but does so by way of punishment. The new argument raised by Mr Craddock in this Court must therefore be rejected."

The analysis made by Handley JA in relation to the use of the expression "any other penalty" in section 23(2) and (4) is clearly supportive of the limiting term being a form of punishment.

In *Smith v R* (2007) 169 ACRIMR 265; [2007] NSWCCA 39, Hall J (with whom Sully and Howie JJ agreed) citied the abovementioned judgment of Handley JA with approval.

In *Courtney v R* [2007] NSWCCA195 Basten JA at [12] stated:-

"12 The exercise required by s 23(1)(b) involved a lack of clarity in some respects. First, although the term is not a penalty as such, imposed by the Court, s 23 itself appears to treat it as a "penalty" because, where imprisonment is not deemed appropriate, the Court is authorised to impose "such other penalty" as it might have done on conviction for a criminal offence: s 23(2). Further, s 10(4) of the Mental Health (Criminal Procedure) Act also tends to imply that the fixing of a limiting term and the consequent detention, following a special hearing, may involve the infliction of a "punishment". Similarly, where the Mental Health Review Tribunal recommends the release of a person who has been held in detention following the nomination of a limiting term, the Attorney-General may object to the person's release on the ground that "the person has served insufficient time in custody or under detention": Mental Health Act 1990 (NSW), s 84(1). That is the view which has been adopted by the Court of Appeal and this Court: see DPP v Mills [2000] NSWCA 236 at [39] (Handley JA, Sheller JA agreeing) and Smith v Regina [2007] NSWCCA 39 at [63] (Hall J, Sully and Howie JJ agreeing); cf Regina v AN (No. 2) [2006] NSWCCA 218 at [32]."

Earlier in the judgment, at [1], Basten JA had stated:

"Where a person is unfit to plead, he or she should not be submitted to a trial in criminal proceedings. In each case, the imposition of punishment, being the usual outcome of conviction for a criminal offence, is inappropriate. Nevertheless, one function of the criminal justice system, namely to protect the community from violent individuals, remains apposite."

Neither Grove J nor Howie J, the other judges on the Court, joined with Basten JA or expressed any view as to whether a limiting term was a penalty or a punishment or otherwise. Basten JA's remarks are obiter. The case turned on other issues.

In *R V Wilson* [2005] NSWCCA 112 the Crown appealed the sentence imposed upon Wilson by the trial judge, Simpson J in relation to a conviction for murder. Wilson had previously been found unfit for trial and a limiting term had been imposed by Wood CJ at CL in relation to the same charge. In time Wilson became fit and was sent to trial proper. The trial judge, Simpson J, did not consider herself bound by conventions that ordinarily would require a sentence no longer than that originally imposed should be fixed. In her remarks on sentence, Her Honour observed that the exercise in which Wood CJ at CL had been engaged was a different one circumscribed by the limitations on the available evidence. She did not consider that the selection of the limiting term by Wood CJ at CL should dictate or even guide her sentencing discretion. Her Honour imposed a sentence of 12 years with a non-parole period of 8 years. In considering the Crown appeal against the leniency of the sentence, Bryson JA (15) stated:-

> *"The decision of Wood CJ at CL relating to the limiting term was not a sentence imposed after conviction, and was not a punishment for crime. It was not imposed after a plea of guilty, and the respondent was not then in a position to make a plea of guilty or of not guilty. It was plain at the time, and it should reasonably be understood by all concerned including the respondent, that if and when the respondent claimed to be fit to make a plea on arraignment the proceedings before the decision of Wood CJ at CL would not govern the disposition of the respondent*.
>
> *The policy considerations which produced the "sound principle of sentencing" referred to in Gilmore v R (1979) 1 ACRIMR 416 at [419] to [420] relate to resentencing after an appeal and do not apply where, as here, there was no appeal and the respondent exercised no right which might be deterred by imposition of a sentence which differed from the limiting term.*"

In a separate judgment, Studdert J at [45] stated "I respectfully agree with what Bryson JA has written as to the limited relevance of the earlier limiting term." Studdert J does not specifically address the question of whether or not a limiting term is properly regarded as a punishment. It is not clear whether, by agreeing in the way that he has stated with Bryson JA he is embracing that aspect of Bryson JA's reasoning. Adams J, whilst agreeing with Bryson JA and Studdert J that Simpson J was not bound to sentence the respondent by reference to the limiting term earlier set by Wood CJ at CL, nevertheless did not specifically refer to the question as to whether or not a limiting term was properly regarded as a form of punishment.

In *R v Mailes* [2004] NSWCCA 394 the court (Dunford J, Adams and Howie J agreeing) at [32] stated :-

> *"32 The objects of sentencing a person who has been convicted of a crime following a trial are the punishment of such person and the other objects set out in s 3A of the CSP Act. The object of nominating a limiting 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, although such person may be released prior to the expiration of such limiting term depending on the person's condition, or if such person becomes fit to be tried during such term, he or she can be tried according to law and if found guilty at such trial, can have a proper sentence fixed with a non-parole period. The maximum time that a*

person can be detained if convicted at a proper trial is the head or total sentence not the non-parole period: MHCP Act s 28 which sentence must take into account any time served under a limiting term."

R v Mitchell (1999) 108 CRIMR 73 is a well-established authority on the question of what is involved in the process of setting a limiting term. In this case dealing with the *Mental Health (Criminal Procedure) Act 1990*, the accused, after a special hearing in respect of a serious assault he had arranged to be carried out, was give a limiting term of 18 years 8 months, expressed to comprise a "minimum term" of 14 years and an "additional term" of 4 years 8 months. On appeal the court determined that section 23(1)(b) does not authorise the division of a limiting term into minimum term and an additional term. The court (Beazley JA, Sperling and Hidden JJ) said:

"21. There is nothing in the wording of the section which warrants the nomination of a minimum and additional term. Nor does the purpose and policy of the section indicate that the limiting term should be so divided. In the first place, the minimum term is inconsistent with the MHCP Act review process under which a person subject to a limiting term may be released at any point prior to the expiration of the limiting term. Secondly, to do so would not serve any rehabilitative purpose as is the case under the Sentencing Act … Accordingly, the appellant must succeed on the first ground of appeal."

