Mental Health Review Tribunal
New South Wales

Case Name:	Mr Franklin
Medium Neutral Citation:	[2025] NSWMHRT 2
Hearing Date(s):	24 July 2025
Date of Decision:	25 August 2025
Jurisdiction:	Mental Health Review Tribunal
Before:	Deputy President the Hon Ann Ainslie-Wallace AM Dr Victor Storm, Psychiatrist Ms Lyn Anthony, Psychologist
Decision:	The Tribunal declined to order Mr Franklin be conditionally released and continued the current Tribunal order which is that he be detained.
Catchwords:	Sufficient time in custody; limiting term; punishment; sentencing; conditional release; cognitive impairment; deterioration in health; change since imposition of limiting term
Legislation Cited:	*Mental Health and Cognitive Impairment Forensic Provisions Act 2020* *Mental Health Act 2007* *Mental Health (Criminal Procedure) Act 1990* Crimes (Sentencing Procedure) Act 1999 *Sentencing Act 1989 (NSW)* Crimes (Administration of Sentences) Act 1999
Cases Cited:	Attorney General for the State of NSW v XY [2014] NSWCA 466 where Basten JA said: at [168] Subramaniam v The Queen [2004] HCA 51 R v Mailes [2004] NSWCCA 394 at [22] R v Mitchell [1999] NSWCCA 120 at [21] R v Mailes at [32] Mitchell at [49] Adams [2013] NSWMHRT 1 Newman v R, [2007] NSWCCA 103 at [35] *DPP v Mills supra at [38]-[39]; Smith v The Queen [2007] NSWCCA 39 at [61]-[63])* R v Mailes R v Mitchell Lindsay J in A v Mental Health Tribunal (no 4) [2014] NSWSC 31 Carr v Western Australia [2007] HCA SS at [5]

Category:	Principal judgment
Representation:	Counsel: William de Mars, Barrister, for forensic patient Solicitors: Mr Callum Hair, Mental Health Advocacy Services instructing William de Mars, Barrister Solicitor for Minister and Attorney General: Calum Brunton, Solicitor of Crown Solicitor's Office Tamara Phillips, Solicitor of Crown Solicitor's Office
File Number(s):	[2025] NSWMHRT 2
Publication Restriction:	This is a de-identified version of the decision

JUDGMENT

The Tribunal declined to order Mr Franklin be conditionally released and continued the current Tribunal order which is that he be detained.

SUMMARY

1. Mr Franklin is a forensic patient. Mr Franklin's current Tribunal order dated 28 February 2023 is for detention in a correctional centre.

2. At this hearing the Tribunal was asked by Mr Franklin's lawyer and by the treating team to consider making an order for conditional release.

3. The matter had been previously adjourned on 1 May 2025 when the Tribunal was asked only to consider whether Mr Franklin had spent "sufficient time in custody" pursuant to s84(1)(c) of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* ("the Act"). It was determined by that panel that the hearing should be adjourned to consider all of the sections of the Act relevant to the issue of Mr Franklin's conditional release.

4. At this hearing, the Tribunal was assisted by detailed written and oral submissions on behalf of the Attorney General and from the Mental Health Advocacy Service ("the MHAS") who appeared for Mr Franklin.

STATUTORY CRITERIA

5. The Tribunal must review forensic patients at intervals of six months – s78(d) of the Act

6. At a review of a forensic patient, the Tribunal may make orders about the patient's detention, care or treatment in a mental health facility, correctional centre, detention centre or other place; or conditional or unconditional release: s81 of the Act.

7. In reaching its decision the Tribunal notes that a forensic patient who is ordered to be detained in a mental health facility should, so far as practicable, be detained in a mental health facility or other facility that is appropriate to the patient's needs and appropriate having regard to the safety of the patient and other persons: s70(2) of the Act.

8. The Tribunal also has had regard to the principles set out in s68 of the *Mental Health Act 2007* which concern the care of people with a mental illness or mental disorder and in particular that people with a mental illness should receive the best possible care and

treatment in the least restrictive environment enabling that care and treatment to be effectively given. The Tribunal also has taken into account s69 of the Act the objects and general principles governing the Act which concern the protection of members of the public and the provision of care treatment and control of persons subject to criminal proceedings who have a mental health impairment or cognitive impairment and the facilitation of treatment of those people.

9. The Act sets out a number of other matters that the Tribunal must also consider when conducting a review and which must apply to all orders made by the Tribunal. They are set out in s 75 of the Act.
   a) Does the person have a mental health impairment or cognitive impairment?
   b) Are there 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; and the continuing condition of the person, including any likelihood of deterioration and the effects of that deterioration: sand
   c) the continuing condition of the patient including any likely deterioration in the patient's condition and the likely effects of that deterioration.

10. Section 84 of the Act falls within Division 3, "Reviews of Forensic Patients by Tribunal". That Division provides, amongst other things, for making an order for a forensic patient's continuing detention, for the transfer of a forensic patient and for the release of a forensic patient.

11. It is within this Division, s84 that the present controversy arises.

12. Section 84 states:

Matters that Tribunal must consider when determining whether to release a forensic Patient

(1) ***General matters for consideration****. The Tribunal must not make an order for the release (including the conditional) release of a forensic patient unless it has considered the following matters –*

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

b. A report by a forensic psychiatrist or other person of a class prescribed by the regulations, who is not currently involved in treating the patient, as to the condition

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

c. *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.*

(2) ***Tribunal must be satisfied patient or public safety not seriously endangered.*** *The Tribunal must not make an order for the release (including the conditional release) of a forensic patient unless it is satisfied that the safety of the patient or any member of the public will not be seriously endangered by the patient's release.*

13. In this matter the Tribunal had before it a report of a forensic psychiatrist, Dr B dated 3 April 2025 which meets the criterion set out in s84(1)(b).

