



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 69

**The Criminal Process
and Persons Suffering
from Mental Disorder**

REPORT

AUGUST 1991

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

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ATTORNEY GENERAL**

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972*, I am pleased to present the Commission's report on the Criminal Process and Persons Suffering from Mental Disorder.

J A THOMSON
Chairman

16 August 1991

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Abbreviations

ALRC Report	Australian Law Reform Commission <i>Sentencing</i> (Report No 44 1988)
Butler Committee Report	Report of the Committee on <i>Mentally Abnormal Offenders</i> (Cmnd 6244 1975)
Campbell	I G Campbell <i>Mental Disorder and Criminal Law in Australia and New Zealand</i> (1988)
Discussion Paper	Law Reform Commission of Western Australia <i>The Criminal Process and Persons Suffering from Mental Disorder</i> (Project No 69 1987)
Fisse	B Fisse <i>Howard's Criminal Law</i> (5th ed 1990)
Gibbs Report	Review of Commonwealth Criminal Law, Interim Report, <i>Principles of Criminal Responsibility and Other Matters</i> (July 1990)
Law Commission Report	The Law Commission <i>A Criminal Code for England and Wales</i> (Report No 177 1989)
Murray Report	M J Murray QC (now Justice Murray) <i>The Criminal Code: A General Review</i> (1983).
Myers Report	<i>Report of the Consultative Council on Review of Mental Health Legislation</i> (1981) to the Victorian Minister of Health
Queensland Report	First Interim Report of the <i>Criminal Code Review</i> Committee to the Attorney General (March 1991)
Sentences of Imprisonment	Advisory Committee on the Penal System <i>Sentences of Imprisonment: A Review of Maximum Penalties</i> (1978)
Starke Report	Victorian Sentencing Committee <i>Sentencing</i> (1988)
TLRC Report	Law Reform Commissioner of Tasmania <i>Insanity, Intoxication and Automatism</i> (Report No 61 1988)
Treatment of Mentally Disordered Offenders	<i>Report of the Inter Departmental Committee on the Treatment of Mentally Disordered Offenders</i> (1989)
VLRC DP	Law Reform Commission of Victoria <i>Mental Malfunction and Criminal Responsibility</i> (DP No 14 1988)
VLRC Report	Law Reform Commission of Victoria <i>Mental Malfunction and Criminal Responsibility</i> (Report No 34 1990)

Chapter 1

INTRODUCTION

1. TERMS OF REFERENCE

1.1 The Commission has been asked:

1. To consider to what extent and on what criteria the law should recognise mental disorder or abnormality in a person accused of a criminal offence as a factor affecting his liability to be tried or convicted.
2. To consider whether there is any need for the continuance of the power in section 662 of the *Criminal Code* to impose an indeterminate sentence on a convicted person simply on the grounds of his 'mental disorder'.
3. To consider what procedures should be provided for reviewing the situation of persons who have been ordered to be detained or kept in custody because of their mental condition by orders made under sections 631, 652, 653, 662 or 693(4) of the *Criminal Code*, with a view to determining whether their detention or custody can be terminated. Such procedure should provide for review by way of administrative routine as well as at the request of the person detained or kept in custody.
4. To consider whether it is desirable for there to be a judicial investigation as to the guilt or innocence of an accused person notwithstanding that he has been found to be of unsound mind and ordered to be kept in custody pursuant to sections 631 or 652 of the *Criminal Code*, or admitted to an approved hospital consequent on an order made under section 36(2) of the *Mental Health Act*.
5. To consider whether courts of summary jurisdiction require any powers beyond those in section 36 of the *Mental Health Act* to permit them to deal fully with accused persons who come before them suffering from mental disorder; in particular to consider whether they require powers analogous to those in sections 631, 652 and 653 of the *Criminal Code*.

6. To consider whether it is desirable that the prosecution and defence should be obliged to exchange, before trial, all expert reports relating to the mental condition of the accused which are intended to form the basis of evidence to be adduced at the trial, and if that is thought to be desirable, to propose appropriate rules for the enforcement of that obligation.
7. To consider whether the courts should have power to obtain psychiatric reports, and if so, for what purpose, and in what circumstances, and by what procedure.
8. To review Division 6 of Part IV of the *Mental Health Act 1962* (which deals with security patients) and its relationship to section 34C of the *Offenders Community Corrections Act 1963*, formerly the *Offenders Probation and Parole Act 1963*.

2. CONSULTATIONS

1.2 To help identify problems in this area of the law, the Commission publicly invited preliminary submissions from persons interested. Nineteen responses were received. The Commission also consulted a number of persons with expertise in this area of the law.¹

1.3 A Discussion Paper was published in February 1987 seeking public comment on the issues considered in this report. Twenty-six individuals, organisations or departments responded. Their names are listed in the Appendix. The Commission wishes to express its appreciation for the time and trouble they took in making comments on the Discussion Paper. All views expressed have been taken into account in the preparation of this report.

¹ Dr P Bean, Senior Lecturer, Department of Social Administration, University of Nottingham, England; I G Campbell, Associate Professor of Law, Law School, University of Western Australia; P A Fairall, formerly Senior Lecturer, Department of Law, University of Newcastle; Professor G A German, Department of Psychiatry and Behavioural Science, University of Western Australia; Professor J K Mason, Regius Professor (Emeritus) of Forensic Medicine, University of Edinburgh; Dr G L Rollo, Consultant Psychiatrist, Department of Corrective Services.

Since then the Commission has also consulted Mr D Hounsome of the Authority for Intellectually Handicapped Persons, and Drs D L Jacobs and J F Hyde of Graylands Hospital.

3. REPORT OF THE INTER DEPARTMENTAL COMMITTEE ON THE TREATMENT OF MENTALLY DISORDERED OFFENDERS

1.4 Following the publication of the Discussion Paper an inter departmental committee² on the Treatment of Mentally Disordered Offenders submitted its report. The Committee's aim was to determine "the best means to ensure that mentally disordered prisoners have ready access to and do in fact receive proper care and treatment during their progress through the criminal justice system." Although a major concern of the Committee was with the facilities provided for mentally disordered prisoners, it also made recommendations on a number of matters within the Commission's terms of reference.³ At the request of the Attorney General, the Commission sought comments from various interested persons and organisations on the Committee's recommendations before drafting this report.⁴ In preparing this report the Commission has taken into account both the recommendations of the Committee and the comments on those recommendations.⁵

² The members of the Committee were Dr D Bockman, Medical Superintendent, Prison Health Services, Department of Corrective Services; Dr R E Fitzgerald, Director of Strategic Services, Department of Corrective Services; Mr M J Murray QC, Crown Counsel, Crown Law Department (as he then was), now Justice Murray; Dr J A Lister, Psychiatric Superintendent, Graylands Hospital, Health Department (as he then was); and Dr G P Smith, Director of Psychiatric Services, Health Department.

³ The Committee submitted its report in February 1989.

⁴ Comments were received from the Australian Association of Social Workers (Western Australian Branch), the Authority for Intellectually Handicapped Persons, the Commissioner of Police, the Criminal Law Association of Western Australia (Inc), the Health Advisory Network, the Law Society of Western Australia, the Hon D K Malcolm, Chief Justice of Western Australia, Psychology Section, Health Department of Western Australia and the Western Australian Association of Occupational Therapists (Inc).

⁵ Comments on a draft of the report have also been obtained from the Criminal Law Association of Western Australia (Inc), K H Parker QC, Solicitor General and C Zempilas, Chief Stipendiary Magistrate.

Chapter 2

CRIMINAL RESPONSIBILITY AND MENTAL DISORDER

1. SECTION 27 OF THE CRIMINAL CODE

(a) The existing law

2.1 The first item in the Commission's terms of reference is to consider to what extent and on what criteria the law should recognise mental disorder or abnormality in a person accused of a criminal offence as a factor affecting the person's liability to be convicted. The question whether a person suffering from mental disorder is to be held criminally responsible for an offence is governed by section 27 of the *Criminal Code*, which provides:

"A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission.

A person whose mind, at the time of his doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was induced by the delusions to believe to exist."

Section 26 provides:

"Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved."

Section 27 applies to all offences whether tried summarily or on indictment.¹ Hence no distinction is made between serious offences, such as wilful murder, and less serious offences, such as assault. The operation and meaning of the key elements of section 27 and certain ancillary matters were considered in the Discussion Paper.²

(b) Retaining the insanity defence substantially in its present form

(i) Introduction

2.2 The Commission recommends retention of the insanity defence.³ The defence is consistent with fundamental notions of criminal responsibility. Its underlying rationale is one of humanity and morality. It is wrong to treat as criminal those who, by reason of severe mental illness or intellectual disability, are temporarily or permanently deprived of capacity to conform with the requirements of law or distinguish right from wrong. The defence is recognised, in one form or another, in all Australian jurisdictions, in New Zealand, England, Canada and most jurisdictions in the United States of America,⁴ though it has been repealed in Montana, Idaho and Utah and its repeal has been recommended in Tasmania.⁵

2.3 The Commission has considered and rejected a number of arguments for abolishing the defence. One argument for abolition is that the insanity defence is not widely used, and that in view of the abolition of capital punishment in Western Australia any incentive to plead insanity has been removed. The fact that murder no longer carries a capital sentence may reduce somewhat the incentive to plead it, assuming no change in the dispositional powers of the court after a successful insanity defence. At present, a person acquitted of an indictable offence on account of mental unsoundness is not discharged but is held in custody at the

¹ *Criminal Code* s 36, and see *Geraldton Fishermen's Co-operative Ltd v Munro* [1963] WAR 129, 133.

² Paras 3.2 to 3.20.

³ The majority of those who commented on this issue in response to the Discussion Paper also favoured its retention.

⁴ Neither the Butler Committee Report nor the Law Commission Report (which was based on the Butler Committee Report) recommended abolition, though both reports favoured significant changes to the defence. The Law Reform Commission of Victoria also concluded that the defence should be retained. It said (VLRC Report para 29):

"While the Commission accepts the force of the criticism of the abolitionist case - particularly with regard to the consequences of an insanity verdict - it believes that the argument based on the injustice of convicting a person who is obviously seriously mentally impaired and unable to tell the difference between right and wrong requires the continued availability of the insanity defence. The undesirable consequences of the insanity verdict should be addressed by reform rather than abolition of the defence."

⁵ TLRC Report 3.

Governor's pleasure. It is therefore not surprising that section 27 is relied upon only in serious cases where there is little possibility of an outright acquittal.⁶ Wider dispositional powers,⁷ and improvements in the custodial environment by the provision of reasonable standards of psychiatric care⁸ and periodic review to overcome the "out of mind, out of sight" syndrome, will undoubtedly cause defence counsel to reconsider the utility of pleading insanity. In any case, the fact that a defence is rarely raised is not a cogent reason for depriving a defendant of the opportunity to raise it.

2.4 Other arguments both for and against abolition of the insanity defence are set out in the Report of the Law Reform Commission of Victoria on *Mental Malfunction and Criminal Responsibility*.⁹ One of the arguments for abolition is that there is "an inconsistency between finding a person not guilty because of insanity on the one hand, and detaining that person at the Governor's Pleasure - usually within the prison system - on the other."¹⁰ Another argument for abolition is that the "existing law precludes consideration of dangerousness by making detention an *automatic* consequence of the insanity verdict."¹¹ (In Western Australia detention is also automatic for a person found not guilty on account of unsoundness of mind though the person is usually detained in an approved hospital.) These arguments would lose

6 A survey of trials in the Supreme Court in the ten year period 1970-1979, inclusive, revealed only 30 trials in which the defence was an issue. During this period approximately 1,300 charges were dealt with by the Supreme Court, 628 involving pleas of not guilty. Eighteen of the charges in which the insanity defence was raised involved the offence of wilful murder for which the penalty at the time was capital punishment.

It is also raised rarely in Courts of Petty Sessions where there is no requirement that the court record a finding that the defence has been raised successfully: para 5.3 below. If successful, the defendant should be discharged from custody: para 5.5 below. The rarity of use may be due to the generally minor nature of offences dealt with in these courts, the cost involved in obtaining expert evidence and a failure to appreciate that a successful defence leads to discharge from custody and not indefinite detention.

7 See paras 2.37 to 2.41 below.

8 Such as those to be provided at the proposed secure facility for mentally disordered offenders at Graylands Hospital. The Inter Departmental Committee on the Treatment of Mentally Disordered Offenders favoured such a facility over a unit in a prison which would be outside the mainstream of the treatment of mental health problems: *Treatment of Mentally Disordered Offenders* 98. It said that (at 98-99):

". . . while surveillance over and chemical control of psychotic prisoners can be achieved in a prison environment in many cases effective treatment requires access to the range of therapeutic and rehabilitative programmes for the acute and not so acute phases of psychiatric illness. If the professionals involved are unable to function effectively upon that basis, experience shows that it is impossible to maintain their interest and development and secure their continued service. All of that means that there is a requirement for a multi-disciplinary adequately staffed forensic psychiatry service attached to and part of the general mental hospital facilities provided by the State. The forensic unit should be as closely integrated as is possible within the civil health care system. To provide that will in the long term in the Committee's view make an effective contribution to the rehabilitative aspects of the criminal justice system."

9 VLRC Report paras 19 to 28.

10 Id para 21.

11 Id para 22.

much of their force if the Commission's recommendations below¹² that disposition should be determined by a court and that detention should be reviewed by a specialist review board were implemented.

(ii) *The logical form of section 27*

2.5 Under section 27, the fact that an accused was suffering from a "mental disease or natural mental infirmity" is a necessary but not sufficient condition for negating responsibility. An associated lack of capacity to understand what one is doing, to know that what one is doing is wrong or to control one's action is also required.

2.6 The Commission considered whether it was desirable to adopt a different approach, whereby proof of severe mental illness would be sufficient to make out the defence, on the footing that the presence of severe mental illness necessarily excludes criminal responsibility.¹³ One consequence of this approach is that the defence would not be called upon to establish a link between the overt manifestations of the mental illness and the offence, although it would still be necessary to prove the existence of a severe mental illness.

2.7 This approach was adopted by the Butler Committee in England, which recommended that proof of severe mental disorder would suffice to negate responsibility:¹⁴ it would not be necessary to establish a causal link between the offence and the defendant's mental condition at the time of the offence. The Committee in effect proposed an irrebuttable presumption of irresponsibility arising from proof of a severe mental disorder.¹⁵ It doubted whether a case would exist where a person might be found to be suffering from a severe mental disorder

¹² Paras 2.37 to 2.39 and 2.43 to 2.45.

¹³ Another approach considered in the Discussion Paper (paras 3.47 and 3.48) was that of the majority of the members of the United Kingdom Royal Commission on Capital Punishment. It recommended that the jury should be left to determine (at 116 of its Report on *Capital Punishment 1949-1953* (Cmd 8932)):

". . . whether at the time of the act the accused was suffering from disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible."

A similar approach has been adopted in the State of Rhode Island in the United States of America.

The Commission considers that this approach is unsatisfactory because it is open-ended. As Fisse states at 463:

"If the test of insanity is open-ended the danger is that juries may be governed in their decisions by widely divergent ideas of insanity."

In comments on the Discussion Paper, a similar view was expressed by the Chief Justice, the Hon D K Malcolm, who said that the approach leaves ". . . rather too wide a responsibility with the jury in terms of the general public policy behind the defence of insanity". The approach was also rejected by the Law Reform Commission of Victoria: VLRC Report paras 54 and 55.

¹⁴ Butler Committee Report para 18.30.

¹⁵ The Committee provided some criteria by which a mental disorder might be judged to be severe: id paras 18.35 and 18.36.

which had "in a causal sense nothing to do with the act or omission for which he is being tried", although the Committee conceded that this was a theoretical possibility.¹⁶

2.8 In his comments on the Discussion Paper, Professor G A German¹⁷ criticised the Butler Committee recommendation because it would be "inappropriate to assume a lack of criminal responsibility simply because there was evidence of some sort of mental dysfunctioning."¹⁸ The approach of the Butler Committee was also criticised by Fisse:

"The purpose of a defence of insanity is not to mimic psychiatric categories; it is to provide a standard of criminal responsibility. In the absence of such a standard the defence is geared not to culpability but to psychiatric diagnosis. Moreover, little precision is gained by resorting to psychiatric parlance. This is apparent from the opaque terminology advanced in the Butler proposal, where severe mental illness is defined in terms of categories that include "delusional beliefs, persecutory, jealous or grandiose" and "abnormal perceptions associated with delusional misinterpretation of events."¹⁹

2.9 The Commission agrees that the approach of the Butler Committee goes too far in assuming that certain categories of mental disorder, evidenced by one or more specific characteristics, necessarily involves a causative link between the disorder and the offence such that the person should not be held responsible for the offence. Further, even if a causal link were established, it may not be unjust to hold the defendant criminally responsible for the conduct the subject of the charge.²⁰ On the other hand, the Butler Committee's approach does not go far enough in that those who are deprived of capacity to know that they ought not to do the act or make the omission alleged due to a mental illness which is not severe would not be entitled to an acquittal. For these reasons, the Commission considers that the approach of the Butler Committee is not satisfactory.

¹⁶ Id para 18.29.

¹⁷ Professor of Psychiatry, University of Western Australia.

¹⁸ As the Law Reform Commission of Victoria states (VLRC Report para 49): "it transforms questions about responsibility into medical assessments made by psychiatrists, not judgments about responsibility made by juries." The Victorian Commission also criticised the approach because listing conditions which qualify as "severe mental illness" is too rigid and "the characteristics proposed in the list are too complex and would lead to endless appeals about their proper interpretation": VLRC Report para 49.

¹⁹ Fisse 464-465.

²⁰ For example, a delusional belief as to a spouse's unfaithfulness. Such a belief should not necessarily excuse a spouse's murder.

2.10 The Butler Committee also recommended that a verdict of "not guilty on evidence of mental disorder" should be returned where the defendant's mental disorder negated a state of mind required for the offence, such as intention, foresight or knowledge notwithstanding that the defendant did the act or made the omission which constituted the offence.²¹ Without such a defence, if one of the elements of the offence were not established for whatever reason, the defendant would be entitled to an absolute acquittal and to discharge from custody. The real purpose of the verdict proposed by the Committee was to give the trial court power to make orders as to the defendant's disposition, including power to order that the defendant be made an inpatient in a hospital.²² In the Commission's view, if the elements of the offence cannot be established, whether due to mental disorder or some other reason, the defendant should be acquitted absolutely. If compulsory treatment in a hospital is necessary, appropriate orders should be sought through civil procedures, subject to the standards and safeguards provided by those procedures.

(iii) *The underlying concept of "mental disease or natural mental infirmity"*

2.11 The concept of "mental disease or natural mental infirmity" defines those people who are entitled to raise the insanity defence. It includes those whose functions of understanding or control are deranged or disordered at the time of the alleged offence whatever the diagnosis, for example, manic-depressive or schizophrenic. A distinction is made between a malfunction of mental faculties resulting from an underlying pathological infirmity of the mind which can be properly termed mental illness²³ and the reaction of a healthy mind to extraordinary external stimuli, such as a blow to the head or psychological trauma.²⁴ The latter malfunctions entitle the defendant to an outright acquittal rather than an acquittal under the insanity defence.²⁵ The concept of "mental disease or natural mental infirmity" excludes "drunkenness, conditions of intense passion and other transient states attributable either to the fault or to the nature of man."²⁶

2.12. The Commission recommends that the expression "mental disease or natural mental infirmity" be replaced with "abnormality of mind (from mental illness or intellectual

²¹ Butler Committee Report para 18.20.

²² Id para 18.42.

²³ Whether of long or short duration or permanent or temporary.

²⁴ *R v Falconer* (1990) 171 CLR 30, 53-54.

²⁵ Paras 2.18 and 2.19 below.

²⁶ The Rt Hon Sir Owen Dixon *A Legacy of Hadfield, McNaghten and MacLean* (1957) 31 ALJ 255, 260.

disability)".²⁷ The term "abnormality of mind" would indicate to the jury the need to establish that the defendant's mind was outside the ordinary due to some pathology. That pathology should be a mental illness or intellectual disability. The term "mental illness" should replace the term "mental disease" because the latter term is an outmoded and archaic one with no modern medical meaning. The Commission considered whether to retain the term "mental disease" by reason of the established body of case law as to its scope and meaning²⁸ but has decided against this course: the change in terminology is not intended to effect the scope of section 27 as defined by that body of case law. The term "natural mental infirmity" is both outmoded²⁹ and unclear. It may refer to a congenital incapacity rather than a supervening deterioration which is suggested by the term "mental disease" though it has been suggested that it includes ". . . a condition of arrested or retarded development."³⁰ To include intellectual impairments whatever the cause and whether arising from a condition subsisting at birth or from subsequent illness or injury, the Commission recommends that the term "natural mental infirmity" be replaced by the term "intellectual disability".³¹

2.13 In Western Australia it has been held that an "anti-social personality disorder"³² is not a mental disease or natural mental infirmity.³³ None of the medical witnesses at the trial, two psychiatrists and a clinical psychologist, described the defendant's condition as a mental disease or natural mental infirmity: "The position simply was that the appellant by reason of his deprived and scarred background had never developed adequate levels of self-control."³⁴ Burt CJ, with whom Smith J agreed,³⁵ held that:

"Upon that evidence which relevantly provides the dictionary for ascertaining the meaning to be given to the expression 'anti-social personality disorder' I think that the

²⁷ The Gibbs Report (at 107) recommended that the term should be "mental disease or defect". The Queensland Report (at 91-92) recommended that the term should be "mental illness or mental defect".

²⁸ Discussion Paper para 3.3.

²⁹ Both the *Mental Health Act 1962* and the *Authority for Intellectually Handicapped Persons Act 1985* refer to an "intellectually handicapped" person.

³⁰ R S O'Regan *Diminished Responsibility Under the Queensland Criminal Code* (1978) 2 Crim LJ 183, 187.

³¹ It is not intended that mere below average intellectual functioning would constitute intellectual disability. In any case it would be necessary to establish that the intellectual disability deprived the person of one of the capacities referred to in para 2.14 below.

³² The term "personality disorder" is used to indicate some form of dysfunction and this usually describes the situation of an individual whose character is such that he or she has difficulty fitting into a society. For recent attempts to provide diagnostic criteria for personality disorders see P A Fairall and P W Johnston *Antisocial Personality Disorder (APD) and the Insanity Defence* (1987) 11 Crim LJ 78, 82-84.

³³ *R v Hodges* (1985) 19 A Crim R 129 (Court of Criminal Appeal).

³⁴ Id 130.

³⁵ Wallace J, at 133, pointed out that the defect was a defect in an individual's personality, not a disease or disorder.

trial judge was right in directing the jury that it was not a state of mental disease or natural mental infirmity within the meaning of those words as used in s 27 of the Code. The evidence simply established that by reason of that condition the appellant was an impulsive man lacking self-control. That is quite a different thing from mental disease and natural mental infirmity within the meaning of s 27 of the Code: see *Porter* (1933) 55 CLR 182 at 188, per Dixon J.³⁶

The Commission recommends no change to the existing law. It is inconsistent with fundamental notions of criminal responsibility to excuse a person's acts or omissions arising from a personality disorder evidenced merely by a lack of self control or indifference to standards of morality.³⁷ The existence of a personality disorder may nevertheless contribute to a finding of "diminished responsibility". Diminished responsibility is discussed below.³⁸

(iv) *Cognition and control*

2.14 Section 27 of the *Criminal Code* provides three independent tests for the defence of insanity -

1. lack of capacity to understand what one is doing;
2. lack of capacity to know that what one is doing is wrong; and
3. lack of capacity to control one's actions.

³⁶ *R v Hodges* (1985) 19 A Crim R 129, 130-131. On appeal to the High Court it was held that, in the light of the evidence, the trial judge's direction that the anti-social personality disorder did not amount to a "mental disease or natural mental infirmity" within s 27 of the *Criminal Code* was justified: P A Fairall and P W Johnston *Antisocial Personality Disorder (APD) and the Insanity Defence* (1987) 11 Crim LJ 78, 81.

³⁷ The American Psychiatric Association also concluded that persons with an anti-social personality disorder should be held responsible for their conduct (*American Psychiatric Association Statement on the Insanity Defence* (1983) 140 *The American Journal of Psychiatry* 681, 685):

"It was assumed by the law that such disorders could impair behaviour control. But this is generally not the experience of psychiatry. Allowing insanity acquittals in cases involving persons who manifest primarily 'personality disorders' such as antisocial personality disorder (sociopathy) does not accord with modern psychiatric knowledge or psychiatric beliefs concerning the extent to which such persons do have control over their behaviour. Persons with antisocial personality disorders should, at least for heuristic reasons, be held accountable for their behaviour."

³⁸ Paras 2.50 to 2.58.

It must also be established that the defendant was, at the time of the relevant act or omission, in such a state of "mental disease or natural mental infirmity"³⁹ as to deprive him or her of one of these capacities.

2.15 The first test excuses a person who is deprived of capacity to perceive the facts correctly because of a mental disorder from culpability for an act or omission. The second test excuses from criminal responsibility a person who by reason of mental disorder lacks capacity to know that he or she ought not to do the act or make the omission. The third test excuses from criminal responsibility a person's act or omission which is not accompanied by volition due to mental disorder. These tests were seen by the drafters of the *Criminal Code* as being consistent with other rules excusing individuals from criminal responsibility.⁴⁰ They differ from these rules in that if the presumption that every person is of sound mind is rebutted and it is established that the defendant was in a "state of mental disease or natural mental infirmity", the defendant is liable to detention though the verdict is one of not guilty. The three tests continue to provide a valid basis for the defence representing as they do circumstances in which a person ought not be blamed for an act or omission which would otherwise constitute an element of an offence. The Commission accordingly recommends that they be retained.⁴¹

(c) Delusions

2.16 The second paragraph of section 27 of the *Criminal Code*⁴² applies to a person who is not entitled to the benefit of the insanity defence (dealt with in the first paragraph)⁴³ but whose mind was affected by delusions on some specific matter or matters.⁴⁴ Where the

³⁹ The Commission recommended in paras 2.11 and 2.12 above that this term should be replaced with the term "abnormality of mind (from mental illness or intellectual disability)".

⁴⁰ See E J Edwards *Insanity Under the Queensland and Western Australian Codes* (1967-1968) 8 University of Western Australia LR 196, 197-198. The first test is consistent with the excuse of mistake of fact (*Criminal Code* s 24), the second with the presumption that young children are incapable of knowing that some acts or omissions are wrong (id s 29) and the third with the excuse which applies to acts or omissions which occur independently of the exercise of the defendant's will (id s 23).

⁴¹ The Queensland Report (at 91) also recommended that they be retained. The Gibbs Report (at 106-107) recommended two tests: whether the defendant was "incapable of knowing what he or she was doing or of understanding that what he or she was doing was wrong according to the ordinary standards of reasonable people."

⁴² See para 2.1 above.

⁴³ Such a person might not be entitled to the benefit of the insanity defence because the person was not in a state of mental disease or natural mental infirmity or was not deprived on one of the three capacities specified in the first paragraph of s 27.

⁴⁴ In his comments on a Draft of a Code of Criminal Law prepared for the Government of Queensland, Sir Samuel Griffith said at 15 that the second paragraph "embodies the opinion of the Judges on the question

second paragraph applies, a person is criminally responsible to the same extent as if the real state of things had been such as the person was induced by the delusions to believe to have existed and not by reference to the actual facts. If, for example, D, due to a delusion, believed that V was attempting to kill him and killed or injured V in self-defence, D would not be criminally responsible because self-defence is an excuse so long as the act is reasonably necessary in order to resist actual and unlawful violence threatened to D or to another person in D's presence.⁴⁵ The second paragraph is likely to be difficult to apply because it involves an inquiry into the defendant's state of mind to determine whether the defendant believed, for example, that the defendant was threatened with "actual and unlawful violence". Where the second paragraph is invoked successfully, the consequences for the defendant depend on the whether a verdict of acquittal or some other verdict is returned. If a verdict of acquittal was returned,⁴⁶ the court would be required to order that the defendant be kept in strict custody until Her Majesty's pleasure is known.⁴⁷ If some other verdict was returned, such as a conviction for manslaughter,⁴⁸ the court could impose a sentence for that offence.

2.17 Cases in which the second paragraph is applicable are likely to be rare because deluded persons are more likely to fall within the first paragraph of section 27: they will be so severely incapacitated mentally that they lack capacity to know that what they are doing is wrong or to choose to act otherwise. That is, "people who suffer in this way cannot be expected to choose a course of conduct that is emotionally inconsistent with the significance for them of what they believe".⁴⁹ Nevertheless, as a recent case in Victoria⁵⁰ shows, there may be circumstances in which the second paragraph would apply. Accordingly, the

actually submitted to them in McNaghten's case." That is (*M'Naghten's Case* [1843-60] All ER Rep 229, 234) if the defendant:

". . . labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real."

