



NSW LAW REFORM COMMISSION

Consultation Paper 8

People with cognitive and mental health impairments in the criminal justice system: forensic samples

January 2010

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Terms of Reference

Pursuant to s 10 of the *Law Reform Commission Act 1967*, the Law Reform Commission is to undertake a general review of the criminal law and procedure applying to people with cognitive and mental health impairments, with particular regard to:

1. s 32 and s 33 of the *Mental Health (Criminal Procedure) Act 1990*;
2. fitness to be tried;
3. the defence of "mental illness";
4. the consequences of being dealt with via the above mechanisms on the operation of Part 10 of the *Crimes (Forensic Procedures) Act 2000*; and
5. sentencing.

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The closing date for submissions is 28 May 2010

Confidentiality and use of submissions

In preparing further papers on this reference, the Commission will refer to submissions made in response to this Consultation Paper. If you would like all or part of your submission to be treated as confidential, please indicate this in your submission. The Commission will respect requests for confidentiality when using submissions in later publications.

Copies of submissions made to the Commission will also normally be made available on request to other people or organisations. Any request for a copy of a submission marked “confidential” will be determined in accordance with *the Freedom of Information Act 1989* (NSW).

ABBREVIATIONS

- COAG:** Council of Australian Governments.
- CP 5:** Consultation Paper 5.
- CP 6:** Consultation Paper 6.
- CP 7:** Consultation Paper 7.
- CP 8:** Consultation Paper 8.
- CP 9:** Consultation Paper 9.
- CROC:** Convention on the Rights of the Child.
- CTO:** Community Treatment Order.
- DSM-IV:** American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th edition, 2000).
- HREOC:** Human Rights and Equal Opportunity Commission.
- ICCPR:** International Covenant on Civil and Political Rights.
- MHA:** *Mental Health Act 2007* (NSW).
- MHCPA:** *Mental Health (Criminal Procedure) Act 1990* (NSW).
- MHFPA:** *Mental Health (Forensic Provisions) Act 1990* (NSW).
- MHRT:** Mental Health Review Tribunal.
- MOU:** Memorandum of Understanding.
- NSWLRC:** New South Wales Law Reform Commission.

ISSUES

Issue 8.1 - see page 6

Should the *Crimes (Forensic Procedures) Act 2000* (NSW) be amended to require the destruction as soon as practicable of forensic material taken from a suspect following a diversionary order under s 32 or s 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW), or should the legislation be amended in some other way referable to the particular order made?

Issue 8.2 - see page 8

Should the *Crimes (Forensic Procedures) Act 2000* (NSW) be amended to require the destruction as soon as practicable of forensic material taken from a suspect following a verdict of not guilty on the ground of mental illness?

Issue 8.3 - see page 14

Should the *Crimes (Forensic Procedures) Act 2000* (NSW) be amended to require the destruction as soon as practicable of forensic material taken from a suspect following:

- (a) a decision by the Director of Public Prosecutions not to continue with the proceedings, or
- (b) a finding at a special hearing that, on the limited evidence available, the defendant has committed an offence?

If so, in what way?

Issue 8.4 - see page 16

Should the *Crimes (Forensic Procedures) Act 2000* (NSW) be amended to require the compulsory retention of forensic material in any of the following cases, namely:

- (a) persons who, because of cognitive or mental health impairment, are diverted from the criminal justice system under s 32 or s 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW);
- (b) persons found not guilty by reason of mental illness;
- (c) persons, having been found unfit to be tried, are found, on the limited evidence available at a special hearing, to have committed an offence?

If so, in what way should the legislation be amended?

PREFACE

0.1 This Paper is the fourth consultation paper in the Commission's reference on people with a mental illness or cognitive impairment in the criminal justice system. It deals with the use of a defendant's forensic material following a finding of unfitness to be tried or not guilty by reason of mental illness, or the making of a diversionary order

0.2 The Paper is one of five consultation papers on this reference. The first four papers are released concurrently, and relate to:

- an overview of the laws affecting people with a mental illness or a cognitive impairment when they become involved as defendants in the criminal justice system ("CP 5");
- the laws governing fitness to be tried and the defences relating to mental impairment (that is, the defence of mental illness, the defence of substantial impairment, and infanticide), which apply primarily to criminal proceedings in the Supreme and the District Courts, and the sentencing of offenders with a mental illness or cognitive impairment ("CP 6");
- the laws relating to the diversion of offenders with a mental illness or cognitive impairment, focusing on the diversionary mechanisms available to the Local Court ("CP 7");
- the use of forensic samples taken from a defendant who is diverted from the criminal justice system, unfit to be tried or not guilty by reason of mental illness ("CP 8").