BACKGROUND

14. Before turning to the issue of Mr Franklin's conditional release, it is helpful to set out some background.

15. Mr Franklin is presently aged 86 and has been a forensic patient since 11 November 2022 when he was found guilty on the limited evidence available of 8 counts of sexual offences against boys who were his pupils at the school at which Mr Franklin was then teaching. The offences took place in the 1970s and 1980s. After a Special Hearing, Mr Franklin was subject to a limiting term of 5 years which will expire on 10 November 2027.

16. Up until the imposition of the limiting term, Mr Franklin had been living with his foster son, Mr Franklin and his family in a rural setting some 30 minutes out of Coffs Harbour. Mr Franklin was first detained at the Clarence Correctional Centre on the North Coast of NSW which was reasonably close to where his foster son lives. Presently, Mr Franklin is living in the Hamden Unit in a facility for aged and frail persons, at the Metropolitan Remand and Reception Centre at Silverwater. He reports himself to be happy there and reports from the treating team indicate no problems or issues with his living circumstances.

17. Mr Franklin has a diagnosis of major neurocognitive disorder and he has a number of medical conditions including hypertension, chronic lumbar back pain and osteoarthritis of his hips. He has glaucoma, intermittent incontinence. In 2021 he suffered from a stroke for which he was hospitalised for some time. He has been diagnosed with melanomas on his scalp which required surgical excision and which require follow up monitoring. In 2022 he fell occasioning a head injury. His physical health complications

are well summarised in prior Tribunal written Reasons for Decision and also the sentencing reasons of the District Court.

Mr Franklin

18. Mr Franklin's foster son lives with his wife and four daughters, aged between 12 and 21. Mr Franklin Junior presently works but is looking to reduce the number of days he works. His wife does not work outside the house. Recently their 21 year old daughter has returned to live with them while she looks for work. The property apparently comprises two houses and it is proposed that the younger three daughters live together in a house separate from the main house in which Mr Franklin Junior and his wife and their oldest daughter will live and provide care for Mr Franklin.

19. Mr Franklin Junior said that he has installed smart locks and sensor cameras in the main house so that Mr Franklin's movements can be detected, presumably at night.

20. Mr Franklin Junior proposes that if Mr Franklin lives with him, he will be constantly supervised by an adult and will not be permitted to be alone with children. It was accepted that the wife of Mr Frankin Junior would, from time to time, have to go into Coffs Harbour for usual shopping and the like. It was not suggested she would take Mr Franklin with her and the Tribunal assumes in that event that he will remain in the home with the 21 year old. Mr Franklin Junior said that no children, presumably friends of the younger children, will be permitted to come to the house.

21. It was not indicated what work the oldest girl is looking for nor how long it is anticipated that she will remain at home assisting her parents with the full time care of Mr Franklin.

22. Mr Franklin Junior said that in his house Mr Franklin will have access to music and books and photos to help him remember the past. He did not mention any activities outside the home environment.

23. As to the index offences, when asked whether he accepted that Mr Franklin had committed the sexual assaults, Mr Franklin said "the court decided he had, and we accept the court's decision" but later said that he and his wife will take the supervision of Mr Franklin seriously because they do not want him to return to prison.

Neuropsychologist report

24. Two reports dated 28 April 2025 and 15 July 2025 by Mr A, clinical neuropsychologist

were before the Tribunal. In the April report, Mr A referred to previous reports which note that Mr Franklin has marked cerebro-vascular risk factors and past brain imaging has revealed generalised age related cerebral and cerebellar atrophy together with chronic ischaemic change secondary to microvascular disease. He has co-morbidities of post traumatic stress disorder, depression and generalised anxiety.

25. Mr Franklin was said to be moving around the Hamden Unit independently and while he uses a walker can manage without one. He spoke favourably about his living conditions and made no complaints. He is independent in his self care.

26. Mr A noted that Mr Franklin is compliant with his medication and requests by staff, he has posed no problems while in detention.

27. However, Mr A noted that given the progressive nature of Mr Franklin's neurodegenerative disease, he will experience a decline in adaptive functioning and while he is presently independent with the usual activities of daily living, his care demands are considerably reduced because of the structured and routine nature of the custodial setting. Observing that the Notice of Intention is for Mr Franklin to be conditionally released to live with his son, Mr A said that it will be more difficult for Mr Franklin to manage his self care and that it is inevitable that Mr Franklin will eventually require 24/7 nursing care.

28. Mr A further noted that while Mr Franklin has made some modifications to his family home in anticipation of Mr Franklin living with them, the home has not been assessed by an Occupational Therapist to gauge its suitability for Mr Franklin's physical needs.

29. Given the inevitable decline in Mr Franklin's mental state Mr A considered that conditional release to his son's home may not be appropriate in the future given the increased care needs that will accompany that mental state decline and residential aged care accommodation will need to be provided.

30. In the updated report of July 2025, Mr A noted that on 10 July 2025 Mr Franklin was assessed by a Planning for Adjustment, Responsivity, Reintegration, Criminogenic Needs and Communication (PARRCC) which suggested he has "complex needs with a focus on criminogenic needs". It was noted that in this assessment with Mr Franklin, he said he did not remember or was not sure of the answers to questions. The purpose or effect of the assessment was not explained.

31. Mr A gave evidence at the Tribunal hearing. He said that Mr Franklin has been approved for residential aged care or, in the alternative, he can access a high level of in home care however he said that while Mr Franklin has been assessed as to his care needs, there is a delay in finding care workers to deliver that care, and it is not at all clear whether carers would be available to provide that care for him.