The second paragraph is based on the outmoded concept of partial insanity under which the mind was thought to be divided into separate compartments in which insanity could affect one compartment but not others: G Williams *Criminal Law: The General Part* (2nd ed 1961) 505-506.

⁴⁵ *Criminal Code* s 31(3).

⁴⁶ For example, if the defendant killed a person due to a delusion that the victim was attempting to kill or injure him.

⁴⁷ *Criminal Code* s 653. As to this power of disposition and the Commission's recommendations with respect to it see paras 2.37 to 2.42 below.

⁴⁸ For example, if the defendant killed a person due to a delusion that provided provocation for a killing.

⁴⁹ H Gross *Justice and the Insanity Defense* The Annals of the American Academy of Political and Social Science *The Insanity Defence* (1985) 96, 101.

⁵⁰ *R v Voukelatos* [1990] VR 1.

Commission recommends that the second paragraph of section 27 of the *Criminal Code* be retained.⁵¹

(d) Section 23 of the Criminal Code: responsibility for acts or omissions which occur independently of the exercise of will

2.18 There is a degree of overlap between the insanity defence and section 23 of the *Criminal Code* which, so far as relevant, provides that ". . . a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will".⁵² Section 23 may be relevant where physical conduct takes place without will, for example sleepwalking,⁵³ or as a result of various conditions such as epilepsy, a cerebral tumour, concussion or hypoglycaemia (as opposed to hyperglycaemia).⁵⁴ A defence for acts or omissions which occur independently of the exercise of a defendant's will could therefore be raised under either section 27 or section 23⁵⁵ of the *Criminal Code*.

2.19 Where evidence raises the question whether a defendant's acts were involuntary under section 23 of the *Criminal Code*,⁵⁶ the burden is on the prosecution to prove beyond a

⁵¹ A majority of those who commented on the question whether this paragraph should be repealed favoured its repeal.

⁵² There have been differing judicial views on what is meant by "act" or "omission". It seems to be accepted at least in this State that "the act or omission mentioned in s 23 is a physical act or omission forming an element of the offence charged, and does not comprehend the totality of the elements of the offence": *Geraldton Fishermen's Co-operative Ltd v Munro* [1963] WAR 129, 132. It does not mean all the external elements of the offence charged including the mental element: *Moss v Baines* [1974] WAR 7, 12. See also *Anderson v Basile* [1979] WAR 53, 55; *Duffy v R* [1981] WAR 72, 75 and *R v Falconer* (1990) 171 CLR 30, 38-39.

⁵³ See, however, *R v Burgess* [1991] 2 WLR 1206 where, in view of the authorities in England on the meaning of "disease of the mind", it was held that sleepwalking was such a disease and it was open to the jury to find the appellant not guilty by reason of insanity, as it did.

⁵⁴ *R v Bingham* [1991] Crim LR 433.

⁵⁵ Such as an action performed unconsciously or subconsciously. Though referred to as a defence this is not strictly correct because it is an assertion that the prosecution has failed to prove that the act or omission was willed.

⁵⁶ In *R v Falconer* (1990) 171 CLR 30, 61-62 Deane and Dawson JJ said:

"The onus of proving guilt remains with the prosecution and that onus is not discharged if an accused is able to raise a reasonable doubt. Of course, common experience teaches us that a person's will ordinarily accompanies his actions and evidence will be required to establish the extraordinary circumstances that an accused's acts occurred independently of the exercise of his will or to raise a doubt whether that was so. It is sometimes said in that situation that the accused is required to rebut an evidentiary presumption or to discharge an evidentiary burden of proof, but it is merely a requirement that there be evidence to displace ordinary human experience. And it will not be enough for an accused merely to assert that his acts were involuntary or that he suffered a loss of memory. Evidence of his condition at the time of the alleged offence supported by some expert medical opinion will be required before an issue of sane automatism can realistically be said to be raised. Moreover, those conditions which will admit of involuntariness that is not the product of disease or natural mental infirmity will be quite confined. The few suggested instances would seem to include: sleepwalking in some circumstances, some cases of epilepsy, concussion, hypoglycaemia and dissociative states. Nevertheless, given these constraints, an accused in setting up a defence under s 23 does not have to

reasonable doubt that the act or omission did not occur independently of the exercise of the defendant's will. If it is not so proved, the defendant is entitled to a "complete acquittal" in the sense that the defendant must be released from custody and, unlike an acquittal under section 27, the defendant cannot be held at Her Majesty's pleasure.

2.20 The relationship between sections 23 and 27 of the *Criminal Code* was recently examined by the High Court in *R v Falconer*.⁵⁷ The Commission does not propose any change to the position outlined by the Court, which held that a verdict of not guilty on the grounds of unsoundness of mind under section 27 should be returned where the absence of control is due to a state of mental disease or natural mental infirmity. Section 23 applies where the act or omission occurred independently of will by reason of involuntary conduct not arising from mental disease or natural mental infirmity.

2.21 Several members of the Court⁵⁸ said that in determining what is meant by the term "mental disease":

". . . generally speaking a distinction has been drawn between an underlying mental infirmity which is productive of one of the prescribed effects and a transient non-recurrent mental malfunction caused by external forces which produces an incapacity to control actions. The former is treated as unsoundness of mind or insanity; the latter is not more than a variation within the norm."⁵⁹

A temporary mental disorder⁶⁰ should not be prone to recur if it is to avoid classification as a mental disease because "a malfunction of the mind which is prone to recur reveals an underlying pathological infirmity."⁶¹

2.22 A number of members of the High Court acknowledged that, though it would be unusual, there would be cases in which there may be evidence to go to the jury which would

prove his condition on the balance of probabilities in order to succeed; he merely has to raise a reasonable doubt that his actions were the result of an involuntary reaction of a sane mind."

⁵⁷ (1990) 171 CLR 30.

⁵⁸ Mason CJ, Brennan and McHugh JJ.

⁵⁹ (1990) 171 CLR 30, 49.

⁶⁰ Such as a "psychological trauma which produces a transient non-recurrent malfunction of an otherwise sound mind": id 54.

⁶¹ Id 54. Deane and Dawson JJ suggested that conditions which will admit of involuntariness that is not the product of disease or natural mental infirmity include "sleepwalking in some circumstances, some cases of epilepsy, concussion, hypoglycaemia and dissociative states": id 61.

support a verdict under either section 23 or section 27 of the Code.⁶² It would be for the jury to decide which, if either, should succeed. Toohey J indicated that the issues would be put to the jury in the following way:⁶³

"If the evidence requires a jury to consider both non-insane automatism and insanity, the question of involuntary conduct should be put in two stages. That is because each of those states of mind is governed by a different section of the Code and the onus of proving each state of mind falls differently. The jury should first ask itself whether the Crown has disproved, beyond a reasonable doubt, non-insane automatism (the onus of proof in relation to that defence being on the Crown).⁶⁴ If the Crown has failed to do so, then the accused will be entitled to an unqualified acquittal.

"But if the Crown has disproved non-insane automatism, it may have done so, not because the acts said to constitute the offence were voluntary, but because they were the involuntary product of an unsound mind. Thus, if the answer to the first question is in the affirmative, the jury should go on to ask a second question, namely, whether the accused has proved, on the balance of probabilities, insanity within the meaning of s 27⁶⁵ (the onus of proof in relation to that defence being on the accused since s 26 presumes every person to be of sound mind). If the answer to that second question is in the affirmative, the jury should acquit but with the rider that the accused was of unsound mind at the relevant time."

(e) **Burden of proof**

2.23 In criminal cases, as a general rule, both parties have an evidential burden of proof⁶⁶ but only the prosecution has a persuasive burden of proof beyond reasonable doubt. There is an exception to this general rule where the insanity defence is raised because every person is presumed to be sound of mind, and any person charged with an offence is presumed to have been sound of mind at the time the offence was alleged to have been committed, until the

⁶² Deane and Dawson JJ (at 62) and Toohey J (at 70).

⁶³ At 77. See also Deane and Dawson JJ at 62 and Mason CJ and Brennan and McHugh JJ at 55-57.

⁶⁴ "The prosecution must prove, beyond reasonable doubt: either
 (a) that the conduct of the accused was not involuntary, or
 (b) that the reactions of the accused were the product of an unsound mind":
 I Leader-Elliott *Falconer* (1991) 15 Crim LJ 205, 207.

⁶⁵ That is, the defence must prove the elements of the defence of insanity: id 208.

⁶⁶ That is, of introducing some evidence in support of the party's case.

contrary is proved.⁶⁷ The defendant must therefore establish the defence of insanity⁶⁸ on the balance of probabilities.⁶⁹

2.24 This exception to the general rule has been criticised because it requires a jury to return a verdict of guilty even if it entertains a reasonable doubt as to whether the defendant had capacity to understand what he or she was doing, control his or her actions or know that he or she ought not to do the act or make the omission.⁷⁰ Suggestions have therefore been made that the defendant should have a mere evidential burden so that once there was sufficient evidence to raise the issue, the prosecution would be required to prove the sanity of the accused beyond a reasonable doubt.⁷¹

2.25 The Commission recommends, however, that the burden of proof should not be changed⁷² because it would impose an intolerable burden on the prosecution to prove beyond a reasonable doubt that the defendant was not, for example, mentally ill or in such a state of mental illness as to deprive the defendant of capacity to control his or her actions.⁷³ The insanity defence can be distinguished from defences such as self defence and provocation, in which the defendant has a mere evidential burden, because with those defences the defendant's claim can be linked to external realities and can be tested against ordinary experience, thereby reducing the risk of successful fabrication. The defendant knows far

⁶⁷ *Criminal Code* s 26.

⁶⁸ *Perkins v R* [1983] WAR 184, 188.

⁶⁹ *Armanasco v R* (1951) 52 WALR 78, 81 and *R v Holmes* [1960] WAR 122, 127. See also *R v Falconer* (1990) 171 CLR 30.

⁷⁰ Another criticism of the rule is that it is difficult for judges to direct juries on differing burdens of proof when, for example, a jury must consider whether the act occurred independently of the defendant's will and, if not, whether the insanity defence had been established. For an explanation of how this should be done see Toohey J's comments in *R v Falconer*: para 2.22 above.

⁷¹ Senate Standing Committee on Constitutional and Legal Affairs *The Burden of Proof in Criminal Proceedings* (1982) 51-52.

⁷² Most of those who commented on this issue favoured retention of the existing rule.

⁷³ A similar conclusion was reached in the Murray Report (at 41) and by the Law Reform Commission of Victoria. It pointed out that (VLRC Report para 69) "...the jury would only have to entertain a doubt about the defendant's sanity; it would not have to be satisfied on the balance of probabilities that the defendant was insane." It argued that (ibid): "Given that the present automatic consequence of this verdict is indefinite detention - and the potential for indefinite detention under the Commission's disposition proposal - this would be undesirable. An acquittal on the basis of insanity is unlike other acquittals. In order to justify indefinite detention, there ought to be more than a reasonable doubt about the defendant's sanity. This is the virtue of the requirement that insanity be proved on the balance of probabilities".

In the District of Columbia at the time John Hinckley attempted to kill President Reagan the prosecution was required to prove beyond a reasonable doubt that the defendant was sane. To many commentators this seemed like an impossible task and was viewed as a major reason for what was seen as an unsatisfactory verdict of "not guilty by reason of insanity". This verdict led to a review of the burden of proof in many jurisdictions in the USA with the result that whereas before the verdict a majority of States had a similar burden to that in the District of Columbia now at least two thirds of the States place the burden on the defendant: R D Mackay *Post-Hinckley Insanity in the USA* [1988] Crim LR 88, 93.

more about his or her state of mind at the time of the alleged offence than the prosecution and that knowledge cannot be tested against ordinary experience. Unless the defendant permitted the prosecution's expert to carry out an examination, the prosecution could not test the defence claim other than by any independent external evidence as to the defendant's mental state or conduct at the time, yet even this might not be available. Further even if expert evidence were available to the prosecution, as has been acknowledged by the American Psychiatric Association, psychiatric evidence is usually not sufficiently clear-cut to prove or disprove the issues raised by the insanity defence beyond a reasonable doubt.⁷⁴

(f) Raising the insanity defence by the prosecution

2.26 At present, the prosecution may not raise the insanity defence during the opening of its case, this being a matter for the defence.⁷⁵ It may, however, establish the insanity defence either by cross-examining defence witnesses⁷⁶ or by leading evidence in order to rebut evidence tendered by the defence in support of another mental state defence, such as that available under section 23 of the *Criminal Code*.⁷⁷ On the basis of this evidence the trial judge could conclude that the insanity defence was an issue and direct the jury to consider the defence regardless of the approach adopted by the defendant.⁷⁸

2.27 The Commission recommends no change to the existing position:⁷⁹ the role of prosecutors is to prosecute:

⁷⁴ *American Psychiatric Association Statement on the Insanity Defense* (1983) 140 *The American Journal of Psychiatry* 681, 685.

⁷⁵ *R v Joyce* [1970] SASR 184, 188; *R v Jeffrey* [1967] VR 467, 473 and *R v Dickie* [1984] 1 WLR 1031, 1037. But cf *Bratty v Attorney-General for Northern Ireland* [1961] 3 All ER 523, 534. In *R v Falconer* (1990) 171 CLR 30 Deane and Dawson JJ said (at 62-63):

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

⁷⁶ The person conducting the cross-examination may ask the witness any question relevant to the issue and is not confined to issues dealt with in the evidence given by the witness in chief: *Cross on Evidence* (Aus Ed) Vol 1 para 17500.

⁷⁷ Para 2.18 above.

⁷⁸ See for example *R v Holmes* [1960] WAR 122.

⁷⁹ The same conclusion was reached by the Gibbs Report: para 9.44(f).

"They do not ask juries to return a verdict of acquittal. A criminal trial at common law is concerned with the proof of a charge: it is not an inquisition If insanity is a defence, it seems to me that it is for the accused and his advisers to decide whether to put it forward."⁸⁰

This is particularly so at present because, if the defence is successful, the defendant must be detained for an indefinite period.⁸¹ The Commission recommends below,⁸² however, that the court should have wider dispositional powers including power to discharge the defendant from custody.

2.28 As pointed out by the Victorian Law Reform Commission, the present position means that the insanity defence can be withheld from the jury because of a tactical assessment by the defendant.⁸³ There is therefore a danger that a person who is insane and dangerous may be acquitted.⁸⁴ However, as Deane and Dawson JJ pointed out in *R v Falconer*, it is anomalous for the prosecution to raise the matter initially: the prosecution should not commence proceedings if it is seeking an acquittal.⁸⁵ Instead the prosecution could enter a *nolle prosequi* and if the defendant needed to be detained either in the interest of that person or of the public an application could be made to a justice for the involuntary commitment of the defendant to an approved hospital.⁸⁶

⁸⁰ *R v Price* [1962] 3 All ER 957, 960 per Lawton J.

⁸¹ Other arguments against allowing the prosecution to raise the insanity defence referred to by the Law Reform Commission of Victoria (VLRC Report 22) are:

1. "Respect for the rights of the individual requires that the defendant be allowed to choose which defences he or she invokes."
2. "To allow the prosecution to lead evidence of insanity unfairly advantages the prosecution because the prejudicial effect of the evidence, together with the presumption of sanity, makes it too easy for the prosecution to establish, for example, intent to kill."
3. "The right to silence and the difficulties of obtaining psychiatric evidence from a defendant who may well refuse a psychiatric examination constitute significant obstacles in principle and in practice to the proposal."

⁸² Paras 2.38 to 2.41.

⁸³ The Law Reform Commission of Victoria recommended, though the arguments were finely balanced, that the prosecution ought to be allowed to lead evidence on insanity: VLRC Report para 67. It also recommended that the prosecutor's burden of proof should merely be on the balance of probabilities because (VLRC Report para 70): "...the issue at stake is whether the court should have the disposition options available under the insanity defence; it is not proof of criminal guilt."

⁸⁴ VLRC Report para 63.

⁸⁵ See footnote no 75 above.

⁸⁶ *Mental Health Act 1962* s 29.

(g) Two stage trial or bifurcation

2.29 Various forms of two stage trial or bifurcation have been proposed or adopted elsewhere because of a fear that a defendant may be prejudiced by the simultaneous trial of the elements of the offence charged and the insanity defence. Where the defendant mounts a defence on the merits and asserts the insanity defence as an alternative, evidence on the latter issue could tend to lead the jury to believe that the defendant did the act or made the omission charged.

2.30 One form of bifurcation allows the jury to decide, at the first stage, whether or not the elements of the offence have been established. If the elements are established, the jury then hears evidence, including psychiatric evidence, on the insanity defence. This approach assumes that the elements of the offence involve only external factors, but many offences also involve a mental element such as intent. In the case of such offences, the defendant's state of mind necessarily arises at the first stage and in some trials the jury may have to consider the same evidence at both stages of the trial, unless evidence which negated a mental element such as intent could be distinguished from evidence on the insanity defence. If not, the justification for a two stage trial would be undermined. It also results in duplication where the evidence to show the defendant's mental state at the time of the offence is substantially the same as that admissible to show insanity.

2.31 A second form of bifurcation allows the jury to consider at the first stage only those elements of the offence which do not involve the mental state of the defendant. At the second stage the jury is required to consider whether the defendant lacked the requisite mental state, such as intent, and, if not, whether the insanity defence had been established. This approach avoids the duplication of evidence on the two issues and removes the possibility that the defence's psychiatric evidence would be used to establish that the defendant committed the act or made the omission alleged. However, a separation of this kind may be just as arbitrary as the separation involved in the form of two stage trial referred to in the previous paragraph. Where, for example, intent or a claim that the act occurred independently of the defendant's will is an issue, the mental capacity at issue is inextricably related to the act.

2.32 As the Commission has concluded that bifurcation does not necessarily have the advantages claimed for it, and indeed has its own difficulties, the Commission recommends that it should not be introduced in this State.⁸⁷

(h) Other procedural matters

(i) Form of the verdict

2.33 At present, if the jury finds that the defendant is not responsible under the insanity defence for the act or omission alleged to constitute the offence, it is required to find specially that the defendant has been acquitted on account of such unsoundness of mind.⁸⁸ Where this finding is made, the court is required to order that the defendant be kept in strict custody until Her Majesty's pleasure is known.⁸⁹ In subsequent paragraphs⁹⁰ the Commission recommends that this mandatory disposition by the Executive be replaced with a discretionary dispositional power to be exercised by the court, including a power to discharge the defendant in appropriate cases. Before the court could exercise this discretionary power it would, of course, need to know that the basis for the verdict of not guilty was that the insanity defence had been raised successfully. Accordingly, the Commission recommends that the existing form of the verdict be retained.

2.34 Another matter relating to the form of the verdict is whether the jury should be required to state the offence of which the defendant has been found to be not guilty. In some cases an alternative verdict is available. For example, where a person is charged with wilful murder, the defendant may instead be convicted of murder or manslaughter. One commentator on the Discussion Paper⁹¹ referred to comments of Burt CJ in *Perkins v R*:

"I am of the opinion that although it does not appear to be the practice and I know of no authority on the point, that in a case such as the present, that is to say, on an indictment charging wilful murder the jury if they acquit the accused 'on account of

⁸⁷ Only one commentator supported bifurcation.

⁸⁸ *Criminal Code* s 653. See *Wilsmore v Court* [1983] WAR 190, 203 per Kennedy J.

⁸⁹ The Governor, in the name of Her Majesty, may give such order for safe custody as the Governor may think fit: *Criminal Code* s 653.

⁹⁰ Paras 2.38 to 2.40 below.

⁹¹ Judge P J Healy.

unsoundness of mind' should be asked to say whether they for that reason have acquitted him of wilful murder, murder or manslaughter."

Burt CJ added:

"It is, I think, important that the Executive should know the true position and it is more important that there should exist no ground for supposing that a man has committed, although not criminally responsible for, a crime for which the jury have found him to have been not guilty."⁹²

The Commission agrees.⁹³ On a charge of wilful murder, the jury may have been satisfied that only the elements of the offence of manslaughter had been established, a finding which carries a different implication of dangerousness from a verdict of wilful murder.⁹⁴ The Commission accordingly recommends that the jury should be required to state the specific offence of which the defendant has been acquitted on account of unsoundness of mind.

(ii) *Instructions as to the consequences of a successful insanity defence*

2.35 At present, in practice, judges do not instruct the jury as to the consequences of a successful insanity defence. It can be argued that the jury should be given this information because otherwise the decision making process could be distorted by ignorance of or a misapprehension as to the consequences of the decision.⁹⁵ If the information were given to the jurors, the judge could give them a direction that it was irrelevant for the purpose of determining the defendant's criminal responsibility. The provision of such information to the jury was, however, criticised by the High Court in *Lucas v R*:

"There is, in our opinion, no need to complicate a trial and the resolution of the issues which arise in it by the introduction of what is truly, so far as the jury are concerned, an extraneous matter. It is, in our opinion, generally undesirable that reference should

⁹² [1983] WAR 184, 189.

⁹³ Though, of course, if the dispositional power is conferred on the court, it would be the court that would need to know the offence for which the jury had found the defendant to be not guilty, and not the Executive.

⁹⁴ It would also be necessary for this to be known for the purpose of the review process: see para 2.49 below.

⁹⁵ There is such a requirement in New South Wales: *Mental Health (Criminal Procedure) Act 1990* s 37. Three of the four commentators on the Discussion Paper who referred to this issue were opposed to such a requirement.

be made to the possible consequences which may ensue upon any verdict which the jury may properly return.⁹⁶

There may, of course, as the High Court pointed out in *Lucas v R*:

". . . be occasions when it is appropriate to apprise the jury of the consequences of the special verdict For example, if counsel should so far exceed his function as to speak to the jury of such consequences it may be not only desirable but necessary in the interests of justice for the judge to advert to the matter in his summing up.⁹⁷

The Commission recommends no change to the existing law so as to impose an obligation on the trial judge to instruct the jury as to the consequences of a successful defence of insanity.

(iii) *Acceptance of a plea of not guilty on account of unsoundness of mind*

2.36 Where a defendant wishes to raise the issue of insanity, a plea of not guilty should be made in which case a trial with a jury must be held: the court cannot accept a plea of not guilty on account of unsoundness of mind.⁹⁸ The Murray Report suggested that the court should be empowered to accept such a plea without a trial where the Crown takes the view that the evidence points to the conclusion that the defendant is not guilty on account of unsoundness of mind.⁹⁹ It proposed that the question of the acceptance of such a plea should be in the discretion of the trial judge. Before accepting the plea the judge should be satisfied with the correctness of the proposed result. This could be done by ". . . reference to the facts as revealed in the depositions, discussions with counsel, the receipt of any other evidence or information which was available and could be put before the Court, and if necessary the

⁹⁶ (1970) 120 CLR 171, 175.

⁹⁷ Ibid.

⁹⁸ *Criminal Code* ss 616 and 622.

⁹⁹ Murray Report 390-392. A similar recommendation was made by the Inter Departmental Committee on the Treatment of Mentally Disordered Offenders: *Treatment of Mentally Disordered Offenders* 76. In comments on the Committee's Report, both the Chief Justice, the Hon D K Malcolm, and the Law Society supported this recommendation. Similar recommendations have also been made in the Gibbs Report (para 9.44(e)) and by the Law Commission Report, Draft Bill cl 37, following a recommendation of the Butler Committee Report (para 18.50). However, the Law Reform Commission of Victoria concluded that it should not be possible to enter a verdict of not guilty on the grounds of mental impairment because (VLRC Report para 73):

". . . the mental condition of defendants in insanity cases raises special concerns about their ability to enter pleas which can result in indefinite detention. In addition, the mental impairment test of rightness or wrongness is peculiarly a jury question."

calling of any witnesses including medical experts to testify to the Court."¹⁰⁰ The requirement that the court be satisfied that there was evidence available that would justify such a verdict would serve to reassure the public that the defendant was not acquitted without good cause. It would also reduce the public disquiet that such a verdict might otherwise produce if the defendant was discharged absolutely. The Commission agrees with the proposal of the Murray Report and recommends accordingly.¹⁰¹

(i) Disposition¹⁰²

2.37 When the insanity defence is successful in the trial of an indictable offence,¹⁰³ the court is required to order that the defendant be detained in strict custody until Her Majesty's Pleasure is known. The Governor, in the name of Her Majesty, may make an order for the safe custody of the person during his or her pleasure. The Governor may also order that the person be admitted to an approved hospital.¹⁰⁴ The result therefore is that the defendant is held in custody for an indeterminate period at the discretion of the Executive. The legal position in Western Australia was criticised by Wickham J in *Wilsmore v Court*:

". . . many would say that the law as it stands is inappropriate and unjust. The position now is that a citizen not found guilty of any crime may be kept in prison as if he were a convicted and sentenced criminal (although he is not) and may be kept there indefinitely at the discretion of the Executive. The question does deserve consideration, not necessarily as arising out of the particular case but as a matter of principle."¹⁰⁵

2.38 The Murray Report recommended minor changes to this position to enable the judge to make an order for the safe custody of the defendant in such place and under such conditions

¹⁰⁰ Murray Report 391-392.

¹⁰¹ A plea of not guilty on account of unsoundness of mind should not, of course, be accepted if the defendant is unfit to stand trial.

The Commission recommends in para 5.4 below that Courts of Petty Sessions should also be able to accept a plea of not guilty on account of unsoundness of mind.

¹⁰² Although the court's dispositional powers are not expressly within the terms of reference it is important to address this issue in this report because these powers influence other matters such as whether the insanity defence should be retained, the extent to which defendants are prepared to raise it and the burden of proof.

¹⁰³ For the position in the case of simple offences see para 5.5 below.

¹⁰⁴ *Mental Health Act 1962* s 48(1).

¹⁰⁵ [1983] WAR 190, 201. For other critics of a similar position in other jurisdictions see VLRC Report paras 76-93, TLRC Report 11 and Butler Committee Report para 18.42

as may be specified until the Governor makes a further order.¹⁰⁶ Subsequently, more extensive changes were recommended by the Inter Departmental Committee on the Treatment of Mentally Disordered Offenders. It recommended three changes -

1. An order as to the defendant's disposition should be made by the trial court and not the Executive.¹⁰⁷
2. That order would not be mandatory but discretionary.
3. In exercising that discretion, the court should have power¹⁰⁸ to make the following orders -
 - (i) An order for the safe custody of the defendant in some institution or place appropriate to the circumstances of the case. Where the person is mentally ill that would ordinarily be an approved psychiatric hospital with a secure ward. In the case of an intellectually handicapped person that place might be a hospital or other institution, including a prison.

¹⁰⁶ Murray Report 423-425. Generally, in the other States of Australia and the Northern Territory, a person acquitted on account of unsoundness of mind must be held in strict custody at the discretion of the Executive: but cf *Crimes Act 1958* (Vic) s 420 (footnote number 108 below) and *Criminal Code* (Tas) s 382.

¹⁰⁷ Treatment of Mentally Disordered Offenders 77-78. A similar approach has also been recommended in England by the Butler Committee (Butler Committee Report para 18.42) and in Victoria by the Starke Report at 444-458 and the Law Reform Commission of Victoria: VLRC Report paras 76-79. The Law Commission Report, which is based in part on the Butler Committee recommendations did not set out the disposition powers in the Draft Bill because detailed proposals would still require consideration by the government departments concerned: Law Commission Report Vol 2, 226. Since then the *Criminal Procedure (Insanity and Unfitness to Plead) Act 1991* has been enacted which (when it comes into force) will empower the court to order that the person be admitted to a hospital or make a guardianship or supervision and treatment order or discharge the person absolutely: s 3.

¹⁰⁸ Courts have already been given wider disposition powers in both Victoria and New Zealand and also under Federal legislation in Australia (*Crimes Act 1914* (Cwth) s 20BJ). In Victoria the court may order detention at the Governor's pleasure or, having regard to any evidence before the court relating to the person's mental health or intellectual disability, make such order as it thinks fit to enable the person to receive appropriate services under the *Mental Health Act 1986* or the *Intellectually Disabled Persons' Services Act 1986*: *Crimes Act 1958* s 420. This section is inoperative at present: VLRC Report para 13. In New Zealand the trial court is required to order that a person acquitted on account of insanity be detained in a hospital as a special patient. Special patients may only be discharged from custody by the Minister of Health. Alternatively, the Minister may direct that the person be held as a committed patient under the ordinary civil processes: *Criminal Justice Act 1985* (NZ) s 117. The Court may, however, after hearing medical evidence and being satisfied that it would be safe in the interests of the public to do so-
 (a) make an order that the person be detained in a hospital as a "committed patient", that is, as a person who has been admitted to and detained as a compulsory patient under civil process; or
 (b) make an order for the person's immediate release: id s 115.
 If the person is subject to a sentence of imprisonment or detention that has not expired, the court may decide not to make any order.

