THIS IS AN OFFICIAL REPORT OF THE MENTAL HEALTH REVIEW TRIBUNAL PROCEEDINGS IN RELATION TO MR EPHRAM AUTHORISED BY THE PRESIDENT OF THE TRIBUNAL ON 14 MAY 2014

Mental Health Review Tribunal

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

FORENSIC REVIEW: Mr Ephram (No 2)

s46(1) Review of forensic patients *Mental Health (Forensic Provisions) Act 1990*

DATE: 31 October 2013

LOCATION: Forensic Hospital

PANEL:	Harold Sperling QC	Deputy President
	Peter Klug	Psychiatrist
	Stephen Woods	Other Member

APPLICATION: The Tribunal to determine that Mr Ephram has become fit to be tried

DECISION

The Tribunal is not competent to "recommend", pursuant to section 47(4) of the Act that Mr Ephram has become fit to be tried.

Signed

Harold Sperling
Deputy President
Date: 11 December 2013

This is the 22nd review of the case of Mr Ephram (the patient), who is currently detained in the Forensic Hospital.

At this review, held on 31 October 2013, Mr Peter O'Brien, of O'Brien Solicitors, appeared for the patient, and Ms Belinda Baker, solicitor advocate, Crown Solicitor's office, appeared to assist the Tribunal.

The Tribunal is indebted to Mr O'Brien and Ms Baker for their carefully prepared and helpful written submissions and for their oral submissions at this review.

THE FACTS

On 2002, the patient set fire to a building. A person died as a result. The patient was charged with murder and with maliciously damaging property by fire with intent to endanger life.

The patient was found unfit to be tried by the NSW Supreme Court in 2003. The procedures following such a finding are prescribed by the *Mental Health (Forensic Provisions) Act 1990* (the Act).

In due course, a special hearing, as prescribed by the Act, was held before a Supreme Court Judge and a jury. The jury returned the following verdicts:

- Not guilty of murder.
- Not guilty on the ground of mental illness of manslaughter.
- Not guilty on the ground of mental illness of maliciously damaging property by fire with intent to endanger life.
- Guilty on the ground of mental illness of the alternative offence of maliciously damaging property by fire.

The Court ordered the patient to be detained. The patient has been detained in a mental health facility to this day.

THE ISSUE FOR DECISION

Put shortly, a person is unfit to be tried if, due to a physical or mental disability, the person cannot be afforded a fair trial because, for example, they are unable to give a coherent account of what occurred to their legal advisers or, if necessary, to the court.

The special defence of mental illness is derived from the common law. It is available where, put shortly, the defendant, because of mental illness, did not know the nature and quality of the act or did not know that the act was wrong.

Fitness to be tried falls to be considered when a trial is in prospect or in progress and relates to the person's condition at that time. The defence of mental illness falls to be considered at a trial or special hearing and relates to the person's mental state at the time of the offence or offences with which the person is charged.

In the present case, the patient applies to the Tribunal for what is referred to in the Act as a "recommendation" that he has become fit to be tried. By arrangement, the Tribunal is first to determine whether it is competent for the Tribunal to make such a finding where, as here, a person, found unfit to be tried, is subsequently found, at a special hearing, to be not guilty on the ground of mental illness.

The purpose of the present application should be noted. As will appear, a consequence of an order for detention following a verdict of not guilty on the ground of mental illness is that the patient, for practical purposes, remains in detention unless and until released by order of the Tribunal. On the other hand, as will appear, the Act provides that a person found unfit to be tried and subsequently found to have become fit to be tried undergoes an ordinary trial or, alternatively, is discharged if the Director of Public Prosecutions decides not to proceed further with the case. Accordingly, if the patient were now found fit to be tried, it is possible, perhaps likely, having regard to the duration of any sentence likely to be imposed following conviction at an ordinary trial, that the Director of Public Prosecutions would elect not to proceed further with the case and the patient would be discharged or, if tried in the ordinary way, would either be released from custody at the conclusion of the trial or at a time substantially earlier than he is likely to be released by the Tribunal. There would then be the possibility of continuing detention being imposed on the patient as an involuntary patient under the *Mental Health Act 2007* but it is apparent that the patient takes his chances in that regard.

It should be mentioned that the issue now before the Tribunal arose at an earlier time in relation to this patient. On 18 August 2006, the patient's treating psychiatrist, wrote to the Tribunal, saying that it was the

opinion of the treating team, as well as a second opinion by an independent psychiatrist, that from a psychiatric perspective the patient might now meet the legal criteria for fitness to be tried. The patient's treating psychiatrist went on to say that he sought advice from the Tribunal as to whether a supplementary hearing was required to consider the question of fitness in view of the issue not having been addressed at the most recent review. The Hon Greg James, then President of the Tribunal, wrote to the patient's treating psychiatrist on 24 August 2006. After referring to the verdicts of not guilty on the ground of mental illness, Mr James said:

> Thereafter, Mr Ephram is to be treated in the same way as a forensic patient who was found not guilty by reason of mental illness who had no previous finding of being unfit to be tried. The fitness of such patients for trial is not a relevant matter for review …. Accordingly, no question now arises as to the Mental Health Review Tribunal reviewing Mr Ephram's fitness for trial at any future hearing.

It has not been suggested that the Tribunal, as presently constituted, is bound by that determination. However, this correspondence shows that there is likely to be a serious question concerning the patient's fitness to be tried if the Tribunal is competent to entertain the issue. The question of competency is not hypothetical.

THE LEGISLATION

In order to set the context for determination of the issue of competency, it is necessary to note the relevant provisions of the Act in some detail.

The following summary will reproduce or summarise only those provisions which are relevant to the issue in hand and, so far as is practicable, only those parts of such provisions as are relevant.

Pursuant to section 14 of the Act, a Court which finds a person unfit to be tried may remand the person in custody or make any other order that the Court considers appropriate (including an order for detention in a mental health facility), and must refer the person to the Tribunal. If an order is made that the person be detained in a mental health facility or other place, the person becomes a forensic patient pursuant to section 42 and, as such, comes within the jurisdiction of the Tribunal.