0.3 The remaining consultation paper ("CP 9") will be released subsequently. It relates to issues particular to young offenders with a mental illness or cognitive impairment.

INTRODUCTION

1.1 This paper is concerned with a particular aspect of the *Mental Health (Forensic Provisions) Act 1990* (NSW), namely, the retention and destruction of “forensic material”.

Police power to collect forensic material from suspects

1.2 Like every other Australian jurisdiction,¹ NSW has legislation that gives the police powers to collect forensic material from people who are suspected of committing a criminal offence.² The *Crimes (Forensic Procedures) Act 2000* (NSW) allows the police to obtain, for example, fingerprints and footprints, and to take samples from a suspect’s body for such purposes as testing for his or her DNA.³ The Act regulates the exercise of these police powers and dictates the procedures that must be followed for procuring forensic material.⁴ It anticipates that the material might be used to produce evidence against a suspect in court,⁵ and also might provide a stored record of his or her DNA on a database for the purpose of investigating his or her involvement in other crimes.⁶ These powers are said to provide the police with an important investigative tool that allows them to identify and exclude suspects with greater ease and accuracy.⁷

-
1. See *Crimes Act 1958* (Vic) Div 30A; *Police Administration Act 1979* (NT) Pt 7 Div 7; *Criminal Law (Forensic Procedures) Act 1998* (SA); *Police Powers and Responsibilities Act 2000* (Qld); *Forensic Procedures Act 2000* (Tas); *Criminal Investigation (Identifying People) Act 2001* (WA); *Crimes (Forensic Procedures) Act 2000* (ACT).
 2. The legislation also empowers the police to obtain forensic material from volunteers and from serious indictable offenders: see *Crimes (Forensic Provisions) Act 2000* (NSW) Pt 7, 8.
 3. See the definition of “forensic material” in s 3(1) of the *Crimes (Forensic Procedures) Act 2000* (NSW).
 4. *Crimes (Forensic Procedures) Act 2000* (NSW) Pt 2 - 4.
 5. *Crimes (Forensic Procedures) Act 2000* (NSW) Pt 9
 6. *Crimes (Forensic Procedures) Act 2000* (NSW) Pt 11.
 7. See NSW, *Parliamentary Debates*, Legislative Assembly, 31 May 2000, 6293-6296 (P Whelan).

Rules for destroying forensic material

1.3 The *Crimes (Forensic Procedures) Act 2000* requires the destruction of a suspect's forensic material, and any record of information relating to that material, in certain situations. These situations include the following:

- Where 12 months have passed since a suspect's forensic material has been obtained and in that time criminal proceedings for the offence have not been instituted or have been discontinued, the forensic material must be destroyed, unless a warrant for the suspect's arrest has been issued.⁸ There is provision for a magistrate to extend the 12 month period (and so defer the time when the forensic material must be destroyed) if the magistrate is satisfied that there are special reasons for doing so.⁹ The 12 month period can be extended on more than one occasion.¹⁰
- Where the suspect has been acquitted of the offence or has been found to have committed the offence but no conviction is recorded, then the forensic material must be destroyed as soon as practicable unless an investigation or proceeding for another offence is pending.¹¹

1.4 In situations where the law requires the destruction of a suspect's forensic material, evidence relating to the material is inadmissible if the prosecution seeks to lead it in any proceedings against the suspect.¹² It is also an offence to record a person's DNA in the DNA database system where the DNA was obtained from forensic material that should have been destroyed.¹³ Similarly, it is an offence to retain or store in a DNA database any identifying information about a person obtained from forensic material after the time that that material was to be destroyed.¹⁴

8. *Crimes (Forensic Procedures) Act 2000* (NSW) s 88(2), (3).

9. *Crimes (Forensic Procedures) Act 2000* (NSW) s 88(5), (6).