- (ii) An order releasing the defendant by way of a conditional discharge into an appropriate after care programme.¹⁰⁹

2.39 The Commission agrees with and recommends the adoption of the first recommendation. As these orders significantly affect the interests of the person, only the courts should be given this dispositional power.

2.40 The Commission also agrees with and recommends the adoption of the second recommendation. The mandatory imposition of detention, whether in a hospital or in a prison, is unjustified because it is based on an assumption that a person who succeeds with a defence of insanity is dangerous and in need of restraint at the time of the trial, a prediction that is apparently based on the commission of the alleged offence. However, the person's mental condition may have improved between the time of the alleged offence and the time of the trial or the conduct may have arisen from a periodic disturbance such as epilepsy¹¹⁰ which can be treated with medication while the person leads a normal life in the community. This mandatory commitment also means that other factors cannot be taken into account, for example, a person may have been granted bail prior to trial, be living in the community, have a family and job, and be involved in an outpatient treatment programme and not require detention, either in a prison or a hospital. Moreover, a mandatory commitment, particularly to a prison, where a person is dealt with in the same manner as a convicted person, by its very nature must be seen as involving punishment, even though formally the defendant is not considered to be culpable.

2.41 So far as the powers proposed by the Inter Departmental Committee in the third recommendation are concerned, the Commission agrees with and recommends that the court should have these powers. However, the Commission recommends that the court should also have power to discharge the defendant without any other order. In some cases the defendant's mental condition at the time of the trial may be such that an absolute discharge can be made. By analogy with the right of a convicted person or the prosecution to appeal against a sentence,¹¹¹ both the defendant and the prosecution should be able to appeal to the Court of Criminal Appeal against the disposition order.

¹⁰⁹ The conditions of release and supervision would be fixed by the court.

¹¹⁰ See *R v Sullivan* [1984] AC 156.

¹¹¹ *Criminal Code* s 688(1a) and (2)(d).

2.42 The disposition of intellectually handicapped persons presents special difficulties because it is undesirable for them to be detained in a prison or approved hospital (unless the person is also mentally ill). Where the court is not satisfied that the defendant could be discharged either conditionally or unconditionally, a court may have no other option than to order detention in a prison or a secure facility of an approved hospital. To provide the courts with more appropriate dispositional options, the Commission recommends that the State Government and the Authority for Intellectually Handicapped Persons consider providing secure facilities for intellectually handicapped persons who are not mentally ill.¹¹²

(j) Review of the detention of those acquitted on account of unsoundness of mind

2.43 Where a person is held in strict or safe custody following an acquittal on account of unsoundness of mind¹¹³ the Governor may order his or her release from custody on such conditions as the Governor thinks fit, including that the person be under the supervision of a community corrections officer.¹¹⁴ The Governor also has power to order that the person be admitted to an approved hospital as a patient and may thereafter order that the person be liberated subject to specified terms and conditions.¹¹⁵

2.44 Where a person has been ordered to be held in strict custody, the Parole Board is required to make a report to the Attorney General with respect to that person once in every year or whenever requested by the Attorney General.¹¹⁶ The provisions of the *Offenders Community Corrections Act 1963* do not apply where the person has been admitted to an approved hospital.¹¹⁷ The position of a person so admitted is kept under review by

112 The Commission understands that the Authority is presently considering providing such facilities.

113 Either at the trial (*Criminal Code* s 653) or on appeal (id s 693(4)).

114 *Offenders Community Corrections Act 1963* s 34A(1) (previously known as the *Offenders Probation and Parole Act*). The purpose of the Governor's order that a person be held in safe custody is "to protect the public and in certain cases to protect the person made the subject of the order": *Wilmore v Court* [1983] WAR 190, 195. The merits of such a determination generally cannot be reviewed by the courts, but different considerations would apply "if it could be shown that [the power to continue the safe custody order] was being exercised for a purpose which is foreign to it as would... be the case if it could be made to appear that the safe custody order was being continued for no purpose other than punishment": id 196. See also Campbell 203-207.

115 *Mental Health Act 1962* s 48(1).

116 *Offenders Community Corrections Act 1963* s 34(2) (a) and (c). The person is not shown the report, nor is he or she entitled to reasons for the recommendation made in the report.

117 *Offenders Community Corrections Act 1963* s 34C(1). There is an inconsistency in the drafting of the *Offenders Community Corrections Act 1963* and the *Mental Health Act 1962*. s 34C(2) of the *Offenders Community Corrections Act* provides that when the Governor makes an order pursuant to s 48(2) of the *Mental Health Act* that "a person be returned to strict custody" the *Offenders Community Corrections Act*, including the provision for an annual report to the Attorney General, once again applies to the person. However, s 48(2) of the *Mental Health Act* does not provide for the person to be returned to strict

psychiatrists at the hospital and the person may be liberated upon such terms and conditions as the Governor thinks fit.¹¹⁸ A person who breaches any term or condition of the release may be retaken and returned to such hospital as the Governor may order.¹¹⁹ Neither the Parole Board nor the superintendent of the hospital has power to release the person from custody: that decision is made by the Governor after taking into account the advice of the Parole Board or the mental health authorities, as the case may be.

2.45 The Inter Departmental Committee on the Treatment of Mentally Disordered Offenders recommended that a specialist review board¹²⁰ should be established to monitor the position of every person who is the subject of a court order following a special verdict.¹²¹ Each case would be reviewed annually or more frequently if the board so decided. The board would also be required to review any case on the application of the person concerned, some interested person on the person's behalf or a representative of any institution or organisation having particular responsibility for the person concerned. The Commission agrees with these recommendations and recommends accordingly. This review process would serve to protect the interests of those detained in custody and avoid any possibility that the situation of a person would be overlooked by the Executive. Review by an independent body, a Mental Health Review Tribunal, has already been introduced in England.¹²² Although there was initial fear that the transfer of the release decision from the Executive to an independent body would lead to a flood of premature releases of dangerous persons, that has not proved to be the case and the use of an independent review body has not measurably increased the risk to the community.¹²³

custody. This lacuna could be overcome by providing that a person may be returned to strict custody on the Governor's order. The result would be, as was probably intended, that the *Offenders Community Corrections Act* would apply to those persons being held in strict custody but not to those being held as patients under the *Mental Health Act*.

118 *Mental Health Act 1962* s.48(1).

119 *Id* s 48(2).

120 The Committee recommended that the chairman of the board should be a Supreme Court judge. The other members would be a psychiatrist and three other persons appointed by the Governor to "represent appropriate areas of expertise and community interest": *Treatment of Mentally Disordered Offenders* 78. The establishment of such a board would not be costly. With only about ten people subject to review at any one time it could meet on an ad hoc basis. Administrative and secretarial services could be provided by those who provide services for the Parole Board.

121 *Treatment of Mentally Disordered Offenders* 78. The Law Reform Commission of Victoria also recommended that a Special Release Board should be established to make release decisions about those detained after a verdict of "not guilty on the ground of mental impairment": VLRC Report paras 95-102.

122 *Mental Health Act 1983* (UK) s 73. The membership of the Tribunal includes a person with legal experience and a registered medical practitioner: *id* s 65(2). For the position in Queensland where a review is carried out by a Patient Review Tribunal and a person may be released by the Parole Board on the recommendation of the Tribunal see the *Mental Health Services Act 1974* s 39.

123 J Peay *Offenders Suffering from Psychopathic Disorder* (1988) 28 *Brit J Crim* 67, 71-72.

2.46 The Committee also recommended that the board's decision should be final except for review for procedural fairness. The Commission does not agree with this recommendation. To allow for some cases to be dealt with by the Supreme Court, for example where a question of principle is involved, the Commission recommends that there should be provision for an appeal to the Court of Criminal Appeal with leave. Where leave is granted, the appeal should enable the merits of the decision to be reviewed.

2.47 As to the powers of the board, the Committee recommended that it should have power to -

- (a) alter the place of safe custody or the terms and conditions of any order for safe custody;
- (b) release conditionally a person in safe custody;
- (c) vary, modify or revoke those conditions;
- (d) return to safe custody a person who has been released conditionally; and
- (e) after a period of conditional discharge, discharge the person unconditionally.

The power to release conditionally from safe custody¹²⁴ and the power to discharge absolutely could only be exercised if the board was satisfied that "the proposed form of order is appropriate having regard to the welfare of the person concerned and the likelihood that the proposed order will not result in substantial danger arising out of his mental condition to the individual himself or the person or property of others."¹²⁵ The Commission agrees with these recommendations and recommends accordingly. These powers, together with regular review by the specialist review board, would enable a treatment regime to be developed for the detainee involving gradual progress towards absolute discharge from custody.

124 Under the existing law a person may be held in safe custody at the Governor's pleasure for the purpose of protecting "the public and in certain cases to protect the person made the subject of the order": *Wilsmore v Court* [1983] WAR 190, 195.

125 Treatment of Mentally Disordered Offenders 79. There is a similar provision in New South Wales where the Mental Health Review Tribunal is required to consider whether the safety of the person or any member of the public will be seriously endangered by the person's release: *Mental Health Act 1990* (NSW) s 81(2).

2.48 To place a limit on the period that a person could be detained in safe custody, the Committee recommended that there should be a maximum period of detention equal to the maximum imprisonment available had the person been convicted of the offence for which the verdict of not guilty on account of unsoundness of mind was returned.¹²⁶ A person who was not absolutely or conditionally discharged before the expiration of the maximum period would be discharged from detention, unless required to be further detained in that place or elsewhere under some form of civil process.¹²⁷

2.49 The Commission appreciates the desire of the Committee to protect the liberty of the subject by providing a maximum period of detention. However, given that the basis for detention is the "dangerousness" of the defendant, it does not agree with the Inter Departmental Committee on the Treatment of Mentally Disordered Offenders that there should be a maximum period of detention equal to the maximum period of imprisonment available had the person been convicted of the offence for which the special verdict was returned.¹²⁸ As the Law Reform Commission of Victoria stated:

"Limiting periods are inconsistent with the notion of dangerousness. Dangerousness bears little or no relationship to the sentence which would have been given had the person been found guilty. Also, the hypothetical sentence may become a *de facto* tariff which a person has to serve, rather than an outer limit on the period of detention."¹²⁹

To balance the need to protect the community from dangerous defendants and the need to protect the liberty of the subject, the Commission recommends a system in which the onus of proof shifts over time. Because the court's order for detention following acquittal on account of unsoundness of mind involves an assessment of dangerousness, during the first 12 months of detention, the onus should rest on those detained to establish that continued detention is not necessary because they do not constitute a substantial danger to themselves or to the person or

¹²⁶ Treatment of Mentally Disordered Offenders 79. In the case of an offence punishable with life imprisonment, the maximum period of detention would be 10 years. This leads to an anomaly, however, because the maximum penalty for manslaughter is 20 years imprisonment. If the offence for which the person would have been convicted is wilful murder or murder, the maximum period of detention would be 10 years but 20 years if the offence would have been manslaughter.

¹²⁷ Such as becoming an involuntary patient under the *Mental Health Act 1962*.

¹²⁸ The Law Reform Commission of Victoria said that the advantage of such schemes is that it offers "a knowable limit on the period of detention and a protection against excessively cautious release decisions": VLRC Report para 106.

¹²⁹ Id para 108.

property of others. After a period of 12 months, the onus should shift to the Crown to establish that continued detention is necessary, that is, the Crown should be required to establish that continued detention is necessary. After a prescribed period, related to the seriousness of the offence of which the defendant was found to be not guilty on account of unsoundness of mind, the defendant should be released unless the specialist review tribunal concluded, after an annual review, that it was more probable than not that the person would attempt to commit offences of serious violence to the person if set at liberty. Where the offence is sufficiently serious to carry a penalty of more than ten years' imprisonment or a life sentence, the prescribed period should be ten years. In other cases, that period should be the statutory maximum sentence for the offence unless the offence did not carry a sentence of imprisonment, in which case the period should be 3 years.

2. DIMINISHED RESPONSIBILITY

2.50 The concept of diminished responsibility has been introduced in a number of jurisdictions including England, New South Wales, Queensland and the Northern Territory.¹³⁰ Under the concept of diminished responsibility in England and New South Wales, a person's liability to be convicted of murder is reduced if an abnormality of mind at the time of the killing substantially impaired the person's responsibility for the killing, and a verdict of manslaughter may be returned instead. In Queensland and the Northern Territory, a verdict of manslaughter may be returned if the defendant's abnormality of mind substantially impaired capacity to understand what the person was doing, or capacity to control the person's actions or capacity to know that the person ought not to do the act or make the omission.¹³¹

2.51 The introduction of the concept of diminished responsibility has been considered and rejected in a number of jurisdictions in Australia. The South Australian Criminal Law and

¹³⁰ *Homicide Act 1957* (UK)s 2; *Crimes Act 1900* (NSW)s 23A; *Criminal Code* (Qld) s 304A; *Criminal Code Act* (NT) s 37.

¹³¹ In Queensland the onus and standard of proof for diminished responsibility and the insanity defence are the same. Diminished responsibility differs from the insanity defence in that it involves an "abnormality of mind" that substantially impairs one of the three capacities whereas under the insanity defence the defendant must be "in such a state of mental disease or natural mental infirmity as to deprive" the defendant of one of the capacities.

A study of reported cases shows that a range of conditions have been used to provide a basis for establishing diminished responsibility including aggressive psychopathy, sexual psychopathy, alcoholism, reactive depression, paranoia, epilepsy and hysteria. Psychopathy was relied upon in some 50% of these cases: K L Milte, A A Bartholomew and F Galbally *Abolition of the Crime of Murder and of Mental Condition Defences* (1975) 49 ALJ 160, 166.

Penal Methods Reform Committee¹³² and the Review of Commonwealth Criminal Law¹³³ recommended that the defence should not be introduced, as did a majority of the Law Reform Commission of Victoria.¹³⁴ In this State, the Murray Report also recommended that the concept of diminished responsibility should not be introduced.¹³⁵

2.52 Arguments against the introduction of the concept of diminished responsibility are -¹³⁶

- (a) Diminished responsibility is a mitigating factor that should be taken into account in the sentencing process.
- (b) The concept is too vague to be given practical effect in criminal trials.
- (c) Because it depends to such a large extent on what the defendant tells a psychiatrist or psychologist, it is open to abuse and fabrication.¹³⁷
- (d) It is illogical to provide, once the elements of an offence have been established, that the defendant should be convicted of some lesser offence because of a substantial abnormality of mind. If the abnormality of mind does not negate an element of the offence or provide the basis for a defence such as the insanity defence, what is really involved is a mitigating circumstance which should be recognised in the sentencing process.

2.53 The following arguments have been advanced for the introduction of the concept of diminished responsibility -¹³⁸

- (a) Where the penalty for wilful murder is death, a conviction for manslaughter enables the death sentence to be avoided in numerous cases in which it would

¹³² Fourth Report *The Substantive Criminal Law* (1977) 44-46.

¹³³ Gibbs Report para 9.43.

¹³⁴ VLRC Report para 148.

¹³⁵ Murray Report 179-180. The Report did not address the issue of whether an alternative approach, the abolition of the mandatory life sentences of imprisonment for wilful murder and murder, should be adopted: *id* 178.

¹³⁶ For other arguments against diminished responsibility see VLRC Report paras 142-147.

¹³⁷ VLRC DP para 146.

¹³⁸ For other arguments in favour of diminished responsibility see VLRC Report paras 135-141.

not be carried out.¹³⁹ This rationale is not applicable in this State because capital punishment for wilful murder has been abolished.

- (b) Where the penalty for wilful murder or murder is mandatory, as it is in this State,¹⁴⁰ a conviction for manslaughter (which has a maximum penalty of 20 years' imprisonment)¹⁴¹ on account of "diminished responsibility" gives the court a wider range of penalties and "public acceptance of lenient sentences is greater where the jury returns a manslaughter verdict rather than a murder verdict".¹⁴²
- (c) There is no sharp dividing line between sanity and insanity and just as insanity involves a continuum so too does individual responsibility. Where responsibility for a killing is substantially impaired, a lesser verdict of manslaughter should be returned rather than murder.
- (d) It avoids the stigma that the defendant would otherwise have to bear of being labelled a "murderer": "Diminished responsibility would enable the differences in moral gravity between murder and manslaughter to be clearly drawn in cases where that is not presently possible."¹⁴³
- (e) A form of diminished responsibility has already been introduced in this State with the offence of infanticide.¹⁴⁴

2.54 In view of the above arguments, the Commission recommends that the concept of diminished responsibility be introduced in this State in relation to charges of wilful murder and murder.¹⁴⁵ In particular, the Commission considers that the concept of diminished responsibility should be introduced because the result, a verdict of manslaughter, gives the

¹³⁹ Report of the *Royal Commission on Capital Punishment 1949-1953* (Cmd 8932) para 411.

¹⁴⁰ The penalty for wilful murder is strict security life imprisonment or life imprisonment and the penalty for murder is life imprisonment: *Criminal Code* s 282.

¹⁴¹ *Id* s 287.

¹⁴² VLRC Report para 138.

¹⁴³ *Id* para 136.

¹⁴⁴ Para 2.59 below. Diminished responsibility would also eliminate anomalies in the operation of the offence of infanticide: VLRC Report para 141.

¹⁴⁵ Four of the eight commentators on this issue favoured the introduction of the concept of diminished responsibility.

court a wider range of penalties. A wider range of penalties is available because the penalty for manslaughter is not mandatory but a maximum of 20 years imprisonment.

2.55 An alternative to the introduction of the concept of diminished responsibility is abolition of the mandatory life sentences for wilful murder and murder and their replacement with maximum sentences of life imprisonment.¹⁴⁶ In comments to the Commission the Chief Justice, the Hon D K Malcolm, supported abolition of the mandatory sentences but wondered whether it was realistic to expect community support for such a proposal at present. He proposed that if mandatory sentences were abolished, diminished responsibility should be specifically acknowledged by legislation as a mitigating factor. But if the mandatory sentences for wilful murder and murder were not abolished, he suggested that there would be a strong case for the introduction of the defence of diminished responsibility. The Commission has not considered whether the mandatory life sentences should be abolished because that issue is not within its terms of reference.¹⁴⁷ In any case the desirability of retaining the mandatory sentences should be considered in a broader context than in relation to a person's abnormality of mind.

2.56 So far as the formulation of the concept of diminished responsibility is concerned, the Commission recommends adoption of the approach in Queensland¹⁴⁸ because it reflects that

¹⁴⁶ A maximum sentence of life imprisonment has been introduced in Victoria (*Crimes Act 1958* s 3): Discussion Paper para 3.83. Abolition of the mandatory life sentences for murder has also been recommended in England by the Butler Committee (Butler Committee Report para 19.14) and a Select Committee of the House of Lords (*Report of the Select Committee on Murder and Life Imprisonment* (1989), in Tasmania by the Law Reform Commissioner of Tasmania (TLRC Report 11) and in Queensland (Queensland Report 44 and 102). In New South Wales the penalty for murder is penal servitude for life, that is, the person must serve that sentence for the term of his or her natural life: *Crimes Act 1900* s 19A (1) and (2). But the court has a discretion to impose a sentence of lesser duration: id s 19A (3). See generally G Coss *Legislation Comment: Crimes (Life Sentences) Amendment Act 1989* (NSW) (1990) 14 Crim LJ 348. In New Zealand the Crimes Bill 1989 dispenses with the mandatory life sentence for murder. This change was supported by the Crimes Consultative Committee in its report on the Bill: *Crimes Bill 1989* (1991) 44-45.

¹⁴⁷ This issue was not considered in the Murray Report: Murray Report 178.

¹⁴⁸ Section 304A of the Queensland *Criminal Code* provides:

"(1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair his capacity to understand what he is doing, or his capacity to control his actions, or his capacity to know that he ought not to do the act or make the omission, he is guilty of manslaughter only.

(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section liable to be convicted of manslaughter only.

(3) When two or more persons unlawfully kill another, the fact that one of such persons is by virtue of this section guilty of manslaughter only shall not affect the question whether the unlawful killing amounted to murder in the case of any other such person or persons."

The Queensland Report (at 102) recommended the retention of this section.

the difference between diminished responsibility and the insanity defence is merely one of degree:¹⁴⁹ the diminished responsibility provision requires that the effect of an "abnormality of mind" (the insanity defence provision refers to a "mental disease or natural mental infirmity")¹⁵⁰ must be "substantially to impair" the capacities listed in the provision whereas the insanity defence provision requires the effect to be to "deprive" the defendant of these capacities altogether.

2.57 As previously stated, where a verdict of manslaughter is returned, the penalty is a maximum of 20 years' imprisonment. Where the basis for the verdict is the defendant's "abnormality of mind", the sentencing judge may face a difficult dilemma: the abnormality of mind may be either a mitigating factor or, because it indicates that the offender is a continuing risk of danger, an aggravating factor. The imposition of a sentence of imprisonment in these circumstances was considered by the High Court in *Veen v R (No 2)*¹⁵¹ where it was held that the appropriate sentence for a particular offence is that which is proportionate to the gravity of the offence. At the same time, the protection of society is a material factor in fixing an appropriate sentence. Thus:

"It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible."¹⁵²

¹⁴⁹ As is pointed out in Fisse (109):

"In England and New South Wales the difference between diminished responsibility and insanity is one of kind as well as degree, for whereas uncontrollable impulse cannot amount to insanity in England or New South Wales, it can amount to diminished responsibility. In Queensland incapacity to control one's actions may be either insanity or diminished responsibility according as D is deprived of all capacity to control his actions or has that capacity only substantially impaired."

¹⁵⁰ In *R v Rolph* [1962] Qd R 262 it was held that "abnormality of mind" covers the same area as "mental disease or natural mental infirmity". In Western Australia, diminished responsibility may have a wider scope than the insanity defence because it has been held that an "anti-social personality disorder" is not a mental disease or natural mental infirmity for the purposes of that defence: para 2.13 above. Elsewhere it has been held that personality disorders are an abnormality of mind arising from inherent causes and so can amount to diminished responsibility: *R v Byrne* [1960] 3 All ER 1 and *Turnbull* (1977) 65 Crim App R 242.

¹⁵¹ (1988) 164 CLR 465.

¹⁵² Id 473.

2.58 Where a mental abnormality is the factor which makes the offender a danger to the public¹⁵³ a consideration of this factor, together with other purposes of criminal punishment, such as deterrence of the offender and of others who might offend, retribution and reform, should not ". . . lead to the imposition of a more severe penalty than would have been imposed if the offender had not been suffering from a mental abnormality."¹⁵⁴ As Malcolm CJ recently pointed out:

"The observance of the distinction between preventative detention, except in those cases which fall under s. 662¹⁵⁵ where it is permissible, and having regard to the need to protect the community when determining the sentence proportionate to the offence, while at the same time not imposing a sentence more severe than that which would have been imposed absent the offender's mental abnormality is a daunting task. The High Court regarded the observance of the distinction as itself calling for 'a judgment of experience and discernment': *Veen (No 2)* supra at p.474. Where the mental abnormality is the condition which pre-disposes the offender to re-offend, so producing the need to protect the public, it is extraordinarily difficult to serve that need without the imposition of a more severe penalty than that which would have been imposed without the mental abnormality. *Veen (No 2)* would seem to require a determination first of what sentence would be proportionate in the absence of the abnormality. The next step is to weigh in the balance the extent to which the mental abnormality makes the offender a danger to the public and at the same time diminishes his moral culpability."¹⁵⁶

In some cases, as the *Veen (No 2)* case shows, this process may lead to the imposition of a severe penalty, even the maximum penalty for the offence. *Veen (No 2)* involved an appeal against a sentence of life imprisonment which was dismissed. The case was in the worst category, thus justifying the maximum penalty for the offence, and the appellant's mental abnormality was not a mitigating factor because it made him a grave danger to society if he went at large.

¹⁵³ In *Veen v R* (1979) 143 CLR 458, 465-466 Stephen J said that where a verdict of manslaughter is returned and both diminished responsibility and provocation were raised at the trial the judge should ascertain the precise basis for the verdict from the jury.

¹⁵⁴ *Veen v R (No 2)* (1988) 164 CLR 465, 476-477.

¹⁵⁵ That is, s 662 of the *Criminal Code*, which is discussed in chap 6.

¹⁵⁶ Speech delivered to the Australian and New Zealand Association of Psychiatry Psychology and Law (WA Branch) 11 December 1989 *Mental Disorder and the Criminal Law* 16-17.

3. INFANTICIDE

2.59 The offence of infanticide, which was introduced in Western Australia in 1986, is defined as follows:¹⁵⁷

"(1) When a woman or girl who unlawfully kills her child under circumstances which, but for this section, would constitute wilful murder or murder, does the act which causes death when the balance of her mind is disturbed because she is not fully recovered from the effect of giving birth to the child or because of the effect of lactation consequent upon the birth of the child, she is guilty of infanticide only.

(2) In this section 'child' means a child under the age of 12 months."

The maximum penalty provided for the offence is seven years imprisonment.¹⁵⁸

2.60 The Commission sought comments in the Discussion Paper on whether the defence of insanity should continue to be available where a woman is charged with infanticide.¹⁵⁹ Even if the prosecution decided to lay a charge of infanticide rather than wilful murder, murder or manslaughter, the defendant's mental state at the time of the offence may justify the raising of the insanity defence. In considering whether or not to raise the defence, the defendant would no doubt take into account the disposition options available either on a conviction for infanticide or on a successful insanity defence. The Commission therefore recommends that it should continue to be available. The charge of infanticide involves ascribing criminal responsibility to a defendant though the sentence which may be imposed if she is convicted is substantially less severe than that for wilful murder, murder or manslaughter.¹⁶⁰

¹⁵⁷ *Criminal Code* s 281A. This offence has also been provided in England (*Infanticide Act 1938* s 1(1)), Tasmania (*Criminal Code Act 1924* s 165A), Victoria (*Crimes Act 1958* s 6), New South Wales (*Crimes Act 1900* s 22A) and New Zealand (*Crimes Act 1961* s 178).

See generally R Lansdowne *Infanticide: Psychiatrists in the Plea Bargaining Process* (1990) 16 Mon LR 41.

¹⁵⁸ The Law Reform Commission of Victoria recommended that the offence of infanticide should be retained but that it should be reformulated: VLRC Report ch 5.

¹⁵⁹ The four commentators who referred to this matter expressed the view that this possibility should be available.

¹⁶⁰ For this reason, the offence of infanticide should be retained even if the concept of diminished responsibility is introduced. See generally R Lansdowne *Infanticide: Psychiatrists in the Plea Bargaining Process* (1990) 16 Mon LR 41, 59-60.

4. GUILTY BUT MENTALLY ILL

2.61 In the United States of America a number of States have provided a verdict of "guilty but mentally ill" as a supplement to the insanity defence.¹⁶¹ In Michigan, for instance, where the verdict was first introduced, if the insanity defence has been pleaded, the guilty but mentally ill verdict may be returned where the defendant is guilty of the offence charged but was mentally ill at the time of the offence though not entitled to be acquitted on the grounds of insanity. A defendant may also enter a guilty but mentally ill plea, but a court cannot accept it until it has held a hearing on the issue of mental illness and is satisfied that the defendant was mentally ill when the offence was committed.

2.62 Where a guilty but mentally ill verdict is returned, the court may impose the same sentence as would be imposed on a defendant who is found to be guilty but not mentally ill. However, the condition of a defendant who is imprisoned must be evaluated and whatever treatment is indicated should be provided. Probation and parole orders can be made conditional on continued psychiatric treatment.

2.63 The following reasons have been advanced for the introduction of the guilty but mentally ill verdict. First, in the United States, it avoids constitutional problems raised by abolishing the insanity defence, yet provides the jury with another dispositional option. It seems to have been expected that the number of insanity acquittals would fall, but an empirical study in Michigan indicates that this has not occurred.¹⁶²

2.64 Secondly, the guilty but mentally ill verdict would ensure that criminally responsible but mentally ill defendants received treatment while incarcerated or on probation or parole. Thirdly, the verdict would assure the public that a criminally responsible and mentally ill defendant received any necessary psychiatric care after sentencing. However, the mental health facilities have been no more readily available for those found guilty but mentally ill than for other convicted persons.¹⁶³

¹⁶¹ It was adopted in at least 11 States: Michigan, Indiana, Illinois, Alaska, Georgia, New Mexico, Delaware, Kentucky, Connecticut, Utah and Pennsylvania: I Keilitz and J P Fulton *The Insanity Defence* (1984) 22.

¹⁶² Id 43.

¹⁶³ Id 45.