Following referral to the Tribunal under section 14, the Tribunal must, pursuant to section 16 of the Act, determine whether the person will, on the balance of probabilities, during the period of 12 months after the finding of unfitness, become fit to be tried and must notify the Court accordingly. If the Tribunal determines

that the person will not, during the period of 12 months, become fit to be tried, the Tribunal must notify the Director of Public Prosecutions accordingly.

Pursuant to section 17, if the Court is notified by the Tribunal that the person *will* become fit to be tried during the period of 12 months, the Court may order that the person be detained in a mental health facility or other place (usually a prison). The person thereupon becomes a forensic patient pursuant to section 42, if not already a forensic patient in consequence of an earlier order for detention.

Pursuant to section 19, if the Court is notified by the Tribunal that the person *will not*, during the period of 12 months, become fit to be tried, the Court is to conduct a special hearing unless the Director of Public Prosecutions advises that no further proceedings will be taken.

Subdivision 1, *Review of forensic patients by Tribunal*, of Part 5, *Forensic patients and correctional patients*, includes section 45. Pursuant to that section, where an order is made under section 17 (for detention of a person in a mental health facility or other place), the Tribunal must review the person's case as soon as practicable, and must determine whether, in its opinion, the person has become fit to be tried. Section 45 further provides that the Tribunal must notify the Court and the Director of Public Prosecutions if it is of the opinion that the person has become fit to be tried or has not become fit to be tried and will not, during the period of 12 months after the finding of unfitness by the Court, become fit to be tried.

Section 46 provides for the periodic review by the Tribunal of all forensic patients at intervals of not less than 6 months.

Section 47(1) provides for what are referred to in the title of the section as "orders and recommendations" which may be made at such a review. These include orders 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 conditionally or subject to conditions.

The power to make an order for release is hedged in by provisions relating to the safety of the patient and others. Section 43 provides as follows, so far as is material.

> 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.

And section 74 provides as follows, so far as is material.

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:

(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 whether the safety of the person or any member of the public will be seriously endangered by the person's release.

Section 47, subsections (4) and (5), relate to the issue of fitness to be tried in the context of a periodic review by the Tribunal. The subsections provide as follows.

(4) On reviewing under section 46 the case of a forensic patient who is subject to a finding that the person is unfit to be tried for an offence, the Tribunal must make a recommendation as to the fitness of the patient to be tried for an offence.

(5) The Tribunal must notify the court that made the finding of unfitness and the Director of Public Prosecutions if, on a review, the Tribunal is of the opinion that the person:

(a) has become fit to be tried for an offence, or

(b) has not become fit to be tried for an offence and will not, during the period of 12 months after the finding of unfitness by the court, become fit to be tried for the offence.

The word "recommendation" in the title of the section and in subsection (4) is curious. Read in conjunction with subsection (5), the word has to be construed as meaning a finding. The word "recommendation" may have been used because findings as to fitness by the Tribunal are not determinative: under the Act – it is unnecessary to refer to all such provisions in detail - a finding of fitness by the Tribunal serves only to open the way for a determination as to fitness by the Court which is then determinative. However that may be, the word "recommendation" in subsection (4), is plainly to be read as meaning a finding by the Tribunal as to

fitness. We mention here the standing given by the legislation to a Court finding as to fitness. Section 15 of the Act provides as follows.

> It is to be presumed:
>
> (a) that a person who has, in accordance with this Part, been found to be unfit to be tried for an offence continues to be unfit to be tried for the offence until the contrary is, on the balance of probabilities, determined to be the case, and
>
> (b) that a person who has, in accordance with this Part, been found fit to be tried for an offence continues to be fit to be tried for the offence until the contrary is, on the balance of probabilities, determined to be the case.

This provision applies to any subsequent reconsideration of the question of fitness, whether by the Tribunal or by a Court.

Sections 29 and 30 provide for what flows procedurally from a finding by the Tribunal that a person has become fit to be tried.

Section 29, provides as follows, so far as is material.

> (1) If the Tribunal has notified the Court that it is of the opinion that a person who has been found to be unfit to be tried for an offence has become fit to be tried for the offence (whether or not a special hearing has been conducted in respect of the offence), the Court:
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> (a) is to obtain the advice of the Director of Public Prosecutions as to whether further proceedings will be taken by the Director of Public Prosecutions in respect of the offence, and
>
> (b) is to hold a further inquiry as to the person's fitness as soon as practicable unless the Director of Public Prosecutions advises that the person will not be further proceeded against in respect of the offence.
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> (2) The Director of Public Prosecutions must advise the Minister for Health and the Tribunal if the Director has determined that no further proceedings will be taken in respect of the offence.

(3) If the Director of Public Prosecutions advises the Minister for Health that a person will not be further proceeded against, the Minister for Health must, after having informed the Minister for Police of the date of the person's release, do all such things within the power of the Minister for Health to order the person's release from detention or to otherwise ensure the person's release from detention.

Section 30 provides as follows, so far as is material.

(1) If, following a further inquiry under section 29, an accused person is found fit to be tried for an offence, the proceedings brought against the person in respect of the offence are to recommence or continue in accordance with the appropriate criminal procedures.

(2) If, following a further inquiry under section 29, an accused person is found unfit to be tried for an offence:

(a) in the case of an accused person who has been detained … as a forensic patient for a period or continuous periods in the aggregate of not less than 12 months and in respect of whom a special hearing has not been held—the Court must conduct a special hearing, or

(b) in the case of any other accused person—the Court may conduct a special hearing (if a special hearing has not been held) or order that the person be returned to the custody or mental health facility from which the person was taken.

(3) The Court must notify the Tribunal if it determines that a forensic patient detained in a mental health facility is fit to be tried for an offence.