32. He said that Mr Franklin's offences are a barrier to him being accepted into respite care.

33. Mr A said that Mr Franklin has been assessed as having a "high cognitive reserve" which can lead to an immediate and dramatic deterioration in his cognition rather than the more progressive deterioration that might be expected with someone with dementia who did not have that high cognitive reserve. With that rapid decline will come a dramatically increased level of needs which, Mr A did not think could be met within the family home.

34. Mr A said that at the moment, Statewide Disability Services did not oppose conditional release to his son's home from a disability needs perspective but was astute to note that this may not continue to be appropriate once his condition deteriorates.

35. No case manager has been found to co-ordinate Mr Franklin's care if he is to be conditionally released, and those obligations will fall to the family. While Mr Franklin's past general practitioner has said that he would resume his general care and will liaise with Community Care Services and specialist services, there was no evidence before the Tribunal that such a specialist is reasonably available to Mr Franklin if he is living with his son and family.

Risk Assessment

36. Dr B provided an independent risk assessment of Mr Franklin for the purposes of s84(1)(b) dated 3 April 2025. Dr B said that Mr Franklin meets the criteria for major neurocognitive disorder due to vascular disease without behavioural disturbance. His cognitive deficits interfere with his independence in everyday activities and, taking into account the charges, he meets the criteria for a paraphilic disorder with a tendency to possible paedophilia. His cognitive disorder impairs his attention, executive function, short and long term memory loss, loss and social cognition and decline in function. He is disoriented to time and place.

37. As to the risk of re-offending, Dr B said that it may be slightly increased with progressive worsening of his dementia because of disinhibition although his cognitive decline will

make him less able to do complex tasks like tracking and grooming a child and his need for increasing assistance in daily living tasks might be protective of any risk of further offending. Dr B also took into account that Mr Franklin uses a walker to get around which too might reduce the likelihood of further offending

38. As to the risks inherent in being released to live with his foster son, and his four daughters, Dr B said that Mr Franklin's offending profile is of sexual assaults against young males, and thus he would pose a low risk of offending to the young girls in the house, he said however that Mr Franklin should not be left alone in the company of the female children or any children and there is a possible risk of offending if young male children came to the house.

39. Dr B said that there was a possible risk of damage to his victims if Mr Franklin was not subject to geographical limitations on his movements.

40. In summary, Dr B said that Mr Franklin has not been tested in the community since he was found guilty and would be suitable to be placed in a dementia specific locked nursing home where his risks could be managed and his access to children is limited.

41. Conditional release will not endanger Mr Franklin and his present care needs can be met by his foster son however as his dementia progresses he will require further support and accommodation in residential aged care.

42. He concluded:

> *I do not believe any member of the public would be seriously endangered as long as there was no access to children, specifically males, that he had an adult with him at all times, and his carers were able to enforce the conditions of him being a "registerable person". He is progressively frail physically. There have not been any incidents of physical or sexual aggression towards other whilst in custody.*

43. Dr B gave oral evidence at the Tribunal hearing. In that evidence he said that even though Mr Franklin's previous offending was against young males, he would be concerned about him having access to any children, whether male or female. While, Dr B said that Mr Franklin's cognitive decline makes him less able to engage in grooming behaviour with children, the decline can however give rise to opportunistic risk through disinhibition and impulsivity. Although Mr Franklin is frail, he can walk around without

the assistance of a walker.

44. As to Mr Franklin's inevitable cognitive decline, Dr B said he will need nursing home accommodation with the multidisciplinary care necessary to engage people with dementia. He observed that it is difficult to find that kind of accommodation. Mr Franklin is not able to be supported by the Community Mental Health System because he does not have a mental health impairment.

45. Dr B recommended a dementia specific nursing home for Mr Franklin. He noted that with cognitive decline Mr Franklin will require assistance with moving, feeding, continence management and lifting. He will require holistic care and diversional activities. However, he said living with family can be comforting and supportive.

46. Given that Mr Franklin is currently settled and happy in his present accommodation, Dr B was asked how a move to his son's home would affect him taking into account his cognitive difficulties. Dr B said Mr Franklin would find it very distressing which could, of itself, lead to a worsening of his condition and it would take him a long time to settle, and then, if his condition deteriorated as rapidly as predicted, he would have another, unsettling move to a specialist dementia facility.

47. Dr B said that before Mr Franklin could be moved to live with his son, there would need to be extensive investigation of the physical environment and ideally the family and Mr Franklin's medical team ideally would link into Community Mental Health teams to monitor him and to link him with an Aged Care team. But added that unfortunately no team is available to him. Further he needs to have access to an aged care psychiatrist and other assistance but without it, it will increase the burden on his family carers.

48. The MHAS argued that Mr Franklin should have conditional release to live with his foster son and family until the point of his decline is reached that it is no longer possible. The MHAS submitted that while the possibility of Mr Franklin's neurocognitive decline may give rise to impulsive and opportunistic risks of further sexual offending, his risk profile is attraction to males which limits the risk to the community. The Tribunal however notes Dr B's oral evidence at the hearing that he would be concerned about him having access to any children, whether male or female. The MHAS argued that living with his family will afford Mr Franklin a caring household which will help him, even though other types of care, such as diversion and occupational therapy will not be available to him.

49. The Attorney General submitted that to conditionally release Mr Franklin would seriously endanger the community and pointed to Dr B's evidence about his not being permitted to have access to any children of any sex. At best, it was submitted that Mr Franklin's family hopes to have a full time adult presence with Mr Franklin but it was argued that with Mr Franklin working and apart from the usual needs of Mrs Franklin to go into town for shopping and the like, the burden of Mr Franklin's care will fall to her and perhaps their oldest daughter, from whom the Tribunal heard no evidence and in relation to whom there is no evidence of her plans for the immediate future nor for that matter her views on being a constant adult presence from time to time to supervise Mr Franklin.