A further submission on appeal was that a person subject to a limiting term might be detained for the whole of that term, which would act unfairly in comparison with a prisoner convicted in similar circumstances who would become eligible for parole after the expiry of the minimum term. The court rejected this argument:

"32. In our opinion, the appellant's submission on this point must fail. Section 23 requires a comparative estimate of "the sentence" considered appropriate if the person had been found guilty after a normal trial. "The sentence' is expressly defined in s 5(4) [of the now repealed Sentencing Act 1989 (NSW) to the totality of the minimum and additional term. "The minimum term" is, by the terms of s 5(1)(a), a specified part or term of "the sentence" which is imposed under the section. The purpose in the comparative exercise required by s 23 is to ensure that the limiting term under the MHCP Act is neither more harsh nor more lenient than a total sentence would have been in the case of a person fit to plead. Thereafter the operation of the two Acts diverge to take account of the different circumstances with which they deal. In the case of the Sentencing Act, the concern is with the person's fitness for parole after having served the minimum term. Under the MHCP Act the concern is with the person's mental state from time to time. A person dealt with under the MHCP Act is subject to at least six monthly reviews by the Tribunal throughout the course of the limiting term and may be released prior to the expiry of the limiting term. The fact that a person may be detained for the whole of the limiting period does not involve any unfairness. Rather, the two different schemes give recognition to the differing purposes of the two Acts."

The court accepted that it had power to re-determine the limiting term, and noted, that in establishing a limiting term, a court must have regard to usual sentencing principles, including the protection of society, deterrence of the offender and others who might be tempted to offend, retribution and reform, as well as having due regard to the maximum sentence prescribed for the offence, the gravity of the objective features of the case, and all relevant subjective considerations relating to the offender. Also, the court should consider any matters relating to parity, the accused's mental condition, future danger where applicable, prior record, and any guilty plea and contrition.

The decision in *Mitchell* was followed by the Court of Criminal Appeal in *R v Mailes* (2004) 62NSWLR181; [2004] NSWCCA394.

In *Subramanian v R* (2004) 201 ALR 1 The High Court (Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ) propounded at [36 forward] a model direction for judges to use when explaining the nature of a special hearing for the purposes of section 21(4) of the Act. Included within that direction is the following paragraph:-

> *"What are the purposes of a special hearing? The first is to see that justice is done, as best it can be in the circumstances, to the accused person and the prosecution. She is put on trial so that a determination can be made of the case against her. The prosecution representing the community has an interest also in seeing that justice be done. A special hearing gives an accused person an opportunity of being found not guilty in which event the charge will cease to hang over her head, and if she requires further treatment that it may be given to her outside the criminal justice system."*

The High Court clearly considers that a purpose of a special hearing is to "see that justice is done, as best as it can be in the circumstances". The Court clearly acknowledges that the prosecution representing the community has an interest in seeing that *justice* is done. The court also clearly recognises the importance of the accused being given an opportunity to be found not guilty. The passage above also seems to acknowledge that the special hearing involves the accused being "put on trial".

It is significant that, in determining a limiting term to be imposed, section 23(1)(b) requires that this be *"the best estimate of the sentence the court would have considered appropriate if the special hearing had been a normal trial of criminal proceedings against a person who was fit to be tried for that offence and the person had been found guilty of that offence."* As noted in the case of *Mitchell* referred to above, this brings into play a number of the components of classic sentencing principles.

In *Subramanian* at [28] the High Court also said this:-

> *"One important purpose of the Act is an ameliorative one, to give a person unfit to be tried in an orthodox way, an opportunity of being acquitted in a special hearing so that any possibility of legal proceedings against the accused of any kind may be brought to an end. It is also no doubt another purpose of the Act that a special hearing actually take place, and that victims be afforded an*

opportunity to see that a form of justice, as necessarily imperfect as it may be in the circumstances, has been done. This purpose is secured not only by the holding of the special hearing, but also, in an appropriate case, by the pronouncement of a "limiting term" of imprisonment that would have to be served if the person had been tried in the normal way. It is self-evident that a special hearing in which an accused is disabled from instructing his or her lawyers or in other ways from full participation in the proceedings, will have its deficiencies. But no system of justice is perfect. Neither the deficiencies of a special hearing under the Act, nor the other matter which was referred to in submissions, that the Act reposes expansive and wide discretions in the state Attorney-General, provides reason to construe and apply the Act otherwise than according to its tenor."

In his written submissions to the Tribunal, Mr Ierace SC, who appeared for Mr Adams, submits that in the various judgments in the case law, there is some blurring between the notion that a limiting term is a penalty or punishment, as opposed to it being 'treated as' a penalty or punishment. He observes that occasionally, the concepts appear to be used interchangeably. He submits that the notion that a limiting term is in fact a penalty has not been universally judicially adopted, and this would seem to be borne out by a number of the judgments referred to above.

Mr Ierace has noted in his submissions that there is no elaboration in the Second Reading Speech as to the meaning of section 74(e) of the Act when the 2008 Amendment Act was introduced. However, Mr Ierace notes that the Second Reading Speech makes no mention of the fixing of a minimum period of detention by way of punishment or otherwise. He notes that the 'insufficient time in custody' provision was originally introduced as a matter for the Attorney General to take into account when ultimately it fell to the Attorney General to determine if a forensic patient would be released (see section 117(6)(a) of the now repealed *Mental Health Act 1983*). He notes that there was no explanation of the meaning of this phrase in the second reading speech when that provision was introduced. Mr Ierace notes in his submissions that the central objective of the legislation at the time was to overcome the inherent procedural unfairness of detention "at the governor's pleasure", to enable the dismissal of charges where the evidence against the defendant was incapable of overcoming a reasonable doubt and, if the defendant was unfit and the evidence passed the test, to provide a maximum period of detention after which the defendant had to be released. Mr Ierace's submission continues:-

"Short of the expiry period however, and subject to the Tribunal's recommendation, the Government retained an otherwise unfettered discretion known as "the executive discretion", whether or not to release the detainee which was preserved by the (it is submitted) deliberately unexplained words: "insufficient time in custody or detention". The discretion applied to forensic patients who had been found not guilty on the grounds of mental illness (whether at trial or at special hearing) as well as to those with a limiting term."