2.65 One argument against the guilty but mentally ill verdict is that juries "may avoid grappling with the difficult moral issues inherent in adjudicating guilt or innocence"¹⁶⁴ when the insanity defence is raised. This has not occurred in either Michigan or Illinois. In Michigan a similar number of acquittals on account of insanity per annum have been returned since the guilty but mentally ill verdict was introduced while in Illinois the number has increased. Studies in Michigan indicate that those found guilty but mentally ill did not meet the insanity defence standard and would have been found guilty in any case.

2.66 A second argument against the guilty but mentally ill verdict is that it is not necessary to have such a verdict to ensure that defendants receive treatment whilst incarcerated. In any case, it is illogical for commitment procedures to be based on a jury verdict which does not take into account the defendant's mental condition at the time of the trial. The guilty but mentally ill verdict has been described as a "hoax on the public" because it "does not abolish the insanity defense, as the public often thinks, and it does not guarantee that the individual will receive treatment while incarcerated".¹⁶⁵ The Commission therefore recommends that the guilty but mentally ill verdict not be introduced in this State. It does, however, recommend below¹⁶⁶ that hospital orders be introduced as an alternative to a sentence following a verdict of guilty.

5. SUMMARY OF RECOMMENDATIONS

2.67 The Commission recommends that -

The insanity defence

1. The insanity defence should be retained.

Paragraphs 2.2 to 2.4

2. The term "mental disease or natural mental infirmity" used in section 27 of the *Criminal Code* should be replaced with the term "abnormality of mind (from mental illness or intellectual disability)".

Paragraphs 2.11 and 2.12

¹⁶⁴ *American Psychiatric Association Statement on the Insanity Defense* (1983) 140 Am J Psychiatry 681, 684.

¹⁶⁵ B A Weiner *Interfaces Between the Mental Health and Criminal Justice System: The Legal Perspective* 32 in *Mental Health and Criminal Justice* (1984, L A Teplin, ed).

¹⁶⁶ Paras 5.23 to 5.37.

3. The second paragraph of section 27 relating to delusions should be retained.

Paragraphs 2.16 and 2.17

Acts or Omissions which occur independently of will

4. No change should be made to the existing law relating to the relationship between sections 23 and 27 of the *Criminal Code*.

Paragraphs 2.18 to 2.22

The burden of proof of the insanity defence

5. There should be no change in the burden of proof of the insanity defence.

Paragraph 2.25

Procedural matters relating to the insanity defence

6. The prosecution should not be permitted to raise the insanity defence during the opening of its case.

Paragraph 2.27

7. A two stage trial should not be introduced for cases in which the insanity defence is raised.

Paragraphs 2.29 to 2.32

8. Where a defence of insanity is successful the jury should continue to be required to find specially that the defendant has been acquitted on account of unsoundness of mind.

Paragraph 2.33

9. Where the insanity defence is successful, the jury should be required to state the specific offence of which the defendant has been acquitted on account of unsoundness of mind.

Paragraph 2.34

10. The trial judge should not be required to instruct the jury as to the consequences of a successful defence of insanity.

Paragraph 2.35

11. The trial court should be empowered to accept a plea of not guilty on account of unsoundness of mind if it is satisfied that there was evidence available that would justify such a verdict.

Paragraph 2.36

Disposition

12. The trial court should have power to determine the appropriate disposition of the defendant where the insanity defence is successful.

Paragraph 2.39

13. In doing so, the court should have power to make the following orders -

1. An order for the safe custody of the defendant in some institution or place appropriate to the circumstances of the case. Where the person was mentally ill that would ordinarily be an approved psychiatric hospital with a secure ward. In the case of an intellectually handicapped person that place might be a hospital or other institution, including a prison.
2. An order releasing the defendant by way of a conditional discharge into an appropriate after care programme.
3. Discharge the defendant without any other order.

Paragraph 2.41

14. The State Government and the Authority for Intellectually Handicapped Persons should consider providing secure facilities for intellectually handicapped persons who are not mentally ill.

Paragraph 2.42

15. Both the defendant and the prosecution should be able to appeal to the Court of Criminal Appeal against the disposition order.

Paragraph 2.41

Review of the detention of those acquitted on account of unsoundness of mind

16. A specialist review board should be established to monitor the position of every person the subject of a court order following a special verdict. Each case would be reviewed annually or more frequently if the board so decided.

Paragraph 2.45

17. The board would also be required to review any case on the application of the person concerned, some interested person on the person's behalf or a representative of any institution or organisation having particular responsibility for the person concerned.

Paragraph 2.45

18. There should be provision for an appeal from the specialist review board to the Court of Criminal Appeal with leave.

Paragraph 2.46

19. The board should have power to –
 - (a) alter the place of safe custody or the terms and conditions of any order for safe custody;
 - (b) release conditionally a person in safe custody;
 - (c) vary, modify or revoke those conditions;
 - (d) return to safe custody a person who has been released conditionally;
and

- (e) after a period of conditional discharge, discharge the person unconditionally.

Paragraph 2.47

- 20. During the first 12 months of detention, the onus should rest on those detained to establish that continued detention is not necessary because they do not constitute a substantial danger to themselves or to the person or property of others.

After a period of 12 months, the onus should shift to the Crown to establish that continued detention is necessary, that is, the Crown should be required to establish that continued detention is necessary.

After a prescribed period, related to the seriousness of the offence of which the defendant was found to be not guilty on account of unsoundness of mind, the defendant should be released unless the specialist review tribunal concluded, after an annual review, that it was more probable than not that the person would attempt to commit offences of serious violence to the person if set at liberty. Where the offence is sufficiently serious to carry a penalty of more than ten years' imprisonment or a life sentence, the prescribed period should be ten years. In other cases, that period should be the statutory maximum sentence for the offence unless the offence did not carry a sentence of imprisonment, in which case the period should be 3 years.

Paragraph 2.49

Diminished responsibility

- 21. The defence of diminished responsibility should be introduced, formulated in the same manner as it has been formulated in Queensland.

Paragraphs 2.54 and 2.56

Infanticide and the insanity defence

- 22. It should continue to be possible to raise the insanity defence where the defendant is charged with infanticide.

Paragraph 2.60

Guilty but mentally ill

23. The verdict of guilty but mentally ill should not be introduced.

Paragraph 2.66

Chapter 3

CRITERIA OF UNFITNESS TO STAND TRIAL

1. GUIDELINES

(a) Present law

3.1 This chapter is concerned with the criteria for determining whether or not a defendant is fit to stand trial due to mental disorder or abnormality.¹ Unlike the issue of criminal responsibility referred to in the previous chapter, which is concerned with the mental state of the defendant at the time of the alleged offence, fitness to stand trial involves a consideration of the defendant's condition at the time of the trial.² At present, in trials on indictment, section 631 of the *Criminal Code* provides that a person is unfit to stand trial³ if, *for any reason*, the person is incapable of understanding the proceedings at the trial so as to be able to make a proper defence.⁴ It does not involve a consideration of whether the defendant has capacity "to understand the substantive law bearing upon criminal responsibility for the act alleged to have been done".⁵

3.2 In giving directions to a jury empanelled to determine whether or not a defendant is fit to stand trial, judges in Western Australia have generally, but not always,⁶ been guided by the more precise explanation of the issues in question given by Smith J in *R v Presser*:

"He needs, I think, to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs

¹ See item 1 of the terms of reference: para 1.1 above.

² If the defendant is found to be unfit to stand trial the court may order that the defendant be either discharged or detained in such place and in such manner as the Court thinks fit until dealt with according to law: *Criminal Code* s 631.

³ For an account of the historical development of the concept of unfitness to stand trial see N Walker *Crime and Insanity in England* (1968) Chap 14.

⁴ The procedure for determining this issue is discussed in the following chapter: para 4.1. The Murray Report recommended that the provision be confined to unfitness arising from "mental disease or natural mental infirmity": Murray Report 399-400.

⁵ *Ngatayi v R* [1980] WAR 209, 211. An appeal to the High Court was unsuccessful: *Ngatayi v R* (1980) 147 CLR 1.

⁶ Compare the summing up of the judges in *R v Narkle* (unreported) Supreme Court of Western Australia, 1974, No 56, and *R v Davies* (unreported) Supreme Court of Western Australia, 1975, No 47 and the summing up in *R v Indich* (unreported) District Court of Western Australia, 1988, No 817.

to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any."⁷

(b) The law elsewhere

3.3 None of the other States in Australia has detailed statutory guidelines for fitness to stand trial. The *Criminal Codes* of Queensland,⁸ Tasmania and the Northern Territory have provisions similar to section 631 of the Western Australian *Criminal Code*.⁹ In South Australia and Victoria, in the case of trials on indictment, a person is unfit to be tried if insane such that the person cannot be tried.¹⁰ The New South Wales *Mental Health (Criminal Procedure) Act 1990*¹¹ simply refers to the defendant's "unfitness to be tried for the offence" and the *Commonwealth Crimes Act 1914* refers to a person's fitness to be tried in respect of the offence.¹²

3.4 In New Zealand the criteria for determining fitness to stand trial have changed a number of times in the last 30 years.¹³ At present, a defendant may be found to be "under

⁷ [1958] VR 45, 48.

⁸ S 28A of the *Mental Health Services Act 1974* (Qld) provides a definition of fitness to stand trial for the purpose of proceedings brought before the Mental Health Tribunal. That definition provides that "fit for trial" means "in relation to a person, fit to plead at his trial and to instruct counsel and to endure his trial, with serious adverse consequences to his mental condition being unlikely."

⁹ *Criminal Code* (Qld) s 613; *Criminal Code* (Tas) s 357; *Criminal Code* (NT) s 357.

¹⁰ *Criminal Law Consolidation Act 1935* (SA) s 293(1) and *Crimes Act 1958* (Vic) s 393. As to Victoria, see the guidelines in *R v Presser* referred to in para 3.2 above.

¹¹ S 5.

¹² S 20B. The Gibbs Report recommended adoption of a provision in the same terms as the existing provision in this State: para 9.44(b).

¹³ In *R v Owen (No 2)* [1964] NZLR 828 the following criteria were put to the jury -

disability" if, because of the extent to which that person is mentally disordered, the person is unable to -

- (a) plead;
- (b) understand the nature or purpose of the proceedings; or
- (c) communicate adequately with counsel for the purpose of conducting a defence.¹⁴

In England a person who is unable to understand the course of proceedings at the trial, so as to make a proper defence, to challenge a juror to whom the person might wish to object, and to understand the substance of the evidence is unfit to stand trial.¹⁵

(c) Proposals for reform elsewhere

(i) New South Wales

3.5 In 1974, following a review of the *Mental Health Act 1958*, the *Mental Health Act Review Committee* recommended that the following definition of "unfit to be tried" should be provided:

-
1. Is the defendant able to understand that he or she is charged with committing a crime or that he or she is entitled to defend the charge?
 2. Is the defendant able to make a proper decision whether to plead guilty or not guilty?
 3. Does the defendant have the ability to appreciate the fact that there is a right to challenge jurors in order to exclude persons who might be prejudiced against the defendant?
 4. Is the defendant able to appreciate the fact that there is a right to cross-examine prosecution witnesses, call witnesses and to give or abstain from giving evidence on the defendant's behalf?
 5. Does the defendant have a rational recollection of the events and circumstances in which the defendant was a participant at the time of the alleged offence? If the defendant were actually present at the scene of the crime, does the defendant have a proper recollection of what he or she did? If the defendant was not present at the scene of the crime, does the defendant have a proper recollection of where and what he or she was doing so that evidence can be called to establish an alibi should that be necessary."

In 1969 the concept of a defendant being "under disability" in relation to a trial was introduced statutorily so that a defendant was under disability if "mentally disordered to such an extent as to be unable to plead, or unable to conduct a defence or instruct a solicitor for that purpose, or unable to comprehend the course of proceedings": *Criminal Justice Amendment Act 1969* (NZ) s 2. The definition was changed to its present form in 1980: *Criminal Justice Amendment Act 1980* (NZ) s 19.

¹⁴

¹⁵ *Criminal Justice Act 1985* (NZ) s 108.

¹⁵ See *R v Podola* [1960] 1 QB 325, 353.

"'Unfit to be tried' means in relation to a criminal charge that the person charged is not able (for whatever reason) to understand the nature of the charge or the possible consequences of a finding of guilt, or properly to conduct a defence (or coherently to instruct a legal adviser for that purpose) or adequately to comprehend the course or significance of proceedings up to and including sentence."¹⁶

The Committee said that, at the time, only persons who were mentally ill could be considered to be unfit to stand trial.¹⁷ The proposed definition therefore involved an extension of those who could be considered to be unfit to stand trial. For example, it might include a person who was amnesic or deaf and dumb. The proposed definition was not accepted when the provisions relating to fitness to stand trial were amended by legislation in 1983.¹⁸ Following comments by a Supreme Court judge on a definition originally included in the Bill, it was thought to be better to leave the definition of unfitness to be worked out on a case-by-case basis by the courts.¹⁹

(ii) *Victoria*

3.6 The Starke Report recommended that the statute governing fitness to stand trial ought to provide that a defendant should be regarded as fit to stand trial only if the defendant was capable of:

- understanding the nature of the charge; and
- pleading to the charge and exercising his or her right of challenge; and
- understanding the nature of the proceeding; and
- generally following the course of the proceeding; and

¹⁶ Report of the *Mental Health Act Review Committee* (1974) 60 and 61.

¹⁷ But see P J M MacFarlane *Unfitness to be Tried for an Offence* (1987) 11 Crim LJ 67, 70-71.

¹⁸ The provisions were included in the *Crimes Act 1900* (NSW) Part XIA. These provisions have since been repealed and replaced: see *Mental Health (Criminal Procedure) Act 1990* (NSW) Part 2.

¹⁹ See P J M MacFarlane *Unfitness to be Tried for an Offence* (1987) 11 Crim LJ 67, 74.

- understanding the substantial effect of any evidence given against him or her;
- or
- making his or her defence to the charge and, if he or she is represented by counsel or a solicitor, of giving his or her counsel or solicitor all necessary instructions to enable the counsel or solicitor to defend the charge on his or her behalf."²⁰

These guidelines generally follow those enunciated in *R v Presser*.²¹ Subsequently, the Law Reform Commission of Victoria proposed the retention of the guidelines set out in *R v Presser*,²² but it did not recommend that the guidelines be codified.

(iii) *England*

3.7 The Butler Committee, in its report on mentally abnormal offenders, decided that the phrase "unfit to plead" was unsatisfactory because it was misleading and recommended that a more appropriate one would be whether the accused was "under disability in relation to the trial".²³ It also considered whether the existing criteria²⁴ were adequate. In a submission to the Committee, Her Majesty's Judges recommended that the existing criteria should be modified by omitting the reference to challenging a juror, and adding the following two criteria -

- (i) whether the defendant can give adequate instructions to legal advisers; and
- (ii) plead, with understanding, to the indictment.

The Committee recommended the adoption of the criteria so modified.²⁵

(iv) *Canada*

²⁰ Starke Report 481-482.

²¹ Para 3.2 above.

²² VLRC Report para 126.

²³ Butler Committee Report para 10.2.

²⁴ See para 3.4 above for the existing criteria.

²⁵ Butler Committee Report para 10.3.

3.8 The Law Reform Commission of Canada recommended in 1976 that a person should be considered to be unfit if, owing to mental disorder:

- "(1) he does not understand the nature or object of the proceedings against him, or
- (2) he does not understand the personal import of the proceedings, or,
- (3) he is unable to communicate with counsel."²⁶

It also recommended that lack of recollection should be specifically excluded as a cause of unfitness to stand trial. The Commission stated:

"The fitness rule is concerned with *present* mental ability to communicate. If the accused is rational and is able to tell his lawyer that he does not remember any of the circumstances of the alleged offence, he should be considered fit to stand trial."²⁷

In a more recent report (in 1987), following these recommendations, the Commission recommended that the criteria for unfitness to plead should be as follows:

"Any person who, at any stage of the proceedings, is incapable of understanding the nature, object or consequences of the proceedings against him, or of communicating with counsel owing to disease or defect of the mind which renders him unfit to stand trial, shall not be tried until declared fit."²⁸

(d) Recommendations

(i) *Retention of the concept of fitness to stand trial*

3.9 Although the question of fitness to stand trial does not arise often in trials in Western Australia,²⁹ the Commission recommends that, as a matter of fairness and humanity, the

²⁶ Law Reform Commission of Canada *Mental Disorder in the Criminal Process* (1976) 14.

²⁷ Ibid.

²⁸ *Recodifying Criminal Law* (Report No 31 1987) 32.

²⁹ A survey of trials in the Supreme Court in the period 1970-1985 disclosed only six cases in which the issue was raised on account of the defendant's mental condition. In four cases the defendant was found to

concept should be retained in our criminal justice system.³⁰ Adversarial proceedings, such as a criminal trial, are unlikely to be fair if the defendant lacks capacity to mount a defence or to instruct counsel, for example, by revealing all the facts of which the defendant is aware.

(ii) *Statutory guidelines*

3.10 The meaning and scope of section 631 has been considered in a number of cases, but there is no authoritative determination on these matters. While the courts have generally been guided by criteria set out in *R v Presser*³¹ there have been differences in the criteria given to juries. The considerations for and against replacing the existing provision with detailed statutory guidelines are -

* The existing provision provides the correct basis for determining whether or not a person is fit to stand trial³² and it allows some flexibility in that the guidelines given to the jury can be tailored to the circumstances of the particular case.

* On the other hand, if guidelines are not set out statutorily, there is a risk that existing judicial guidelines may not be used consistently.

* The enactment of guidelines also provides an opportunity to reassess the law and to ensure that the law is straightforward and easy to understand using terms with as precise a meaning as possible.

* Statutory guidelines do not necessarily avoid misinterpretation, but they tend to make the law more certain and the application of the guidelines by the courts more easily ascertainable.

* Statutory guidelines also provide assistance for experts who may be required to examine a defendant in order to determine whether the person is fit to stand trial.³³

be unfit to stand trial. In a fifth case the defendant was remanded for a psychiatric report but died before the trial was due to be held. In the sixth case the defendant was found to be fit to stand trial.

³⁰ The same conclusion was reached by the Inter Departmental Committee on the Treatment of Mentally Disordered Offenders in its report *Treatment of Mentally Disordered Offenders* at 50-51.

³¹ Para 3.2 above.

³² In its report *Treatment of Mentally Disordered Offenders* (at 63) the Inter Departmental Committee concluded that the tests of capacity formulated by the common law were adequate without statutory definition, but that it had no objection to the provision of statutory criteria ". . . if it was thought desirable as in some other jurisdictions".

3.11 To promote consistent assessments of fitness to stand trial by experts and the courts, the Commission recommends that statutory guidelines be provided. In deciding whether or not a defendant is, for any reason, capable of understanding the proceedings so as to make a proper defence the deliberation of the judge or jury should include a consider of whether the defendant is capable of -

- (i) pleading to the indictment with understanding;
- (ii) understanding that the nature or purpose of the proceedings is to determine whether or not the defendant committed the offence charged and generally following the course of the proceedings;
- (iii) understanding the substantive effect of the evidence;
- (iv) making a defence to the charge and, if represented by counsel, communicating adequately with counsel for the purpose of giving all necessary instructions to enable a defence of the charge to be conducted.

2. AMNESIA

3.12 Another issue is whether or not a person suffering from amnesia should be entitled to raise the issue of fitness to stand trial.³⁴ Depending on the circumstances, a defendant with amnesia could be seriously handicapped in making a proper defence. If unable to remember events at the time of the alleged offence, the defendant could not give counsel and the court an account of what happened. On the other hand, the defendant would suffer no handicap if independent witnesses could give an account of what happened or provide the defendant with an alibi. Even where a state of mind such as intent was an element of the offence, an account by an independent witness could enable the defendant to make a proper defence.

³³ See, for example, *Reference by Director of Psychiatric Services in Respect of Roy Sarracino* (1987) 31 A Crim R 176, 180 in which an expert witness had not had his attention directed to the definition of fitness to stand trial and merely stated that the defendant was unfit to stand trial because he had a paranoid disorder.

³⁴ The only commentator on the Discussion Paper to refer to this issue, the Chief Justice, the Hon D K Malcolm, said that he was prepared to see hysterical amnesia which brought the defendant within the guidelines recognised as a ground for unfitness to stand trial.

3.13 The question whether a defendant with amnesia should be able to raise the issue of fitness to stand trial was considered in England in *R v Podola*.³⁵ Podola claimed that he was unfit to stand trial because of amnesia as to the events at the time of the crime. The Court of Criminal Appeal held that hysterical amnesia did not render a person unfit to be tried for an offence because the relevant legislation, the *Criminal Lunatics Act 1800*, was confined to an "insane" person. The Court said that it did not accord "with reason or common sense to extend the meaning of the word [insane] to include persons who are mentally normal at the time of the hearing of the proceedings against them, and are perfectly capable of instructing their solicitors as to what submission their counsel is to put forward with regard to the commission of the crime."³⁶

3.14 This approach has not always been adopted by the courts in England. For example, in *R v Governor of HM Prison at Stafford, ex parte Emery*³⁷ the defendant, a deaf mute who was unable to write or to use and understand sign language, was found to be unfit to stand trial, not upon the grounds of any mental affliction, but simply because of his inability to communicate with or be communicated with by others. In any case, the reasoning of the Court of Criminal Appeal may be criticised on two grounds. First, a defendant who is suffering from amnesia at the time of the trial is not necessarily "mentally normal", if for example, the amnesia is due to an organic or psychological cause.³⁸ Secondly, defendants are not capable of instructing their counsel as to a defence if they cannot recall where they were or what they were doing at the time of the alleged offence. Their position is different from defendants who merely claim that they cannot remember where they were at the time of an offence but who can say that they did not commit the offence. For the amnesic defendant a defence of accident or alibi may be justified but it cannot be raised unless independent witnesses are available and come forward.

3.15 As section 631 of the *Criminal Code* is not confined to an "insane" person but applies to a person who for any reason "is incapable of understanding the proceedings so as to make a proper defence" the decision in *R v Podola* can be distinguished. An indication of the width of the provision in this State is that the want of understanding need not be due to a mental or

³⁵ [1960] 1 QB 325.

³⁶ Id 356.

³⁷ [1909] 2 KB 81.

³⁸ Amnesia may arise from organic brain damage arising from, say, a blow to the head or it may have a psychological cause such as a dissociative phenomenon stemming from a reaction to an anxiety producing situation.

physical condition; it can be due to the defendant coming from a different cultural background.³⁹ In the High Court, Gibbs, Mason and Wilson JJ commented that defendants are capable of understanding the proceedings so as to make a proper defence if they are able to understand the evidence, and to instruct their counsel as to the facts of the case.⁴⁰ A person with genuine amnesia would not necessarily have these capabilities.

3.16 One concern with the availability of amnesia as a basis for unfitness to stand trial is that it could be feigned readily.⁴¹ Were it feigned successfully, the result would be that the defendant would be discharged from custody and the trial would be postponed indefinitely. A safeguard against feigned amnesia however is that a "real question as to incapacity" must be raised before the procedure set out in section 631 of the *Criminal Code* should be followed.⁴² As amnesia does not, of itself, prevent a person understanding the proceedings at the trial so as to make a proper defence, the Commission does not recommend that it be expressly provided that a person suffering from amnesia should be entitled to raise the issue of fitness to stand trial. On the other hand, it could fall within the guidelines and should not be excluded as a basis for a determination that a defendant is unfit to stand trial. For example, the fourth guideline proposed by the Commission in paragraph 3.11 above could apply to a defendant with amnesia. Whether or not that was so in a particular case could involve a consideration of factors such as -

1. The extent to which the amnesia affected the defendant's ability to consult with and assist counsel.
2. The extent to which the evidence, such as evidence relating to the crime itself as well as any reasonably possible alibi, could be extrinsically reconstructed in view of the defendant's amnesia.

³⁹ See the case of an Aboriginal, Jamba Jinba Yupupu, referred to in an article by L Davies *The Yupupu Case* (1976) 2 Legal Service Bulletin 133 and *R v Grant* [1975] WAR 163.

⁴⁰ *Ngatayi v R* (1980) 147 CLR 1, 9.

⁴¹ Butler Committee Report para 10.7. A majority of the members of the Committee recommended that amnesia should not be available as a basis for unfitness to stand trial. For the arguments of those in the majority and the minority see the Discussion Paper paras 4.10 to 4.12.

⁴² *Ngatayi v R* (1980) 147 CLR 1, 9.

3. The extent to which the prosecution assisted the defence in the reconstruction.⁴³

3. SECTION 652 OF THE *CRIMINAL CODE*

3.17 Section 652 of the *Criminal Code* provides that a person who is not of sound mind cannot be tried. The purpose of section 652 is not clear. It may have been intended to be an extension of section 631 which operates only "when the accused person is called upon to plead to the indictment." If this is so, it would enable the issue of fitness to stand trial to be raised following the defendant's plea. However, this may not be the section's purpose because it is not as wide as the section which expressly deals with fitness to stand trial: section 631 refers to "any reason", but section 652 refers only to "sound mind". Section 652's real purpose may be to allow a trial to be interrupted if the defendant is unsound of mind, whether or not unfit to stand trial.⁴⁴ This approach has two advantages: it prevents the defendant from disrupting the trial proceedings with bizarre behaviour and the defendant may receive treatment for the mental condition. The disadvantage is that the defendant may be detained indefinitely, possibly in a mental hospital,⁴⁵ even though the defendant is not deprived by the mental disorder of capacity to make a proper defence.

3.18 The four commentators on the Discussion Paper who referred to the issue, including Mr M J Murray QC, as he then was,⁴⁶ supported the repeal of section 652. Mr Murray's approach was consistent with his recommendations in the Murray Report where his view was that the section merely operated as an extension of section 631.⁴⁷ Having recommended that section 631 of the *Criminal Code* should be widened to apply at any time during the trial, he recommended that section 652 be repealed. This approach has the advantage that the trial is not interrupted if the defendant is merely unsound of mind but not unfit to stand trial unless a short adjournment is required because the defendant's decorum disrupts the trial. Although respect for the court and maintenance of the decorum of the court are important considerations, they alone should not preclude a defendant from an opportunity of obtaining an acquittal. While an adjournment of the trial in order to receive treatment may be in the

⁴³ These factors were adopted in *Wilson v United States* 391 F.2d 460, 463-464 (DC Cir 1968) referred to in D H Hermann *Amnesia and the Criminal Law* (1986) 22 Idaho LR 257, 285.

⁴⁴ A similar provision in Queensland appears to have been used in this manner in *R v O'Brien* 1922 QWN 33.

⁴⁵ Under the *Mental Health Act 1962* s 47.

⁴⁶ Now Justice Murray.

⁴⁷ Murray Report 423.

defendant's best interest, most trials will not be unduly long and that treatment can be provided at the end of the trial whether or not the defendant is convicted.⁴⁸ Accordingly, the Commission recommends that section 652⁴⁹ be repealed and that section 631 be extended to apply at any time during the trial.

4. SUMMARY OF RECOMMENDATIONS

3.19 The Commission recommends that -

1. The existing provision, section 631 of the *Criminal Code*, should be supplemented by providing that a person is not capable of understanding the proceedings so as to make a proper defence if the defendant is unable to -

- (i) plead to the indictment with understanding;
- (ii) understand that the nature or purpose of the proceedings is to determine whether or not the defendant committed the offence charged and generally follow the course of the proceedings;
- (iii) understand the substantive effect of the evidence; and
- (iv) make a defence to the charge and, if represented by counsel, communicate adequately with counsel for the purpose of giving all necessary instructions to enable a defence of the charge to be conducted.

Paragraph 3.11

2. Section 652 of the *Criminal Code*, which provides that a person cannot be tried if not of sound mind, be repealed.

Paragraph 3.18

⁴⁸ Where a person is imprisoned, a prison superintendent may order the removal of a prisoner to a hospital, including an approved hospital under the *Mental Health Act 1962*, for treatment: *Prisons Act 1981 s 27*.

⁴⁹ The repeal of section 652 was also recommended in the report *Treatment of Mentally Disordered Offenders* (at 63). The Inter Departmental Committee on the Treatment of Mentally Disordered Offenders said that: "It is a bad provision which does not tie the question of unsoundness of mind to the capacity to participate properly in the trial process."

3. Section 631 of the *Criminal Code* be amended so that it applies at any time during the trial.

Paragraph 3.18

Chapter 4

FITNESS TO STAND TRIAL: PROCEDURE

1. THE PROCEDURE IN WESTERN AUSTRALIA

(a) Unfitness to stand trial due to mental disorder

4.1 If it is uncertain whether a defendant is capable of understanding the proceedings at the trial of an indictable offence so as to make a proper defence, a jury must be empanelled to determine the matter. The jury may find that the defendant is incapable of understanding the proceedings due to some physical or mental disorder, or because of a different cultural background.¹ However, in this report the Commission is concerned only with defendants who are considered to be unfit to stand trial due to mental disorder or intellectual disability.² Section 631 provides³ that if the jury finds that a defendant is incapable of understanding the proceedings, the court may order that the defendant be either discharged or detained ". . . in such place and in such manner as the court thinks fit, until he can be dealt with according to law".⁴ Of course, the trial proceeds in the normal manner if the jury finds that the defendant is capable of understanding the proceedings.