It is unnecessary to go into the intricacies of these provisions. It is sufficient to observe that, in the ordinary case, if the Tribunal decides that the person is fit for trial, the Director of Public Prosecutions may decide not to proceed further against the person, in which case the person is released from detention and discharged; on the other hand, if the Director of Public Prosecutions decides to proceed and the person is found, on further enquiry by the Court, to be fit to be tried, the Court proceeds with an ordinary trial.

In the present case, as mentioned earlier in these reasons, the patient looks to the foregoing provisions of sections 29 and 30 in the expectation or hope of earlier release than at the hands of the Tribunal, perhaps immediate release. However, sections 29 and 30 are, as appears above, predicated on a finding of fitness by the Tribunal pursuant to section 47 (4). Hence the issue for decision by the Tribunal in this case as to

whether the latter provisions operate where the person has been found not guilty on the ground of mental illness at a special hearing. We will turn to that issue in due course. Meanwhile, we continue the necessary review of the scheme of the legislation.

A special hearing, such as was undergone by this patient, is provided for by section 19 of the Act. Relevantly, the section provides as follows.

> (1) If the Court receives a notification of a determination from the Tribunal under section 16 (3), 45(3) or 47(5) that a person will not, during the period of 12 months after the finding of unfitness, become fit to be tried for an offence, the Court:
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> (a) is to obtain the advice of the Director of Public Prosecutions as to whether further proceedings will be taken by the Director of Public Prosecutions in respect of the offence, and
>
> (b) is to conduct a special hearing as soon as practicable unless the Director of Public Prosecutions advises that no further proceedings will be taken.
>
> (2) A special hearing is a hearing for the purpose of ensuring, despite the unfitness of the person to be tried in accordance with the normal procedures, that the person is acquitted unless it can be proved to the requisite criminal standard of proof that, on the limited evidence available, the person committed the offence charged or any other offence available as an alternative to the offence charged.

As indicated above, the three provisions referred to in section 19(1) relate to three ways in which the Tribunal may come to communicate with the Court concerning a forensic patient's fitness. It is sufficient to observe, for present purposes, that, in this case, following notification by the Tribunal of its "recommendation" (that is, finding) concerning fitness, the patient was found by the Court to be unfit and that, pursuant to section 19 of the Act, the Court held a special hearing.

Section 22 of the Act provides for the verdicts available at a special hearing. The section provides as follows.

> (1) The verdicts available to the jury or the Court at a special hearing include the following:
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> (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 Royal 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 28 is mentioned in section 22(3)(b). We will come to section 28 shortly.

In the case of a verdict that, on the limited evidence available, the person committed the offence charged or an alternative offence, section 23 provides that the court must indicate whether, if the special hearing had been a normal trial of a person who was fit to be tried, it would have imposed a sentence of imprisonment. If so, the court must nominate what is referred to as a "limiting term", being the best estimate of the sentence the Court would have imposed if the special hearing had been the normal trial of a person who was fit to be tried and the person had been found guilty of the offence.

The consequences of nominating a limiting term include, pursuant to section 42 of the Act, that the person becomes a forensic patient and subject to the jurisdiction of the Tribunal (if not already a forensic patient by operation of provisions applying at an earlier stage). A further consequence is that, pursuant to section 27 and depending on the mental state of the person (as found by the Tribunal in an intermediary step), the Tribunal may order that the person be detained in a mental health facility or in a place other than a mental health facility (usually a prison).

In the result, a person ordered to be detained following a verdict that, on the limited evidence available, the person committed the offence or an alternative offence may be released at any time in the discretion of the Tribunal under an order pursuant to section 47(1), subject to considerations concerning risk to the patient and others, but must be released no later than the expiration of the limiting term.

Section 28 prescribes a further consequence of a verdict that, on the limited evidence available, the person committed the offence. The section, so far as is material, provides as follows.

> (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.

There is no provision for a limiting term and no provision corresponding with section 28 in relation to a person found not guilty on the ground of mental illness at a special hearing..

We come then to what does flow from a verdict of not guilty on the ground of mental illness, when returned at a special hearing.

As set out above, section 22(2) provides that a verdict of not guilty on the ground of mental illness is to be taken to be equivalent for all purposes to such a verdict under section 38. Section 38 provides as follows.

> (1) If, in an indictment or information, an act or omission is charged against a person as an offence and it is given in evidence on the trial of the person for the offence that the person was mentally ill, so as not to be responsible, according to law, for his or her action at the time when the act was done or omission made, then, if it appears to the jury before which the person is tried that the person did the act or made the omission charged, but was mentally ill at the time when the person did or made the same, the jury must return a special verdict that the accused person is not guilty by reason of mental illness.
>
> (2) If a special verdict of not guilty by reason of mental illness is returned at the trial of a person for an offence, the Court may remand the person in custody until the making of an order under section 39 in respect of the person.

Section 39 (1) provides as follows:

> If, on the trial of a person charged with an offence, the jury returns a special verdict that the accused person is not guilty by reason of mental illness, the Court may order that the person be detained in such place and in such manner as the Court thinks fit until released by due process of law or may make such other order (including an order releasing the person from custody, either unconditionally or subject to conditions) as the Court considers appropriate.

Pursuant to section 42, a person detained pursuant to section 39 becomes a forensic patient (if not already a forensic patient) and, as such, is amenable to the jurisdiction of the Tribunal.

Section 25 is in the same vein as section 22 (2). It provides as follows:

> If at a special hearing the defence of mental illness is raised and the jury or Judge, as the case may be, returns a special verdict that the accused person is not guilty by reason of mental illness, the person is thereafter to be dealt with and an order may be made under this Act in respect of the person as if the jury or Judge, as the case may be, had returned such a special verdict at a normal trial of criminal proceedings.

That takes the reader again to sections 38 and 39, as in the case of section 22(2). Conformably, a person detained pursuant to section 25 becomes a forensic patient pursuant to section 42 (if not already a forensic patient) and, as such, is amenable to the jurisdiction of the Tribunal.

