Chapter 5

Mental Impairment Defences

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Insanity – Mental Impairment

INTRODUCTION

The defence of insanity is based upon 'the moral assumption that it is wrong to punish those who, by reason of mental incapacity, are not capable of free and rational action'.[1] Insanity is a defence to all offences in Western Australia.[2] However, not all accused who suffer from a mental impairment will be able to satisfy the requirements of the defence. There are strict criteria placed upon the types of mental impairment that will qualify for the defence, as well as requirements regarding the effect of the impairment upon the accused's offending behaviour. A successful insanity defence results in a qualified acquittal; that is, 'not guilty on account of unsoundness of mind'.[3] Although the objective or physical elements of the offence (for homicide, the act of killing or causing the death) will generally be proven beyond reasonable doubt or admitted by the accused, the defence of insanity excuses the accused from criminal responsibility as a result of his or her mental state at the time of committing the offence.

A mentally impaired accused experiences the criminal justice system differently to other accused at all stages of the criminal justice process. There are special rules and procedures that govern a mentally impaired accused before trial, during trial and after trial. The Commission reviewed all aspects of this process in the late 1980s, publishing its recommendations in 1991.[4] Recommended amendments to 'fitness to stand trial' procedures and to dispositions available upon a verdict of not guilty on account of unsoundness of mind were substantially implemented in 1996.[5] The Commission has taken the opportunity provided by this reference to re-examine the defence of insanity and its dispositional consequences in the specific context of homicide offences in Western Australia.

Keeping it in perspective

Community perceptions of mental illness in general, and mentally impaired offenders in particular, are largely influenced by 'sensational depictions' in crime shows on television and in films.[6] In these depictions 'mad' is often used as a synonym for 'bad' and there is sometimes the suggestion that 'madness' may be feigned to escape punishment.[7] As a result, mental illness is often feared and the availability and nature of the insanity defence is widely misunderstood.[8]

While mental impairment is reasonably common,[9] cases where mentally impaired people kill are actually quite rare.[10] Studies have found that mentally disordered offenders rarely kill strangers and rarely kill in public places: in most cases the victim is a family member and the offence is committed at a private residence.[11] Western Australian data is limited, but a study undertaken over the six-year period 1993–1999 showed that the defence of insanity succeeded in only eight homicide cases;[12] while a check of the Supreme Court database over the five-year period 2001–2006 revealed only two successful insanity defences for a homicide offence.[13] Currently there are nine people held under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) (the CLMIA Act) on custody orders for homicide offences.[14]

HISTORY OF THE DEFENCE

'Madness' has excused an accused from criminal responsibility since at least the 6th century.[15] The modern concept of the defence of insanity derives from the same principles: that an insane accused cannot be held responsible for his or her acts because of a lack of reason

1. Fairall PA & Johnston PW, 'Antisocial Personality Disorder and the Insanity Defence' (1987) 11 *Criminal Law Journal* 78, 79.
2. *Criminal Code* (WA) s 27.
3. *Criminal Procedure Act 2004* (WA) s 146.
4. Law Reform Commission of Western Australia (LRCWA), *The Criminal Process and Persons Suffering from a Mental Disorder,* Project No. 69 (1991).
5. See *Criminal Law (Mentally Impaired Accused) Act 1996* (WA). This included the recommendation that a specialist review board be established to oversee the detention of those acquitted on account of unsoundness of mind.
6. Freeman K, *Mental Health and the Criminal Justice System*, Crime and Justice Bulletin No. 38 (NSW Bureau of Crime Statistics and Research, October 1998) 1.
7. Ibid.
8. Ibid.
9. Kraya N & Pillai K, 'Mentally Abnormal Homicide in Western Australia' (2001) 9 *Australasian Psychiatry* 161.
10. Mouzos J, 'Mental Disorder and Homicide in Australia' (1991) 133 *Australian Institute of Criminology: Trends and Issues* 3 & 5.
11. However, homicides committed by mentally disordered offenders are far more likely to be committed without any known or apparent motive (87.8% as opposed to only 35.9% of other offenders): Mouzos J, 'Mental Disorder and Homicide in Australia' (1991) 133 *Australian Institute of Criminology: Trends and Issues* 1.
12. A further nine accused appear to have been unsuccessful with the defence of insanity, although apparently psychotic at the time of the offence: Kraya N & Pillai K, 'Mentally Abnormal Homicide in Western Australia' (2001) 9 *Australasian Psychiatry* 161, 164.
13. Jamie Curley, Supreme Court of Western Australia, email (6 September 2007). Both accused were acquitted on account of unsoundness of mind for the offence of wilful murder.
14. Lee Bateman, State Review Boards Secretariat, email (27 August 2007). The longest current custody order is dated 1986 and the most recent is 2007. Of these nine accused, three are currently held in mental institutions, two are in prison and four are on conditional release in the community.
15. Being the time of the Justinian codification of Roman criminal laws: Bronnit S & McSherry B, *Principles of Criminal Law* (Sydney: Law Book Company, 2001) 209.