4.2 Where a person is detained in custody following a finding of unfitness to stand trial there is no statutory procedure for reviewing the situation of the person so detained. The person's mental state can, however, as a matter of administrative practice, be kept under review by officers of the Department of Corrective Services or the Health Department, as the case may be, depending on where the person is held.⁵

¹ Para 3.15 above. There is no appeal against a jury's determination: para 4.27 below.

² A person who has been committed to stand trial may also be diverted from the criminal process if two medical practitioners find that the person is suffering from "mental disorder to the extent that he ought not to stand trial": *Mental Health Act 1962* s 47(1)(a). Where such a finding is made, the Minister may direct that the person be admitted as a patient to an approved hospital until the superintendent or another psychiatrist certifies that the person is fit to be discharged, in which case the Minister must order that the person be removed to the place the person was detained prior to admission as a patient. Admission as a patient does not operate as a bar to a subsequent indictment and trial: *id* s 47(2).

³ There are similar procedures in South Australia (*Criminal Law Consolidation Act 1935* s 293), Victoria (*Crimes Act 1958* s 393), Tasmania (*Criminal Code* s 357) and Queensland (*Criminal Code* s 613).

⁴ This is sufficiently wide to allow the court to order that the person be kept in a prison or hospital. The purpose of the section is to ". . . facilitate the performance by the Crown of its duty to determine what, if any, steps need to be taken to render the accused person fit to stand trial": *R v Donovan* [1990] WAR 112, 118. The fact that a defendant has been found to be incapable of understanding the proceedings does not mean that the person cannot be indicted again and tried: *Criminal Code* s 631.

⁵ Cases in other jurisdictions give some indication of how the question of fitness might be dealt with in the absence of a statutory procedure for reviewing the detention of a person found to be unfit to stand trial. In *Stathis* (Supreme Court of South Australia, 18 September 1978 unreported referred to in *R v Forrester*

(b) Unsoundness of mind during the trial

4.3 Section 652 of the *Criminal Code* provides that in trials on indictment, if it appears or it is alleged during a trial that a defendant is unsound of mind, the jury hearing the charge must consider whether or not the person is sound of mind.⁶ If the jury finds that the defendant is unsound of mind the court is required to order detention in strict custody until the person is dealt with under the laws relating to insane persons.⁷ As the Commission has recommended that section 652 of the *Criminal Code* be repealed,⁸ the following discussion is confined to the procedure for dealing with unfitness to stand trial due to mental disorder.

2. RECOMMENDATIONS

(a) Holding a special hearing

4.4 The major problem with the existing procedure for dealing with fitness to stand trial is that the criminal process is interrupted where a defendant is found to be unfit to stand trial⁹ until he or she becomes fit to stand trial. Although the procedure appears to be for the defendant's benefit, it can operate unfairly, particularly if the defendant is detained indefinitely in either an approved hospital or a prison. Those so detained may feel aggrieved at an indefinite detention without trial and this feeling may have an adverse effect on any treatment they receive. In any case, it may be in a defendant's interest for the trial to proceed

(1982) 7 A Crim R 167, 169), the defence intimated in court that the defendant wished to be tried. The Chief Justice heard evidence as to the then condition of the defendant which was to the effect that she was fit to stand trial, and then took a plea from her. In another South Australian case (*R v Forrester* (1982) 7 A Crim R 167, 169), Mitchell J said:

"... I am of the opinion that, except in the cases of agreement by the parties that the accused is fit to plead and wishes to plead, it is necessary for a jury to be empanelled to decide, after hearing evidence, whether the accused's condition has improved to the extent that he is fit to plead. A jury having once determined that the accused is unfit to plead, it seems to me that the onus of proving that he is now fit to plead should be on him who asserts it. If the Crown makes the assertion then the proof should be beyond reasonable doubt; if the accused claims that he is fit to plead the onus of proving it should be upon the balance of probabilities."

⁶ There are similar provisions in Tasmania (*Criminal Code* s 380) and Queensland (*Criminal Code* s 645).

⁷ A person who is found to be unsound of mind during the trial can be indicted again and tried for the offence: *Criminal Code* s 652. The Minister may order that a person who has been found to be unsound of mind during the trial be admitted to an approved hospital as a security patient: *Mental Health Act 1962* s 47(1). If this is done, the person must be detained in the hospital until the superintendent or another psychiatrist certifies that the person is fit to be discharged. The case may therefore be kept under review within the hospital as a matter of medical routine: s 55 of the *Mental Health Act 1962* relating to review by the Supreme Court of a person detained as a patient in any approved hospital does not apply to a person admitted under s 47 (*Mental Health Act 1962* s 56). The Parole Board is required to make an annual report and recommendation to the Attorney General about each person who is in strict custody: *Offenders Community Corrections Act 1963* s 34(2)(a).

⁸ Para 3.18 above.

⁹ Or unsound of mind during the trial. Although the following discussion is concerned with fitness to stand trial, similar problems arise with unsoundness of mind during the trial.

because there may be grounds for attacking the prosecution's case: the prosecution may be barred as a matter of law or the prosecution may be unable to establish a prima facie case or prove beyond reasonable doubt that the defendant committed the offence charged.¹⁰ A finding of unfitness to stand trial also means that defences such as accident, self-defence and insanity cannot be considered by a jury.¹¹

4.5 Under the existing criminal process there are two opportunities to obtain the defendant's discharge even though, if a trial were held, the defendant would be unfit to stand trial. One opportunity is at a preliminary hearing, but the court only has to consider whether the prosecution evidence is sufficient to put the defendant on trial for an indictable offence.¹² the prosecution does not have to establish its case beyond reasonable doubt as it does at a trial with a jury.¹³

4.6 The second opportunity is at a pre-arraignment hearing.¹⁴ At this hearing, a court may determine any question of law that may arise in the trial. The admissibility of any matter in evidence, including a confessional statement, or question of law can therefore be determined before the issue of the defendant's fitness to stand trial is raised. If the determination of such matters meant that the defendant had no case to answer or that the case was too weak to proceed, the prosecution could consider entering a nolle prosequi, thus bringing the proceedings to an end without the need to consider whether the defendant was fit to stand trial. There could, however, be other cases in which the weakness of the prosecution case would not be exposed until its evidence was tested in court or until the defence presented its evidence. To deal with these cases it would be necessary to provide for the issue of fitness to stand trial to be postponed at least until the opening of the case for the defence¹⁵ or for a special hearing to be conducted to enable the defendant to obtain an acquittal.

¹⁰ This may occur, for example, if the prosecution cannot tender its only or main piece of evidence, such as a confessional statement: *R v Stewart* (1972) 56 Cr App R 272.

¹¹ The lapse of time between the alleged offence and the eventual trial may also hamper the trial because witnesses may have died or left the State or their memories may have faded.

¹² *Justices Act 1902* s 106.

¹³ In any case, even if a defendant is discharged at a preliminary hearing, the Attorney General may present an indictment in the Supreme or District Court: *Criminal Code* s 579.

¹⁴ The Murray Report (at 397-399) recommended that pre-empanelment proceedings be introduced. They are at present held in the Supreme Court, but not in the District Court.

¹⁵ At which time the defence could make a submission of no case to answer.

4.7 Postponement of the issue of fitness to stand trial until the opening of the case for the defence may occur in both England¹⁶ and New Zealand.¹⁷ The English legislation provides that where the question arises whether or not a defendant is under such a disability as would constitute a bar to the defendant being tried, the court may postpone a consideration of the question of fitness to be tried until any time prior to the opening of the case for the defence if, having regard to the nature of the supposed disability, the court is ". . . of opinion that it is expedient so to do and in the interests of the accused".¹⁸

4.8 If the question of fitness was postponed and the defendant was acquitted there would, of course, be no need to consider the matter further and the defendant would be discharged.¹⁹ If, however, the defendant was not acquitted prior to the opening of the case for the defence, the question of fitness would be considered and determined.²⁰

4.9 In this State the Inter Departmental Committee on the Treatment of Mentally Disordered Offenders recommended the adoption of a procedure similar to that in England and New Zealand. It recommended that although the question of fitness to be tried should ordinarily be resolved as soon as it arises, it should be possible for the trial judge to postpone

¹⁶ *Criminal Procedure (Insanity) Act 1964* (UK) s 4. The Act substantially enacts the recommendations of the Criminal Law Revision Committee in its Third Report *Criminal Procedure (Insanity)* (1963 Cmnd 2149).

¹⁷ *Criminal Justice Act 1985* (NZ) s 110.

¹⁸ *Criminal Procedure (Insanity) Act 1964* (UK) s 4(1) and (2). In *R v Burles* [1970] 1 All ER 642, 644-645 the Court of Appeal stated that:

" . . . a trial judge must in applying this subsection first consider the apparent strength or weakness of the prosecution case as disclosed on the depositions or statements as the case may be. He should then go on to consider the nature and degree of the suggested disability, something which will be disclosed in the medical reports before the judge; then having paid attention to those two matters he must ask himself: what is expedient and in the prisoner's interest? Approaching the matter on that basis one can envisage cases to which there can really only be one answer; thus the prosecution case may appear so strong and the suggested condition of the prisoner so disabling that postponement of the trial at issue would be wholly inexpedient. Again, the prosecution case may be so thin that whatever the degree of disablement it clearly would be expedient to postpone the trial. Between these two extremes it falls to the judge to weigh up the various considerations, and as a matter of discretion to order that the issue either be tried forthwith or postponed."

See also *R v Webb* [1969] 2 All ER 626.

In other cases the question of fitness to be tried is determined as soon as it arises: id s 4(3). If the question of fitness to be tried is determined at the commencement of the proceedings (ie it is not postponed under s 4(1) and (2)) and the trial proceeds the defendant must be tried by a jury other than the one which determined the question of fitness: id s 4(4)(a).

In New Zealand, the determination of whether or not the defendant is under disability may be postponed until any time up to the opening of the case for the defence if it is in the interests of the defendant: *Criminal Justice Act 1985* (NZ) s 110(3).

¹⁹ *Criminal Procedure (Insanity) Act 1964* (UK) s 4(2).

²⁰ In England the question of fitness is determined either by the jury by whom the defendant was being tried or by a separate jury: id s 4(4)(b). In New Zealand, the question whether or not a defendant is under a disability is determined by a judge: *Criminal Justice Act 1985* (NZ) ss 109 and 111. The Commission recommends below that the issue of fitness to stand trial should be determined by a judge: para 4.26.

resolution of the question if it was proper in the interests of justice that the prosecution should first be required to present its case before a jury. The court would be required to direct a verdict of acquittal and discharge the defendant if the prosecution failed to prove an element of the offence charged or if there was so little evidence that it would be dangerous to allow the case to go to the jury.²¹

4.10 The principal shortcoming of a postponement of the issue of fitness to stand trial until the end of the prosecution case is that it provides limited assistance to defendants: it can be effective only in those cases in which the prosecution cannot establish a prima facie proof of guilt. To overcome this shortcoming, the Commission recommends that provision be made for a special hearing to be held even though the defendant is unfit to stand trial.²² A special hearing would enable the defendant to obtain an acquittal if that is possible before being detained, perhaps indefinitely.²³ The expense of a scheme allowing special hearings would

²¹ Treatment of Mentally Disordered Offenders 64. Alternatively, the committee suggested that the prosecution case could be presented to the judge in the form of a voir dire and the judge could enter a verdict of acquittal and discharge the defendant if the evidence did not establish an essential element of the offence charged or if no reasonable jury properly directed could properly return a verdict of guilty: id 64-65. This approach was supported by the Law Society.

²² Two forms of special hearing, one proposed by the Butler Committee and one which operates in New South Wales, were examined in the Discussion Paper: paras 5.29-5.40. For the existing New South Wales provisions see *Mental Health (Criminal Procedure) Act 1990 Part 2* (NSW). Although the recommendations of the Butler Committee have not been implemented as yet, a private member's bill has been passed providing for a special hearing in England: *Criminal Procedure (Insanity and Unfitness to Plead) Act 1991*.

The Victorian Law Reform Commission criticised the New South Wales procedure because of the expense and delay involved as a result of the need for a shuttle between the court and the Mental Health Review Tribunal to determine whether the person is likely to remain unfit for the next 12 months. It also criticised the scheme for setting a "limiting term" because sentencing culpability cannot be determined in unfit cases. Another criticism was of the possibility of a finding that the person is guilty on the limited evidence available. It said that (VLRC Report para 124):

"Guilt is inextricably linked with intent and that is a matter which cannot be satisfactorily dealt with where the defendant is unable to give proper instructions."

Despite these criticisms, the Victorian Law Reform Commission reported that prosecution and defence lawyers involved in special hearings in New South Wales were generally satisfied with the system: VLRC Report para 124.

The Victorian Law Reform Commission proposed a special hearing involving the following procedure: VLRC Report 46. If a person has been found to be unfit to be tried and it is unlikely that the person will become fit to be tried within the next 12 months, a special hearing should be held to determine whether the prosecution can prove its case against the defendant and any other issues which can fairly be determined in view of the defendant's condition. At a special hearing, the jury would be able to return a verdict of acquittal, a verdict of not guilty on the ground of mental impairment or a finding that no issue can be determined. Where the defendant is found to be not guilty on the ground of mental impairment, the disposition options and release mechanisms would be the same as those applicable to a not guilty on the ground of mental impairment verdict. Where the finding is that no issues can be determined, the defendant remains unfit to stand trial and the disposition options and release mechanisms would be the same as those applicable to a not guilty on the ground of mental impairment verdict.

For an alternative approach see *Crimes Act 1914* (Cth) ss 20B-20BH. The Gibbs Report (paras 9.4-9.12), which contains a detailed account of the procedure, recommended its retention: para 9.44(a).

²³ If the defendant is acquitted on a special trial, it could also mean that the actual offender will not escape detection and prosecution.

not be great because fitness to stand trial arises rarely.²⁴ Of course, if the defendant was not acquitted at a special hearing, there might be the additional cost of a trial when the defendant became fit to stand trial.

4.11 With the introduction of a special hearing, the issue of fitness to stand trial should be dealt with in the following manner. As stated above,²⁵ it should be possible to raise the issue of fitness to stand trial at any time during the trial. Once raised, it should be determined by the judge.²⁶ The trial would proceed in the normal manner if the defendant was fit to stand trial.

4.12 If not, the judge should, on the application of the defence, have a discretion to order that a special hearing be held if it is in the interests of justice to do so. The exercise of this discretion would involve a consideration of the strength of the prosecution case and the likelihood that it could be challenged by the defence and an acquittal secured. That assessment could be made on the basis of the depositions or submissions by counsel for the defence and the prosecution on the Crown case, though the defence counsel would have to consider whether it was worthwhile to reveal its defence at the outset. The judge could also consider whether the defendant was likely to become fit to stand trial within a short space of time.²⁷ If so, it may be preferable to adjourn the trial instead of holding a special hearing. Such an adjournment would not preclude the holding of a special hearing if the defendant did not become fit to stand trial within the anticipated time. If the judge decided not to hold a special hearing or adjourned the trial, the defendant would be dealt with in the manner discussed below.²⁸

4.13 Where the judge decided to hold a special hearing it would be conducted in the same way as a normal trial with a jury except in two respects.²⁹ First, the defendant should not be permitted to give evidence. A defendant who was unfit stand trial might wish to give evidence against counsel's advice with the result that the defendant would be subject to the perhaps unedifying spectacle of a cross-examination. The defendant might also disclose

²⁴ It was raised in only six cases in the Supreme Court in 1970-1985. Between 1986 and 1990 there have been only about eight special hearings in New South Wales: VLRC Report para 122.

²⁵ Para 3.18.

²⁶ Para 4.26 below.

²⁷ That would not be the case where, for example, the defendant had a severe intellectual handicap.

²⁸ Paras 4.14-4.17.

²⁹ If the issue of fitness to stand trial is raised after a jury has been empanelled and the judge orders that a special hearing be held, the hearing should be held before that jury.

incriminating evidence which could be tendered at a subsequent trial if a verdict of acquittal was not returned at the special hearing. Secondly, the jury should not be able to return a verdict of guilty. It would be unfair to allow such a verdict to be returned where the defendant is unfit to stand trial. The jury should be confined to returning a verdict of acquittal, a verdict that the defendant is not guilty on account of unsoundness of mind³⁰ or a finding that no issue can be determined.³¹ Where the latter finding is made, the defendant remains unfit to stand trial and the disposition options would be those set out below.³² The defendant should not be permitted to have more than one special hearing.

(b) Disposition following a finding of unfitness to stand trial

4.14 If the defendant is found to be unfit to stand trial and a special hearing is not held or at a special hearing the jury finds that no issue can be determined, the question of the defendant's disposition arises. In England, where the jury finds that the defendant is not fit to plead the trial does not proceed further³³ and the court is required to order that the defendant be admitted to such hospital as may be specified by the Secretary of State.³⁴ A person found to be under a disability may appeal to the Court of Appeal against that finding.³⁵ A finding that a person is under a disability and unfit to plead does not bar that person from being tried once the Secretary of State, after consultation with the responsible medical officer, is satisfied that the person can properly be tried.³⁶ The indefinite nature of the order may discourage defendants from raising the fitness issue except where the offence charged is very serious and would, on conviction, lead to a lengthy sentence of imprisonment.

4.15 In New Zealand, if the defendant is found to be "under disability" the judge must order that the defendant be detained as a "special patient" under the *Mental Health Act 1969*³⁷ but an order may be made that the defendant be held as a "committed patient" or discharged from custody if the judge is satisfied that it is safe in the interests of justice to make the order.³⁸ When either of these orders is made, the proceedings against the defendant are stayed and no

³⁰ In which case the defendant should be dealt with in the manner set out in paras 2.38-2.41 above.

³¹ The same recommendation was made by the Victorian Law Reform Commission: VLRC Report 46.

³² Para 4.17.

³³ *Criminal Procedure (Insanity) Act 1964* (UK) s 4(5).

³⁴ Id s 5(1). S 3 of the *Criminal Procedure (Insanity and Unfitness to Plead) Act 1991* substitutes a new s 5 which empowers the court to order that the person be admitted to a hospital or make a guardianship or supervision and treatment order or discharge the person absolutely.

³⁵ *Criminal Appeal Act 1968* (UK) ss 15 and 16.

³⁶ *Criminal Procedure (Insanity) Act 1964* (UK) s 5(4).

³⁷ *Criminal Justice Act 1985* (NZ) s 115.

³⁸ Id s 115(2).

further proceedings may be taken against the defendant in respect of any offence charged in those proceedings.³⁹ Special patients are subject to a maximum period of detention.⁴⁰ If before the expiration of that period a certificate is given by two medical practitioners or by the superintendent of a hospital that the defendant is no longer under disability, the Attorney General must direct that the defendant be brought before the appropriate court or be held as a committed patient. During that period, even though the defendant is still under disability, the Minister may direct that the defendant be held as a committed patient if detention as a special patient is no longer necessary. At the expiration of the period, if the defendant is no longer under disability, the Attorney General must direct that the defendant be brought before the appropriate court or be held as a committed patient. Otherwise the defendant must be held as a committed patient. Once the defendant is held as a committed patient the proceedings are stayed and no further proceedings should be taken against the defendant in respect of any offence charged in those proceedings.⁴¹

4.16 In this State, the Inter Departmental Committee on the Treatment of Mentally Disordered Offenders recommended that the court should have power to order that the defendant be held in safe custody or released on bail until dealt with according to law. The court would be responsible for monitoring the progress of the matter and reviewing decisions as to the disposition of the defendant.⁴² In any case, it was recommended that detention in safe custody should not be for longer than one half the maximum period of imprisonment which might be imposed upon the defendant by way of sentence upon conviction for the offence charged in the indictment. The maximum period of detention would be three years unless the offence was punishable by life imprisonment or strict security life imprisonment, in which case, the maximum period would be five years. If still unfit to stand trial at the end of the maximum period, the defendant would be discharged from further proceedings upon the indictment.⁴³

4.17 Because the liberty of the subject is involved, the Commission agrees with the recommendation of the Inter Departmental Committee on the Treatment of Mentally

³⁹ Id s 115(5).

⁴⁰ Where the offence charged is punishable by imprisonment for life that period is seven years. In other cases it is half the maximum term of imprisonment to which the defendant is liable on conviction: id s 116(1).

⁴¹ *Criminal Justice Act 1985 (NZ)* s 116 (6)-(7).

⁴² Treatment of Mentally Disordered Offenders 65-66. The person in charge of the institution in which the defendant was held would be responsible for reporting to the court when the defendant became fit to stand trial or there was a need to change the defendant's treatment or place of custody: id 65.

⁴³ Id 66-67.

Disordered Offenders that decisions as to disposition should be made by the courts and not by the Executive and so recommends. The Commission also recommends that the court should have power to release the defendant on bail because it may provide a beneficial way of dealing with defendants, particularly intellectually handicapped persons. As there are no secure facilities in Western Australia for the detention of intellectually handicapped persons,⁴⁴ they might otherwise be detained in a prison⁴⁵ or a secure psychiatric facility. A power to release on bail would enable the court to release the defendant conditionally, for example, on condition that the person reside at a facility provided by the Authority for Intellectually Handicapped Persons or a private care group⁴⁶ and receive training designed to render the person fit to stand trial.⁴⁷

(c) Review of the detention of a person found to be unfit to stand trial

4.18 Another issue that needs to be addressed is the procedure for reviewing the detention of a person found to be unfit to stand trial. The Inter Departmental Committee on the Treatment of Mentally Disordered Offenders recommended that the court should be responsible for monitoring the defendant's progress and reviewing the disposition decision. It also recommended that this mechanism for review should involve imposing a duty on the person in charge of the particular institution to report to the court in writing whenever it was considered that the defendant had become fit to stand trial or there was a need to change the treatment or the place of custody to accommodate such a change. The court could then reconvene the inquiry as to fitness to stand trial so as to make further orders to facilitate treatment or to consider whether the defendant was fit to stand trial.⁴⁸

⁴⁴ The Commission recommended in para 2.42 above that the Government and the Authority for Intellectually Handicapped Persons should consider providing secure facilities for intellectually handicapped persons who are not mentally ill.

⁴⁵ The recent case of Leonard Indich highlights the inadequacy of the existing powers and facilities. Indich, who is intellectually handicapped, was found to be unfit to stand trial and was ordered to be detained in a prison: *R v Indich* (unreported) District Court of Western Australia, 1988, no 817. Eventually a nolle prosequi was entered and he was released to be cared for by relatives in the country where it was suggested that he would be away from the environment that led him into contact with the law.

⁴⁶ Such as the Activ Foundation Inc.

⁴⁷ See *R v Donovan* [1990] WAR 112, 118 where it was held that the purpose of the disposition is to enable "the Crown to determine what, if any, steps need to be taken to render the accused person fit to stand trial".

⁴⁸ Treatment of Mentally Disordered Offenders 65-66 paras 18 and 19. The Inter Departmental Committee on the Treatment of Mentally Disordered Offenders also recommended that there should be a maximum period that a person could be held in custody so that the defendant would be discharged from further proceedings upon the indictment at the end of that period if he or she was still unfit to stand trial: para 4.16 above.

4.19 The Commission differs from the Inter Departmental Committee on the Treatment of Mentally Disordered Offenders in that it believes that the position of a person found to be unfit to stand trial should be reviewed by a specialist review board.⁴⁹ The review process should comprise a number of elements. The defendant's progress should be monitored by the board. That should be done by periodic reports to the board by the authority responsible for the defendant's treatment or training or sooner at the request of the board. Secondly, following any such review, the board should have power to hold a hearing to determine whether a custodial order is still necessary, whether the person can be discharged either conditionally or unconditionally or whether the defendant is fit to stand trial. Thirdly, as a custodial order or a conditional discharge is a significant restriction on an individual, a person who believes that he or she is fit to stand trial or no longer need be detained in custody or subject to a conditional discharge, should have a right to have the order reviewed by the board.

4.20 The Inter Departmental Committee on the Treatment of Mentally Disordered Offenders recommended that there should be a limit on the period a person could be detained in an endeavour to produce fitness to stand trial. It recommended that the period of detention should not be greater than one half the maximum period of imprisonment that could be imposed on the defendant for the most serious offence charged. Where that offence was punishable by life imprisonment or strict security life imprisonment, the maximum period would be five years. In other cases the maximum period would be three years. Once the appropriate period had expired, if the defendant remained unfit to stand trial, the defendant would be acquitted by the court and discharged from detention, unless the person could be detained under the civil processes.⁵⁰

4.21 Although limitation periods are necessarily arbitrary, the Commission recommends that the approach of the Inter Departmental Committee on the Treatment of Mentally Disordered Offenders should be adopted, though not necessarily the periods proposed by it.⁵¹ While the review process recommended above will ensure that those who become fit to stand trial are returned to court promptly, it should be recognised that there is a point where it is of

⁴⁹ For the position in Queensland where the review is carried out by a Patient Review Tribunal see the *Mental Health Services Act 1974* ss 34 and 38. In Tasmania, there is a review mechanism involving a Mental Health Review Tribunal: *Criminal Code* s 382.

⁵⁰ A similar approach has been adopted in New Zealand (*Criminal Justice Act 1985* s 116(1)) and Queensland (*Mental Health Services Act 1974* s 35(3)).

⁵¹ Five years might be thought to be too short a period where a person is charged with unlawful killing.

no avail to continue to detain a person in the hope that the person will become fit to stand trial, though civil commitment may still be necessary. This is because, after a lengthy period of time, it is unrealistic to expect that the defendant will ever become fit to stand trial. In any case, if the defendant was being deprived of a fair trial, the court may stay proceedings against the defendant even if the person became fit to stand trial.

(d) Raising the issue of fitness to stand trial at a preliminary hearing

4.22 At present, in the case of indictable offences, the issue of fitness to stand trial can be raised during a trial.⁵² However, there is no statutory provision which permits the issue to be raised during a preliminary hearing held before a stipendiary magistrate or justices of the peace.⁵³ It is uncertain whether the question could be raised independently of any statutory provision.⁵⁴

4.23 An advantage of allowing the issue of fitness to be raised and determined at a preliminary hearing is that a defendant who is unfit can be diverted from the criminal process at an early stage to receive treatment though such treatment could be obtained in any case in the period between the committal and the trial. The major reason for allowing the issue of fitness to stand trial to be raised is that a defendant's mental condition might deprive him or her of the ability to mount a defence. This reason does not have the same importance at a

⁵² S 631 of the *Criminal Code* applies only where the defendant "is called upon to plead to the indictment".

⁵³ In *New Zealand*, the question of whether or not a defendant is under a disability may be raised at a preliminary hearing. If the issue is raised and the court considers that a postponement is in the interests of the defendant, it may postpone a consideration of the question until it determines whether the defendant should be committed for trial. If the charge is dismissed, the question of whether the defendant is under a disability is not determined. If, however, the charge is not dismissed and the court finds that the defendant is under disability, the proceedings are adjourned until the defendant ceases to be under disability: *Criminal Justice Act 1985* (NZ) s 110(5). A similar approach has been proposed in *Canada*: Law Reform Commission of Canada, Report on *Mental Disorder in the Criminal Process* (1976) 15-16. In *Victoria*, it was recommended that the Public Advocate, appointed under the *Guardianship and Administration Act 1986*, should be notified by the presiding magistrate at a committal hearing whenever it appeared that an accused was unfit to stand trial. In such a case, the Public Advocate would take over the role of instructing counsel appearing for the accused: Starke Report 475-476. The accused could decline to be represented by the Public Advocate and this wish would be acceded to unless the magistrate found that the accused was unfit to stand trial. A preliminary hearing would proceed in the normal manner except that the prosecution would be required to make all material within its possession available to the Public Advocate, whether or not the prosecution intended to lead it as part of its case, or considered it relevant in the matter. If the magistrate concluded that the evidence was of sufficient weight to support a conviction of any indictable offence, the defendant would be committed for trial. Otherwise, the defendant would be discharged. The *Commonwealth Crimes Act 1914* contains a complicated procedure for raising and dealing with the issue of fitness to stand trial at committal proceedings: *Crimes Act 1914* (Cwth) ss 20B-20BH. For a detailed account of this procedure see the Gibbs Report paras 9.4-9.11.