Because there is no provision in the legislation for a limiting term in the case of a person found not guilty on the ground of mental illness at an ordinary trial or at a special hearing, if the person is ordered to be detained following such a verdict, the detention is indeterminate and the person may only be released at the discretion of the Tribunal, hedged in as that discretion is, by safety considerations.

In consequence, detention following a verdict of not guilty on the ground of mental illness (whether at an ordinary trial or at a special hearing) may be for a shorter time than an ordinary sentence for the same offence, but may also exceed – sometimes by a substantial margin - the sentence which would have been imposed if the person were convicted and sentenced at an ordinary trial. (By the same token, such detention may substantially exceed the limiting term which would have been set by the Court following a verdict that, on the limited evidence available, the person committed the offence. But that scenario is not material to this case.)

Subdivision 3, *Termination of status as a forensic patient*, of Division 2 of the Act, *Forensic patients*, specifies the ways in which a person may cease to be a forensic patient. These include unconditional release by the Tribunal or a Court or the expiry of conditions in the case of conditional release (section 51), a verdict of not guilty or a verdict following a special hearing that, on the limited evidence available, the person committed the offence but a limiting term is not imposed (section 52 (1)), a limiting term imposed in respect of the person expires (section 52(2)), a person found to be unfit to be tried is subsequently found to have become fit to be tried (section 52(3)), and the relevant charges are dismissed or the Director of Public Prosecutions decides that the person will not be further proceeded against (section 52(5)).

Of these provisions, the terms of section 52(3) should be noted in full. The subsection provides as follows.

> A person who has been found by a court to be unfit to be tried for an offence ceases to be a forensic patient if the Tribunal notifies the court and the Director of Public Prosecutions that it is of the opinion that the person has become fit to be tried for an offence (whether or not a special hearing has been conducted in respect of the offence) and a finding is made, at a further inquiry by the court as to the person's unfitness, that the person is fit to be tried for an offence.

SUBMISSIONS ON BEHALF OF THE PATIENT

Mr O'Brien's primary submission was that the language of section 47(4) and (5) is clear and mandatory in its terms, providing, as it does, that, on a section 46 review, the Tribunal *must* make a "recommendation" as to the fitness of a forensic patient who is subject to a finding that the person is unfit to be tried, and *must* notify the court and the Director of Public Prosecutions if the Tribunal is of the opinion that the person has become fit to be tried. In consequence, the Tribunal was bound to comply with these provisions according to their terms, subject only to consideration of the context of these provisions in the Act as a whole and the purposes of the statute.

Mr O'Brien cited *Palgo Holdings Pty Ltd v Gowans* (2005) 215 ALR 253, 264 [41] where McHugh, Gummow, Hayne and Heydon JJ said in their joint judgment:

> [T]he correct question is not whether a legal or an ordinary meeting should be given to a particular statutory term. Rather, it is what is the natural and ordinary meaning of the language as read in its context and with attention to the legislative purpose and available materials that disclose that purpose.

Mr O'Brien also cited, to the same effect, section 33 of the *Interpretation Act 1987* which provides as follows, so far as is material.

> In the interpretation of a provision of an Act … a construction that would promote the purpose or object underlying the Act … (whether or not that purpose or object is expressly stated in the Act …) shall be preferred to a construction that would not promote that purpose or object.

Mr O'Brien submissions were then appropriately directed to context and purpose.

It was submitted that a fundamental purpose of the legislation is to protect the interests of a person found unfit to be tried. These interests, it was submitted, include the advantages of an ordinary trial in the event that the person becomes fit to be tried if, at that stage, the Director of Public Prosecutions elects to prosecute the charge.

Such advantages are not to be underrated. The opportunity of an ordinary trial includes the possibility of acquittal. We acknowledge the force of this submission: the person might, for example, have a defence of alibi or coercion or accident or self-defence or might have an account of the facts which negates a necessary mental element in the offence, whereas the person might have been incapable, at the earlier

time, to make good such a defence because of the physical or mental condition which rendered the person is unfit to be tried.

According to Mr O'Brien's argument, section 47(4) and (5) were to be seen as an essential part of the machinery intended to secure that objective, in that an opinion on the part of the Tribunal that the person had become fit to be tried opened the door to a determinative reconsideration of the question of fitness by the Court. No other avenue was available under the legislation for such a determinative reconsideration of the question of fitness. Accordingly, it was said, the exclusion of a class of forensic patients from the operation of those provisions would be contrary to a purpose of the legislation. In particular, construing them to the exclusion of persons found unfit to be tried and subsequently found not guilty on the ground of mental illness would be contrary to a purpose of the legislation.

It was common ground that a person found unfit to be tried and subsequently found, at a special hearing, to have committed the offence on the limited evidence available qualified for reconsideration of the question of fitness by the Tribunal under to section 47(4). There was then no sensible reason, it was submitted, why the same opportunity should have been denied to persons found unfit to be tried and subsequently found not guilty on the ground of mental illness following a special hearing. The distinction would be unfair and unjust, it was said.

The submissions noted in the last four paragraphs of these reasons would have considerable force if the only relevant objective to be discerned in the legislation was to provide the opportunity of an ordinary trial to a person found unfit to be tried who subsequently becomes fit. The question arises, however, as to whether there is any competing purpose to be discerned in the legislation, bearing on the construction of section 47(4) and (5) and which should be given priority when reading the Act as a whole. We will return to that question.

Mr O'Brien relied on the provisions of section 15 of the Act (quoted above). In his submission, to construe section 74(4) as not including a person found unfit to be tried and subsequently found not guilty on the ground of mental illness following a special hearing was inconsistent with the intent of section 15, namely, as submitted, that a finding of unfitness to be tried was only to be determinatively decided by a Court. A construction of section 74(4) which denied the Courts the opportunity of exercising that function in relation to a class of persons was inconsistent with that intent, it was submitted.