10. *Crimes (Forensic Procedures) Act 2000* (NSW) s 88(7).

11. *Crimes (Forensic Procedures) Act 2000* (NSW) s 88(4).

12. *Crimes (Forensic Procedures) Act 2000* (NSW) s 83.

13. *Crimes (Forensic Procedures) Act 2000* (NSW) s 91.

14. *Crimes (Forensic Procedures) Act 2000* (NSW) s 94.

Issues for discussion here

1.5 As part of this review, the Commission has been asked to consider the operation of Part 10 of the *Crimes (Forensic Procedures) Act 2000*¹⁵ in relation to people with cognitive or mental health impairment who are:

- subject to a diversionary order under s 32 or 33 of the *Mental Health (Criminal Procedure) Act*;
- found not guilty by reason of mental illness;¹⁶ or
- found unfit to be tried.¹⁷

1.6 Victim advocacy groups have expressed concern that, as the legislation currently stands, a defendant's forensic material will likely be destroyed if the defendant is found unfit, found not guilty by reason of mental illness, or diverted out of the criminal process.¹⁸ They argue that forensic material should not be destroyed in these situations, because it could assist in investigating the defendant's involvement in other crimes.

1.7 Two competing interests are at play in relation to the retention of forensic material and its uses. On the one hand, access to forensic material promotes the public interest in ensuring that crime is investigated and solved with efficiency and accuracy.¹⁹ A number of benefits flow from this. For one, the public is assured that offenders are brought to justice and face punishment and that the community is protected from their criminal conduct. Secondly, in cases where a person's forensic material has excluded him or her from consideration as a suspect, police resources are freed up to concentrate on other suspects in an investigation or on solving other crimes. Thirdly, victims of crime, or a victim's family, are given some finality by the assurance that the investigation into the crime has been resolved.

1.8 On the other hand, there is also a public interest in ensuring that access to forensic material is limited. A person's forensic material can reveal a range of information about that person, depending on the type of forensic material in question. The fact that a public authority potentially

15. Letter from NSW Attorney General to LRC, 7 July 2008.

16. *Mental Health (Forensic Provisions) Act 1990* (NSW) Pt 4.

17. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 14, 16(4), 19.

18. Letter from NSW Attorney General to LRC, 7 July 2008.

19. See NSW, *Parliamentary Debates*, Legislative Assembly, 31 May 2000, 6293-6296 (P Whelan).

has access to their information necessarily involves an interference with the person’s private life.²⁰ It has been consistently recognised, both within Australia and internationally, that it is important to safeguard a person’s privacy from government intrusion when regulating the use of his or her forensic material.²¹ Longer-term retention by the police or other public authority of such personal information not only has immediate implications for an individual’s privacy, but also gives rise to concerns about an eventual broadening of the purposes for which the information was originally obtained and the possibility of misuse of that information. Added to this is the risk of on going stigmatisation of a person whose forensic material is retained for an indefinite time, on the basis that that person may be identified as a “criminal” regardless of whether or not he or she has been convicted of an offence.²² It was in recognition of these concerns that the destruction rules in respect of suspects were originally proposed, on the basis that once charges are dropped against a suspect or no offence is proved, he or she should be entitled to be treated like anyone else in the community.²³ To do otherwise, it was said, would “undermine the justice system”.²⁴

1.9 Consideration of possible changes to the conditions for the destruction of a suspect’s forensic material needs to take account of these competing public interests and to strike a balance between them. The following discussion looks in detail at the application of the destruction rules to each particular circumstance of, the making of a diversionary order, not guilty by reason of mental illness and unfitness to be tried, and questions the desirability for change in light of these considerations, and identifies issues which arise as to possible amendment of the existing law.

20. See *S and Marper v United Kingdom* [2008] ECHR 1581.

21. See Parliament of NSW, Legislative Council, Legislative Council Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (Report 18, 2002) ch 4; Australia, Forensic Procedures Review Committee, *Report of Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures* (2003) 7.1-7.4; *S and Marper v United Kingdom* [2008] ECHR 1581.

22. See generally Parliament of NSW, Legislative Council, Legislative Council Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (Report 18, 2002) ch 4, [6 49].