⁵⁴ Not being simply an adjectival or procedural matter, it could not be dealt with under the court's "unexpressed power to control its procedures": *Sparkes v Bellotti* [1981] WAR 65, 69.

preliminary hearing as at a trial because the issue at a preliminary hearing is whether or not there is sufficient evidence to put the defendant on trial: the defendant is not in jeopardy of being convicted of the offence charged. The preliminary hearing provides a safeguard against misconceived or speculative prosecutions in the higher courts. In view of these considerations, the Commission recommends that it should not be possible to raise the issue of fitness to stand trial at a preliminary hearing.⁵⁵

4.24 Problems can, however, arise at a preliminary hearing if a defendant is not fit to participate in the proceedings. At such a hearing the defendant may be required to make two elections: whether or not to have the charge dealt with summarily⁵⁶ or to have a preliminary hearing.⁵⁷ If the defendant is mentally unfit to make these elections, the Commission recommends that the defendant should be deemed to have elected to have a trial on indictment or a preliminary hearing, as the case may be.⁵⁸ This approach is consistent with the existing procedure where a defendant stands mute when asked to elect whether or not to have a preliminary hearing. In such a case the defendant is deemed to have elected to have a preliminary hearing.⁵⁹ This approach means that the prosecution must present evidence to support the charge at a preliminary hearing and, if the presiding officer⁶⁰ is of the opinion that the evidence is not sufficient to put the defendant on trial for any indictable offence, the defendant must be discharged.⁶¹ If on the other hand the evidence is sufficient, the defendant would be committed for trial⁶² and the issue of fitness to stand trial could then be raised at the trial.

(e) Raising the issue of fitness to stand trial by the prosecution

4.25 At present the defence, the prosecution⁶³ and the court⁶⁴ may raise the issue of whether a defendant is fit to stand trial. It might be argued that as the prosecution and the defence are

⁵⁵ The Victorian Law Reform Commission also concluded that it should not be possible to raise unfitness to stand trial at committal hearings: VLRC Report para 112.

The two commentators on the Discussion Paper who addressed this issue said that it should be possible for the issue of fitness to stand trial to be raised during a preliminary hearing.

⁵⁶ *Justices Act 1902* s 101A. See Campbell 37-38.

⁵⁷ *Justices Act 1902* s 101B.

⁵⁸ The Inter Departmental Committee on the Treatment of Mentally Disordered Offenders also recommended that the matter should proceed on the basis that full committals are required: Treatment of Mentally Disordered Offenders 48 para 19.

⁵⁹ *Justices Act 1902* s 101B(2)(a).

⁶⁰ Usually a stipendiary magistrate.

⁶¹ *Justices Act 1902* s 106.

⁶² *Id* s 107.

⁶³ *Ngatayi v R* (1980) 147 CLR 1, 9.

adversaries the prosecution should not be permitted to raise the issue of fitness, an issue which may prevent the defendant from challenging the prosecution's case. However, the Commission recommends that the prosecution should continue to be able to raise the issue because it is a matter relevant to the fairness of the trial process. In any case, the Commission's recommendations above will enable the prosecution's case to be tested notwithstanding that the defendant may be unfit to stand trial.⁶⁵ Further protection is provided for the defendant because when the issue is raised by the prosecution the standard of proof is proof beyond a reasonable doubt.⁶⁶

(f) Should the issue of fitness to stand trial be determined by a jury or a judge?

4.26 At present a jury, not the judge presiding at the trial, determines whether the defendant is fit to stand trial.⁶⁷ Two arguments for retaining jury determination of the issue are -

- * The question of fitness to stand trial involves the determination of a question of fact to some extent, a question which is traditionally determined by a jury.
- * It is a determination which, under the existing law, can lead to indefinite detention possibly in a prison and a determination by a jury is a necessary safeguard. Even if the Commission's recommendation for review of the detention of a person found to be unfit to stand trial was adopted the defendant could face detention for some period of time.

Three arguments for providing for the issue to be determined by a judge are -

⁶⁴ *R v Donovan* [1990] WAR 112, 115.

⁶⁵ Paras 4.10 to 4.13 above.

⁶⁶ *R v Donovan* [1990] WAR 112, 116. It might, however, be argued that the prosecution should only be required to establish lack of fitness to stand trial on the balance of probabilities because it is a preliminary issue. This is the position in both New South Wales (*Mental Health (Criminal Procedure) Act 1990* ss 5 and 6) and Queensland (*Mental Health Services Act 1974* s 28A) where the contending party need only prove the matter on the balance of probabilities. The Commission considers, however, that the prosecution should continue to be required to prove lack of fitness beyond a reasonable doubt. As a safeguard, it has the advantage over other safeguards, such as wider dispositional powers and an independent review mechanism, that it applies at the time fitness is determined.

⁶⁷ In comments on the Discussion Paper, six commentators said that the issue should be determined by a judge. Only one commentator said that the issue should continue to be determined by a jury.

- * The question of fitness to stand trial does not involve the defendant's culpability and therefore consideration of the issue by a jury is unnecessary.
- * Determination of the issue by a judge would avoid the need for two jury trials, one to determine the issue of fitness and the other to determine the defendant's culpability.
- * The Murray Report recommended that the issue of fitness to stand trial should be determined by a judge⁶⁸ because it is difficult to convey to a jury an adequate understanding of fitness to stand trial which involves an appreciation of "not only the factual matters likely to be raised in the course of the trial, but also the legal issues which arise, both as matters of substance and as procedural matters in relation to how the accused would be best served in conducting his defence".⁶⁹

The Commission is persuaded by the third and fourth arguments above that a judge, not a jury, should determine the issue of fitness to stand trial. It recommends accordingly.⁷⁰

(g) A defendant's right of appeal

4.27 Where the issue of fitness to stand trial has been determined and the trial proceeds,⁷¹ the defendant, if convicted, may appeal against the conviction on a question of law or fact including an error relating to a preliminary issue.⁷² However, there is no right of appeal against a jury's determination that a defendant is unfit to stand trial.⁷³ In the interests of fairness to the defendant, particularly as the Commission has recommended that the prosecution should continue to be permitted to raise the issue of fitness to stand trial,⁷⁴ the

⁶⁸ Murray Report 400-401.

⁶⁹ Id 401.

⁷⁰ The same recommendation was made by the Inter Departmental Committee on the Treatment of Mentally Disordered Offenders: Treatment of Mentally Disordered Offenders 64 para 9. The Criminal Law Association agreed with the Commission's recommendation.

Similar recommendations have been made by the Butler Committee (Butler Committee Report para 10.20) and the Law Reform Commission of Canada: *Mental Disorder in the Criminal Process* (1976) 16. That is, if the defendant is found to be fit to stand trial.

⁷² *Criminal Code* s 688(1)(a) and (b). See *R v Podola* [1960] 1 QB 325, 348.

⁷³ A ruling of a judge of the District Court on the issue might, however, be subject to review by one of the prerogative writs.

⁷⁴ Para 4.25 above.

Commission recommends⁷⁵ that a defendant should have a right to appeal against a finding of unfitness to stand trial.⁷⁶ As with other procedural matters there should be no right of appeal against a judge's decision as to whether or not a special hearing should be held.

3. SUMMARY OF RECOMMENDATIONS

4.28 The Commission recommends that -

Preliminary hearings

1. It should not be possible to raise the issue of fitness to stand trial at a preliminary hearing.

Paragraph 4.23

2. If a defendant is mentally unfit to elect whether to have a charge dealt with summarily or to have a preliminary hearing, the defendant should be deemed to have elected to have a trial on indictment or a preliminary hearing, as the case may be.

Paragraph 4.24

Holding a special hearing

3. Provision should be made for a special hearing to be held notwithstanding that a defendant is unfit to stand trial if it is in the interests of justice to do so.

Paragraphs 4.10 to 4.13

⁷⁵ Because the court can raise the issue of fitness, this recommendation does not depend on whether the prosecution should continue to be able to raise the issue.

⁷⁶ Such an appeal right exists in Victoria (*Crimes Act 1958 s 570C*), New Zealand (*Criminal Justice Act 1985 s 112*) and the United Kingdom (*Criminal Appeal Act 1968 ss 15 and 16*). The Butler Committee recommended that the United Kingdom appeal right should be retained: Butler Committee Report para 10.31.

Such an approach was favoured by the five commentators on the Discussion Paper who addressed this issue.

Disposition following a finding of unfitness to stand trial

4. Decisions as to the disposition of a person found to be unfit to stand trial should be made by the courts and not by the Executive. The dispositional powers should include power to release the defendant on bail.

Paragraph 4.17

Review of the defendant's condition

5. A specialist review board should monitor a defendant's condition. It should have power hold a hearing to determine whether a custodial order is still necessary, whether the person could be discharged either conditionally or unconditionally or whether the defendant is fit to stand trial.

Paragraph 4.19

6. Further, as a custodial order or a conditional discharge is a significant restriction on an individual, a person who believes that he or she is fit to stand trial or no longer need be detained in custody or subject to a conditional discharge should have a right to have the order reviewed by the board.

Paragraph 4.19

7. A limit should be placed on the time a person can be detained in custody following a finding of unfitness to stand trial.

Paragraph 4.21

The prosecution's role

8. It should continue to be possible for the prosecution to raise the issue of fitness to stand trial.

Paragraph 4.25

Determination of the issue by a judge

9. The issue of fitness to stand trial should be determined by a judge.

Paragraph 4.26

A defendant's right of appeal

10. A defendant should have a right of appeal against a finding of unfitness to stand trial.

Paragraph 4.27

Chapter 5

POWERS OF COURTS OF PETTY SESSIONS

1. INTRODUCTION

5.1 The Commission has been asked to consider whether Courts of Petty Sessions¹ require any powers beyond those contained in section 36 of the *Mental Health Act 1962*² to allow them to deal with defendants who come before them suffering from mental disorder. In particular the Commission has been asked to consider whether these courts require powers analogous to those given to courts hearing charges of indictable offences such as the powers to deal with the insanity defence and fitness to stand trial.

5.2 Although Courts of Petty Sessions have no statutory power to deal with the insanity defence and fitness to stand trial at present, they have two statutory powers to deal with defendants suffering from mental disorder -

- * Section 36 of the *Mental Health Act 1962* provides a means of obtaining a medical report on a person charged with a summary offence and, if necessary, committing the person to an approved hospital for a period not exceeding 28 days.³

- * Section 9(1) of the *Offenders Community Corrections Act 1963* provides that where a person has been convicted of an offence punishable by a term of imprisonment, a court may make a probation order effective for a period of between six months and five years.⁴ A probation order may require the probationer to submit to medical, psychiatric or psychological treatment. It

¹ Generally Courts of Petty Sessions may be constituted by a stipendiary magistrate or two or more justices: *Justices Act 1902* ss 20 and 33. Usually only courts constituted by a stipendiary magistrate conduct trials, with justices confined to imposing sentences where a defendant enters a plea of guilty: Law Reform Commission of Western Australia *Report on Courts of Petty Sessions: Constitution, Powers and Procedure* (Project No 55 Part II 1986) para 2.18.

² This Act is repealed by the *Mental Health Act 1981*. However, the latter Act has not been proclaimed. Since it was enacted the mental health legislation in this State has been reviewed by the Mental Health Legislation Review Committee. This review led to the enactment of the *Authority for Intellectually Handicapped Persons Act 1985*. A further review of the *Mental Health Act 1962* is presently being conducted by the *Mental Health Act Working Party* which may lead to legislation replacing both the *Mental Health Act 1962* and the *Mental Health Act 1981*. The Working Party published a Discussion Paper in November 1990.

³ Paras 5.14 to 5.16 below.

⁴ Para 5.38 below.

may also require that the probationer reside for the period of probation in a specified institution or place, including a hospital for the purpose of receiving treatment.⁵

These, and additional powers that could be conferred on Courts of Petty Sessions, including those to deal with the insanity defence and fitness to stand trial, are discussed in this chapter.

2. THE INSANITY DEFENCE

5.3 Although the insanity defence provided by section 27 of the *Criminal Code* can be raised by a person who is charged with a simple offence,⁶ there is no provision for a Court of Petty Sessions to find specially that the defendant has been acquitted on account of unsoundness of mind. As there is no reason for making a distinction between Courts of Petty Sessions and other courts in this regard, the Commission recommends that Courts of Petty Sessions should have express power to acquit a defendant on the ground of unsoundness of mind.⁷

5.4 Courts of Petty Sessions do not have express power to accept a plea of not guilty on the ground of unsoundness of mind. The Commission recommended above⁸ that, in trials on indictment, the court should be empowered to accept a plea of not guilty on account of unsoundness of mind if satisfied that there is evidence available that would justify such a verdict. The Commission recommends that the same power should be available to Courts of Petty Sessions. A similar recommendation was made by the Inter Departmental Committee on the Treatment of Mentally Disordered Offenders.⁹

5.5 Courts of Petty Sessions also at present do not have power to make an order for the disposition of a person who successfully raises the defence. Where the defence is successful, the court should dismiss the complaint and, if the defendant is in custody, order the defendant's release.

⁵ The court must be satisfied that arrangements have been made or can be made for the person's reception.

⁶ Para 2.1 above.

⁷ The same recommendation was made by the Inter Departmental Committee on the Treatment of Mentally Disordered Offenders (Treatment of Mentally Disordered Offenders 76) and the Butler Committee (Butler Committee Report para 18.19).

⁸ Para 2.36.

⁹ Treatment of Mentally Disordered Offenders 76.

5.6 In England, the Butler Committee recommended that a Magistrates' Court should have a range of dispositional orders, including an order for hospital in-patient or out-patient treatment or discharge without any order.¹⁰ In this State, the Inter Departmental Committee on the Treatment of Mentally Disordered Offenders recommended dealing with this issue by empowering Courts of Petty Sessions to -

- * discharge the defendant absolutely;
- * make a hospital order for the admission of the person on an involuntary basis to an approved hospital; or
- * order the placement of a person who was not thought to require such detention and treatment in an appropriate institution or place of safety.¹¹

Detention in an approved hospital would be in accordance with the procedures of civil law for the admission of a person as an involuntary patient.¹² The Committee said:

"No greater interference is justified by a special verdict at summary level but these recommendations will provide a capacity to raise the special plea in relation to a simple offence or an indictable offence being dealt with summarily in a way which will lead . . . to the imposition of an appropriate measure of control best designed to secure effective care or treatment as required for the particular individual."¹³

5.7 While the Commission agrees with the Inter Departmental Committee on the Treatment of Mentally Disordered Offenders that Courts of Petty Sessions should have power to discharge a defendant absolutely and recommends accordingly, it does not agree with the other two dispositional powers proposed by the Committee. If admission as an involuntary patient in an approved hospital, or some other placement, is considered to be necessary that should be done by means of the civil procedure with its accompanying facilities and safeguards.

¹⁰ Butler Committee Report para 18.42. These recommendations have not been adopted as yet.

¹¹ Treatment of Mentally Disordered Offenders 77.

¹² The Committee said that where such an order was made ". . . the future detention of the individual concerned should be in accordance with the procedures of civil law": *ibid.*

¹³ *Ibid.*

3. FITNESS TO STAND TRIAL

(a) The existing position

5.8 If the issue of fitness to stand trial is raised in Courts of Petty Sessions there is no express statutory procedure for dealing with it.¹⁴ Further, there is little judicial authority on how a court should act in the absence of a statutory provision.¹⁵ The Commission understands that the practice in this State is for the trial to be adjourned. Section 36 of the *Mental Health Act 1962* is also used in some cases to obtain a report on the defendant's fitness to stand trial even though the actual purpose of this section is to determine whether or not a person should be admitted to an approved hospital.

(b) Recommendations of the Inter Departmental Committee on the Treatment of Mentally Disordered Offenders

5.9 As an adjunct to recommendations for the diversion of defendants from the criminal process,¹⁶ the Inter Departmental Committee on the Treatment of Mentally Disordered Offenders recommended that provision be made for dealing with defendants in Courts of Petty Sessions who might be unfit to stand trial. In cases where the defendant was mentally disordered and diversion would not be appropriate or the defendant was intellectually handicapped, the Committee recommended that the court should determine the issue of fitness to stand trial. If the defendant was found to be unfit to stand trial and the most serious offence before the court did not carry a penalty of imprisonment, the Committee recommended that the complaint should be dismissed and the defendant discharged because ". . . the seriousness of the offence does not warrant further effort or interference with the defendant in the context of the criminal law."¹⁷

¹⁴ None of the other jurisdictions studied by the Commission has a provision for the determination of the issue of fitness to stand trial in courts of summary jurisdiction. The Butler Committee recommended (Butler Committee Report paras 10.35-10.37) that a Magistrates' Court should have power to determine the issue of disability in the same way as a court hearing a charge of an indictable offence: Discussion Paper paras 5.29 to 5.32.

¹⁵ In one case it was suggested that the court should enter a plea of not guilty otherwise a conviction subsequently recorded could be set aside: *R v Martin* (1904) 4 SR (NSW) 720, 725. See also *Slater v Marshall* [1965] WAR 222, 231 where a conviction was quashed because medical evidence obtained after the conviction was recorded suggested that the defendant was not in a fit state to make a proper plea. In another case it was held that the court should go no further and should desist from hearing the charge: *Pioch v Lauder* (1976) 13 ALR 266, 271-272.

¹⁶ These recommendations are discussed in paras 5.18 to 5.22 below.

¹⁷ Treatment of Mentally Disordered Offenders 46.

5.10 In other cases, the Committee was of the view that the defendant should be released on bail, conditioned to secure treatment or training, or remanded in custody. If a defendant released on bail did not become fit to stand trial within six months, the court would be required to dismiss the complaint and discharge the defendant unless, having ". . . regard to the nature of the offence charged, the antecedents of the defendant, and the particular circumstances of the case, the court considers that some further remand should be ordered."¹⁸ Where the defendant was remanded in custody, the court could give directions as to the defendant's treatment and training in a hospital or place of safe custody. The maximum period of remand in custody for the purpose of achieving fitness to stand trial would be the periods set out in paragraph 5.21 below. If the defendant did not become fit to stand trial within the relevant period, the complaint would be dismissed and the defendant discharged from custody.¹⁹

(c) Recommendations

5.11 The present position in Courts of Petty Sessions is unsatisfactory in three respects -

- * There is no statutory expression of the criteria for determining whether or not a person is fit to stand trial.
- * There is no procedure for determining whether or not a defendant is fit to stand trial.
- * Nor is there any provision for determining how a defendant should be disposed of if found to be unfit to stand trial.

5.12 In the case of trials on indictment, the Commission recommended above²⁰ that there should be detailed statutory guidelines for determining whether or not a person is fit to stand trial. As the arguments for providing these guidelines in the case of trials on indictment are equally applicable to trials in Courts of Petty Sessions, the Commission recommends that they should also apply to trials in these courts.

¹⁸ Id 47.

¹⁹ If the defendant became fit to stand trial within the relevant period and was convicted, the period in custody would be taken into account in determining the appropriate sentence.

²⁰ Para 3.11.

5.13 As to the second issue, at present, where the court is satisfied that the defendant is unfit to stand trial the matter is adjourned and the defendant released. In the case of trials on indictment, the Commission recommended in the previous chapter that there should be provision for a special hearing notwithstanding that the defendant may be unfit to stand trial. While the procedure recommended by the Inter Departmental Committee on the Treatment of Mentally Disordered Offenders set out in paragraphs 5.9 and 5.10 above may be appropriate in some cases, in other cases the defence may wish to have an opportunity to secure an outright acquittal and thus avoid the prospect of a remand in custody. Accordingly, while the Commission agrees that the relatively informal procedure recommended by the Committee should apply to summary trials, it recommends that the defence should also be given an opportunity to secure an acquittal by having a special hearing in a Court of Petty Sessions in the same way as was recommended in respect of trials on indictment.²¹

4. DIVERSION FROM THE CRIMINAL PROCESS

(a) The existing law

5.14 Diversion from the criminal process may occur under section 36 of the *Mental Health Act 1962* which provides that where it appears to a court of summary jurisdiction that a person charged with an offence²² is, or may be, suffering from mental disorder,²³ the court may order that the person be remanded for any period not exceeding 28 days, either -

- (a) on bail, for examination by a medical practitioner, or
- (b) in custody, for reception into, and observation in, an approved hospital.²⁴

5.15 Where a defendant is released on bail for examination by a medical practitioner and the practitioner is of the opinion that the defendant appears to be suffering from mental

²¹ Paras 4.10 to 4.13 above.

²² In one case a stipendiary magistrate held that this power was not available where a person had been convicted because the person was no longer "charged with an offence".

²³ S 5 of the *Mental Health Act 1962* provides that "mental disorder" means "any illness or intellectual defect that substantially impairs mental health but, except for the purposes of section 47 and Part VI [ss 62-78], does not include a handicap whereby a person is an intellectually handicapped person".

²⁴ Buildings or parts of buildings at Graylands Hospital, Heathcote Hospital, Lemnos Hospital and La Salle Hospital are approved hospitals: Mental Health Order 1988.

disorder, the practitioner must refer the defendant to an approved hospital. Following a referral the court may order that the defendant be conveyed to, and received into, an approved hospital.²⁵ If the superintendent of an approved hospital to which a defendant has been remanded for observation is of the opinion that the defendant is suffering from mental disorder, the defendant must be admitted to the hospital and the court informed of that fact.²⁶

5.16 When a person who has been admitted to an approved hospital under section 36 is to be discharged,²⁷ the superintendent, unless the court that made the order otherwise directs, must inform the court of the proposed discharge, and if so required by the court, discharge the defendant into the defendant's former custody.²⁸ Before a patient is returned to court, the hospital authorities may attempt to persuade the police to withdraw the charge against the defendant.²⁹ However, a small proportion of defendants have their charges withdrawn because the police take the view that issues such as fitness to stand trial and the insanity defence should be dealt with by the court and not by the exercise of a police discretion to withdraw a charge.

(b) Recommendations

(i) Repealing the section

5.17 The principal argument for retaining section 36 is the humanitarian one that by diverting a defendant from the criminal process, a person will receive treatment earlier than otherwise might be the case. Indeed a person might receive treatment that otherwise would not be obtained. Diversion from the criminal process is not always in a defendant's interests, however, because it involves a deprivation of liberty. Those committed to an approved hospital might spend more time in custody than they would have done if convicted of the

²⁵ *Mental Health Act 1962* s 36(2).

²⁶ *Id* s 36(3).

²⁷ If not discharged earlier, the defendant must be discharged from status as a patient after six months unless the period of the defendant's status is extended under ss 39(2) or 45 of the *Mental Health Act 1962*: *Mental Health Act 1962* s 39(1). For the discharge mechanisms including an application to the Supreme Court for the discharge of a person from status as a patient see *Mental Health Act 1962* ss 52, 54 and 55.

²⁸ *Mental Health Act 1962* s 36(4).

²⁹ One reason for this is that the provisions of the *Mental Health Act 1962* that apply to leave of absence (s 42) and discharge to after-care (s 43) do not apply to a patient admitted under section 36 unless every charge that was preferred against the person has been withdrawn or dismissed: *Mental Health Act 1962* s 44.

offence charged.³⁰ Indeed, on conviction, they might simply be fined or made subject to a probation order.³¹ An alternative is to provide for diversion after a person has been convicted of an offence but before a sentence is imposed. In the following section,³² the Commission recommends that this form of diversion, known as a hospital order, be introduced. If this recommendation were adopted, there would be no need to retain section 36 of the *Mental Health Act 1962*.³³ Accordingly, the Commission recommends that section 36 be repealed if provision is made for hospital orders. If not, because of its humanitarian aspect, section 36 of the *Mental Health Act 1962* should be retained,³⁴ subject to a number of modifications discussed below including reducing the maximum period for a remand in custody to 72 hours in most cases.

(ii) *The purpose of the section*

5.18 One criticism of section 36 is that it gives little indication of its purpose.³⁵ The Inter Departmental Committee on the Treatment of Mentally Disordered Offenders recommended that the purpose of the assessment should be to investigate whether there is an immediate need for care or treatment and the capacity of the defendant properly to participate in court proceedings. To this end the report would be required to deal with -

- (a) the present and future need for care or treatment;
- (b) whether the defendant was fit to plead and stand trial in the sense in which those terms are used in the criminal law;

³⁰ This could occur even with the time limits proposed by the Inter Departmental Committee on the Treatment of Mentally Disordered Offenders referred to in para 5.21 below.

³¹ Para 5.2 above.

³² Paras 5.23 to 5.37 below.

³³ One possible circumstance in which there could still be a role for section 36 is where the charge is not disposed of at the defendant's first appearance in court and the matter is adjourned to a later date. Other avenues are available, however. Where the defendant is remanded in custody, the defendant can be transferred from a prison to an approved hospital for treatment: *Prisons Act 1981* s 27. Where the defendant is released on bail, that bail could be granted on condition that the defendant undergo a psychiatric examination (*Bail Act 1982* s 17, Schedule Part D cl 2(3)(a)) and in appropriate cases the defendant could be involuntarily committed to an approved hospital for treatment: *Mental Health Act 1962* s 29.

³⁴ The Inter Departmental Committee on the Treatment of Mentally Disordered Offenders did not expressly address the issue of whether a diversionary power should be retained but proceeded on the basis that it would be retained.

³⁵ Associated with this difficulty is a concern expressed by hospital authorities that they receive no warning that a person is being referred to them by a court. Nor are they advised of the role they are to play.

- (c) where treatment or some other remedial action was required, whether there was a need for detention in a hospital or some other institution;
- (d) if so, the likely duration of the detention required and the prospects of recovery.³⁶

The Commission agrees and recommends that the report should be required to deal with the above matters. As an involuntary admission should not occur other than in the same circumstances in which a person can be detained under civil proceedings, the report should also deal with whether the person "is suffering from mental disorder and that it is in the interest of that person or of the public that he should be admitted to an approved hospital for treatment."³⁷

(iii) *The scope of the section*

5.19 At present the scope of section 36 is governed by the requirement that the person must be suffering from a "mental disorder".³⁸ The definition of "mental disorder" expressly excludes a "handicap whereby a person is an intellectually handicapped person", that is, "a person who has a general intellectual functioning which is significantly below average and concurrently has deficits in his adaptive behaviour, such conditions having become manifest during the development period."³⁹ The latter definition, which is the same as that which defines the scope of the *Authority for Intellectually Handicapped Persons Act 1985* and the people who may receive services pursuant to that Act, does not exclude all those with an intellectual impairment from the operation of section 36 of the *Mental Health Act 1962*. Persons with an intellectual impairment, but who are not within the definition of "intellectually handicapped persons", will be subject to section 36 so long as their impairment substantially impairs their mental health.⁴⁰ In practice, the Psychiatric Services Division⁴¹ sees its role as caring for psychiatrically ill people and not those who are only intellectually handicapped. Consequently, intellectually handicapped persons who are not also mentally

³⁶ Treatment of Mentally Disordered Offenders 42.

³⁷ *Mental Health Act 1962* s 29. It should also be made clear that an admission under s 36 can only be made in these circumstances.

³⁸ See footnote 23 above.

³⁹ *Mental Health Act 1962* s 5.

⁴⁰ For example, as the definition of intellectually handicapped person is confined to "developmentally disabled persons", s 36 would be applicable to non-developmentally disabled intellectually impaired persons.

⁴¹ Which is responsible for administering the *Mental Health Act 1962*.

disordered but who are remanded pursuant to section 36 of the *Mental Health Act 1962* are not admitted to an approved hospital and are returned to the court. The Commission considers that section 36 should apply to a person with a mental disorder whether or not that person is also intellectually handicapped. The question of the diversion of those who have only an intellectual handicap should be addressed separately.⁴²

(iv) *Limiting the period of a remand*

5.20 Another criticism of section 36 is that sometimes it is used when there is no basis for the requested evaluation or an evaluation is sought by remanding the defendant in custody when it could have been obtained by releasing the defendant on bail. The Inter Departmental Committee on the Treatment of Mentally Disordered Offenders recommended that this criticism be addressed in two ways. First, where it was thought to be necessary to obtain a report, the court should be required to adjourn the matter to obtain advice, either orally or in writing, from a medical practitioner preferably by releasing the defendant on bail conditioned so that the defendant would be required to attend at some place for the purpose of the examination and assessment. The Committee supported a proposal that there should be on-call medical practitioners in the metropolitan area and country towns to provide the report. The aim would be to provide the court with some expert assistance without the need for a formal hospital remand.⁴³ Secondly, where a remand in custody was necessary, the Committee recommended that the period of remand in custody should not exceed 72 hours. The Commission agrees that the maximum period of a remand in custody should be 72 hours, unless it is impracticable to obtain an assessment from an approved hospital within that period. In this case, a remand of up to 7 days should be permitted. Where a defendant has been remanded for up to 72 hours, further remands of up to 72 hours should be permitted where that is necessary to complete an assessment.