We think this submission gives undue significance section 15. The section specifies the burden of proof and the standard of proof whenever a question of fitness arises for decision. It operates not only in relation to a determinative decision as to fitness by a Court. It applies equally to a "recommendation" or finding as to fitness by the Tribunal, including a "recommendation" or finding pursuant to section 47(4). The submission begs the question as to whether section 47(4) operates to require the Tribunal to make such a provisional determination at a section 46 review where the person has been found not guilty on the ground of mental illness.

Mr O'Brien submitted that there were other provisions of the Act which supported this approach. He referred to section 29 of the Act (quoted above). With section 30, this provision provides the machinery for redetermination of the question of fitness where a person has been found unfit to be tried. Section 29 picks up the process at the point where the Tribunal has notified the Court that it is of the opinion that a person found unfit to be tried has become fit. Mr O'Brien relied on the words "whether or not a special hearing has been conducted" in that provision as disclosing a legislative intention that the question of unfitness remains a live issue after a special hearing. Accordingly, it was submitted, it cannot have been intended that the Tribunal was not to comply with section 47(4) and (5) in a case where a special hearing has been held.

In the same vein, reference was made to section 52(3) (also quoted above). It provides that a person, found by a Court to be unfit to be tried, ceases to be a forensic patient if the Tribunal notifies that it is of the opinion that the person has become fit to be tried, "whether or not a special hearing has been conducted", and a finding is made, at a further enquiry by the Court that the person is fit to be tried. Again, the same submission is made.

The difficulty with the submissions made in the last two paragraphs of these reasons is that sections 29 and 30, and similarly section 52(3), have no scope for operation if the Act, properly construed, does not allow redetermination of fitness for trial where the person has been found not guilty on the ground of mental illness following a special hearing. If the Act is so construed, the words "whether or not a special hearing has been conducted" in these sections still have work to do, namely, in relation to cases where the person has been found at a special hearing to have committed the offence on the limited evidence available. So the words, "whether or not a special hearing has been conducted", in these sections do not indicate, one way or the other, whether the Act, read as a whole, requires the question of fitness to be redetermined at a section 46 review in the case of a person found not guilty on the ground of mental illness following a special hearing.

SUBMISSIONS BY COUNSEL ASSISTING

Ms Baker submitted that a person found unfit to be tried and subsequently found not guilty on the grounds of mental illness following a special hearing is not "a person subject to a finding that the person is unfit to be tried" within the meaning of the section 47(4).

In support of that submission, Ms Baker relied on the principle of statutory construction that regard should be had to the statute as a whole.

She relied on section 25 (quoted above). That section provided, in effect, that a person found not guilty on the ground of mental illness following a special hearing was thereafter to be dealt with, and an order could be made under the Act, as if the person were found not guilty on the ground of mental illness at a normal trial. The consequence of a finding of not guilty on the ground of mental illness at an ordinary trial is (pursuant to sections 38 and 39) that the person, if ordered to be detained, can only be released by order of the Tribunal, with an emphasis on the safety of the person and members of the public.

Accordingly, in Ms Baker's submission, it could not have been intended that a person found unfit to be tried and subsequently found not guilty on the ground of mental illness following a special hearing would come within the ambit of section 47(4). That was because, under the scheme of the Act as outlined above, section 47(4) opened the gate to discharge at the discretion of the Director of Public Prosecutions, or to an ordinary trial, following which the person might be acquitted, receive no custodial sentence or receive a custodial sentence which might prove to be much shorter than an order for indeterminate detention following a special hearing where the verdict was not guilty on the ground of mental illness.

Hence, in Ms Baker's submission, it was necessary to construe section 47(4) to mean that a person found unfit to be tried and subsequently found not guilty on the ground of mental illness following a special hearing was not a person "subject to a finding that the person is unfit to be tried".

In further support of that approach, Ms Baker referred to the suite of verdicts available to the Court following a special hearing. She submitted that these provisions also showed that a verdict of not guilty on the ground of mental illness following a special hearing was intended to be a final verdict, not open to be displaced by any subsequent course of events. The points were as follows.

In section 22(1) of the Act, the verdict that the person committed the offence, or had committed an alternative offence, was qualified by the phrase "on the limited evidence available". In Ms Baker's

submission, this phrase recognised that the verdict was provisional and the reason for its provisional character, namely, that, if the person became fit to be tried, the evidence might be more complete at an ordinary trial. There was no such qualification in the case of a person found not guilty or not guilty on the ground of mental illness. This, it was submitted, indicated that a verdict of not guilty on the ground of mental illness following a special hearing was intended to be as final as a verdict of not guilty following such a hearing.

This submission was supplemented by reference to section 19 (2) which provides as follows:

> A special hearing is a hearing for the purpose of ensuring, despite the unfitness of the person to be tried in accordance with the normal procedures, that the person is acquitted unless it can be proved to the requisite criminal standard of proof that, on the limited evidence available, the person committed the offence charged or any other offence available as an alternative to the offence charged.

There is no reference in this provision to the possibility of being found not guilty on the ground of mental illness at a special hearing.

Ms Baker pointed out that, historically, a verdict in a criminal trial of not guilty by reason of mental illness (the old defence of insanity) was equivalent to an acquittal. She submitted that this accounted for the absence of reference in section 19(2) to a verdict of not guilty on the ground of mental illness. We take the submission to be that the omission of any reference to the verdict of not guilty on the ground of mental illness as a possible outcome of a special hearing showed that the legislature regarded that verdict as being in the nature of an acquittal and, accordingly, it could be implied, as having the same finality as a verdict of not guilty at an ordinary trial.

We think the submission relating to section 19(2) draws too long a bow. It is highly speculative. It is as likely, if not more likely, that the availability of a verdict of not guilty on the ground of mental illness following a special hearing was omitted from section 19(2) by inadvertence. We will say no more about this submission. We do not mean to include it in later references to Ms Baker's submissions.