in committing the act.[16] The basis of the modern English defence (imported into Australia via the common law) was laid down in *M'Naghten's Case* in 1843.[17]

Daniel M'Naghten shot and killed the Prime Minister of England's private secretary mistakenly thinking he was the Prime Minister and under the delusion that he was being persecuted by the British government. Lord Tindal CJ directed the jury that if the accused 'was not sensible, at the time he committed [the act], that he was violating the laws of both God and man, then he would be entitled to a verdict in his favour: but if, on the contrary, they were of the opinion that when he committed the act he was in a sound state of mind, then their verdict must be against him'.[18] On the basis of evidence of 'morbid delusions', the jury pronounced a verdict of not guilty on the ground of insanity.

This verdict caused such public controversy in England that the 12 judges of the common law courts were called upon to provide opinion to the House of Lords on the law governing insanity cases. The so-called M'Naghten rules were the result of this debate in the House and agreed upon by all but one of the judges.[19] The M'Naghten rules provide the common law basis for a defence of insanity as follows:

> [T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.[20]

All Australian jurisdictions have an insanity defence based upon the M'Naghten rules, though their legislative formulations differ. The most obvious difference can be found in the Code states (Western Australia, Queensland and Tasmania) and in the jurisdictions that have adopted variations on the Model Criminal Code formulation (South Australia, the Australian Capital Territory, the Northern Territory and the Commonwealth). In each of these jurisdictions the defence features a volitional element (that is, the effect that the mental impairment has on the accused's ability to control conduct) in addition to the cognitive elements described in the M'Naghten rules. Only New South Wales is governed completely by the common law M'Naghten rules, with Victoria having a close statutory version of the rules.

THE INSANITY DEFENCE IN WESTERN AUSTRALIA

Section 27 of the *Criminal Code* (WA) (the Code) sets out the defence of insanity as follows:

> A person is not criminally responsible for an act or omission on account of unsoundness of mind if at the time of doing the act or making the omission he is in such a state of mental impairment 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.

In broad terms the defence therefore requires that:

1. the accused was mentally impaired as defined by the Code at the time of the offence; and
2. the mental impairment deprived the accused of one of three named capacities.

Each of these elements is discussed below.

Mental impairment

Under s 1 of the Code, 'mental impairment' is defined as intellectual disability, brain damage, senility or mental illness. The term 'mental illness' is separately defined in s 1 of the Code as

> an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli.

This definition draws heavily upon the definition of 'disease of the mind' which underpins the common law defence of insanity as expounded by King CJ in *Radford* [21] and approved by the High Court in *Falconer.*[22] These cases make clear that an underlying pathological infirmity of the mind must be distinguished from 'mere excitability of a normal man, passion, even stupidity, obtuseness, lack of self-control and impulsiveness'.[23]

16. Ibid 210.
17. *M'Naghten's Case* [1843] 10 Cl & Fin 200.
18. Ibid 202.
19. Ibid. In England the House of Lords has the right to require the judges to answer abstract questions of existing law. The majority view on behalf of the judges was given by Lord Tindal CJ who presided (with Williams and Coleridge JJ) over M'Naghten's trial. The minority view was expressed by Maule J.
20. Ibid 210.
21. *Radford* (1985) 42 SASR 266, 274 (King CJ).
22. *Falconer* (1990) 171 CLR 30, 53 (Mason CJ, Brennan and McHugh JJ).
23. *Radford* (1985) 42 SASR 266, 274 (King CJ), citing Owen J in *Porter* (1933) 55 CLR 182, 188.