50. It was submitted that there was no evidence about how the family will manage the constant adult supervision of Mr Franklin taking into account the usual family needs to leave the house.

51. The Attorney General submitted that while conditional release to Mr Franklin's home may be less restrictive care than at present, it will be neither safe nor provide effective care because he will have no access to necessary services and supports that are available to him presently and in terms of geriatric care.

52. Further it was submitted that there was no evidence from Mr Franklin as to how Mr Franklin will be managed in the face of a rapid cognitive decline, or how consequent on that decline the disruption of a further move to dementia care unit would be managed.

53. There can be no doubting the sincerity of the desire of Mr Franklin Junior and his wife's to have Mr Franklin released from detention to live with them, nor their views that for him to be in a house with people who care about him will be beneficial for him.

54. While the Statewide Disability Service does not oppose Mr Franklin's conditional release to live with his foster son, the evidence of Mr A and that of Dr B demonstrates that while to live with Mr Franklin will provide Mr Franklin with a less restrictive environment in which to live, he will not have access to the necessary supports he presently enjoys and which he will need in the face of his inevitable and predicted rapid neurocognitive decline.

55. The burden of his care, up to that point, will fall solely on the family and the general practitioner whose practice is in Coffs Harbour and who while happy to take over Mr Franklin's care, did not indicate that he could or would be available out of office hours

or indeed to make home visits.

56. The Tribunal also takes into account the evidence that a move from Mr Franklin's present accommodation back to his foster son's home is likely to cause him confusion and distress because of his declining cognition and may precipitate the dramatic and rapid decline in his capacity of which Mr A spoke. A further move, once he is no long able to be cared for at his foster son's home would again, cause him significant confusion and distress.

57. The Tribunal concludes that conditional release will not provide Mr Franklin with care that is consistent, safe and effective and which is necessary for him.

S84(1)(b)

58. The next matter which must be considered by the Tribunal, before any order for conditional release can be made, is the report of the forensic psychiatrist required by s84(1)(b) – in this case the report of Dr B as to the condition of Mr Franklin and whether the safety of Mr Franklin or any member of the public will be seriously endangered by his release. Dr B's opinion is that Mr Franklin is not a danger to himself, and that is accepted.

59. The report indicates that whether or not a member of the community would be seriously endangered rests solely on the capacity for Mr Franklin to be constantly supervised to prevent him coming into contact with children, whether a member of the family household or otherwise.

60. The Tribunal's consideration of the s84(1)(b) report overlaps with the mandatory provision of s84(2).

S84(2)

61. This section provides that a Tribunal must not make an order for release unless it is satisfied that the safety of the patient or any member of the public will not be seriously endangered.

62. In determining this question, the Tribunal is guided by the decision in *Attorney General for the State of NSW v XY* [2014] NSWCA 466 where Basten JA said: at [168]

> *The concept of the public being "seriously endangered by the patient's release"*

undoubtedly encompasses both the nature of the potential harm and the chance of its occurrence. If the conduct which may occur would probably not have serious consequences for any member of the public if it did occur, a reasonably high chance of occurrence would be tolerable. If the anticipated conduct following … non compliance with a regime of medication involved serious physical harm and possibly homicide, a much lower level of risk of occurrence would need to be established for the Tribunal to be satisfied …

63. Here, the identified risk is of Mr Franklin having access to a child and sexually assaulting the child. Ideally, the risk of it occurring would be low because the family are confident (a confidence not necessarily shared by the Tribunal) that they can provide constant adult supervision of Mr Franklin to ensure he never has access to a child or children. However, the risk if it did eventuate would in the Tribunal's view cause significant harm to the child as is well demonstrated by the accounts of the persisting harm experienced by the victims of Mr Franklin's earlier sexual offending.

64. The Tribunal is not satisfied that the safety of a member of the public will not be seriously endangered if Mr Franklin was to be conditionally released to live with his family.

Special hearing and limiting terms s84(1)(c)

65. Given the issues argued on the application, it is useful and important to set out the statutory context.

66. Where the question of a person's fitness to stand trial on charges preferred against them arises, Division 2 of the Act sets out the procedures to be followed in order to make that determination and where after enquiry, a person has been found not to be fit to stand trial and will not become fit within 12 months from that date, the court must hold a special hearing as provided in s54.

67. Section 54 states:

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

68. The section continues and provides that the special hearing is to be conducted "as nearly as possible as if it were a trial of criminal proceedings". For the purposes of the special hearing, the defendant is taken to have entered a plea of not guilty. (s56 (1) and (5) of the Act).

69. Section 59 of the Act provides the verdicts that may be available at the conclusion of a special hearing, relevantly here, ss(1)(c) provides a court may enter a verdict that on the limited evidence available, the defendant committed the offence charged.

70. Where that finding is made, s 62 provides, relevantly, that it constitutes a qualified finding of guilt but does not provide the basis in law for a conviction.