23. See NSW, *Parliamentary Debates*, Legislative Council, 21 June 2000, 7101-7104 (J W Shaw).

24. See Commonwealth, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Forensic Procedures Bill and The Proposed National DNA Database*, Discussion Paper (May 1999), 83.

THE EFFECT OF A DIVERSIONARY ORDER UNDER THE REQUIREMENTS TO DESTROY FORENSIC MATERIAL

1.10 In CP 7, we discuss the powers of the Local Court to divert defendants out of criminal proceedings according to s 32 and 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW).²⁵ It does not appear that the legislation relating to the destruction of forensic material²⁶ operates in relation to a diversionary order made pursuant to s 32 or s 33. The only possible way in which s 88 of the *Crimes (Forensic Procedure) Act 2000* (NSW) could apply to such an order would be by force of sub-s (4)(a) which requires that forensic material be destroyed where “the person is found to have committed an offence ... but no conviction is recorded”. However, this provision does not operate in relation to a diversionary order made under s 32 because the procedure under that section does not involve a finding of guilt, and the section specifically provides that a decision to dismiss charges against a defendant pursuant to the section “does not constitute a finding that the charges against the defendant are proven or otherwise”.²⁷ Similarly, the procedure under s 33 for discharge of a defendant does not involve a finding of guilt and, where a defendant is taken to be discharged pursuant to sub-section (2) of the section, it is specifically provided that this does “not constitute a finding that the charges against the defendant are proven or otherwise”.²⁸

1.11 In consequence, the forensic material obtained from a person subject to such a diversionary order may be retained indefinitely.

1.12 In considering what provision, if any, should be made, in these circumstances, for the compulsory destruction of forensic material in such cases, a further examination of the provisions of s 32 and s 33 is necessary.

1.13 Under s 32, the magistrate may dismiss the charge and discharge the defendant, unconditionally or subject to conditions. If the magistrate discharges a defendant subject to a condition and if the defendant fails to comply with the condition within 6 months of the discharge, the

25. See NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: diversion*, Consultation Paper 7 (2010).

26. *Crimes (Forensic Procedures) Act 2000* (NSW) Pt 10.

27. *Mental Health (Forensic Procedures) Act 1990* (NSW) s 32(4).

28. *Mental Health (Forensic Procedures) Act 1990* (NSW) s 33(4).

magistrate may deal with the charge as if the defendant had not been discharged.²⁹

1.14 In the case of s 33, the magistrate may discharge the defendant, unconditionally or subject to conditions. There is no provision for effective revocation of the discharge for non-compliance with a condition, as in the case of s 32.

1.15 Under the existing legislation, where a person is found to have committed the offence and no conviction is recorded, any forensic material must be destroyed as soon as practicable.³⁰ That provision operates in relation to a discretionary order made pursuant to s 10 *Crimes (Sentencing Procedure) Act 1999* (NSW) by which the court may, without proceeding to conviction, find a person guilty of an offence and either dismiss the charge or discharge the person subject to conditions. Why should the situation be different where the defendant is unconditionally discharged under s 32 or s 33? On the other hand, a conditional discharge under s 32 is not final in view of what may occur when a condition is breached.

1.16 It is suggested that the question of compulsory destruction of forensic materials in such cases as these should be deferred pending the review of s 32 and s 33 proposed in this series of reports.³¹ Meanwhile, the Commission would welcome any preliminary views on the matter.

Issue 8.1

Should the *Crimes (Forensic Procedures) Act 2000* (NSW) be amended to require the destruction as soon as practicable of forensic material taken from a suspect following a diversionary order under s 32 or s 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW), or should the legislation be amended in some other way referable to the particular order made?

29. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 32(3D).

30. *Crimes (Forensic Procedures) Act 2000* (NSW) s 88(4)(a).

31. See NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: diversion*, Consultation Paper 7 (2010) ch 3, 4.

THE EFFECT OF A VERDICT OF NOT GUILTY BY REASON OF MENTAL ILLNESS UNDER THE REQUIREMENTS TO DESTROY FORENSIC MATERIAL

1.17 A special verdict of not guilty by reason of mental illness involves a finding that the defendant committed the acts constituting the crime of which he or she is charged, but because of mental illness lacked the mental capacity to be held criminally responsible.³² A defendant found not guilty of an offence by reason of mental illness is not convicted of the offence and the special verdict does not form part of his or her criminal history for the purposes of sentencing for any subsequent offence.³³

1.18 As in the case of a diversionary order, it appears that no provision of the legislation operates to require the destruction of forensic material in relation to a person found not guilty on the ground of mental illness.