Mr Ierace further notes in his submissions that the executive discretion was not surrendered until the 2008 Amendment Act and that the second reading speech for that Act made no reference to the executive

discretion having been exercised, or intended to be exercised, so as to reflect punishment, or a minimum term of detention.

Mr Ierace submits that the current section 74(e) remains as a broad discretion, albeit to be exercised by the Tribunal rather than by the executive, with no further qualification than the ordinary meaning of the words themselves as understood in light of the relevant parts of the Act, most particularly the objectives of the part (section 40) the criteria for release (section 43) and matters to be taken into account (section 74, most particularly section 74(d)).

Mr Ierace points out in his submissions that the current provision in section 74(e) of the Act applies only to persons on a limiting term and does not apply to persons who have been found not guilty on the grounds of mental illness. This is a change from the previous regime under section 84 of the former *Mental Health Act 1990*, whereby the Attorney General's objection could be applied in relation to forensic patients both where they were on limiting terms or were detained because they had been subject of a special verdict of not guilty on the grounds of mental illness. Mr Ierace submits, and the Tribunal accepts, that there is no authority (and no credible argument given the absence of criminal culpability or moral blameworthiness) to the effect that the detention of persons subject to a special verdict is to be regarded as punishment. Mr Ierace accordingly submits that, if 'insufficient time in custody' did not so reflect a punitive purpose before the amendments, the current section 74(e) should not be interpreted as having a punitive purpose. However, the Tribunal is of the view that it does not necessarily follow that section 84, so far as it applied to forensic patients subject to a limiting term, could not be regarded as having a punitive purpose, even if it did not have a punitive purpose in relation to forensic patients who had been found not guilty on the grounds of mental illness. Indeed, the fact that section 74(e) retains the 'sufficient time in custody' requirement only in relation to forensic patients subject to a limiting term and not in relation to forensic patients found not guilty on the grounds of mental illness, might just as forcefully be argued to be an acknowledgement of this very distinction.

Furthermore, It is reasonable to draw a distinction between the Attorney General's discretionary power to object under section 84 of the now repealed *Mental Health Act 1990*, on the one hand, and the specific requirement in section 74(e) of the current Act that requires the Tribunal to have regard to whether or not a forensic patient, who is subject to a limiting term, has spent sufficient time in custody. The former section 84 was very much couched as a broad ministerial discretion vested in the Attorney General to object on the grounds of insufficient time served in custody. However, the current provision is far more circumscribed – it applies only to persons serving a limited term and the provision is such that it is one of a number of factors that the Tribunal must have regard to when considering a proposed release. This is a very different context from that in which it appeared in its previous life in the *Mental Health Act 1990*.

Mr Kell of Counsel appearing for the Attorney General at the hearing before the Tribunal, also provided helpful written and oral submissions. In his written submission he makes reference to relevant passages in the decisions of *Courtney, Mills* and *Subramanian* referred to above in these reasons. He submits that

section 74(e) is clearly intended by Parliament to have particular work to do beyond the matters to which regard may be had in section 43(a) and (b) of the Act, as well as the matters in section 74(a) to 74(d). He submits that whether a person has spent "sufficient time in custody" within the meaning of section 74(e) permits reference to ordinary sentencing principles including the purposes of sentencing. He submits that this permits recourse to the objective features of the offending and the relevant subjective features of the person found to have committed the offence. He submits that one consideration is whether the time spent in custody is sufficient to reflect the denunciation of the conduct, although recognising that denunciation and retribution have significantly reduced emphasis in the case of an intellectually disabled offender (and he refers to *Muldrock v The Queen* (2011) 244CLR120 at [54] and [58]). Mr Kell further submits that, in considering the issue of sufficient time in custody, the Tribunal may also properly have regard to whether there have been any relevant developments since the limiting term was imposed.

Mr Kell submits that section 74(e) is properly interpreted as being a mechanism to ensure that forensic patients on limiting terms are to be detained for at least the minimum period of time that a prisoner convicted of the same offence (and relevantly sharing the same subjective features) would spend in custody. He submits that to release Mr Adams prior to that date would not, in an objective sense, adequately punish him for the conduct engaged in; would not relevantly denounce his conduct; and would not sufficiently recognise the harm done to the victim of the crime and the community.

In his submissions, Mr Ierace contends that the period in custody that Mr Adams has already spent, with his intellectual and rehabilitative deficits, cannot reasonably be characterised as "insufficient time in custody". He argues that, by any reasonable measure given the fact that he was not convicted at trial, Mr Adams has spent sufficient time in custody. He submits that the interpretation of the provision proposed by the Attorney General's submission, namely that it obliges the Tribunal to fix and apply a minimum period of detention equivalent to a notional non parole period, should be rejected.

Mr Kell in oral submissions before the Tribunal clarified that having regard to a non-parole period that might be appropriate for a person who was fit is being put forward, not as a requirement, but as a 'guidepost' for the Tribunal to consider on the issue of 'sufficient time in custody.'

In supplementary written submissions, Mr Ierace raised an argument that, for the Tribunal to take it upon itself to determine what would have been an appropriate non-parole period, for punitive purposes, would constitute a judicial function that could not be exercised by the Tribunal. He refers to *Brandy v HR & EOC* [1995] HCA10. He submits that any such determination would be beyond the jurisdiction of the Tribunal.