71. The finding of guilt having been made, s63 provides a range of penalties that can be applied.

72. Section 63(2) says:

> ***Limiting Terms****. If the court would have imposed a sentence of imprisonment for the offence if the special hearing had been an ordinary trial of criminal proceedings and the person had been fit to be tried for the offence, the court must nominate a term (a limiting term) that is the best estimate of the sentence that the court would have imposed on the defendant in those circumstances.*

73. Section 63(5) provides that:

> *(****5) Factors for consideration in determining penalty***
> *Without limiting subsection (2) or (3), in determining a limiting term or other penalty, the court—*
> *(a) must take into account that, because of the defendant's mental health impairment or cognitive impairment, or both, the person may not be able to demonstrate mitigating factors for sentencing or make a guilty plea for the purposes of obtaining a sentencing discount, and*
> *(b) may apply a discount of a kind that represents part or all of the sentencing discounts that are capable of applying to a sentence because of those factors or a guilty plea, and*
> *(c) must take into account periods of the defendant's custody or detention before, during and after the special hearing that related to the offence.*

74. Following a special hearing, Mr Franklin was found on the limited evidence available of committing eight offences against four victims - six offences of indecent assault on a male person and two offences of procure an indecent act with a male person. The offences were committed in the 1970s and 1980s in respect to four young boys each of whom was a pupil of Mr Franklin who was their school teacher at the relevant times. The sentencing facts note that in relation to each offence, Mr Franklin lured the child to a private place, once in a school classroom and on other occasions to his house where he sexually assaulted the boys.

75. On [a date in 2022] the Judge of the NSW District Court imposed [eight] limiting terms partially accumulated, the first term expressed to commence in November 2022 and the last term to expire on10 November 2027, amounting to a total limiting term of five years. Of those eight imposed limiting terms, four have been completed, one is presently in force and three are yet to take effect.

76. Once a limiting term has been imposed, the Court must refer the person to the Mental Health Review Tribunal which occurred.

77. The nature of a special hearing and the imposition of a limiting term was considered in *Subramaniam v The Queen* [2004] HCA 51 where the Court said:

> *[28] … 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 the 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. ….*

What is the nature of a limiting term?

78. The present controversy raised the nature and effect of a limiting term. In *R v Mailes* [2004] NSWCCA 394 at [22] in comparing the provisions of the *Mental Health (Criminal*

Procedure) Act 1990 and the *Crimes (Sentencing Procedure) Act 1999* Dunford J said:

> *22 The MHCP Act s 23(1)(b) requires the judge to nominate as the "limiting term" the best estimate of the "sentence" the Court would have considered appropriate if the person had been found guilty of the offence at the normal trial. "Sentence" is not defined in the MHCP Act so I would regard "sentence" in that Act as having the same meaning as in the CSP Act, namely the total or head sentence and not the non-parole period.*

79. A limiting term is not intended to nor is it appropriate for a limiting term to nominate a non-parole period.

80. In *R v Mitchell* [1999] NSWCCA 120 at [21] the plurality 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 this section indicate that the limiting term should be so divided. In the first place, a 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 1989 (NSW). …*

81. The court continued and noted the important difference between a limiting term and a sentence in which a non-parole period was nominated that at the conclusion of the non-parole period, which is that a person may be released to parole subject to consideration of matters set out in the *Crimes (Administration of Sentences) Act 1999* compared with a limiting term, at the end of which the person is entitled to automatic release. (The Tribunal here notes that automatic release is subject to any application for extension of that person's forensic status pursuant to s121 of the Act.)

82. At paragraph 32 in *Mitchell*, the court said in rejecting a submission that without setting a minimum or non-parole period, a person subject to a limiting term may be subject to a longer period in detention than he would have had he been subject to a sentence which had a non-parole period specified:

> *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) to be 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 section 23 is to ensure that a limiting term under the MH(CP) Act is neither more harsh nor more lenient than a total sentence would have been in a 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 MH(CP) Act the concern is with the person's mental state from time to time. A person dealt with under the MH(CP) 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.

83. This view was similarly expressed in *R v Mailes* at [32].

84. The Attorney General’s submissions contended that while no non-parole period is set in a limiting term, in determining whether a person has spent “sufficient time in custody” a notional non-parole period could act as a guidepost to that determination. Equally although to a different point, the MHAS argued that if it was determined that Mr Franklin had not spent sufficient time in custody, he would be unduly penalised because had he been sentenced after an ordinary trial he may have been entitled to a diminution of the statutory ratio between non-parole period and the balance of his sentence because of “special circumstances” applicable to his circumstances.

85. Both propositions must be rejected. First, the authorities make it clear that there is a divergence at the point of sentencing at which a non-parole period is set and a limiting term is imposed. While the non-parole period is the minimum time a person must spend in custody, the additional term is, as the court said in Mitchell, whether a person is released on parole depends on rehabilitation amongst other things. It is not a foregone conclusion that a person sentenced to a non-parole period will be granted parole once the minimum term has expired. Furthermore, that person remains subject to conditions and control and the possibility of return to custody during the parole period.

86. Next, and in part rejection of the MHAS submission about special circumstances, to

attempt to posit a non-parole period in a limiting term, amounts to no more than speculation in the absence of evidence of the circumstances in which the statutory ratio would be departed from.

87. Whether deployed by the Attorney General in attempting to ascertain “sufficiency” or by the MHAS in resisting a conclusion that sufficient time has not been spent, any concept of fixing a hypothetic parole period is riven with potential for unfairness.

Is a limiting term commensurate with or akin to a sentence of imprisonment imposed after an ordinary trial?

88. In setting a limiting term, a judge is required to have regard to the terms of the *Crimes (Sentencing Procedure) Act 1999* (the Sentencing Act), this is clear from the words “the court must nominate a term (a limiting term) that is the best estimate of the sentence the court would have imposed” in s63(2) of the MHCIFPA. Section 3A of the Sentencing Act sets out the purposes of sentencing:

> *(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.*

89. Section 21A of the Sentencing Act lists matters that are to be taken into account when determining the appropriate sentence. They are factors which tend to aggravate the objective seriousness the offence and those in mitigation of the offence which are, in general, matters personal to the offender.

90. The determination of what sentence is appropriate involves both consideration of the purposes of sentencing in s3A, matters to which s21A applies and other matters.