1.19 The special verdict of not guilty on the ground of mental illness disposes of the proceedings as conclusively as a conviction or an acquittal.³⁴ However, it is neither, although with elements of both. On the one hand, there is a finding that the offence was committed. On the other hand, the person is found not to have been responsible in law for what they have done.

1.20 How do policy considerations bear on this situation? If conviction in the ordinary way justifies retention of forensic material,³⁵ as it does under the legislation, why not the finding of having committed the offence in the case of a person found not guilty on the ground of mental illness? The same policy considerations appear to apply.

32. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 38(1). See also NSW Law Reform Commission, *People with cognitive and mental health impairments: criminal responsibility and consequences*, Consultation Paper 6 (2010) ch 3.

33. See *Heatley v The Queen* [2008] NSWCCA 226, [41]-[43]. Section 5(2) of the *Criminal Appeal Act 1912* (NSW) provides that a person acquitted on the ground of mental illness shall be deemed to be a person convicted of an offence even if mental illness was not raised as a defence by the defendant at trial. This provision has the very narrow purpose of allowing a mechanism for appealing against a finding of mental illness where this was not an issue raised by the defendant at trial and does not extend beyond this very limited purpose.

34. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 39.

35. See NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences*, Consultation Paper 6 (2010) ch 3.

1.21 Conformably, because of the finding that the person committed the offence, the privacy and other considerations that arise in the case of a person acquitted do not appear to apply in the case of a person found not guilty on the ground of mental illness.

1.22 On the other hand, where, without proceeding to a conviction a court finds the person guilty of an offence and dismisses the charge or discharges the person subject to conditions,³⁶ any forensic material must be destroyed.³⁷ However, it may be assumed that such discretionary orders are only ever made in relation to minor offences and are arguably not analogous for that reason.

1.23 It may be thought, in these circumstances, that there is no occasion for amendment of the legislation to provide for the compulsory destruction of forensic material in the case of a person found not guilty on the ground of mental illness.

1.24 That would accord with the situation in some other Australian jurisdictions where the situation is made explicit rather than being left to inference. Western Australian law requires the destruction of identifying information of a suspect if the charge against the suspect is finalised without a finding of guilt, except if the suspect is found not guilty of an offence because of unsoundness of mind.³⁸ In Victoria, the police can apply to a court to retain a forensic sample and any information arising from it if the person from whom the sample was taken is found guilty of the offence in question³⁹ or is found not guilty because of mental impairment.⁴⁰

1.25 Submissions on the question would be welcome.

Issue 8.2

Should the *Crimes (Forensic Procedures) Act 2000* (NSW) be amended to require the destruction as soon as practicable of forensic material taken from a suspect following a verdict of not guilty on the ground of mental illness?

36. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10.

37. *Crimes (Forensic Procedures) Act 2000* (NSW) s 88(4)(a).

38. *Criminal Investigation (Identifying People) Act 2002* (WA) s 67.

39. Or any other offence arising from the same circumstances or any offence in respect of which evidence obtained as a result of the forensic procedure had probative value: see *Crimes Act 1958* (Vic) s 464ZFB(1)(b), (1A)(b).

40. *Crimes Act 1958* (Vic) s 464ZFB.

THE EFFECT OF A FINDING OF UNFITNESS TO BE TRIED AND OF SUBSEQUENT PROCESSES UNDER THE REQUIREMENTS TO DESTROY FORENSIC MATERIAL

1.26 In proceedings in the Supreme or District Court, a defendant may be found by the court to be unfit to be tried. The finding is provisional. The Mental Health Review Tribunal and the court then have defined roles under the relevant legislation concerning review of the person's fitness for trial.⁴¹ So far as is presently relevant, the following outcomes may be the result:

- Following a finding that the person has become fit for trial, the person may go to trial in the ordinary way.⁴²
- In certain circumstances, the court may be required to hold a special hearing or, in other circumstances, may do so at its discretion.⁴³
- The Director of Public Prosecutions may decide, in certain circumstances, not to proceed further with the proceedings.⁴⁴

1.27 If the defendant goes to trial in the ordinary way, the legislation relating to destruction of forensic material then operates according to the outcome of the trial⁴⁵ and no issue arises for present purposes.