Whether a particular mental condition may amount to a mental illness to which the insanity defence applies is not a medical question but a question of law for the judge.[24] It has been observed that the absence of a medical definition of the term 'disease of the mind' (or 'underlying pathological infirmity of the mind') allows the defence a degree of flexibility to adapt to modern diagnostic practices.[25] It is also argued that a legal definition of the term allows physical conditions that an expert would not necessarily consider a mental disorder but that can affect the mind (such as hyperglycaemia,[26] arteriosclerosis,[27] and epilepsy[28]) to be encompassed by the defence. However, as discussed in relation to automatism in Chapter 4, although these conditions have been held to fall within the common law defence of insanity, the question whether they are encompassed under the Code defence is unclear.[29] The genesis of this question lies in the fact that the common law definition of mental illness precludes conditions that result from the reaction of a healthy mind to *external* extraordinary stimuli.[30] The fact that the Code definition leaves out the word 'external' has caused some commentators to suggest that conditions resulting from a healthy mind's reaction to *internal* extraordinary stimuli (such as the physical conditions mentioned above) are excluded from the defence.[31]

The Commission has examined this issue in some detail in Chapter 4 and has concluded that the absence of the word 'external' in the definition of mental illness under the Code enables a more 'holistic' approach when considering whether a particular condition should be classified as a mental illness. Following consultation on this issue and an examination of relevant case law, the Commission has concluded that the current definition of mental illness under the Code is adequate and does not require amendment.[32]

Should personality disorders be included in the definition of mental impairment?

The Model Criminal Code insanity (or 'mental impairment') defence is quite closely modelled on the Western Australian provision set out above. However, one significant difference is that the Model Criminal Code definition of mental impairment includes specific reference to 'severe personality disorder'. This definition has been enacted in the criminal codes of the Commonwealth and the Australian Capital Territory, but the Northern Territory and South Australian codes (which have, in all other respects, implemented the model provision) have omitted severe personality disorder from the definition of mental impairment. In light of this disparity among jurisdictions, the Commission has considered whether the Western Australian insanity defence should include express reference to personality disorders.

There are a number of different types of personality disorder, but the one most commonly diagnosed in homicide offenders is antisocial personality disorder.[33] The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* describes antisocial personality disorder as being 'characterised by a childhood history of antisocial behaviour which has continued into adulthood and has manifested itself in such behavioural symptoms as impulsivity, aggressiveness, irresponsibility, recklessness, deceitfulness and a lack of remorse for misdeeds'.[34] These characteristics motivated the early 19th century physician James Cowles Pritchard to term the disorder 'moral insanity'.[35] According to Janet Ruffles, between 15 and 30 per cent of persons diagnosed with antisocial personality disorder present with a severe form of the disorder and are classified as psychopathic.[36] Psychopathy combines the behavioural characteristics described above with various affective and interpersonal disturbances.[37] It is generally

24. *Kemp* [1957] 1 QB 399. Obviously a judge will be influenced by the expert medical evidence in deciding whether there is sufficient evidence of an underlying pathological infirmity of the mind to put the question of insanity to the jury.
25. McSherry B, 'Defining What is a "Disease of the Mind": The untenability of current legal interpretations' (1993) 1 *Journal of Law and Medicine* 76, 80.
26. Hyperglycaemia is an excess of blood sugar: see *Hennessy* [1989] 2 All ER 9. Compare hypoglycaemia (a deficiency of blood sugar) which has been held to fall under the defence of 'sane automatism': *Quick* [1973] 1 QB 910.
27. On the basis that, when under stress, hardening of the arteries may interrupt the flow of blood to the brain: *Holmes* [1960] WAR 122; *Kemp* [1957] 1 QB 399.
28. *Cottle* [1958] NZLR 999; *Foy* [1960] Qd R 225. Epilepsy has also fallen under the sane automatism defence: *Holmes* [1960] WAR 122.
29. See Chapter 4, 'Unwilled Conduct and Accident: The distinction between sane automatism and insane automatism'.
30. *Radford* (1985) 42 SASR 266, 274 (King CJ).
31. Whitney K, Flynn M & Moyle P, *The Criminal Codes: Commentary and materials* (Sydney: Law Book Company, 5th ed., 2000) 492.
32. See Chapter 4, 'Unwilled Conduct and Accident: The distinction between sane automatism and insane automatism'.
33. Antisocial personality disorder is sometimes known as 'Dangerous and Severe Personality Disorder' because of the severity of the disorder (usually in the psychopathic range) and the high risk the sufferer poses to society by virtue of their serious antisocial behaviour. See Office of the Chief Psychiatrist (WA), *Report on Alternative Detaining Powers in Relation to Persons Diagnosed with Dangerous and Severe Personality Disorder* (2004) 8.
34. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (1994), as summarised by Ruffles J, 'Diagnosing Evil in Australian Courts: Psychopathy and antisocial personality disorder as legal synonyms of evil' (2004) 11 *Psychiatry, Psychology and Law* 113, 114.
35. Pritchard JC, *Treatise on Insanity and Other Disorders Affecting the Mind* (England: Haswell, Barrington & Haswell, 1835).
36. Ruffles, J, 'Diagnosing Evil in Australian Courts: Psychopathy and antisocial personality disorder as legal synonyms of evil' (2004) 11 *Psychiatry, Psychology and Law* 113, 114.
37. Ibid.