91. It is tolerably clear then that in setting a limiting term, the court’s access to the subjective matters referred to in 21A is limited or not available because of the circumstances of the person in respect of whom a limiting term is being imposed.

92. In *Mitchell* it was said:

> *51. It seems to us, therefore, that the trial judge must look at the particular circumstances of the case and have regard to subjective factors to the extent that they existed at any time after the commission of the offence and before sentence. If a person's mental state means that such subjective factors were not, and because of that mental state could not be, present at relevant times, we are of the opinion that no presumption operates in the accused person's favour and no account can be taken of the absence of those subjective factors. In other words, the court must nominate a limiting term, having regard only to such factors as are in fact present and relevant. In a case where a person's mental condition prevents or inhibits there being subjective factors to take into account, the factors which will be relevant or of primary significance must thereby be objective ones, such as the seriousness of the charge and parity of sentence, if that is a relevant factor.*

93. While mitigatory presumptions such as remorse being demonstrated through a plea of guilt are not available to a person in relation on whom a limiting term is imposed, section 63(5) of the Act operates to include other factors to be taken into account in determining penalty after a finding of guilt. They are that because of the person's mental health impairment the person may not be able to demonstrate mitigating factors for sentencing or to make a guilty plea for the purposes of obtaining a discount on sentence and the court imposing the sentence may apply a discount that represents part of all of the sentencing discounts that are capable of applying to a sentence because of these factors or a plea of guilty.

94. In *Mitchell* at [49] the Court said no general principle can be laid down as to whether and how such subjective factors should be taken into account, noting each case should be determined having regard to its own circumstances.

95. Notwithstanding the provisions of s63(5) there remain limitations on the matters available to be taken into account on determining the "best estimate" of sentence which in the Tribunal's view clearly distinguish it from a sentence passed in the ordinary way and they are not, as the Attorney General's submissions postulate, commensurate.

Has Mr Franklin spent "sufficient time in custody"?

96. The contention in this matter is how "sufficient time" is measured?

97. The Attorney General's submissions contend that this question should be determined by having regard to the length of the limiting term, the sentencing remarks of the court and the patient's history and progress in the forensic system since the imposition of the limiting term. These submissions were basically in accordance with the approach taken by the Tribunal in *re Adams* [2013] NSWMHRT 1.

98. The Attorney General's submissions argue that this approach is consistent with the concept that the imposition of the limiting term has within it a punitive element and thus reference to the length of the limiting term and the sentencing remarks Mr Franklin's time in custody has not achieved adequate punishment for the offending and to find, contrary to the submissions that he had spent sufficient time in custody would not properly hold him to account for his offending nor to properly denounce his conduct. Finally it would not pay proper regard to the lasting harm his offending caused his victims.

99. The MHAS contended first for what may be called the "utility principle" that is that the limiting term having been imposed, the sentencing considerations and the matters referred to by the sentencing judge have no further work to do in determining whether Mr Franklin has spent sufficient time in custody. Rather, it was submitted that that question was to be answered by reference to whether there is any continued utility in Mr Franklin being further detained by having regard to courses or rehabilitation programs available to him in detention and whether he would benefit from having more time in custody to engage in those programs.

100. Because of Mr Franklin's physical condition and declining mental state, it was argued there are no programs of education or rehabilitation available to him while in detention and thus for him to remain in custody would be based purely on his being punished for the offences because there is no utility otherwise for him in being in custody.

101. The MHAS accepted that a limiting term, is by its nature a punishment and so much is to be gleaned from the words of the sections in Division 2 and 3 of the Act. However, once imposed, whether or not sufficient time in custody has been spent must be determined by the objects and principles of the Act contained in ss 69 and 70 of the Act which are beneficial in nature and it was argued that there is nothing within those objects and principles which concern "punishment".

102. To put the issue of whether a limiting term is punishment beyond doubt, in *Newman v*

R, [2007] NSWCCA 103 at [35] Spigelman CJ said rejecting a submission that the purpose of the legislative scheme was to provide a "specific and flexible" procedure for dealing with offences committed by people with a mental health impairment:

> *35 The relevant part of the Act is concerned to establish a regime for the determination of criminal guilt or innocence in circumstances where normal criminal procedures could not apply by reason of the mental condition of an accused at the time of trial. It is incorrect to describe the procedures as "diversionary" or as "flexible". They are alternative procedures designed to ensure that justice is done having in mind the possibility of a person's unfitness to be tried. Justice must, however, be done not only to the accused but to the victim, bearing in mind the public interest in resolving allegations of criminal conduct.*
>
> *….*
>
> *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. …*
>
> *… 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 s22(1). The latter finding is identified in s22(3) as a "qualified finding of guilt". Upon such a finding the court can determine under s23 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".*
>
> *….*
>
> *41. The reference to "any punishment" in s10(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 … In any event, it is well established that the orders of the court after a special hearing constitute punishment. (DPP v Mills supra at [38]-[39]; Smith v The Queen [2007] NSWCCA 39 at [61]-[63])*

103. Support for the beneficial interpretation of the relevant section was said to be found in reference to passages in *R v Mailes* and *R v Mitchell* where the court spoke of the purpose of a limiting term not being "to punish" the person. However, those passages read in context of the whole of the Courts' determination make it clear that the imposition of a limiting term was to set a term of detention that is no harsher (nor more lenient) than the person would have received had they been convicted after an ordinary trial. That is, the limiting term was not a punishment per se.