1.28 If the Director of Public Prosecution decides not to proceed further with the proceedings,⁴⁶ it appears that the proceedings would then be "discontinued" within the meaning of the legislation and any forensic material would then have to be destroyed as soon as practicable.⁴⁷ It may be that the legislation should be amended to make this clear beyond question.

1.29 If the court holds a special hearing, the defendant may be acquitted, may be found not guilty on the ground of mental illness, or

41. See NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: fitness to be tried*, Consultation Paper 6 (2010) ch 1, 2.

42. See *Mental Health (Forensic Provisions) Act 1990* (NSW) ss 13, 30(1), 45.

43. See *Mental Health (Forensic Provisions) Act 1990* (NSW) ss 19(1), 30(2).

44. See *Mental Health (Forensic Provisions) Act 1990* (NSW) s 19(1), 29.

45. *Crimes (Forensic Procedures) Act 2000* Pt 10.

46. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 19(1), 29.

47. *Crimes (Forensic Procedures) Act 2000* s 88(2)(c).

may be found to have committed an offence on the limited evidence available.⁴⁸

1.30 The legislation draws no distinction between acquittal at a special hearing and acquittal at an ordinary trial. Accordingly, the provisions in the legislation relating to destruction of forensic material apply to acquittal at a special hearing in the same way as they apply to acquittal at an ordinary trial.⁴⁹

1.31 Similarly, there is no distinction to be drawn between a verdict of not guilty on the ground of mental illness returned at a special hearing and the same verdict returned at an ordinary trial.⁵⁰ We refer to what we have written above in that regard.⁵¹

1.32 If, at a special hearing, the defendant is found to have committed an offence, the court must decide if a sentence of imprisonment would have been imposed had the defendant been convicted of the offence in the ordinary way.⁵² If so, the defendant may be ordered to be detained, but only for a “limiting term” fixed by reference to the sentence that would have been imposed had the defendant been tried and convicted in the ordinary way.⁵³ If a prison sentence would not have been imposed, the court may impose whatever penalty would have imposed or make any other order it might have made following conviction for the particular offence at an ordinary trial.⁵⁴

1.33 What consequence in relation to the retention of forensic material should then flow from a finding made at a special hearing that, on the limited evidence available, the person committed an offence? For the purpose of this discussion, it is necessary to note the terms of the legislation involved. Section 88(4) of the *Crimes (Forensic Procedure) Act*

48. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 22(1).

49. *Crimes (Forensic Procedures) Act 2000* (NSW) s 87(1).

50. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 22(2).

51. See para 1.17-1.24.

52. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23(1)(a).

53. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23(1)(b).

54. See *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23(2). See generally NSW Law Reform Commission, *People with an intellectual disability and the criminal justice system*, Report 80 (1996) 181-188; NSW Department of Health, *Review of the NSW forensic mental health legislation* (2008) 47, 50 on a discussion of the shortcomings of the provision and suggestions for improvement.

2000 provides that forensic material must be destroyed “if the person is found to have committed an offence to which the forensic material relates but no conviction is recorded”. That provision is framed to relate to the procedure under s 10 of the *Crimes (Sentencing Procedure) Act 1999* which, as mentioned earlier, provides that “a court that finds a person guilty of an offence” may, “[w]ithout proceeding to conviction”, order that the charge be dismissed unconditionally or that the person be discharged subject to conditions.⁵⁵

1.34 By comparison, s 22 of the *Mental Health (Forensic Provisions) Act 1990* provides that the verdicts available at a special hearing, following a finding of unfitness for trial, include “that on the limited evidence available, the accused person committed the offence charged (or) ... an offence available as an alternative to the offence charged.”⁵⁶ It is further provided by s 22 that such a verdict “constitutes a qualified finding of guilt and does not constitute a basis in law for any conviction for the offence to which the finding relates”⁵⁷.