On more secure ground, Ms Baker referred to section 22(2) (quoted above). This provision is to the same effect as section 25. However, it carries the additional words that a verdict of not guilty on the ground of mental illness following a special hearing is equivalent to such a verdict following an ordinary trial "for all practical purposes". This phrase fortified the argument in reliance on section 25.

Ms Baker referred to section 28 (quoted above) which relates to a verdict that, on the limited evidence available, the person committed the offence or an alternative offence. It provides, in effect, that the verdict is not a bar to criminal proceedings for the same or substantially the same offence if the person ceases to be in detention before the expiry of the limiting term. Ms Baker submitted that it was significant that there was no corresponding provision in relation to a verdict of not guilty on the ground of mental illness following a special hearing, nor for allowing time in detention to be taken into account if, criminal proceedings having been resumed, the person was convicted and a custodial sentence was imposed. The absence of any such provision in relation to a verdict of not guilty on the ground of mental illness following a special hearing was, in Ms Baker's submission, a further indication that a verdict of not guilty on the ground of mental illness following a special hearing was intended to be final.

The submission in relation to section 28 went further than that. It was observed that, if section 47(4) applied to a person found unfit to be tried and subsequently found not guilty on the ground of mental illness following a special hearing, the person might be found, on enquiry by the Court, to have become fit to be tried. That would require the Director of Public Prosecutions to decide, pursuant to section 29, whether to prosecute the proceedings, and there would then be an ordinary trial, pursuant to section 30, if the Director of Public Prosecutions decided to do so. However, as a practical matter, the Director's decision could only be, in these circumstances, to refrain from prosecuting the matter further in view of the principle of double jeopardy. That was because the verdict of not guilty on the ground of mental illness following a special hearing was, pursuant to section 22(2) and section 25, equivalent to a verdict of not guilty on the ground of mental illness following an ordinary trial, and there was no provision such as section 28(2) allowing further proceedings to be prosecuted in relation to the same offence following such a verdict.

It appeared, therefore, in Ms Baker's submission, that, if section 47(4) applied in the present circumstances, a subsequent finding by the Court that the person had become fit for trial would necessarily result in the person being discharged without the option of the person being subjected to an ordinary trial. It was submitted that this consequence cannot have been intended, as section 30 demonstrated, and, accordingly, section 47(4) had to be construed in the limited way which Ms Baker proposed.

Ms Baker submitted that, if that consequence was incorrect, the principle of double jeopardy was relevant in another way. She cited the principle that a court will prefer a construction which least infringes common law rights and the right not to be placed in double jeopardy was a fundamental common law right. Whilst an

ordinary trial might be advantageous in some circumstances it could be decidedly disadvantageous in others. Accordingly, the principle against double jeopardy applied.

It was submitted, in these circumstances, that, had the legislature intended that, notwithstanding a verdict of not guilty on the ground of mental illness following a special hearing, a person, having become fit for trial, could be tried again for the same offence at an ordinary trial, it would have provided for such a course expressly, as it did by section 28(2) in relation to persons found, on the limited evidence available, to have committed an offence. Accordingly, it was submitted, section 47(4) should be read in the way proposed, which would avoid putting in double jeopardy persons who, having been found unfit to be tried, were subsequently found not guilty on the ground of mental illness following a special hearing.

Ms Baker also referred to section 45 (paraphrased above). The section relates to persons who have been found, on the limited evidence available, to have committed an offence and who have been ordered to be detained. The section provides that the Tribunal must review such a person's case as soon as practicable after the order that the person be detained and must, on such review, determine whether, in its opinion, the person has become fit to be tried. Any such finding triggers the operation of section 29 and opens the way to the person being dealt with by discharge at the discretion of the Director of Public Prosecutions or, alternatively, by ordinary trial.

Ms Baker observed that section 44 of the Act is the corresponding provision where a person is found not guilty by reason of mental illness and has been ordered to be detained. The section applies to a case where the verdict has been returned following a special hearing or following an ordinary trial. Like section 45, it makes provision for review by the Tribunal as soon as practicable, but there is no provision in section 44, as in the case of section 45, for the Tribunal to determine whether the person has become fit to be tried in a case where there has been a prior finding of unfitness and the verdict has been returned following a special hearing. This, it was submitted, was a further indication that it was not intended that fitness for trial could to be reviewed in the case of a person found unfit to be tried and subsequently found not guilty by reason of mental illness following a special hearing.

Ms Baker also referred to judicial consideration of the operation of the Act. She cited a number of instances where judges of the NSW Supreme Court had, albeit in obiter dicta, made statements which reflected their expectation that a verdict of not guilty on the ground of mental illness following a special hearing would result in the person being detained as a forensic patient and not released until such time as the Tribunal decided to do so. Whilst not constituting binding authority, these statements are, technically, persuasive

authority. They are, however, to be received with caution in relation to the present issue, there being no reason to suppose that a contrary argument on that issue was advanced in these cases for the judges' consideration. This submission is noted but, in the circumstances, we give it no weight.

The same caution has to be exercised in relation to Ms Baker's reference to a publication of the NSW Law Reform Commission, *Consultation Paper 6: People with cognitive and mental health impairments in the criminal Justice system: criminal responsibility and consequences* (2010), where it was said, at p. 44, that, in the case of a verdict of not guilty on the ground of mental illness following a special hearing, there was no provision for the finding of unfitness to be reopened if the person became fit for trial. We make the same observation concerning the weight to be accorded to this statement as in relation to the dicta referred to in the previous paragraph.

SUBMISSIONS IN REPLY ON BEHALF OF THE PATIENT

Mr O'Brien went to the central theme of Ms Baker's argument, namely, that, in consequence of the verdict of not guilty on the ground of mental illness following a special hearing, the patient was not "a person unfit to be tried" within the meaning of section 47(4). He submitted that this conclusion was precluded by section 15, referred to in his opening submissions. The section was now invoked in an additional way.