104. Equally the Tribunal was referred to obiter remarks of *Lindsay J in A v Mental Health Tribunal (no 4)* [2014] NSWSC 31 who when considering and refusing leave to appeal by a forensic patient objecting to the delivery of his medication by depot injection, referred to the provisions of the Act as being "designed to benefit, not punish" a person. While no doubt correct in a general sense, it does not provide support for the "utility" principle in determining the work of a particular section.

105. The Tribunal does not accept this is the appropriate means of determining whether a person has spent "sufficient time in custody".

106. There is no support in the language of Divisions 2 and 3 of the Act which would permit of this interpretation of "sufficient" to mean "utility". Further, it is to be recalled that s84(1)(c) operates to set apart patients who are subject to a limiting term from the other considerations contained within that section in determining the question of release and which include questions of community safety and care, control and treatment. To attempt to determine whether a person has spent sufficient time in custody by reference to matters specifically addressed in the preceding sections, would leave s84(1)(c) with no work to do.

107. Finally, while the objects and principles are guidelines to the administration of the sections of the Act, they cannot drive or change the clear import of the words of individual sections. The Attorney General argued, and the Tribunal accepts, that in any legislation, there may not be complete alignment between expressions of objects and principles and the proper application of individual sections. (see *Carr v Western Australia* [2007] HCA SS at [5])

108. Thus, at the point at which a limiting term is imposed, it constitutes a "punishment" as described by Spigelman CJ in *Newman*. There is no indication in the words of the Act that provide the basis for the fact of the imposition of the limiting term and the reasons

for it being set to one side for the purposes of determining “sufficient time”.

109. In the alternative, the MHAS argued that while the Tribunal could have regard to the length of the limiting term and the reasons for its imposition, it was inimical to the objects and purposes of the Act to decide the question of sufficient time spent in custody solely on the basis of whether the patient had been punished enough. In this aspect of the submissions, the MHAS drew a distinction between the “aspects of punishment” inherent in the determination of sentence and the concept of “pure punishment” which was said to be retributive.

110. The authorities are clear that in arriving at a limiting term, the court is required to take into account the purposes of sentencing and the factors in aggravation of the objective gravity of the offence and those in mitigation to the extent to which they were available.

111. This submission accepted that in sentencing there is an aspect of punishment in denunciation; in holding the person to account for their actions; in deterrence and, in paying proper regard to the impact on the victims of the sentencing. It was argued that these aspects of sentencing do not necessarily have to result in detention and that is clear from the alternate penalties that could be imposed pursuant to s63 of the Act.

112. While so much is apparent, whether and to what extent these aspects of sentencing result in detention form part of the instinctive synthesis necessary to arrive at an appropriate sentence and do not readily or indeed sensibly bear disentangling.

113. The MHAS argued that here, the purposes of denunciation, deterrence and the regard for the harm to the victims had a limited role in determining the question of sufficient time in custody. It was submitted that denunciation arises from the limited finding of guilt and the imposition of the limiting term regardless of the time spent in custody. Further it was argued that deterrence has a limited role to play in the case of a person with a mental illness or, as here, significant dementia. It was submitted that when these aspects of sentencing are removed or found to have little weight, all that is left to determine “sufficient time in custody” is “pure punishment” or retribution which should not play a role in the determination of the question posed by s84(1)(c).

114. We do not agree. First, questions of the patient’s mental incapacity age and prospect of a deterioration in his mental functioning clearly formed part of the sentencing calculus in the present case. Secondly, while a person such as Mr Franklin with limited capacity to

understand the process and in mental state decline, will not necessarily be an appropriate vehicle for specific deterrence, there here are wider aspects of these considerations that transcend the particular circumstances of the patient, namely the need to denounce the offences of sexually abusing children in his care and under his authority and to sound a note of general deterrence. In addition there was the need to recognise the harm to the victims. These aspects remain constant and are not extinguished by the effluxion of time.

115. The Tribunal does not accept the construction that if the only function being served by a person's continued detention is to reflect punishment, it is necessarily inimical to the operation of the Act, but as we have indicated, we do not accept that there is nothing but "pure punishment" to be achieved by Mr Franklin spending further time in custody.

How then is the question of whether a person has spent sufficient time in custody determined?

116. The Attorney General argued, and the Tribunal accepts that this determination requires a comparison – sufficient having regard to what? The answer lies partially in considering the basis and reasons for imposing the limiting term which provides a temporal connection with the process of providing a "best estimate" of the sentence otherwise to have been imposed after an ordinary trial and a consideration of what has, in the intervening period changed.

117. In re Adam, the Tribunal in the course of its consideration of this question set out the submission then made on behalf of the Attorney General in which it was submitted that the question of sufficiency can be answered by determining whether the time already spent recognised the objective gravity of the offending, the harm to the victims and the need to denounce the conduct.

118. The Tribunal finds significant force in this additional consideration. Thus we are of the view that in order to answer the question of whether a person has spent sufficient time in custody, the reasons for and length of the imposed limiting term are clearly relevant as a temporal marker against which the questions of what has changed since that time and has the time already spent in custody recognised the matters of objective seriousness can be measured. Finally, tempering those matters by reference to the person's present mental state and physical condition will bring to bear the necessary application of the objects and principles of the Act.