(v) *Disposition of the charge*

5.21 As indicated in paragraph 5.16 above, section 36 contemplates that the charge against the defendant will be finally disposed of by a court hearing. The Inter Departmental

⁴² See para 5.41 below. Probation orders could also be used: para 5.39 below.

⁴³ Commentators on the Committee's recommendations saw difficulties in implementing this proposal both in the country and in the city. The Psychology Section, Health Department of Western Australia pointed out that the assessment procedure required a well established professional network to be in existence in advance.

Committee on the Treatment of Mentally Disordered Offenders recommended, however, that the consequences of the order that the person be admitted as a patient should vary depending upon the offence charged or, where more than one offence was charged, the most serious of them:

- (a) If the penalty for the offence did not include imprisonment, the charge would be dismissed. This approach was considered to be justified because "the defendant has suffered greater restriction upon his liberty than might at first instance occur upon his conviction."
- (b) If the maximum penalty for the offence was not more than six months' imprisonment, the defendant would be returned to the court at the expiration of three months unless returned earlier by reason of his or her discharge as an involuntary patient. The charge should then be dismissed and defendant released unless the defendant still required treatment and admission under ordinary civil criteria.⁴⁴
- (c) If the maximum penalty for the offence exceeded six months' imprisonment, the defendant would be returned to the court at the expiration of three months. If necessary, the order for admission to hospital could be extended for a period of up to three months. The defendant would be returned to the court at the expiration of the additional period unless returned earlier by reason of his or her discharge as an involuntary patient. The charge would then be dismissed and the defendant released unless the defendant still required treatment and admission under ordinary civil criteria.⁴⁵

The Commission does not agree with this recommendation because commitment to an approved hospital following an assessment that a person is in need of treatment in a hospital should not absolve the person of responsibility for the alleged offence.

5.22 One matter the Committee did not address is the implications of the dismissal of a charge in the circumstances referred to above on compensation for the victim of a crime or

⁴⁴ This appears to refer to the criteria in s 29 of the *Mental Health Act 1962: Treatment of Mentally Disordered Offenders* 44 para 11.

⁴⁵ Id 44-45.

restitution of property. Under the existing law, such a dismissal would prevent the victim of a crime from obtaining compensation under the *Criminal Injuries Compensation Act 1985*⁴⁶ or restitution under section 717 of the *Criminal Code*.⁴⁷ An amendment to the *Criminal Injuries Compensation Act 1985*⁴⁸ would, however, allow a person to apply to the Assessor for an award of compensation for injury or loss if the circumstances of the case were such that it would be unjust if that person were not eligible to apply for an award. It might be considered that restitution should be available by analogy with the availability of restitution where a charge is dismissed under the "first offenders" provision of the *Criminal Code*.⁴⁹ However, that provision applies only where a defendant pleads guilty or the court thinks that the offence is proved. That would not be the case with a dismissal in the circumstances proposed by the Inter Departmental Committee on the Treatment of Mentally Disordered Offenders and it would not, therefore, be appropriate for the provisions relating to restitution to apply to the dismissal. That, of course, would not mean that a person could not seek compensation for lost or damaged property through civil procedures.

5. HOSPITAL ORDERS

(a) Introduction

5.23 At present Courts of Petty Sessions in Western Australia do not have power to make a hospital order,⁵⁰ that is, an order committing a mentally disordered person convicted of an offence to an approved hospital instead of passing sentence.⁵¹ Civil commitment procedures could be used after a sentence, other than a sentence of imprisonment, was imposed so long as someone was prepared to make an application to a stipendiary magistrate or justice of the peace for the commitment of the offender to an approved hospital.⁵²

⁴⁶ See s 7 of the *Criminal Injuries Compensation Act 1985* and the definition of "offence" in s 3.

⁴⁷ See the definition of "convicted" in s 716A of the *Criminal Code*.

⁴⁸ Criminal Injuries Compensation Amendment Bill 1991.

⁴⁹ S 669.

⁵⁰ Hospital orders may, however, be made by courts of summary jurisdiction in England and New Zealand and in this country in Tasmania and Victoria: England: *Mental Health Act 1983* s 37; Victoria: *Mental Health Act 1986* s 15; Tasmania: *Mental Health Act 1963* s 49; New Zealand: *Criminal Justice Act 1985* s 118. In Victoria, the Starke Report recommended (at 482-483) that hospital orders should be retained. Generally the effect of a hospital order in these jurisdictions is to place the offender in a similar position to a patient committed for treatment under civil procedures.

⁵¹ Their only specific statutory power to deal with a mentally disordered person is to make a psychiatric probation order: para 5.38 below.

⁵² *Mental Health Act 1962* s 29. Where a sentence of imprisonment was imposed treatment could be given in prison or the person could be transferred from prison to an approved hospital: *Prisons Act 1981* s 27. In the latter case, however, the admission to hospital is entirely within the discretion of prison and mental health services personnel.

5.24 Hospital orders have the advantage that they enable the sentencing court to take an offender's mental condition and need for treatment in hospital into account during the sentencing process and to make an order for treatment in hospital⁵³ rather than impose a penalty. To provide Courts of Petty Sessions with this discretion, the Commission recommends that hospital orders should be introduced in this State. It is not within the Commission's terms of reference to consider whether the Supreme and District Courts should have power to make hospital orders. It would be incongruous for provision to be made for hospital orders in Courts of Petty Sessions but not in the Supreme or District Court. The Commission therefore recommends that these courts also be given power to make hospital orders.

5.25 Unlike penalties such as imprisonment or a fine, the aim of a hospital order is to improve the offender's mental illness by psychiatric treatment in the hope that this will contribute to the person's rehabilitation. In doing so, however, hospital orders involve a severe curtailment of the liberty of the individual. It is therefore important to circumscribe carefully the circumstances in which they may be made to ensure that they are not misused. Taking the above matters into account, the Commission recommends that Courts of Petty Sessions should be able to make a hospital order only where -

1. a person has been convicted of any offence punishable on summary conviction;
2. the person is suffering from a mental illness;
3. medical treatment in a hospital is likely to alleviate or prevent a deterioration of the person's condition; and
4. it is in the interest of that person or of the public that the person should be admitted to an approved hospital for treatment.

⁵³ Where necessary the person could be treated in the special secure unit at Graylands Hospital.

These conditions, and other matters, are discussed in the following paragraphs.

5.26 The power should be discretionary, that is, a hospital order should not necessarily be made even if all of the conditions referred to above have been met. There might, for example, be cases in which the gravity of the offence would justify a term of imprisonment, rather than a hospital order,⁵⁴ but with the possibility of a transfer to an approved hospital and return to prison to undergo the remainder of the sentence if the offender no longer needed to be detained as a mentally disordered person.⁵⁵ A court might also decide against making a hospital order because a less restrictive alternative such as a probation order would be more appropriate or because arrangements could not be made for the person's admission to an approved hospital.⁵⁶

(b) Hospital orders should apply to all offences punishable on summary conviction

5.27 It should be possible to make a hospital order whether or not the defendant was convicted of an offence punishable with imprisonment.⁵⁷ While there may be concern that a person would be confined as a result of an offence for which the person could not have been imprisoned had the person been sane, a hospital order is a therapeutic disposition in which the defendant is placed in the hands of doctors and as such it is irrelevant whether the offender was convicted of an offence carrying a sentence of imprisonment.⁵⁸ In any case, the

⁵⁴ *R v Cummins* [1991] 1 VR 44, 49.

⁵⁵ See *R v Redmile* [1987] 1 NZLR 157, 164-165.

⁵⁶ See *R v Tutchell* [1979] VR 248, 256-257 where the Full Court emphasised in another context, the making of a probation order designed to ensure a course of treatment for an offender, the need for a court ". . . to be satisfied by direct evidence from the persons and authorities required to take part in the project to provide treatment, that they are fully aware of the background and condition of the offender and agree to accept the responsibilities proposed for them."

⁵⁷ This is the position in Victoria (*Mental Health Act 1986* s 15) and New Zealand (*Criminal Justice Act 1985* s 118). In England (*Mental Health Act 1983* s 37) or Tasmania (*Mental Health Act 1963* s 49) a hospital order may be made only in respect of a person convicted of an offence punishable with imprisonment.

⁵⁸ A different conclusion was reached by the Australian Law Reform Commission. At para 206 of the ALRC Report it said:

"Because it is of the essence of a hospital order that the offender is involuntarily confined in consequence of a conviction, there is a punitive content to hospital orders. They should be equated with imprisonment, and should not be made unless, were the offender not mentally ill, the court would have imposed a custodial sentence. The maximum period of the hospital order (that is, the maximum period for which the offender can be detained), should be the period for which imprisonment would have been ordered."

Commission recommends below⁵⁹ that there should be review procedures to ensure that a person is not detained unnecessarily.

(c) Mental illness

5.28 Hospital orders should be made only in respect of offenders suffering from a **mental illness** as defined in the *Mental Health Act 1962*, that is, a:

". . . psychiatric or other illness that substantially impairs mental health but . . . does not include a handicap whereby a person is an intellectually handicapped person."⁶⁰

This definition excludes those with an intellectual handicap who are not mentally ill. It would not be appropriate for these people to be confined in an approved hospital: a probation order or discharge with or without conditions may be a more appropriate means of dealing with them.⁶¹

(d) Susceptibility to treatment

5.29 Medical treatment in a hospital should be likely to alleviate or prevent a deterioration of the person's condition.⁶² Hospital orders should not be made if the offender is suffering from a mental illness for which there is no treatment available or where the prospects of successful treatment are poor. It is impracticable and illogical that a treatment order should be made when there is little or no prospect that the treatment will be successful. In these cases the defendant should be sentenced in the ordinary way which may include imprisonment, a fine or a probation order.

(e) Hospitalisation is necessary

5.30 Clearly, a hospital order should only be made where it is necessary. This is a requirement in England, New Zealand Tasmania and Victoria though there are variations from

Where an offender had sufficiently recovered so as no longer to need involuntary hospitalisation, the sentencing court would be required to resentence the offender, but it should take into account the fact that the offender had been hospitalised and the course of treatment.

⁵⁹ Para 5.33.

⁶⁰ *Mental Health Act 1962* s 5.

⁶¹ Paras 5.39 and 5.41 below, respectively.

⁶² There is a similar requirement in England: *Mental Health Act 1983* (UK) s 37(2)(a)(i).

jurisdiction to jurisdiction.⁶³ In Western Australia a person cannot be committed civilly unless a stipendiary magistrate or a justice is satisfied that ". . . it is in the interest of that person or of the public that he should be admitted to an approved hospital for treatment".⁶⁴ The same conditions should apply to admission under a hospital order following conviction for an offence.⁶⁵

(f) Evidence to meet the criteria

5.31 In Tasmania, New Zealand and England evidence of the relevant mental condition must be provided by two medical practitioners. In Victoria, a hospital order cannot be made unless the court receives a report from the authorized psychiatrist of the psychiatric in-patient service to which it is proposed to admit the person recommending the proposed admission.⁶⁶ The Victorian approach ensures that the court receives evidence from those who would be responsible for the offender's treatment that the offender is suitable for treatment in the hospital concerned. For this reason, the Commission recommends that the Victorian approach be adopted in this State. The Commission also recommends that a court contemplating making a hospital order should have power to obtain a report from the psychiatrist by adjourning the case and remanding the defendant either on bail or in custody for 72 hours.⁶⁷

⁶³ In *England* s 37(2)(a) of the *Mental Health Act 1983* provides that the court must be satisfied that ". . . the mental disorder from which the offender is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and, in the case of psychopathic disorder or mental impairment, that such treatment is likely to alleviate or prevent a deterioration of his condition". In *New Zealand* s 118 of the *Criminal Justice Act 1985* provides that the court must be satisfied that the offender's mental condition requires that he or she be detained in hospital either in his or her own interest or for the safety of the public. The *Tasmanian Mental Health Act 1963* (s 51) provides that the mental disorder must be of a "nature or degree that warrants . . . detention in an institution for medical treatment" and that it is "expedient that a hospital order" should be made. In *Victoria* s 15 of the *Mental Health Act 1986* provides that a hospital order may be made where the court is satisfied that:

- "(i) the person appears to be suffering from a mental illness that requires treatment; and
- (ii) the treatment can be obtained by admission to and detention in a psychiatric in-patient service; and
- (iii) the person should be admitted as an involuntary patient for her or his health or safety or for the protection of members of the public".

⁶⁴ *Mental Health Act 1962* s 29.

⁶⁵ If provision were made for community treatment orders, as proposed in the Discussion Paper of the Working Party to Review the *Mental Health Act* (18-23), they could be used as an alternative to a hospital order in appropriate cases.

⁶⁶ *Mental Health Act 1986* (Vic) s 15(2).

⁶⁷ In Victoria the court may make an assessment order authorising the taking of the person to a specified psychiatric in-patient service for a period not exceeding 72 hours to enable the person to be assessed for suitability for a hospital order: id s 15(5).

(g) Limitation on the period of detention

5.32 In England the offender may be detained for up to six months but that period may be renewed. The person is generally treated in the same way as a person compulsorily admitted to a hospital as a result of civil processes and can be discharged at any time by the responsible medical officer, the hospital managers or a mental health review tribunal.⁶⁸

5.33 In the other jurisdictions referred to above there is no limitation on the period a person can be detained in a hospital but there are procedures for reviewing the need for the detention.⁶⁹ As time limits on the period of detention are necessarily arbitrary,⁷⁰ the Commission does not favour the approach adopted in England. Nevertheless, it is important to ensure that a person is not held longer than is necessary to ensure that the purposes of the order are fulfilled. The Commission therefore recommends that the superintendent of the hospital concerned should be responsible for continually monitoring whether detention in a hospital is necessary⁷¹ and the Board of Visitors of the hospital should review the need for the person's continued detention every three months. In addition, the detainee should be able to make an application to the Supreme Court under section 55 of the *Mental Health Act 1962* for an order of discharge either conditionally or unconditionally. A patient should be discharged if not mentally ill or if it is not in the patient's interest that he or she should be detained in an approved hospital.

(h) Hospital orders with restrictions

5.34 Hospital orders with restriction orders, that is, an order which imposes a restriction on the circumstances in which the person can be released, may be made in England and Tasmania. In England, for example, an offender convicted in a Magistrates' Court can be remanded to the Crown Court where a hospital order with restrictions can be imposed.⁷² A restriction order, for a fixed period or without time limit,⁷³ may be imposed where it appears

⁶⁸ *Mental Health Act 1983* (UK) ss 20 and 66.

⁶⁹ *Mental Health Act 1963* (Tas) s 66(9) and Part V; *Mental Health Act 1986* (Vic) ss 29-38; *Mental Health Act 1969* (NZ) s 73.

⁷⁰ See para 2.49 above.

⁷¹ That is, because the person is mentally ill (para 5.28) and in need of hospitalisation (para 5.30 above).

⁷² *Mental Health Act 1983* (UK) s 43. The Butler Committee concluded that Magistrates' Courts should not have power to make restriction orders: Butler Committee Report para 14.27

⁷³ Following guidance by the court in *R v Gardiner* [1967] 1 WLR 464, 469 restriction orders are usually for an unlimited time, on the reasoning that a medical prognosis is rarely certain. In 1982 90% of restriction

to the court that it is necessary for the protection of the public from serious harm. A patient subject to a restriction order can be discharged by a mental health review tribunal, but only after spending six months in hospital, or with the consent of the Home Secretary. If a restriction order is for a fixed term, once that term expires, the patient may still be detained under a hospital order without restrictions.

5.35 The restriction order provisions in England are based on recommendations of the Royal Commission on the Law Relating to Mental Illness and Mental Deficiency, which recommended that they should be available where ". . . there is a real danger of the commission of further serious offences."⁷⁴ Courts of Petty Sessions in this State deal with some persons who commit serious offences,⁷⁵ and may pose a danger of the commission of further serious offences. For this reason the Commission recommends that, in making a hospital order, a court should also be able to make a finding that the person is being hospitalised because it is in the public interest.⁷⁶ Where such a finding is made, the interest of the public should also be taken into account during the review process⁷⁷ in determining whether detention in a hospital continues to be necessary.

(i) **Revocation of hospital orders**

5.36 One aspect of hospital orders in other jurisdictions is that the court that made the order cannot revoke or vary it even if a person committed to a hospital turns out to have feigned mental disorder or to be a malingerer or uncooperative. According to Walker, all that the hospitals can do is hope that they abscond or discharge them.⁷⁸ In England, there has been dissatisfaction with hospital orders because, having been made as an alternative to imprisonment, patients have been discharged after only a short time in custody when it appeared that they did not need in-patient treatment or had no intention of co-operating with the hospital staff.⁷⁹ The Butler Committee saw its recommendation for the introduction of

orders where without limit of time: A Ashworth and L Gostin *Mentally Disordered Offenders and the Sentencing Process* [1984] Crim LR 195, 205.

⁷⁴ Para 519.

⁷⁵ Eg assault with intent to do grievous bodily harm: *Criminal Code* s 318(1)(b).

⁷⁶ See *Mental Health Act 1962* s 29.

⁷⁷ Para 5.33 above.

⁷⁸ N Walker *Sentencing: Theory, Law and Practice* (1985) 341.

⁷⁹ Butler Committee Report 187-188. Various solutions to this problem were considered by the Butler Committee but it decided not to recommend the adoption of any of them. It concluded, at para 14.12, that:

". . . some of the criticisms of the early discharge of patients under hospital orders have arisen solely from a lack of understanding of the implications of the court's making a hospital order. It should be

interim hospital orders⁸⁰ as a means of dealing with the problem. Such an order would enable an offender to be sent to hospital for treatment for a limited period to test the person's suitability for treatment.⁸¹ The same approach was recommended in Victoria by the Myers Report.⁸² As a result of these recommendations, interim hospital orders were introduced in England and Victoria.⁸³

5.37 Interim hospital orders have limited value in dealing with all those who may feign mental illness or prove to be malingerers because they are unlikely to be made in respect of all such persons. The Commission recommends the adoption of another approach. If, within fourteen days of being detained in an approved hospital, a person proves uncooperative, unresponsive to treatment or not to need treatment the person should be referred back to a Court of Petty Sessions for a consideration of whether the order should be revoked and a sentence imposed.⁸⁴ An analogous power is the power to revoke a probation order and impose a penalty for the offence in respect of which the probation order was made.⁸⁵ If a hospital order is revoked, the court should take into account the period of detention in hospital in fixing the offender's sentence.⁸⁶

6. PROBATION ORDERS

(a) The existing law

5.38 Courts of Petty Sessions have power to make a probation order when a person is convicted of any offence punishable by a term of imprisonment.⁸⁷ A probation order involves a requirement that the offender be under the supervision of a community correction officer for a period of between six months and five years instead of being sentenced. The court may require that the offender comply during the probation period with such conditions as the court considers necessary for securing the good conduct of the offender or preventing the

more clearly understood and accepted that the court in making such an order (without a restriction order) is deciding that henceforward the offender is to be dealt with on the basis of the same medical considerations as would govern the treatment and discharge of any other patient. He is being removed from the penal process; it is being decided not to punish him. The possibility of his early discharge must be taken into account by the court."

⁸⁰ Butler Committee Report paras 12.5-12.6.

⁸¹ Id para 14.11.

⁸² Para 10.13 (vii) of the Report.

⁸³ *Mental Health Act 1983* (UK) s 38; *Mental Health Act 1986* (Vic) s 15(3)(a).

⁸⁴ See N Walker *Sentencing: Theory, Law and Practice* (1985) 342.

⁸⁵ *Offenders Community Corrections Act 1963* s 16.

⁸⁶ Cf *Mental Health Act 1986* (Vic) s 15(4)(b).

⁸⁷ *Offenders Community Corrections Act 1963* s 9.

commission of another offence. In particular, a probation order may be made under which the offender agrees to submit to medical, psychiatric or psychological treatment, including treatment in a hospital.⁸⁸

5.39 A probation order may be a most effective disposition for an intellectually handicapped offender⁸⁹ because it can include supervision and training for the offender in a disciplined community. An example of this supervision and training is the segregated community based programme provided by the Authority for Intellectually Handicapped Persons.⁹⁰ Another example, given by the Australian Law Reform Commission, relates to intellectually handicapped offenders who steal from shops because they do not know how to handle or understand money. For these people the most appropriate sanction may be a probation order requiring that the offender attend a programme to be taught how to handle money.⁹¹

(b) Recommendation

5.40 Probation orders have the following advantages -

- * They provide a relatively cheap and a humane means of dealing with some offenders.
- * They are community-based, that is involving out-patient treatment, thus avoiding institutional treatment or perhaps even prison.
- * "Psychiatric probation orders are, in some circumstances, seen as preferable to hospital orders, as there is a guarantee of supervision which the hospitals can rarely provide after discharge."⁹²
- * Psychiatrists also see value in the probation order because of "the involvement of the probation officer in the 'police' role of being able to employ the threat of

⁸⁸ Id s 9(6)(a).

⁸⁹ So long as the offender understands the importance and consequences of a probation order.

⁹⁰ See G Jones *Doing Something Positive: Developments in Western Australia* in Australian Institute of Criminology *Intellectually Disabled Offenders* (Seminar Proceedings No 19 1987) 135-138.

⁹¹ ALRC Report para 214.

⁹² Campbell 176. The conclusion is supported by one study in the United Kingdom: T C N Gibbens, K Soothill and C Way *Psychiatric Treatment on Probation* (1981) 21 *Brit J of Crim* 324, 333-334.

proceedings to have the probation order revoked unless the offender complies with treatment requirements and attends treatment appointments."⁹³

On the other hand -

- * There is conflicting evidence as to the value and effectiveness of psychiatric probation orders.⁹⁴
- * Although it is necessary for a defendant to consent to a psychiatric probation order, it has been suggested that a person is "less likely to be motivated to cooperate than a patient who has sought treatment himself."⁹⁵ One study found however that "if the offender had been got to understand the implications of the order and the nature of the treatment before consenting he was likely to make a genuine effort to persevere with it."⁹⁶

These possible difficulties suggest that there is a need for care in selecting those to be subject to a probation order, particularly a psychiatric probation order, and in explaining the implications of the order to the offender but not that they should be abolished. Accordingly the Commission recommends that the power to make a probation order in respect of a mentally disordered or intellectually handicapped person should be retained.⁹⁷

7. INTELLECTUALLY HANDICAPPED PERSONS

5.41 As stated above,⁹⁸ the power to make a probation order provides one means for courts to deal with intellectually handicapped persons. It is, however, limited because the person must be convicted of an offence punishable by a term of imprisonment. Because of their emphasis on treatment in an approved hospital, neither hospital orders nor section 36 of the *Mental Health Act 1962* provide a suitable alternative means of dealing with intellectually

⁹³ Campbell 176-177.

⁹⁴ Butler Committee Report paras 16.2-16.4. In England a psychiatric probation order may be made under s 3 of the *Powers of the Criminal Courts Act 1973*.

⁹⁵ Butler Committee Report para 16.2.

⁹⁶ N Walker *Sentencing: Theory, Law and Practice* (1985) 333.

⁹⁷ The two commentators who referred to the matter supported the retention of the power. The Butler Committee also recommended that the power should be retained in England (Butler Committee Report para 16.4). Use of psychiatric probation orders was also supported by the Inter Departmental Committee on the Treatment of Mentally Disordered Offenders: Treatment of Mentally Disordered Offenders 47-48.

⁹⁸ Para 5.38.

handicapped persons. To provide such an alternative, the Commission recommends that where it appears to a Court of Petty Sessions that a defendant is intellectually handicapped and it would be more appropriate to do so,⁹⁹ there should be provision for an intellectually handicapped defendant to be discharged, without a sentence being imposed, into the care of a responsible person¹⁰⁰ either conditionally or unconditionally.¹⁰¹ By analogy with good behaviour bonds,¹⁰² the maximum period for which the offender should be liable to be called up for sentence for a breach of a condition should be one year.

8. SUMMARY OF RECOMMENDATIONS

5.42 The Commission recommends that:

The insanity defence

1. Courts of Petty Sessions should have express power to -

(a) acquit a defendant on the ground of unsoundness of mind;

Paragraph 5.3

(b) accept a plea of not guilty on account of unsoundness of mind if satisfied that there is evidence available that would justify such a verdict.

Paragraph 5.4

2. Where a defendant is acquitted on account of unsoundness of mind, a Court of Petty Sessions should have power to discharge the defendant absolutely.

Paragraph 5.7

⁹⁹ Based on an outline of the facts alleged in the proceedings or such other evidence as the court may consider relevant.

¹⁰⁰ Such as the supervisor of the segregated community based programme provided by the Authority for Intellectually Handicapped Persons: See G Jones *Doing Something Positive: Developments in Western Australia* in Australian Institute of Criminology *Intellectually Disabled Offenders* (Seminar Proceedings No 19, 1987) 135-138.

If a scheme of community care orders is introduced, such an order could be made as an alternative to the imposition of a sentence.

¹⁰¹ See *Mental Health (Criminal Procedure) Act 1990* (NSW) s 32(3).

¹⁰² *Criminal Code* s 19(7).

Fitness to stand trial

3. The detailed statutory guidelines for determining fitness to stand trial recommended for trials on indictment (paragraph 3.11 above) should also apply to trials in Courts of Petty Sessions.

Paragraph 5.12

4. The procedure recommended by the Inter Departmental Committee on the Treatment of Mentally Disordered Offenders for dealing with fitness to stand trial should be adopted (paragraphs 5.9 and 5.10) but the defence should also be given an opportunity to secure an acquittal by having a special hearing.

Paragraph 5.13

Section 36 of the *Mental Health Act 1962*

5. If provision is made for hospital orders, section 36 of the *Mental Health Act 1962* should be repealed. If not, it should be retained subject to a number of modifications.

Paragraphs 5.17-5.22

Hospital orders

6. Courts of Petty Sessions should be empowered to make hospital orders where -
 1. a person has been convicted of any offence punishable on summary conviction;
 2. the person appears to be suffering from a mental illness;
 3. medical treatment in a hospital is likely to alleviate or prevent a deterioration of the person's condition; and
 4. it is in the interest of that person or of the public that the person should be admitted to an approved hospital for treatment.

Paragraphs 5.23-5.30

7. A hospital order should not be made unless the court receives evidence from those who would be responsible for the offender's treatment that the offender is suitable for treatment in the hospital concerned.

Paragraph 5.31

8. The superintendent of the hospital concerned should be responsible for continually monitoring whether detention in a hospital is necessary and the Board of Visitors of the hospital should review the need for the person's continued detention every three months. In addition, the detainee should be able to make an application to the Supreme Court under section 55 of the *Mental Health Act 1962* for an order of discharge either conditionally or unconditionally. A patient should be discharged if not mentally ill or if it is not in the patient's interest that he or she should be detained in an approved hospital.

Paragraph 5.33

9. In making a hospital order, a court should also be able to make a finding that the person is being hospitalised because it is in the public interest. Where such a finding is made, the interest of the public should also be taken into account during the review process in determining whether detention in a hospital is necessary.

Paragraph 5.35

10. If, within fourteen days of being detained in an approved hospital, a person proves uncooperative, unresponsive to treatment or not to need treatment the person should be referred back to a Court of Petty Sessions for a consideration of whether the order should be revoked and for sentencing.

Paragraph 5.37

Probation orders

11. The power to make probation orders in respect of mentally disordered or intellectually handicapped persons should be retained.

Paragraph 5.40

Intellectually handicapped persons

12. Where it appears to a Court of Petty Sessions that a defendant is intellectually handicapped, and it would be more appropriate to do so, there should be provision for an intellectually handicapped defendant to be discharged, without a sentence being imposed, into the care of a responsible person either conditionally or unconditionally. The maximum period for which the offender should be liable to be called up for sentence for a breach of a condition should be one year.

Paragraph 5.41

Chapter 6

INDETERMINATE SENTENCES

1. EXISTING LAW

6.1 Where a person has been convicted of an indictable offence, section 662 of the *Criminal Code* provides that the court may, having regard to the person's antecedents, character, age, health, *mental condition*, the nature of the offence or any special circumstances of the case, direct that the offender be detained during the Governor's pleasure in a prison either at the expiration of a finite term of imprisonment then imposed or without imposing a finite term of imprisonment. The Commission is required to consider whether there is any need to retain this power to impose an indeterminate sentence because of a person's mental condition.

6.2 A person serving an indeterminate sentence under section 662 may be released on parole by the Governor¹ for any period not exceeding two years.² During the period of parole, the person is under the supervision of a community corrections officer³ and must comply with such requirements as are prescribed and with such other requirements as the Governor considers necessary.⁴

6.3 Section 662 of the *Criminal Code* was enacted in 1918 with the aim of reforming a convicted person before the person fell into a life of crime.⁵ It was hoped that an indeterminate sentence would provide both an incentive for reform and a means of allowing the sentence to fit the offender. The latter aim could be achieved by the date of release of a prisoner being set by an administrative body, the Indeterminate Sentences Board,⁶ after observing the offender's conduct and development in prison.