The section provides that it is presumed that a person who has been found unfit to be tried continues to be unfit until the contrary is, on the balance of probabilities, determined to be the case. Mr O'Brien observed that a verdict of not guilty on the ground of mental illness at a special hearing was not such a determination. Accordingly, in his submission, the contention that a person, found unfit to be tried, ceased to be a person found to be unfit within the meaning of section 74(4), when subsequently found not guilty on the ground of mental illness following a special hearing, was inconsistent with the operation of section 15.

We have to say that this submission puts a gloss on Ms Baker's argument which is not there. Ms Baker's submission was not that sections 22(2) and 25 operate to convert a person found to be unfit to be tried into a person fit to be tried. Rather, it was that, having regard to those sections and the Act as a whole, a person found to be unfit to be tried and subsequently found, at a special hearing, to be not guilty on the ground of mental illness was not "subject to a finding that the person is unfit to be tried" within the meaning of section 47(4). There is no question there of a person *ceasing to be unfit to be tried.*

Next, it was submitted that it is integral to the scheme of the Act as disclosed by sections 11, 12, 13 and 14, that, a finding as to fitness by the Tribunal being provisional, the only way a determinative decision as to

fitness may be made under the Act is by a judge, following an enquiry by the judge into the question. It was submitted that for a person found unfit to be tried to cease to be subject to that finding in consequence of a verdict of not guilty on the ground of mental illness ran counter to the scheme of the Act in that regard.

Again, we have to say that a distinction has to be drawn between a person *not being* "subject to a finding that the person is unfit to be tried" within the meaning of section 47(4) – that being Mr Baker's argument – and a person *ceasing to be* subject to such a finding. The argument is not that the status of the person as to fitness is changed from being subject to a finding that the person is unfit to not being subject to such a finding. The submission is that a person found not guilty on the ground of mental illness after a special hearing is not a person "subject to a finding that the person is unfit" within the meaning of section 47(4), notwithstanding that the person has been found to be unfit and has not been found to have become fit.

As to section 22(2) and section 25, Mr O'Brien submitted that these provisions should be read down to accommodate section 47(4) and (5) in view of the mandatory terms of those subsections. We take the argument to be that sections 22(2) and 25 should be read as relating only to the orders which might be made by the Court following a verdict of not guilty on the ground of mental illness following a special hearing.

The submission shows how sections 22(2) and section 25 can be read if section 47(4) requires the Tribunal to decide whether a person has become fit to be tried in a case where the person has been found, at a special hearing, to be not guilty on the ground of mental illness. However, it does not resolve the primary question as to whether section 47(4) and (5), should be construed in that way.

It was further submitted that section 25, which appears to cover the same field as section 22(2), was in more limited terms and should, accordingly, be read as limiting the operation of section 22(2).

It is not entirely clear why the legislature thought it necessary to include section 25 in view of section 22(2). It does seem, however, that section 22(2) and (3) were intended to specify the legal content of the verdicts available following a special hearing, and that sections 24, 25, 26 and 27 were intended to specify what follows from each of those verdicts respectively. In the case of a verdict of not guilty on the ground of mental illness, the legal content and what follows are stated in similar terms and to similar effect, the only discernible difference of any significance between the two provisions being the phrase "for all purposes" in section 22(2). It may have been thought useful, nonetheless, to include section 25 in the series of sections which relate to what flows from each of the available verdicts, lest something be implied from the omission.

Whatever may have been the purpose of including section 25, we see no reason for concluding that the legislature intended, by enacting section 25, that the phrase "for all purposes" in section 22(2) should be disregarded.

DISCUSSION

It is common ground that there is a tension between section 47(4), on the one hand, and sections 22(2) and 25, on the other. The question is how that tension is to be resolved.

Little is to be gained from an attempt to give section 47(4) a purposive construction. On the one hand, there is to be found in the statute recognition of the value of an ordinary trial in the case of a person found unfit to be tried and who subsequently becomes fit. The person might be acquitted or, if convicted, might not be given a custodial sentence or might be given a custodial sentence of shorter duration than detention under the jurisdiction of the Tribunal. On the other hand, a person found not guilty on the ground of mental illness is found to have committed an offence when mentally ill and, if ordered to be detained, a serious offence. The mental illness will have been found to have contributed to the offence by rendering the person incapable of knowing the nature and quality of the act or that the act was wrong. Protecting the safety of members of the public is mentioned specifically in section 40 as an object of the Act. Release in such a case, only if the Tribunal is satisfied that the safety of the person or any member of the public will not be seriously endangered, may be seen as serving that objective. So too the requirement to have regard to an independent expert opinion concerning such danger as a consideration relating to release.

Obviously enough, the two objectives to which we have referred pull in opposite directions. Minds may differ as to how they are to be balanced out. The NSW Law Reform Commission in its *Report 138, People with cognitive and mental health impairments in the criminal Justice system; Criminal responsibility and consequences*, recommended that a limiting term should be set for persons found not guilty on the ground of mental illness following a special hearing and who have been ordered to be detained, in the same way as now occurs in the case of a person found, on the limited evidence available, to have committed the offence or an alternative offence (see [7.83] - [7.89] and Recommendation 7.2). Review of unfitness for trial in the case of a person found not guilty on the ground of mental illness would be a logical consequence of such a change in the law. That, however, is beside the point. What is presently relevant is how the balance between these conflicting purposes is struck in the legislation, not how – on one view or another – it ought to be struck as a matter of policy.

The relevant point is that the existence of two conflicting objectives, inherent or stated in the legislation, precludes a purposive construction approach to the question of how a particular provision in the legislation is to be read. Which objective does one select? So one turns to the scheme of the Act for an indication of the intention of the legislature.

A person found to be unfit to be tried may be required to undergo a special hearing. Every person who is subjected to a special hearing is a person found to be unfit to be tried. There is a uniformity in that characteristic on entry to a special hearing. By contrast, each person leaves the special hearing process with one of four available verdicts, and the legislation specifies how the person is to be dealt with in each case.