1.35 There is a superficial similarity between the wording of s 88 of the *Crimes (Forensic Procedures) Act* and the wording of s 22 of the *Mental Health (Forensic Provisions) Act*. However, there are also material differences. These are as follows.

1.36 First, a relevant condition for operation of s 88 is that the person is “found to have committed an offence”, whereas, under s 22 of the *Mental Health (Forensic Provisions) Act* the verdict “constitutes a qualified finding of guilt”. This is not merely a linguistic distinction. The former finding is an unqualified finding that the person committed the offence following a plea of guilty or a trial according to law. The latter finding, on the other hand, is referred to as a “qualified finding” because the special hearing is not a trial according to law. It is the best that can be done where the defendant is unable to participate in the process. The court might not have the whole story and, in consequence, there is a serious possibility

55. See generally NSWLRC, *People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences*, Consultation Paper 6 (2010) ch 6, 8. In relation to the former provision in the *Crimes Act 1900* (NSW) see NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [4.6]-[4.9]; NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [9.41].

56. Specifically s 22(1)(c) and (1)(d).

57. Specifically s 22(3)(a).

that the finding of guilt might be erroneous.⁵⁸ The difference between an unqualified finding of guilt and a qualified finding is, therefore, one of substance in this context.

1.37 Secondly, the other relevant condition for operation of s 88 of the *Crimes (Forensic Procedures) Act* is that “no conviction is recorded”. That wording suggests a situation in which there is a discretion to convict or not to convict, after a finding that the offence has been committed. By contrast, under s 22 of the *Mental Health (Forensic Provisions) Act*, the relevant verdict “does not constitute a basis in law for any conviction for the offence to which the finding relates”. That is a situation where no conviction is possible.

1.38 For these reasons, we suggest that the provisions of the legislation relating to the destruction of forensic material do not appear to operate where, at a special hearing following a finding of unfitness for trial, a person is found to have committed an offence on the limited evidence available. However, submissions on this point are invited.

1.39 At this stage in the discussion, it is necessary to note that a finding, made at a special hearing, that the defendant committed an offence may put an end to the proceedings for that offence or for any substantially similar offence, but not so in all circumstances.

1.40 The legislation is framed in the following way. There is a bar in general terms to further criminal proceedings,⁵⁹ subject to an exception referable to the limiting term that is fixed in conjunction with any custodial order, made following a finding at a special hearing that an offence has been committed.⁶⁰

1.41 The effect of these provisions is as follows. In the case of a non-custodial order made at a special hearing,⁶¹ there is a bar against further proceedings in relation to the same or a substantially similar offence. In

58. See NSW Law Reform Commission, *People with cognitive mental health impairments in the criminal justice system: criminal responsibility and consequences* (Consultation Paper 6, 2010) ch 2.

59. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 28(1).

60. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 28(2).

61. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23(2). See also *Smith v The Queen* [2007] NSWCCA 39.

the case of a custodial order,⁶² the bar against further proceedings operates as from the expiration of the limiting term fixed in conjunction with the order, or from the date of earlier release.⁶³

1.42 Put another way, once there is a finding, made at a special hearing, that an offence has been committed, there is a bar against further proceedings for the same or a substantially similar offence, except during the actual period for which the person may have been detained under a custodial order.⁶⁴

1.43 It seems obvious enough that there should be no compulsory destruction of forensic material while further proceedings can be instituted. On the other hand, once it becomes clear that there will not be further proceedings, there is a case for compulsory destruction of forensic material. The argument would be that a person found to have committed an offence at a special hearing has not been found guilty at a fair trial according to law and should, accordingly, be dealt with no less favourably than a suspected person against whom no proceedings are brought, or a person who is charged with an offence and acquitted at an ordinary trial, or a person found to have committed an offence but against whom no conviction is recorded (all of whom are entitled to have their forensic material destroyed).⁶⁵

1.44 The circumstances for compulsory destruction of forensic material arising under the last paragraph would then be as follows:

62. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23(1). See generally NSW Department of Health, *Review of the NSW forensic mental health legislation* (2008) 14-15, for the policy justifications of a limiting term.

63. See *R v Mitchell* [1999] NSWCCA 120; *R v Mailes* [2004] NSWCCA 394. See generally NSW Department of Health, *Review of the NSW forensic mental health legislation* (2008) 46, where it is stated that in practice, early release of forensic patients does not often occur.