TWO HYPOTHETICAL EXAMPLES

It is helpful, for identifying the legislative purpose behind the 'sufficient time in custody' requirement, to consider some hypothetical situations that can and do arise in the context of unfitness for trial and limiting terms.

Suppose a person commits a murder by stabbing an innocent commuter on a railway platform at a crowded station. Assume that the whole event is captured on a surveillance camera and there are numerous reliable eye-witnesses who can attest to the facts. Assume that evidence establishes that the accused person was mentally competent and fit at the time of the offence and that all aspects of the offence are capable of proof beyond reasonable doubt. Assume that the accused then suffers a severe stroke and becomes significantly cognitively impaired and confined to a wheelchair as a result prior to his trial. Assume that the accused is unfit and will not meet the requirements for fitness established in *R v Presser* [1958] VR 45. Assume that the victim was completely blameless and is survived by family members.

Assume further that the accused is found unfit and, after a special hearing for the charge of murder, is given a limiting term of 20 years. Now suppose that, a year later, an application is made to the Tribunal that the accused be released pursuant to an order under section 43 of the Act. Assume that evidence establishes that, due to his cognitive impairment, the accused is not going to benefit from any rehabilitation programs available in his place of detention, although he still manages to enjoy some degree of quality of life, although diminished by his cognitive impairment. Assume also that, due to his impairment, the accused does not present any danger to himself or to other members of the public.

What would be a "sufficient time in custody" for such a person? The argument that, because he has never been fit for trial he cannot and should not be "punished" seems to fly in the face of the overwhelming evidence of his guilt of the crime at a time when he was fit, and this is so despite his lack of participation in a meaningful way in the trial. It is a simple reality that sometimes prosecution cases are overwhelming. It is of course, vital that the special hearing procedure occur in order to put the Crown to proof of its case beyond reasonable doubt (albeit on the limited evidence available). Would not the community, including family of the deceased, in such a case, have every reason to feel that 'Justice' was not being served if the Tribunal were to release the person after only one year in custody? If section 74(e) has no element of punishment (using that word in its broad sense) contained within the notion of "sufficient time in custody", then, in this scenario, there would be no constraint upon the Tribunal from releasing the person. Yet such a decision may not serve 'Justice' in the sense that the term is used by the High Court in the passage from *Subramanian* referred to above.

An equally sharp example, but on the other side of the equation, is a scenario such as the following. Assume that our accused person on the railway platform scenario fled from the scene. Assume that an innocent man, misidentified by eye-witnesses, was wrongly charged with the crime. Assume that the innocent man has a perfect alibi witness who can truthfully attest to his whereabouts in another location at the time that the crime was committed. Assume, however, that before he discloses the existence of his alibi, the accused has a stroke and becomes severely cognitively impaired. Assume that he is unable to recall or inform anyone about his alibi witness. Assume that a special hearing takes place and the accused is wrongfully found, on the limited evidence available, to have committed the offence. Assume that a limiting term is imposed upon him of 20 years.

This second scenario raises quite a different issue. Here we have a completely innocent person who, by reason of his unfitness for trial, is unable to disclose and pursue what would have been a watertight defence that would have ensured an acquittal in a normal trial assuming he had not suffered his stroke. Suppose that an application is made to the Tribunal for the man's release after he has served one year in custody.

This second scenario was put to Counsel in argument at the hearing. Mr Kell submitted that this would simply be an example of a miscarriage of justice, which can occur even in the best of circumstances in a normal trial. This is a compelling submission. Mr Ierace, on the other hand, submitted that the scenario showed up precisely the problem that can arise if a limiting term is regarded as a form of punishment for here we have an innocent man who has not had a proper full trial and who, through his subsequent cognitive impairment, has been unable to properly present his case for an acquittal.

These two scenarios highlight what the High Court in *Subramanian* has described as "a form of justice, as necessarily imperfect as it may be in the circumstances."

Having considered the legislation and its history and the relevant case law, and having considered the very helpful submissions by Mr Ierace and Mr Kell, the Tribunal is persuaded that the imposition of a limiting term does carry with it an element of 'punishment' in the broader sense of that word, and this in turn supports the view that the purposes of a limiting term should be equated, to some degree, with the purposes of sentencing. That it is a 'punishment' in the broad sense is strongly supported by the reasoning of Spigelman CJ (with Bell and Price JJ concurring) in *Newman v R* (2007) referred to above; the approach taken by the Court in *Newman's* case is consistent with the approach taken by Handley JA (with whom Sheller JA agreed) in *DPP v Mills.* This view also derives support from the passages referred to above from *Subramanian* and from the language of the Act, especially section 10(4) and section 23.

It is difficult to see any other work that section 74(e) has to do, apart from giving expression to the need for sufficient 'punishment' (using that word in its broad sense) which the Tribunal considers is properly equated to the purposes of sentencing in section 3A of the *Crimes (Sentencing Procedure) Act 1999* referred to above. If a person is otherwise not posing any serious danger to himself or herself or to others, continued incarceration can serve no other purpose.

The Tribunal draws some assistance in relation to the purpose of limiting terms from the second reading speech made by Mr Brereton, Minister for Health, on 24 November 1982 at the time that the House was considering the *Crimes (Mental Disorder) Amendment Bill* and the *Miscellaneous Acts(Mental Health) Repeal Amendment Bill.* The former Bill, was passed into law as the *Crimes (Mental Disorder) Amendment Act 1982* which was assented to on 31 December 1983 and commenced in August 1986. This Amendment created Part 11A of the *Crimes Act* under the heading "Unfitness to be tried for an Offence." Section 428P was in the following terms (emphasis added):-

*"**428P Procedure after completion of special hearing***

(1) Where, following a special hearing, it is found on the limited evidence available that an accused person committed the offence charged or some other offence available as an alternative, the Court:

(a) shall indicate whether, if the special hearing had been a normal trial of criminal proceedings against a person who was fit to be tried for the offence which the person is found to have committed, it would have imposed a sentence of imprisonment or penal servitude, and

*(b) where the Court would have imposed such a sentence, shall nominate a term, in this section referred to as a **limiting term**, in respect of that offence, being the best estimate of the head sentence the Court would have considered appropriate if the special hearing had been a normal trial of criminal proceedings against a person who was fit to be tried for that offence and the person had been found guilty of that offence.*

(2) Where in respect of a person a Court has nominated a limiting term, the Court:

(a) shall refer the person to the Mental Health Review Tribunal, and

(b) may make such order with respect to the custody of the person as the Court considers appropriate.