- In the case of a verdict of not guilty, the person is to be dealt with as if found not guilty at an ordinary trial.
- If the person is found, on the limited evidence available, to have committed the offence or an alternative offence (which accounts for two of the available verdicts) and the person is ordered to be detained, a limiting term will also have been nominated, thereby setting the maximum period of detention, and the person will be discharged or subjected to an ordinary trial in the discretion of the Director of Public Prosecutions if the person becomes fit for trial during the period of the limiting term.
- If the person is found not guilty on the ground of mental illness, the person is dealt with as if found not guilty on the ground of mental illness at an ordinary trial. If such a person is ordered to be detained, the period of detention is indeterminate, release being possible only by order of the Tribunal which must be satisfied that neither the patient nor any member of the public will be seriously endangered by the person's release.

Section 47(4) is ancillary to the requirement that the Tribunal review the case of every forensic patient periodically. It is in terms requiring review of the question of fitness for trial in the case of any forensic patient who is "subject to a finding that the person is unfit to be tried". Taken literally, those words would include a person found unfit to be tried and subsequently found at a special hearing to be not guilty on the ground of mental illness. A literal reading of the subsection is, however, not consistent with the scheme of the Act as outlined above.

How then is section 47(4) to be accommodated in the context of the Act as a whole?

Counsel Assisting proposes, as a solution, that, on a proper construction of section 47(4), a person found not guilty by reason of mental illness following a special hearing is not a person "subject to a finding that the person is unfit to be tried" within the meaning of the subsection. That is easily said but one has to ask in what sense a person found to be unfit to be tried is not "subject to a finding that the person is unfit to be tried" within the meaning of the subsection. The answer appears to be: In the sense that, having regard to sections 22(2) and 25 and to the scheme of the Act as a whole, it is apparent that the subsection is not intended to apply to a person found not guilty on the ground of mental illness following a special hearing.

The proposed approach has the virtue of rendering section 47(4) consistent with the scheme of the Act as a whole. As such, the approach answers to the principle that, where possible, the provisions of a statute should be read so as to achieve consistency. However, the disadvantage of the approach is that it introduces a fiction that a person found unfit to be tried, and accordingly subject to a finding that the person is unfit to be tried, is not a person subject to that finding by reason of the happening of an event, namely, a verdict following a special hearing that the person is not guilty on the ground of mental illness. In short, it requires that the phrase "subject to a finding that the person is unfit to be tried" should not be given its ordinary meaning in consequence of that event. One does not read the words of a statute contrary to their ordinary meaning if that is unnecessary.

In our view, this difficulty is easily and properly avoided by accepting the reality of a conflict between section 47(4), on the one hand, and sections 22(2) and 25, on the other, and resolving that conflict by recognising a statutory intention that any provision of the Act which provides for a course potentially at odds with that prescribed by sections 22(2) and 25 is not to operate in that way. That intention is to be found in the phrase" for all purposes" in section 22(2) which is readily construed as meaning that any other provision of the Act potentially at odds with section 22(2) in its effect is overridden to the extent that it has that effect.

This approach does not deprive section 47(4) of work to do. The subsection continues to operate according to its terms in the case of persons found at a special hearing, to have committed the offence on the limited evidence available.

The foregoing approach would be sufficient to decide the matter in question. However, there are a number of other provisions in the Act and omissions from the Act, apart from sections 22(2) and 25, which are referred to in the submissions of Counsel Assisting and summarised above in these reasons. They fortify the foregoing approach conclusively.

We should mention that there is a further principle of statutory interpretation that, in the event of manifest conflict between general and specific provisions in legislation, a specific provision prevails over a general one (the maxim "generalia specialibus non derogant"). The principle is not, however, one which overrides all other principles of statutory interpretation. In *Commissioner of Police v Eaton* [2013] HCA 2, Crennan, Kiefel and Bell JJ, citing earlier authority, said, in their joint judgment, at [46] -

> Lord Wilberforce went on to observe that discussion of these matters commonly involves consideration of the rule of construction [the maxim "generalia specialibus non derogant"] which presumes that a later, general enactment is not intended to interfere with an earlier, special provision unless it manifests that intention very clearly. Even so, the question as to the operation of the statutes remains a matter to be gleaned by reference to legislative intention. That intention is to be extracted "from all available indications".

Although the discussion in that case related to the application of the principle to an inconsistency between successive statutes, the discussion is also relevant to the resolution of an inconsistency between provisions in the one statute.

It was submitted in argument, in the present matter, that section 22(2) and section 25, on the one hand, and section 47(4), on the other, were all general provisions or, alternatively, that section 47(4) was more general than section 22(2) and section 25.

It is unnecessary to decide whether the classes of person to whom these provisions relate sufficiently coincide to attract the principle of statutory interpretation under discussion; nor, in that event, which of the provisions, if any, are to be regarded as general or specific in relation to each other. That is because, assuming for the purposes of the argument, that the principle is attracted and that section 47(4) is a specific provision relative to sections 22(2) and 25 and is, therefore, prima facie, to be given priority, the present case comes squarely within the qualification to the principle, the legislative intention to give priority to sections 22 (2) and 25 over section 47 (4) being patent having regard to the considerations discussed above.

CONCLUSION

For these reasons, it is the determination of the Tribunal that, in the case of a forensic patient such as Mr Ephram, who has been found unfit to be tried and who has subsequently been found not guilty on the

grounds of mental illness following a special hearing, the Tribunal is not competent to "recommend", pursuant to section 47(4) of the Act, that the person has become fit to be tried.

Mr Ephram's application that the Tribunal so "recommend" is accordingly dismissed.

This result finalises the present review, in view of the arrangement concerning its limited ambit.

Since this has not been a normal periodic review, the next periodic review of Mr Ephram's case should be held within 6 months from 12 September 2013, that being the date of the last normal periodic review.

This is the unanimous decision of the panel.