64. See generally NSW Law Reform Commission, *People with an intellectual disability and the criminal justice system* Report 80 (1996), 183-184, in which it was recommended that a qualified finding of guilt should be an absolute bar to further prosecution.

65. *Crimes (Forensic Procedures) Act 2000* (NSW) s 88. See also NSW, *Parliamentary Debates*, Legislative Assembly, 24 November 1982, 3005-3007 (Laurie Brereton, Minister for Health).

- (a) Upon a decision by the Director of Public Prosecutions not to proceed further with the proceedings following a finding that the person is or has become fit for trial.⁶⁶
- (b) Upon the making of a non-custodial order at a special hearing.⁶⁷
- (c) Upon release prior to the expiration of a limiting term, which is fixed in conjunction with a custodial order made at a special hearing.⁶⁸
- (d) Upon the expiration of a limiting term, which is fixed in conjunction with a custodial order made at a special hearing order.⁶⁹

1.45 The contrary argument would be that the public policy reasons for retaining forensic material operate in the case of a person found to have committed an offence, even on the limited evidence available at a special hearing, and outweigh the interests of the person concerned in such a case.

Issue 8.3

Should the *Crimes (Forensic Procedures) Act 2000* (NSW) be amended to require the destruction as soon as practicable of forensic material taken from a suspect following:

- (a) a decision by the Director of Public Prosecutions not to continue with the proceedings, or
- (b) a finding at a special hearing that, on the limited evidence available, the defendant has committed an offence?

If so, in what way?

66. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 19(1), 29. Strictly speaking, such a decision by the DPP may not be conclusive under the legislation because of the prerogative of the Attorney General to bring proceedings by ex officio indictment. We leave open for consideration whether that power is impliedly removed by the legislation and, if not, whether the possibility of exercise warrants consideration for present purposes. See also the observation made in para 1.28 concerning the possible need to clarify the legislation in relation to the decision of the DPP not to proceed further with the proceedings:

67. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23(2).

68. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 28(2).

69. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 28(2).

COMPULSORY RETENTION OF FORENSIC MATERIAL

1.46 This is a related topic. The legislation makes no provision for the compulsory retention of forensic material. That is left to the discretion of the authorities subject only to the provisions for compulsory destruction dealt with above. No comparative legislation in other Australian jurisdictions makes provision for compulsory retention of forensic material.⁷⁰ A question nonetheless arises as to whether there is a special reason for the compulsory retention of forensic material in the case of persons who, because of cognitive or mental health impairment, are diverted from the criminal justice system under s 32 or s 33 of the *Mental Health (Forensic Provisions) Act 1990*, or are found not guilty by reason of mental illness,⁷¹ or are found unfit to be tried⁷² and subsequently found, on the limited evidence available at a special hearing, to have committed an offence.⁷³

1.47 Such a provision would treat these persons less favourably than persons convicted of an offence in the ordinary way, whose forensic material is kept only for so long as the authorities deem appropriate. It might, therefore, be seen as adverse discrimination on the ground of cognitive or mental health impairment. Submissions might nonetheless yield a justification for such a provision.

70. See *Crimes Act 1958* (Vic); *Police Administration Act 1979* (NT); *Criminal Law (Forensic Procedures) Act 1998* (SA); *Police Powers and Responsibilities Act 2000* (Qld); *Forensic Procedures Act 2000* (Tas); *Criminal Investigation (Identifying People) Act 2001* (WA); *Crimes (Forensic Procedures) Act 2000* (ACT).

71. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 22(1)(b), 38.

72. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 14, 16, 19.

73. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 22(1)(c)-(d).

Issue 8.4

Should the *Crimes (Forensic Procedures) Act 2000* (NSW) be amended to require the compulsory retention of forensic material in any of the following cases, namely:

- (a) persons who, because of cognitive or mental health impairment, are diverted from the criminal justice system under s 32 or s 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW);
- (b) persons found not guilty by reason of mental illness;
- (c) persons, having been found unfit to be tried, are found, on the limited evidence available at a special hearing, to have committed an offence?

If so, in what way should the legislation be amended?