Length of the limiting term and the reasons for its imposition

119. In determining the best estimate of the sentence which otherwise would have been imposed the Judge took into account:

- *At the time of the offending, Mr Franklin was in a position of authority over the victims which provided his access to them;*
- *The victims were in their early teens which made them more vulnerable to Mr Franklin and Mr Franklin was in his thirties. Mr Franklin abused the age difference between him and his victims to commit the offences;*
- *The offences occurred when Mr Franklin isolated the victims from others*
- *The judge assessed the objective seriousness of each of the offences and found that the offending fell within the lower medium range and high range of objective seriousness for offences of that type*
- *The victim impact statements provided by the victims identified the persisting effects of the offender's conduct on them;*

120. Turning to the subjective features, the sentencing judge found:

- *There was no evidence of offending since the charged crimes and Mr Franklin had no prior criminal convictions, however the judge noted that had he had, it would perhaps have precluded him from obtaining a position as a teacher through which he obtained access to the victims and thus did not provide mitigation for him of the objective seriousness of the offending conduct;*
- *Mr Franklin was found unfit to stand trial and as such he was unable to establish mitigating circumstances that may have been in his favour;*
- *At the time of consideration of sentence, Mr Franklin was 83 years old;*
- *Mr Franklin has significant health problems and his incarceration would significantly increase the risk of his having a stroke however the judge found that while this factor was significant it was not determinative because the nature and circumstances of the offending warranted a sentence of imprisonment regardless of Mr Franklin's health;*
- *While there was no suggestion that Mr Franklin was suffering from a mental health condition at the time of the offending which would diminish his moral culpability, in his present mental state he is a less suitable vehicle for specific deterrence and general deterrence, and his age and other infirmities will make his experience in custody more onerous*

- *There was no evidence that Mr Franklin had accepted responsibility for his offending or acknowledged the consequences of it and in fact at a time before he became unfit, he denied the offences*
- *There was no evidence about his prospects of rehabilitation although the sentencing judge took into account that the likelihood of his reoffending was negligible because of his age and infirmities*

121. The judge noted that while Mr Franklin's physical and mental health issues made him a less suitable vehicle for general and specific deterrence, his conduct required denouncing. He considered that deterrence and community protection did not warrant particular weight and rehabilitation did not appear to warrant emphasis. The judge noted that the harm to the victims must be recognised.

122. The judge observed that the only reasonable conclusion had this sentence been imposed following an ordinary trial, a sentence of imprisonment would have been imposed. In considering what limiting term was to be imposed, the judge took into account that but for his unfitness Mr Franklin conceivably could have pleaded guilty although he noted that before he became unfit, he denied the offences. Thus the judge did not apply a nominal discount for a hypothetical plea of guilty.

123. The structure of the sentences imposed is also relevant to this consideration. The limiting terms were partially accumulated and the sentencing judge noted when reflecting on the "best estimate" of a sentence that would otherwise have been imposed:

> *"Partial accumulation of the sentences would have been required in order to reflect the totality of the criminality involved following an ordinary trial. The limiting terms to be nominated in these proceedings should be similarly partially accumulated in order to reflect the totality of the criminality involved. However it must be born in mind that the determination of partial accumulation of sentences imposed following an ordinary trial would be made with reference to the non-parole period rather than the term of the sentence. The total effective term arising from partial accumulation of the limiting terms appropriate to reflect the totality of the criminality will be indicated but for reasons previously expressed, directions as to commencement and expiry dates will be deferred. The total effective term arising from partial accumulation of all the limiting terms will be five years."*

124. Having taken these matters into account, his Honour imposed eight limiting terms

totalling 5 years.

What has changed?

125. At the time that the limiting terms were imposed, the sentencing judge had before him evidence of Mr Franklin's frail physical condition and the expectation that his mental state would decline with worsening dementia. In imposing the limiting terms, the sentencing judge said that Mr Franklin has:

> *"a significantly increased risk of stroke in custody and in that event the probability of it being fatal or resulting in severe disfunction or deterioration. This evidence establishes there is a risk incarceration may jeopardise the offender's health of life. This is a significant albeit not determinative consideration."*

126. Since the imposition of the sentences, Mr Franklin's physical health remains poor and his mental state has continued to decline. However, the evidence before the Tribunal on this hearing was to the effect that because Mr Franklin is assessed as having had a high "cognitive reserve" he is very likely to have an immediate and dramatic decline in mental capacity rather than a slow deterioration that might occur in patients without that load.

127. While this is in some respects different from the prognosis expected at the time of sentencing, that Mr Franklin's deterioration may be rapid and dramatic, does not, in the Tribunal's view amount to a change of such significance that, of itself, would compel a finding that Mr Franklin has spent sufficient time in custody.

128. At the time the sentence was imposed, the judge considered Mr Franklin's likelihood of re-offending to be negligible, the evidence of Dr B to which we have referred does not necessarily support that position and the Tribunal concludes that there remains a risk of him reoffending which, while small, is not negligible.

Has the time elapsed provided sufficient recognition of the matters referred to in the sentence?

129. At the time of the Tribunal review, Mr Franklin has served slightly more than half of the total imposed term and the Tribunal observes that some of the individual limiting terms are yet to commence.

130. Having regard to the seriousness of his offending, in particular his exploitation of his role of authority over the victims, their ages and vulnerability to him because of his role and

his age, his isolating them in order to commit the offences and, as the sentencing judge remarked, the role of denunciation of those who sexually abuse children and the need to recognise the harm to the victims, this of itself suggests that insufficient time has been spent in custody.

131. However, the Tribunal is satisfied, taking into account the matters to which we have referred and particularly the change and likely deterioration in Mr Franklin’s mental state which when weighed against the recognition of the matters taken into account in sentencing, that he has spent sufficient time in custody. This finding is made understanding that some of the limiting terms imposed on Mr Franklin have not yet commenced but takes account of the totality of the sentence imposed, namely one of five years.

132. This however, is not the end of the consideration of whether Mr Franklin should be conditionally released and by reason of the Tribunal’s findings in relation to the other subsections of s84(1) and the imperative consideration in s84(2), the Tribunal concludes that it will not make an order for Mr Franklin’s conditional release but will continue his present order for detention.

The Hon Ann Ainslie-Wallace AM
Deputy President

Date 25 August 2025

****