(3) Where, under subsection (2), a Court refers a person to the Tribunal, the Tribunal shall determine whether or not:

(a) the person is suffering from a mental illness, or

(b) the person is suffering from a mental condition for which treatment is available in a hospital and, where the person is not in a hospital, whether or not the person objects to being detained in a hospital.

(4) The Tribunal shall notify the Court which referred the person to it under subsection(2) of its determination with respect to the person.

(5) Where at a special hearing the defence of mental illness is raised and the jury returns a special verdict that the accused person is not guilty by reason of mental illness, the person shall thereafter be dealt with and an order may be made under this subsection in respect of the person as if the jury had returned such a special verdict at a normal trial of criminal proceedings.

(6) Where, at a special hearing, it is found that an accused person is not guilty of an offence charged, the person shall thereafter be dealt with as if the person had been found not guilty at a normal trial of criminal proceedings."

This section was the first appearance of the concept of "limiting term" in the NSW Legislation. The wording of section 428 P (1)(a) and (1)(b) introduced a scheme that is very similar to the current scheme in relation to special hearings and limiting terms in the current *Mental Health (Forensic Provisions) Act 1990*. Prior to the said amendments to the *Crimes Act*, it was possible for a person who had been found to be unfit to plead, to be detained indefinitely and to become "lost in the system." In the Second Reading Speech these problems were identified and at page 3005 of the Hansard report Mr Brereton said as follows:-

> *"Other deficiencies in the existing system can be summarized as follows: the onus of proof rule in fitness to plead hearings is not clear; the nature of fitness proceedings is not clear, for example, whether they are adversary proceedings or not; no procedure exists for compelling the Crown law authorities to indicate whether it is intended that charges will not be proceeded with against a particular person, and there is no review by an independent tribunal of the necessity for continued detention of a person detained as unfit. It is towards overcoming these deficiencies that the provisions of part XI A of the bill, entitled "Unfitness to be tried for an offence", are directed."*

At page 3006 of the Hansard report, Mr Brereton said the following in relation to what was then the proposed section 428 L, which became section 428 P of the Act (emphasis added):-

> *"Under the proposed procedures when it is found that a person will not become fit during the next twelve months a special inquiry must be held so far as is practicable within thirty days of the finding of unfitness to determine whether the person committed the offence or whether the person is not guilty of the offence. This will allow the mentally retarded accused person his day in court and at least the opportunity to have the charges against him dismissed. If a person is found not guilty at a special inquiry, he must be discharged. Under proposed section 428 L, where he is found to have committed the offence alleged, the court must state the sentence or disposition it would have considered appropriate had the special inquiry been a normal criminal trial and the person been found guilty. It is intended by this provision that a person should not be detained for an offence because of his unfitness for any period in excess of that which he would have been detained had he been of sound mind and found guilty of a similar offence. In addition, the court may do one or more of the following: order the person's detention; make arrangements for the person's admission to and treatment in a mental hospital; discharge the person; or make any other appropriate order.*
>
> *The legislation thus provides a series of options as to disposal. If the matter is of a minor nature, the court may be of the opinion that despite the finding against the person, discharge may be the appropriate order because the sentence it would have imposed would have been of a non-custodial nature in any case. Proposed sections 428N and 428O make provision for a further investigation to be held and the procedures that apply following the completion of such further investigation.* ***I am aware that some members of the legal profession maybe a little puzzled by the special inquiry notion, involving as it does a significant departure from the principle that a mentally incompetent person should not be put in jeopardy of criminal punishment.***

> ***This is an excellent principle, but in practice it is capable of operating very unjustly, particularly, as I have said, against mentally retarded persons.*** *Most mentally ill people fluctuate in their capacity to comprehend reality, and to understand court proceedings. The present law caters for such persons. They are detained in a mental hospital until they get better and are fit for trial. The trial then proceeds, and they may be found guilty or not guilty. They have their day in court. By contrast, persons who are very mentally retarded are most likely never to improve in their mental competence. Such persons will never, under existing section 24 of the Mental Health Act, be certified to be in effect capable of standing trial. They may be locked up forever on a mere accusation. Although the special inquiry procedure may appear to be somewhat novel, it is designed to obviate such possible injustice, and I am confident that it will operate satisfactorily."*

Mr Brereton is his Second Reading Address has thus clearly stated that this legislation involved *"a significant departure from the principle that a mentally incompetent person should not be put in jeopardy of criminal punishment."* This passage would seem to accord with, and supports, the interpretation that the Tribunal considers should properly be given to the scheme under the current *Mental Health (Forensic Provisions) Act 1990* and to the expression "sufficient time in custody". The origins of the current scheme can be traced directly to the *Crimes (Mental Disorder) Amendment Act 1982*.

Having so determined, the Tribunal will now explore some of the other submissions made in relation to the other issues that arise in this matter.