¹ *Offenders Community Corrections Act 1963* s 40C(1) and (2). The Parole Board is required to report annually to the Minister with respect to the person: id s 34(2)(d).

² Id s 41(2).

³ Ibid.

⁴ Id s 41(3). At any time before the expiration of the parole period, the Parole Board may cancel, amend, suspend or vary the parole order: id s 44(1). Parole is automatically cancelled if the parolee is sentenced to another term of imprisonment: id s 44(2).

⁵ Discussion Paper paras 8.3 and 8.6.

⁶ The Parole Board is the successor to the Indeterminate Sentences Board.

6.4 Although at times the indeterminate sentence has been seen as providing the sentencing court with flexibility,⁷ recent decisions of the Court of Criminal Appeal and the High Court have disposed of the suggestion that the section may be used to incarcerate indefinitely "for his own good" a person who does not represent a danger to the public. In *Tunaj v R* Burt CJ stated:

"Section 662 of the Code must now be construed in the overall legislative setting which includes and which for present purposes is, I think, dominated by the *Offenders Probation and Parole Act*. In that setting the command of the section that in making an order under s 662 of the Code the court should have regard to the 'antecedents, character, age, health and mental condition of the person convicted, the nature of the offence or any special circumstances of the case' cannot mean, if it ever did mean, that a court can make an order under that section if, having had regard to such matters it considers that such an order would, in some general sense which does not include the safety of the public, advance the 'welfare' of the convicted person. In my opinion, the enactment of the *Probation and Parole Act* now requires one to say that an order should be made under s 662 only in very exceptional circumstances and those circumstances must indicate and firmly indicate that the convicted person has shown himself to constitute a danger to the public."⁸

6.5 The application and scope of section 662 was further considered by the Court of Criminal Appeal and the High Court in the case of *Chester v R*.⁹ Chester was convicted of stealing with threats of actual violence and sentenced to a finite term of imprisonment together with a direction that he be detained in prison at the expiration of that term during the Governor's pleasure. His previous convictions, dating back over 17 years, related mainly to the use of cannabis but included convictions in 1976 for causing an explosion and injury to property, and attempting to cause an explosion and injury to property, when he attempted to blow up parts of the woodchip loading terminal at Bunbury.

⁷ Discussion Paper para 8.8.

⁸ *Tunaj v R* [1984] WAR 48, 51. The reference to the *Offenders Probation and Parole Act* (now the *Offenders Community Corrections Act*) is because, whereas the Indeterminate Sentences Board was specifically required to consider whether a person held in a reformatory prison was "sufficiently reformed" to be released "on parole" (s 64E(5)(a) of the *Prisons Act 1903* as inserted by the *Prisons Act Amendment Act 1918*), there was no similar request placed on the Parole Board.

⁹ (1988) 165 CLR 611.

6.6 An appeal to the Court of Criminal Appeal was dismissed by a majority comprising Wallace and Pidgeon JJ. Wallace J did so on the basis that psychiatric evidence indicated that Chester was not merely odd but dangerous unless prepared to accept counselling and possibly medication. Pidgeon J concluded that evidence before the sentencing judge indicated that Chester might commit further offences of a serious nature. On the other hand, Burt CJ concluded that Chester's record did not sustain the prognosis that upon his release there would be such a likelihood of his committing an offence of such a kind that it could be said that he would "constitute a constant threat to the community". Refining the approach he adopted in *Tunaj v R*, he held that an order for indefinite detention should not be made unless the release of an offender at the expiration of a custodial sentence, proportionate to the offence, would "expose the community to the real likelihood of violent harm" or sexual offences.

6.7 On appeal to the High Court, a submission by the Solicitor-General that the object of section 662 was to protect the public from persons who have a propensity to commit *serious* crimes was rejected and it was held that the section should be "confined to very exceptional cases where the exercise of the power is demonstrably necessary to protect society from physical harm."¹⁰ The High Court reached this conclusion on the basis that a sentence of preventive detention, which would violate the common law principle that a sentence should be proportionate to the gravity of the offence,¹¹ could not be justified on the ground that it is necessary to protect society from crime which is serious but non-violent. The High Court said:

"The exercise of the power should be reserved for those very exceptional cases . . . in which the sentencing judge is satisfied by acceptable evidence that the convicted person is, by reason of his antecedents, character, age, health or mental condition, the nature of the offence or any special circumstances, so likely to commit further crimes of violence (including sexual offences) that he constitutes a constant danger to the community. The stark and extraordinary nature of punishment by way of indeterminate detention, the term of which is terminable by executive, not judicial, decision, requires that the sentencing judge be clearly satisfied by cogent evidence that the convicted person is a constant danger to the community in the sense already explained."¹²

¹⁰ *Chester v R* (1988) 165 CLR 611, 618.

¹¹ See *Veen v R* (1979) 143 CLR 458 and *Veen v R (No2)* (1988) 164 CLR 465.

¹² *Chester v R* (1988) 165 CLR 611, 618-619.

The Court concluded that Chester's criminal record and evidence that he was suffering from chronic paranoid schizophrenia did not establish that he posed a constant danger of violent injury to the community.

6.8 The High Court's decision restricts the scope of section 662 in two ways. First, by referring to "further crimes of violence" it confines the section to defendants who commit crimes of violence. This implies crimes involving personal harm but it is not clear whether it would include offence such as arson which involve property damage but could lead to personal harm. Secondly, the defendant must be so likely to commit further crimes of violence that the person constitutes a constant danger to the community. This restriction is not without difficulties. One major difficulty is that the prediction of the dangerousness of an individual with reasonable accuracy is notoriously difficult.¹³ False positives, that is, a prediction that a person will be dangerous though in reality it is not the case, are a fundamental problem. False positives result both in injustice for the person falsely predicted as being dangerous and the unnecessary use of facilities to hold people who are not dangerous. The notion of danger to the community also presents difficulty involving as it does an assessment of the level of risk a community will tolerate. The meaning of the term "constant" is not clear: it may mean continuing danger but it suggests that the danger must be unchanging or unremitting. Obvious examples are the jealous husband or lover who has failed to kill but swears to try again and the terrorist who feels bound to resort to violence for the sake of a cause. It might also include a person with a psychopathic personality. But it could exclude a person subject to periodic losses of self control whatever the cause.

6.9 Although the scope of the sections is narrow, it is noteworthy that the High Court was critical of the section and the manner of its operation. It pointed out that it confers a large discretionary power without specifying a precise criterion according to which the power is to be exercised¹⁴ and is terminable by executive and not judicial decision,¹⁵ that is, the maximum period of detention is not fixed by the sentencing court.

2. DISCUSSION

6.10 As stated above, the Commission has been asked to consider whether there is any need to retain the power in section 662 to impose an indeterminate sentence on an offender on the

¹³ See Butler Committee Report para 4.11.

¹⁴ (1988) 165 CLR 611, 617.

¹⁵ Id 619.

grounds of the person's mental condition. In recent cases in the High Court the principle of proportionality, that is, that the appropriate sentence for a particular offence is that which is proportionate to the gravity of the offence, has been firmly established as the basis for sentencing. So far as preventive detention is concerned, this means that a sentence should not be increased beyond what is proportionate to the crime merely in order to extend the period of protection of society from the risk of recidivism on the part of an offender.¹⁶ While the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society, the protection of society is a material factor in fixing an appropriate sentence. A distinction is made ". . . between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible."¹⁷ For example, one factor which is material in determining the sentence to be imposed is that the offender's mental abnormality may lead the offender to kill again. Where there is such an abnormality, it may reinforce the need for the longest permissible sentence. However, this is not a basis for imposing a sentence more severe than that which would have been proportionate to the gravity of the offence if the offender had not been suffering from a mental abnormality. It follows that if section 662 is retained, that is, that an indeterminate sentence is a permissible sentence, it should be possible to take into account the offender's mental condition in determining whether or not an indeterminate sentence should be imposed. For this reason, the Commission considers that the desirability of a power to impose an indeterminate sentence on the ground of an offender's mental condition cannot be considered in isolation from the other factors set out in the section. The Commission therefore makes no recommendation on this matter. However, it suggests that a review of the power to impose an indeterminate sentence pursuant to section 662 be carried out. Such a review is justified in view of the criticisms of indeterminate sentences which have been made by a number of writers,¹⁸ the critical comments made by the High Court in *Chester v R*¹⁹ and the uncertainty as to the scope of the section as a result of the High Court's judgement in *Chester v R*²⁰. Such

¹⁶ *Veen v R (No 2)* (1988) 164 CLR 465, 472.

¹⁷ *Id* 473.

¹⁸ A Freiberg and D Biles *The Meaning of "Life": A Study of Life Sentences in Australia* (1975) 24-27, A M Dershowitz *Indeterminate Confinement: Letting the Therapy Fit the Harm* (1974-1975) 123 *Uni of Penn LR* 297, Criminal Law and Penal Methods Reform Committee of South Australia *First Report: Sentencing and Corrections* (1973) 12-13.

¹⁹ Para 6.9 above.

²⁰ Para 6.8 above.

a review might consider whether a scheme of periodic orders for detention should be introduced to replace the indeterminate sentence.²¹

6.11 At present, as the decision as to an offender's release from custody is made by the Governor with the advice of the Executive Council, the length of the sentence is determined administratively without any reasons necessarily being given for the decision. In its report, *Treatment of Mentally Disordered Offenders*, the Inter Departmental Committee recognised that it was not part of its task to consider the circumstances proper for the imposition of an indeterminate sentence in the first place under section 662. It did however examine the mechanism for terminating an indeterminate sentence and concluded that responsibility should reside with the Parole Board and not with the Governor in Executive Council. The Parole Board was considered to be the appropriate body, rather than the specialist review board recommended for those acquitted on account of unsoundness of mind,²² because persons dealt with under section 662 would not solely be persons who were mentally disordered.²³ The Commission agrees and recommends accordingly. Provision should be made for the Parole Board's composition to be varied depending on whether the offender is intellectually disabled or being held in an approved hospital. In these cases, the composition of the Board should include a person with expertise in the area of intellectual disability or mental illness, as the case may be.

3. SUMMARY OF RECOMMENDATIONS

6.12 The Commission recommends that the Parole Board should be responsible for deciding when to release on parole a person serving an indeterminate sentence under section 662 of the *Criminal Code*.

Paragraph 6.11

²¹ See the proposal of Deane J in *Veen (No 2) v R* (1988) 164 CLR 465, 495.

²² Paras 2.45 and 2.46 above.

²³ *Treatment of Mentally Disordered Offenders* 85.

Chapter 7

EXPERT REPORTS

1. INTRODUCTION

7.1 The Commission is required to consider whether -

- * the prosecution and the defence should be obliged to exchange, before trial, all expert reports relating to the mental condition of the defendant that are intended to form the basis of evidence to be adduced at the trial;¹
- * courts should have power to obtain psychiatric reports, and if so, for what purpose, in what circumstances and by what procedure.

These matters are discussed below.

2. EXCHANGE OF REPORTS

(a) The present position

7.2 At present there is no formal procedure whereby the prosecution and the defence are required to exchange copies of expert reports. However, the prosecution should supply the defence with a copy of an expert report in its possession, such as that of a prison medical officer as to the sanity of the accused.² The defence is under no obligation to provide the prosecution with a copy of any expert report in its possession.³ Indeed, where a report is prepared in contemplation of the proceedings for the purpose of obtaining or giving legal advice relating to the proceedings, the report is subject to legal professional privilege and can be withheld from the prosecution.⁴

¹ If this were thought to be desirable, the Commission is also required to propose appropriate rules for the enforcement of that obligation.

² *R v Casey* (1947) 32 Cr App R 91.

³ It is, however, an "almost invariable practice for defence counsel to forward copies of psychiatric reports to the prosecution": R J Davies *Criminal Law Defences: Unsoundness of Mind* [1982] Law Summer School 4.

⁴ *Wheeler v Le Marchant* (1881) 17 Ch D 675, 681.

(b) Recommendation

7.3 The present position means that theoretically the prosecution may be taken by surprise if the defence of insanity is raised at the trial without prior notice. In those cases in which the defence does not provide the prosecution with a copy of an expert report, the prosecution will have no opportunity to prepare for the cross-examination of the defence experts or to carry out an investigation to rebut the defence case. The exchange of expert reports relating to the mental condition of the defendant would also enable areas of dispute to be defined, with a consequent reduction in the duration of trials and their cost, particularly if the prosecution accepted the diagnosis of an expert witness for the defence. For these reasons the Commission recommends that the prosecution and the defence should be obliged to exchange, before trial, all expert reports relating to the mental condition of the defendant which are intended to form the basis of evidence to be adduced at the trial.⁵ This recommendation is the same as one in the Murray Report.⁶ The Commission agrees that it would be unnecessarily draconian for the non-disclosure to lead to the inability to tender the evidence, and the interests of justice are best served by ensuring that the other side has an adjournment of trial if so desired.⁷

3. THE POWER OF COURTS TO OBTAIN EXPERT REPORTS

(a) The present position

7.4 At present, courts have a statutory power to obtain a psychiatric report in two circumstances. The first of these powers, section 36 of the *Mental Health Act 1962*, has already been discussed.⁸ This section enables a court of summary jurisdiction to remand in custody or release on bail a person charged with an offence for examination. The second statutory power applies where a person has been convicted of an offence. Under section 8(a) of the *Offenders Community Corrections Act 1963* a court may require the Chief Executive Officer of the Department of Corrective Services to prepare and submit to the court such reports and information as the court requires with respect to any convicted person.

⁵ This approach was supported by four commentators on the Discussion Paper.

⁶ Murray Report 413-415 and 606-607.

⁷ Id 414.

⁸ Paras 5.14 to 5.22 above.

(b) Recommendations

7.5 As a general rule, the judge should not call a person to give evidence save in the most exceptional circumstances.⁹ This is because the trial involves an adversarial process in which the judge's role is to hold the balance between the contending parties without taking part in their disputations. Nevertheless one circumstance¹⁰ in this area of the law where it would be desirable to empower a court to obtain evidence from an expert witness is where the issue of fitness to stand trial has been raised,¹¹ particularly as it does not necessarily involve the court in a dispute between the defence and the prosecution. Even if there is a dispute, the defendant's culpability is not involved. Accordingly, the Commission recommends that the court should be given a discretion to call an expert witness where the issue of fitness to stand trial has been raised.

7.6 In order to enable an expert report to be obtained, it would be necessary to empower the court to remand the defendant either on bail or in custody to undergo an examination at a place approved by the court.¹² Where a report is submitted to the court following the examination, a copy of the report should be given to the defendant, the defendant's counsel and the prosecution.

7.7 Without more, a report prepared for the court would not be privileged.¹³ Consequently, a self-incriminating statement made by the defendant during an examination for the purposes of preparing a report might be admissible in a trial of the offence charged. A safeguard is that a statement would not be admissible if it were not made voluntarily. Although an examination carried out at the direction of a court would not be a voluntary examination, a confession made during such an examination, depending on the circumstances in which it was carried out,¹⁴ could be made voluntarily and so be admissible in a subsequent trial. The Commission considers that the existing safeguard is adequate and that there is no

⁹ *R v Apostilides* (1984) 154 CLR 563, 575.

¹⁰ Another possible circumstance arises from the Commission's recommendation that the court should be empowered to accept a plea of not guilty on account of unsoundness of mind: para 2.36 above. It may be distinguished from the issue of fitness to stand trial though because it involves the defendant's culpability. In this circumstance, the court could refuse to accept the plea unless it was satisfied that there was evidence available which would justify the plea.

¹¹ The Commission has recommended that fitness to stand trial be determined by a judge: para 4.26 above.

¹² See *Criminal Justice Act 1985* (NZ) s 121.

¹³ *R v Salahattin* [1983] 1 VR 521, 527.

¹⁴ See generally, D Byrne and J D Heydon *Cross on Evidence* (Aus Ed) Vol 1 paras 33595-33605.

need to provide that statements made by the defendant during the examination should be inadmissible for purposes other than those for which they were sought.

4. SUMMARY OF RECOMMENDATIONS

7.8 The Commission recommends that -

Exchange of reports

1. The prosecution and the defence should be obliged to exchange, before trial, all expert reports relating to the mental condition of the defendant which are intended to form the basis of evidence to be adduced at the trial.

Paragraph 7.3

The power of courts to obtain expert reports

2. The court should be given a discretion to call an expert witness where the issue of fitness to stand trial has been raised.

Paragraph 7.5

3. To enable an expert report to be obtained, the court should be empowered to remand the defendant either on bail or in custody to undergo an examination at a place approved by the court. Where a report is submitted to the court following the examination, a copy of the report should be given to the defendant, the defendant's counsel and the prosecution.

Paragraph 7.6

Chapter 8

SUMMARY OF RECOMMENDATIONS

CRIMINAL RESPONSIBILITY AND MENTAL DISORDER

The insanity defence

1. The insanity defence should be retained.

Paragraphs 2.2 to 2.4

2. The term "mental disease or natural mental infirmity" used in section 27 of the *Criminal Code* should be replaced with the term "abnormality of mind (from mental illness or intellectual disability)".

Paragraphs 2.11 and 2.12

3. The second paragraph of section 27 relating to delusions should be retained.

Paragraphs 2.16 and 2.17

Acts or omissions which occur independently of will

4. No change should be made to the existing law relating to the relationship between sections 23 and 27 of the *Criminal Code*.

Paragraphs 2.18 to 2.22

The burden of proof of the insanity defence

5. There should be no change in the burden of proof of the insanity defence.

Paragraph 2.25

Procedural matters relating to the insanity defence

6. The prosecution should not be permitted to raise the insanity defence during the opening of its case.

Paragraph 2.27

7. A two stage trial should not be introduced for cases in which the insanity defence is raised.

Paragraphs 2.29 to 2.32

8. Where a defence of insanity is successful the jury should continue to be required to find specially that the defendant has been acquitted on account of unsoundness of mind.

Paragraph 2.33

9. Where the insanity defence is successful, the jury should be required to state the specific offence of which the defendant has been acquitted on account of unsoundness of mind.

Paragraph 2.34

10. The trial judge should not be required to instruct the jury as to the consequences of a successful defence of insanity.

Paragraph 2.35

11. The trial court should be empowered to accept a plea of not guilty on account of unsoundness of mind if it is satisfied that there was evidence available that would justify such a verdict.

Paragraph 2.36

Disposition

12. The trial court should have power to determine the appropriate disposition of the defendant where the insanity defence is successful.

Paragraph 2.39

13. In doing so, the court should have power to make the following orders -

1. An order for the safe custody of the defendant in some institution or place appropriate to the circumstances of the case. Where the person was mentally ill that would ordinarily be an approved psychiatric hospital with a secure

ward. In the case of an intellectually handicapped person that place might be a hospital or other institution, including a prison.

2. An order releasing the defendant by way of a conditional discharge into an appropriate after care programme.
3. Discharge the defendant without any other order.

Paragraph 2.41

14. The State Government and the Authority for Intellectually Handicapped Persons should consider providing secure facilities for intellectually handicapped persons who are not mentally ill.

Paragraph 2.42

15. Both the defendant and the prosecution should be able to appeal to the Court of Criminal Appeal against the disposition order.

Paragraph 2.41

Review of the detention of those acquitted on account of unsoundness of mind

16. A specialist review board should be established to monitor the position of every person the subject of a court order following a special verdict. Each case would be reviewed annually or more frequently if the board so decided.

Paragraph 2.45

17. The board would also be required to review any case on the application of the person concerned, some interested person on the person's behalf or a representative of any institution or organisation having particular responsibility for the person concerned.

Paragraph 2.45

18. There should be provision for an appeal from the specialist review board to the Court of Criminal Appeal with leave.

Paragraph 2.46

19. The board should have power to -
- (a) alter the place of safe custody or the terms and conditions of any order for safe custody;
 - (b) release conditionally a person in safe custody;
 - (c) vary, modify or revoke those conditions;
 - (d) return to safe custody a person who has been released conditionally; and
 - (e) after a period of conditional discharge, discharge the person unconditionally.

Paragraph 2.47

20. During the first 12 months of detention, the onus should rest on those detained to establish that continued detention is not necessary because they do not constitute a substantial danger to themselves or to the person or property of others.

After a period of 12 months, the onus should shift to the Crown to establish that continued detention is necessary, that is, the Crown should be required to establish that continued detention is necessary.

After a prescribed period, related to the seriousness of the offence of which the defendant was found to be not guilty on account of unsoundness of mind, the defendant should be released unless the specialist review tribunal concluded, after an annual review, that it was more probable than not that the person would attempt to commit offences of serious violence to the person if set at liberty. Where the offence is sufficiently serious to carry a penalty of more than ten years' imprisonment or a life sentence, the prescribed period should be ten years. In other cases, that period should be the statutory maximum sentence for the offence unless the offence did not carry a sentence of imprisonment, in which case the period should be 3 years.

Paragraph 2.49

Diminished responsibility

21. The defence of diminished responsibility should be introduced, formulated in the same manner as it has been formulated in Queensland.

Paragraphs 2.54 and 2.56

Infanticide and the insanity defence

22. It should continue to be possible to raise the insanity defence where the defendant is charged with infanticide.

Paragraph 2.60

Guilty but mentally ill

23. The verdict of guilty but mentally ill should not be introduced.

Paragraph 2.66

CRITERIA OF UNFITNESS TO STAND TRIAL

24. The existing provision, section 631 of the *Criminal Code*, should be supplemented by providing that a person is not capable of understanding the proceedings so as to make a proper defence if the defendant is unable to -

- (i) plead to the indictment with understanding;
- (ii) understand that the nature or purpose of the proceedings is to determine whether or not the defendant committed the offence charged and generally follow the course of the proceedings;
- (iii) understand the substantive effect of the evidence; and
- (iv) make a defence to the charge and, if represented by counsel, communicate adequately with counsel for the purpose of giving all necessary instructions to enable a defence of the charge to be conducted.

Paragraph 3.11

25. Section 652 of the *Criminal Code*, which provides that a person cannot be tried if not of sound mind, should be repealed.

Paragraph 3.18

26. Section 631 of the *Criminal Code* should be amended so that it applies at any time during the trial.

Paragraph 3.18

FITNESS TO STAND TRIAL: PROCEDURE

Preliminary hearings

27. It should not be possible to raise the issue of fitness to stand trial at a preliminary hearing.

Paragraph 4.23

28. If a defendant is mentally unfit to elect whether to have a charge dealt with summarily or to have a preliminary hearing, the defendant should be deemed to have elected to have a trial on indictment or a preliminary hearing, as the case may be.

Paragraph 4.24

Holding a special trial

29. Provision should be made for a special hearing to be held notwithstanding that a defendant is unfit to stand trial if it is in the interests of justice to do so.

Paragraphs 4.1 to 4.13

Disposition following a finding of unfitness to stand trial

30. Decisions as to the disposition of a person found to be unfit to stand trial should be made by the courts and not by the Executive. The dispositional powers should include power to release the defendant on bail.

Paragraph 4.17

Review of the defendant's condition

31. A special review board should monitor a defendant's condition. It should have power to hold a hearing to determine whether a custodial order is still necessary, whether the person

could be discharged either conditionally or unconditionally or whether the defendant is fit to stand trial.

Paragraph 4.19

32. Further, as a custodial order or a conditional discharge is a significant restriction on an individual, a person who believes that he or she is fit to stand trial or no longer need be detained in custody or subject to a conditional discharge should have a right to have the order reviewed by the board.

Paragraph 4.19

33. A limit should be placed on the time a person can be detained in custody following a finding of unfitness to stand trial.

Paragraph 4.21

The prosecution's role

34. It should continue to be possible for the prosecution to raise the issue of fitness to stand trial.

Paragraph 4.25

Determination of the issue by a judge

35. The issue of fitness to stand trial should be determined by a judge.

Paragraph 4.26

A defendant's right of appeal

36. A defendant should have a right of appeal against a finding of unfitness to stand trial.

Paragraph 4.27

POWERS OF COURTS OF PETTY SESSIONS

The insanity defence

37. Courts of Petty Sessions should have express power to -

- (a) acquit a defendant on the ground of unsoundness of mind;

Paragraph 5.3

- (b) accept a plea of not guilty on account of unsoundness of mind if satisfied that there is evidence available that would justify such a verdict.

Paragraph 5.4

38. Where a defendant is acquitted on account of unsoundness of mind, a Court of Petty Sessions should have power to discharge the defendant absolutely.

Paragraph 5.7

Fitness to stand trial

39. The detailed statutory guidelines for determining fitness to stand trial recommended for trials on indictment (paragraph 3.11 above) should also apply to trials in Courts of Petty Sessions.

Paragraph 5.12

40. The procedure recommended by the Inter Departmental Committee on the Treatment of Mentally Disordered Offenders for dealing with fitness to stand trial should be adopted (paragraphs 5.9 and 5.10) but the defence should also be given an opportunity to secure an acquittal by having a special hearing.

Paragraph 5.13

Section 36 of the Mental Health Act 1962

41. If provision is made for hospital orders, section 36 of the *Mental Health Act 1962* should be repealed. If not, it should be retained subject to a number of modifications.

Paragraphs 5.17-5.22

Hospital orders

42. Courts of Petty Sessions should be empowered to make hospital orders where -

1. a person has been convicted of any offence punishable on summary conviction;
2. the person appears to be suffering from a mental illness;
3. medical treatment in a hospital is likely to alleviate or prevent a deterioration of the person's condition; and
4. it is in the interest of that person or of the public that the person should be admitted to an approved hospital for treatment.

Paragraphs 5.23-5.30

43. A hospital order should not be made unless the court receives evidence from those who would be responsible for the offender's treatment that the offender is suitable for treatment in the hospital concerned.

Paragraph 5.31

44. The superintendent of the hospital concerned should be responsible for continually monitoring whether detention in a hospital is necessary and the Board of Visitors of the hospital should review the need for the person's continued detention every three months. In addition, the detainee should be able to make an application to the Supreme Court under section 55 of the *Mental Health Act 1962* for an order of discharge either conditionally or unconditionally. A patient should be discharged if not mentally ill or it is not in the patient's interest that he or she be detained in an approved hospital.

Paragraph 5.33

45. In making a hospital order, a court should also be able to make a finding that the person is being hospitalised because it is in the public interest. Where such a finding is made, the interest of the public should also be taken into account during the review process in determining whether detention in a hospital is necessary.

Paragraph 5.35

46. If, within fourteen days of being detained in an approved hospital, a person proves uncooperative, unresponsive to treatment or not to need treatment the person should be

referred back to a Court of Petty Sessions for a consideration of whether the order should be revoked and for sentencing.

Paragraph 5.37

Probation orders

47. The power to make probation orders in respect of mentally disordered or intellectually handicapped persons should be retained.

Paragraph 5.40

Intellectually handicapped persons

48. Where it appears to a Court of Petty Sessions that a defendant is intellectually handicapped, and it would be more appropriate to do so, there should be provision for an intellectually handicapped defendant to be discharged, without a sentence being imposed, into the care of a responsible person either conditionally or unconditionally. The maximum period for which the offender should be liable to be called up for sentence for a breach of a condition should be one year.

Paragraph 5.41

INDETERMINATE SENTENCES

49. The Parole Board should be responsible for deciding when a person serving an indeterminate sentence under section 662 of the *Criminal Code* should be released on parole.

Paragraph 6.11

EXPERT REPORTS

Exchange of reports

50. The prosecution and the defence should be obliged to exchange, before trial, all expert reports relating to the mental condition of the defendant which are intended to form the basis of evidence to be adduced at the trial.

Paragraph 7.3

The power of courts to obtain expert reports

51. The court should be given a discretion to call an expert witness where the issue of fitness to stand trial has been raised.

Paragraph 7.5

52. To enable an expert report to be obtained, the court should be empowered to remand the defendant either on bail or in custody to undergo an examination at a place approved by the court. Where a report is submitted to the court following the examination, a copy of the report should be given to the defendant, the defendant's counsel and to the prosecution.

Paragraph 7.6

J A THOMSON, *Chairman*

R L LE MIERE

M D PENDLETON

16 August 1991

APPENDIX

LIST OF THOSE WHO COMMENTED ON THE DISCUSSION PAPER

Authority for Intellectually Handicapped Persons
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Department of Corrective Services
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Graham, Dr J
Healy P J, Judge, District Court of Western Australia
Heenan D C, Chief Judge, District Court of Western Australia
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Lister J A, Dr
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McCann D A, Coroner
Mulcahy M
Murray M J, QC (now Justice Murray)
Pascoe C M
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Potas I, Australian Institute of Criminology
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