thought that personality disorder is untreatable, although support may be given to encourage control of aggressive and violent behaviour.[38] The general consensus in psychiatric literature is that 'involuntary treatments imposed on a person [who has a personality disorder but is] not motivated to change have no chance of success'.[39] The Office of the Chief Psychiatrist in Western Australia has also reported that deterrent forms of punishment do not usually modify the behaviour of persons suffering from personality disorder.[40]

Case law in Western Australia and elsewhere suggests that personality disorder is not considered a mental illness at law.[41] Indeed, according to CR Williams, a person with a personality disorder is not regarded as being mentally ill within the discipline of psychiatry.

> The word 'personality' refers to an individual's characteristic way of functioning psychologically. Some persons have traits of character that are abnormal or socially undesirable. At an extreme level such persons are described as having a personality disorder. The position of such persons is, however, quite different from that of a person suffering from a disturbance of mental functioning, which is what mental illness is. The fact that a person's behaviour is deviant, maladapted or non-conformist does not necessarily mean that it is the product of any disturbance of mental functioning.[42]

This appears to be supported by the wider psychiatric profession; according to the *Oxford Textbook of Psychiatry,* 'most psychiatrists begin by separating mental handicap and personality disorder from mental illness'.[43] The common element of all mental illnesses is said to be a 'pervasive inability to engage reality',[44] and it is here that personality disorders differ from mental illness.[45] People suffering from a personality disorder generally appreciate what they are doing and, although there may be some difficulty in controlling their actions, 'it cannot be said that [they are] completely lacking in volitional capacity'.[46] Even if such a disorder was accepted by a Western Australian court as a relevant mental illness for the purpose of the defence of insanity, it would be a rare case where one or more of the three relevant capacities was completely (as opposed to substantially) impaired.

In the Commission's opinion severe personality disorder should not (like intellectual disability, senility and brain damage) automatically qualify as a mental impairment for the purposes of the insanity defence. But this does not mean that personality disorder should be specifically excluded from the defence of insanity. The Commission is aware that medical diagnostic practices can change over time and that there may be some types or degrees of personality disorder that come to be considered as mental illnesses in the future. There may also be cases where a personality disorder derives from an underlying pathological infirmity of the mind or where it coexists with such an infirmity. Whether a particular mental illness will activate consideration of the defence of insanity is a question of law for the judge.[47] The Commission is satisfied that the current definition of mental impairment provides sufficient flexibility to the court to consider whether a particular condition, including a personality disorder, qualifies for the defence.

Time of the offence

The law is only interested in the accused's mental capacity at the time of the offence. As Dixon J made clear in his model direction to the jury on the insanity defence in *Porter,* the law is

> not concerned, except for the purpose of finding out how he stood at that moment, what his subsequent condition was or what his previous condition was. He may have been