CONSIDERATION OF FURTHER ISSUES

In supplementary written submissions dated 4 March 2013 and provided to the Tribunal at the hearing of this review, Mr Kell refers to some of the legislative history relating to the 2008 Amendment Act which commenced operation on 1 March 2009. He notes that the review of the NSW Forensic Mental Health legislation conducted by Hon Greg James QC in 2007 (The James Review) recommended against the retention of a test such as "sufficient time in custody". Mr Kell notes that despite the position taken in the James Review, Parliament chose to enact section 74(e). In oral submissions at the hearing, Mr Kell, in response to a question from the President of the Tribunal, suggested that the expression "sufficient time in custody" might not relate to punishment so much as to a consideration of ordinary sentencing principles, including the objective seriousness of the index event and whether the time spent in custody to date would sufficiently recognise the harm done to the victim of the crime and the community and would sufficiently denounce the relevant conduct engaged in by the applicant. He submitted that, having regard to ordinary sentencing principles of this kind would be consistent with the provisions of the Act and decisions of the Court of Criminal Appeal which recognised that a limiting term is analogous to and may be treated as, the imposition of a penalty.

Mr Kell also submitted that section 74(e) does not require the Tribunal to be involved in fixing of a quasi non-parole period. Rather he submitted, the Tribunal is required by Parliament to determine whether the

forensic patient has spent "sufficient time in custody". He submits that significant guidance as to this concept in a particular case can be gained from any relevant judicial findings or remarks. In an appropriate case, guidance (while not being determinative) may be gleaned from a consideration of the statutory formula under section 44(2) of the *Crimes (Sentencing Procedure) Act 1999*. Mr Kell further submitted that section 74(e) does not impose a blanket veto on release of a forensic patient prior to any defined period of time, and that no constitutional constraint relevantly arises.

It is clear that Parliament has intended that the consideration of the issue of "sufficient time in custody" in section 74(e) is one that can properly be carried out by the MHRT, to whom the responsibility has been given by the legislation. The decision for release is one that is vested in the forensic division of the Tribunal which, pursuant to section 73 of the Act is to be comprised by the President or a Deputy President who is the holder or former holder of a judicial office, as well as comprising a member who is a psychiatrist, registered psychologist or other suitable expert in relation to a mental health condition and a third member who has other suitable qualifications or experience.

The Tribunal and its mix of expertise has been specifically chosen for this task by Parliament, and is particularly well suited to undertake it.

What then, should be the criteria that the Tribunal in its forensic division ought to consider when having regard to whether or not a forensic patient subject to a limiting term has spent sufficient time in custody?

The Tribunal has the particular advantage, when considering a release application, of being able to know the forensic patient's history as a forensic patient during the time that they have served of their limiting term to date. Under Part 5 of the Act, the Tribunal is required to conduct reviews of forensic patients each six months and, during a period of a limiting term, the Tribunal will generally have conducted many reviews prior to any application being made for release. The Tribunal over time gains a deeper knowledge and understanding of the forensic patient and their progress including occasional setbacks. This history will clearly inform the Tribunal and ought to be taken into account as one factor in assessing whether sufficient time has been spent in custody. Some forensic patients will develop considerable insight into the nature of their offending behaviour at the time of the index offence and may also develop a genuine and deep sense of remorse and contrition that may not have been present at the time that the limiting term was set. It is not unusual for forensic patients, after gaining additional insight into their offending behaviour through programs available to them whilst in custody, to become more acutely aware of the gravity of what they have done. Some forensic patients go through extreme depression that, in turn, needs to be treated. Sometimes changes may occur in the physical or mental condition of the forensic patient that increases the hardship of their incarceration over and above that which may have been apparent to the judge who fixed the limiting term.

The Tribunal has come to the view that it would be appropriate to have regard to the following when assessing whether sufficient time has been spent in custody:-

1. The length of the limiting term set by the court.
2. The sentencing remarks made by the court when setting the limiting term.
3. The patient's history as a forensic patient whilst serving the limiting term to date, including any progress or lack thereof made in matters such as insight into their offending behaviour at the time of the index offence, the degree of the patient's remorse and contrition, their current physical and mental condition and such other relevant matters that may arise from a consideration of that history, so that an assessment can be made whether or not it remains appropriate to continue to detain the patient for the purposes of sentencing referred to in Section 3A of the *Crimes (Sentencing Procedure) Act 1999* (set out above).

It is clear that section 23(1)(b) of the Act requires the court, when nominating a limiting term, to make the term "the best estimate of the sentence the court would have considered appropriate if the special hearing had been a normal trial of criminal proceedings against a person who was fit to be tried for that offence and the person had been found guilty of that offence." It is clear that, in performing that task, a court setting a limiting term would need to have regard to section 3A of the *Crimes (Sentencing Procedure) Act 1999.* It seems entirely appropriate that the Tribunal should also have regard to that section when considering whether or not sufficient time has been spent in custody. Of course, by the time the Tribunal is having regard to that question under section 74(e), it will be vital to have regard to the patient's history as a forensic patient whilst serving the limiting term. By also having regard to the length of the limiting term, the remarks of the court when setting the limiting term, as well as, in the case of a conditional release, any conditions that the Tribunal may consider it appropriate to impose, the Tribunal will be appropriately guided on the issue of whether sufficient time has been spent in custody.

The Tribunal has the power to release a person conditionally or unconditionally. When making a conditional release, the Tribunal can impose very stringent conditions as to a variety of factors, including (but not limited to) the conditions referred to in section 75 of the Act which provides:

"***75 Conditions that may be imposed by Tribunal on release or leave of absence***

(1) The Tribunal may impose conditions relating to the following matters on orders for release or granting leave of absence made by it in relation to a forensic patient under this Part:

(a) the appointment of a case manager, psychiatrist or other health care professional to assist in the care and treatment of the patient,

(b) the care, treatment and review of the patient by persons referred to in paragraph (a), including home visits to the patient,

(c) medication,

(d) accommodation and living conditions,

(e) enrolment and participation in educational, training, rehabilitation, recreational, therapeutic or other programs,

(f) the use or non-use of alcohol and other drugs,

(g) drug testing and other medical tests,

(h) agreements as to conduct,

(i) association or non association with victims or members of victims' families,

(j) prohibitions or restrictions on frequenting or visiting places,

(k) overseas or interstate travel.

(2) This section does not limit the matters in relation to which a condition may be imposed."

Conditional release orders can be structured so as to keep very firm control and supervision over a forensic patient who is subject to a conditional release. The Tribunal may also review the case of any such patient at any time the Tribunal considers it appropriate to do so (section 46(1)). Thus a conditional release may still retain an element of punishment and, at the same time, may ultimately promote the safety of the community as well as the rehabilitation of the patient. It is also important to bear in mind that the Tribunal may, at a review under section 68 of the Act, order a forensic patient back into detention, effectively revoking the conditional release, in the event that the forensic patient has breached any release condition, or has suffered a deterioration of their mental condition so as to be at risk of causing serious harm to themselves or to another member of the public because of their mental condition. It is accordingly proper for the Tribunal to have regard to its capacity to make such orders, and any orders so made, when assessing whether the forensic patient has spent "sufficient time in custody".

An example of a consideration of the purposes of sentencing that would be relevant to "sufficient time in custody" is the issue of whether or not the patient is at risk of becoming institutionalised by further detention, to the extent that it would unreasonably detract from their capacity to reintegrate into the community and to rehabilitate themselves. This consideration would fall within the purpose of sentencing identified in section 3A (d): *"to promote the rehabilitation of the offender."*

Mr Kell for the Attorney General has submitted that the appropriate non-parole period equivalent to the limiting term, had it been a normal full sentence, should stand as a guide post for the Tribunal in assessing sufficient time in custody. Whilst the purposes of sentencing, as indicated above, will be appropriate to have regard to, there is simply no basis in the Act that would authorise the Tribunal to enter into any such calculation, nor can this be implied in the legislation. As has been clearly stated in the case of *Mitchell* referred to above, there is a point at which the criminal sentencing process and the management of forensic patients by the MHRT diverge. The Tribunal's function is to have regard to whether the patient has spent 'sufficient time in custody', by considering the legislation that governs the operation of the Tribunal and which delimits its powers. Having regard to the objects and purposes of the Act and to its expressed provisions as have been discussed above, the Tribunal considers that the proper approach to assessing the sufficiency of time in custody is as has been stated above.

[The Tribunal then proceeded to consider:

1. The sentencing remarks made at the time that the limiting term was imposed.

2. Past Tribunal reviews and Mr Adams' history as a forensic patient and whilst serving the limiting term.

3. The proposed plan proposed by the Community Justice Program to be implemented if Mr Adams were to be conditionally released, together with the expert evidence on the suitability of that plan.

4. Submissions from registered victims.

5. Submissions from counsel for Mr Adams and the Attorney General on these issues.]

CONSIDERATION

The Tribunal gives due regard to the sentencing remarks. In particular, the Tribunal gives due regard to his Honour's remarks in relation to the brutal nature of the index offence and its objective seriousness. The Tribunal gives due regard to the numerous subjective features of Mr Adams that his Honour has referred to, including his troubled upbringing, his long standing troubled behaviour and the history and extent of his intellectual disability. The Tribunal has due regard to the findings made by his Honour in relation to Mr Adams' history of offending and in relation to the significant risk that his Honour considered that Mr Adams posed to the community.

It is clear that in the years that Mr Adams has been in custody, there has been a considerable amount of unsatisfactory, problematic and aggressive behaviour. He has self-harmed, he has had suicidal ideation, and he has threatened harm to others in his custodial settings. All this reflects the ongoing nature of his behavioural problems, his intellectual disability and the considerable risk that he poses, of which there has been much evidence as referred to in these reasons. The authors of the CFMHS report note that Mr Adams' aggressive behaviour appears to stem from extremely poor frustration tolerance, emotional dysregulation as well as his antisocial traits.

Nevertheless, there is also evidence that Mr Adams' impulsivity and aggressive conduct has moderated to some degree in the past years, with the frequency and intensity of such conduct having decreased. This clearly emerges from the consideration of the Tribunal's past reviews of Mr Adams, and also from the various reports and evidence received by the Tribunal on this review. The Tribunal notes that Mr Adams has some coping strategies, albeit basic ones, for managing his anger. In addition, the document review in the CFMHS report noted that Mr Adams had stated that he had not engaged in self-harming behaviour or attempted suicide since [year].

The Tribunal accepts the evidence of [psychiatrist] that there has been some overall stabilisation and improvement in Mr Adams' behaviour, that there has been less aggression and violence and that Mr

Adams' access to work had been a factor and he had been less of a management problem. Dr [psychiatrist] stated that Olanzapine, an anti-psychotic medication, was prescribed for Mr Adams as a mood stabiliser including for impulsivity and behaviour management. He considered that it has been helpful for Mr Adams. Dr [psychiatrist] is clearly of the view that appropriate medication will play an important part in the ongoing management of Mr Adams, and the Tribunal accepts that appropriate medication and regular engagement with, and review by, a psychiatrist, would be a critical component for Mr Adams' management were he to be conditionally released.

The Tribunal accepts Dr [psychologist] assessment that Mr Adams now poses a moderate and no longer a high risk of future violence to others, and, subject to certain conditions, that his risk could be managed appropriately, under the CJP's proposed Case Implementation Plan, in such a way as to ensure that there would not be any serious endangerment of either Mr Adams or any member of the public.

The recommended conditions that emerge from the evidence of Dr [psychologist] are, firstly, that there should be in place a clear protocol and capacity for Mr Adams to be subject to a blanket ban for alcohol, and should he for any reason have unsupervised time in the community (such as for work purposes or organised leisure activities) he should accept breathalysation on return to ensure no alcohol use has occurred. Secondly, it was clear from his evidence that Dr [psychologist] was concerned were it to be the case that 'line of sight' supervision of Mr Adams might cease after three months, simply because that was what was in the plan.

[The Tribunal made further comments on what it perceived to be inadequacies of the current Case Implementation Plan.]

Despite all of the impressive work and effort that CJP has put into the development of the SNRG Case Implementation Plan, in its current form and in view of the replies received from CJP in response to the Tribunal's inquiries, the plan currently falls short of adequately addressing the management needs that have been identified by [psychologist] and [psychiatrist]. The Tribunal notes that Mr Kell in his submissions also identified these shortcomings.

Accordingly, in view of the current difficulties identified with respect to the proposed CJP SNRG Case Implementation plan in its present form and stage of development, the Tribunal is not at this time satisfied of the requirements for release prescribed by section 43(a) and (b) of the Act.

The Tribunal acknowledges that a great deal of effort has clearly been put into the development of the SNRG Case implementation plan thus far by the CJP. It may well be that the shortcomings in the proposed management plan can be addressed in the near future by further development of the plan that addresses the various concerns noted by the Tribunal in these reasons. The Tribunal would be willing to hold an early review if requested to consider any further application by Mr Adams for conditional release.

HAS MR ADAMS SPENT 'SUFFICIENT TIME IN CUSTODY'?

The Tribunal has had regard to the remarks of the sentencing Judge when his Honour nominated the limiting term for Mr Adams. This has been discussed above.

The Tribunal has had regard to Mr Adams' history as a forensic patient, with a view to determining whether or not it remains appropriate to detain him for a further period for the purposes of sentencing referred to in section 3A of the *Crimes (Sentencing Procedure) Act 1999*.

On one view, it would appear that Mr Adams' lengthy period in custody has not yet led to any expression of remorse or contrition, or indeed insight into his offending behaviour, and this could be seen as a reflection that the period of time served in custody may not yet have been sufficient to address the section 3A purposes, particularly punishment and personal deterrence. However, it is very clear on the evidence that Mr Adams' intellectual disability plays a large role in affecting his capacity to address these issues in the same manner as someone who is not so disabled might do. [Psychologist] notes that Mr Adams has never been able to accept responsibility for his index offence or to express remorse, and that the nature of his deficits suggest he would be unlikely to do so. The Tribunal considers that additional time in custody is unlikely to change this situation.

As previously noted, the evidence before the Tribunal indicates that Mr Adams' aberrant behaviour has generally moderated in recent years to a point where his risk, whilst still significant, is now somewhat less than it was. Expert evidence has been given that the risk could be managed appropriately by a conditional release plan with appropriate conditions in place. [Psychiatrist]'s evidence was he did not consider that Mr Adams had learned anything new to manage his behaviour but that his more settled behaviour had more to do with his mood and affect. However, [psychiatrist] did consider that Mr Adams was capable of learning some things from a behavioural management perspective, that is, by conditioning. There is evidence before the Tribunal Mr Adams has some strategies in place, albeit basic ones, for moderating his conduct.

An important factor, when considering the section 3A purposes of sentencing, is that, if the Tribunal were to grant Mr Adams release, it would necessarily be a conditional release on very strict conditions. Any breach of conditions might well result in the release being revoked, whereupon Mr Adams would be returned to custody, and this prospect would remain for the entire balance of his limiting term, unless he were to be unconditionally released prior to that time – a most unlikely occurrence given Mr Adams' risk and his overall circumstances as discussed in these reasons. A conditional release therefore would continue to impose a strictly supervised regime upon Mr Adams, and this clearly would be a continuation of his punishment and would indeed continue to serve all of the purposes referred to in section 3A, including promoting his rehabilitation.

The CFMHS report identifies, in relation to risk, that there is a high probability that upon release, given his poor coping ability, Mr Adams will be exposed to serious stressors such as adjusting to living in the community after a significant period of incarceration, attending to activities to daily living, and interpersonal issues due to his communication problems and intellectual disability. The Tribunal considers that this difficulty of being 'institutionalised' will only become worse if Mr Adams were to remain in custody for a further prolonged period, and that a workable conditional release would promote his rehabilitation and, indeed, the protection of the community in so far as a conditional release would enable him to be strictly monitored in a way that will not be possible when his limiting term expires, when he will be entitled to be released unconditionally. If that were to be done without any previous efforts at transitioning Mr Adams into the community, the risk to the community would certainly be a greater one than would be the case with a carefully monitored conditional release.

In view of all these considerations the Tribunal is satisfied that Mr Adams' has served sufficient time in custody.

DETERMINATION

The Tribunal has carefully considered the evidence before it and is satisfied that there are clearly reasonable grounds for believing that care, treatment and control of Mr Adams is necessary for his own protection from serious harm and the protection of others from serious harm. Having also had regard to the matters referred to in section 74 and the requirements of section 43 of the *Mental Health (Forensic Provisions) Act*, **the Tribunal accordingly determines:**

1. That Mr Adams has spent sufficient time in custody within the terms of section 74(e) of the *Mental Health (Forensic Provisions) Act 1990*.
2. That the Tribunal is <u>not</u> at this time satisfied that:
    a. The safety of the patient or any member of the public will not be seriously endangered by Mr Adams' release; and
    b. Other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to Mr Adams.
3. That there should be no change to Mr Adams' current order in relation to his detention, care or treatment.
4. That Mr Adams has not become fit to be tried for an offence.

And the Tribunal further makes the following recommendations pursuant to section 76A of the said Act:

3. That the Community Justice Program within the Office of the Principal Officer in the Department of Aging, Disability and Home Care give consideration to further developing the proposed CJP SNRG Case Implementation plan, in respect to Mr Adams, so as to address the shortcomings of the current plan as identified in these reasons

4. That the Community Forensic Mental Health Service of Justice Health consult to and assist the CJP to further develop its proposed plan so as to address those shortcomings, and that CFMHS subsequently provide a report to the Tribunal as to the suitability of such plan for the purpose of the next Tribunal review of Mr Adams pursuant to section 46 of the said Act.

The Tribunal wishes to express its gratitude to Mr Ierace SC and to Mr Kell, and to their instructing solicitors, for the very detailed and helpful submissions and assistance that they have given in this matter.

Signed

Professor Daniel Howard SC
President
Dated this day 10 May 2013