38. Office of the Chief Psychiatrist (WA), *Report on Alternative Detaining Powers in Relation to Persons Diagnosed with Dangerous and Severe Personality Disorder* (2004) 10.
39. Submission to the Victorian Parliamentary Social Development Committee Inquiry into Mental Disturbance and Community Safety (1989), as cited in Williams CR, 'Development and Change in Insanity and Related Defences' (2000) 24 *Melbourne University Law Review* 711, 730. See also ibid.
40. Office of the Chief Psychiatrist (WA), *Report on Alternative Detaining Powers in Relation to Persons Diagnosed with Dangerous and Severe Personality Disorder* (2004) 7.
41. *Hodges* (1985) 19 A Crim R 129; *Jeffrey* [1982] Tas R 199; *Willgoss* (1960) 105 CLR 295. It is notable also that the criterion for mental illness under the *Mental Health Act 1996* (WA) s 4(2)(f)—which governs civil commitment processes—specifically excludes a person who only 'demonstrates antisocial behaviour'.
42. Williams CR, 'Development and Change in Insanity and Related Defences' (2000) 24 *Melbourne University Law Review* 711, 729. This view is supported by the American Psychiatric Association in its 'Statement on the Insanity Defense' (1983) *American Journal of Psychiatry* 681, 685. See also Office of the Chief Psychiatrist (WA), *Report on Alternative Detaining Powers in Relation to Persons Diagnosed with Dangerous and Severe Personality Disorder* (2004) 9.
43. Gelcer M, Gath D, Mayou R & Cowen P, *The Oxford Textbook of Psychiatry* (Oxford: Oxford University Press, 3rd ed., 1996) 57, as cited in McSherry B, 'Mental Impairment and Criminal Responsibility: Recent Australian legislative reforms' (1999) 23 *Criminal Law Journal* 135, 137.
44. McAuley F, *Insanity, Psychiatry and Criminal Responsibility* (Dublin: Round Hall Press, 1993) 35.
45. McSherry B, 'Mental Impairment and Criminal Responsibility: Recent Australian Legislative Reforms' (1999) 23 *Criminal Law Journal* 135, 137.
46. Scottish Law Commission, *Report on Insanity and Diminished Responsibility,* Report No. 195 (July 2004) [2.60]. See also ibid.
47. Although the judge's decision whether the accused's condition qualifies for insanity will usually be taken with the benefit of psychiatric or medical evidence, such evidence is not a necessary precondition for the defence: *Lucas* (1970) 120 CLR 171.

> sane before and he may have been sane after, but if his mind were disordered at the time to the required extent, then he should be acquitted on the ground of insanity at the time he committed the offence.[48]

This is an important point because, although it may seem to the layperson that there should be some warning of mentally disordered behaviour, psychiatric studies have found that 'people in their first episodes of mental illness [are] at greater risk of committing serious violence than those in subsequent episodes'.[49] The definition of mental illness under s 1 of the Code also makes clear that an illness of a temporary nature or short duration will qualify for the insanity defence.

Deprivation of named capacities

A successful insanity defence in Western Australia requires that the accused must be found to have been deprived by mental impairment of one of three named capacities: the capacity to understand the act; the capacity to control the act; and the capacity to know that the act ought not be done. These capacities are known as the three 'arms' of the insanity defence and are described below.

Capacity to understand the act

The first arm of the defence concerns the capacity to understand the act. This has been interpreted as being substantially the same as the M'Naghten formulation which refers to not knowing 'the nature and quality of the act [the accused] was doing'.[50] An example of this arm of the defence would be if the accused was so affected by mental disorder as to mistake the nature of a physical act; for example 'throwing a baby on a fire believing that it was a log of wood'[51] or cutting a person's throat 'believing it is a loaf of bread that is being cut'.[52] A less extreme example would be that the accused did not appreciate that his or her act was so dangerous as to kill or cause serious injury.[53]

Capacity to control the act

The second arm of the defence concerns the capacity to control conduct. Except for Victoria and New South Wales, all Australian jurisdictions have a volitional component to the insanity defence.[54] Sometimes known as 'insane automatism',[55] this arm broadens the scope of the defence beyond the M'Naghten rules which refer to the effect of mental impairment on an accused's cognitive functions only.[56]

Some forensic psychiatrists submitted to the Victorian Law Reform Commission's 2004 inquiry that it would be 'very difficult to give any kind of expert opinion about volition'.[57] The difficulty is said to lie in the problem of distinguishing between a desire or impulse which is uncontrollable and one that the accused simply chooses—in his or her disordered mental state—not to control.[58] This argument references a broad conception of the second arm – that of a conscious but 'irresistible impulse' on the basis of mental disease.[59] However, while not expressly excluding irresistible impulse, the High Court in *Falconer* appeared to favour a much narrower interpretation that applies only to *unconscious involuntary conduct* due to mental disease.[60] Either way, it has been noted that the volitional arm of the defence of insanity is relied upon very rarely in isolation[61] and that most accused who are unable to control their

48. *Porter* (1933) 55 CLR 182, 187.
49. Nielssen OB, Wesmore BD, Large MM & Hayes RA, 'Homicide During Psychotic Illness in New South Wales Between 1993 and 2002' (2007) 186 *Medical Journal of Australia* 301, 301. In this study 61 per cent of subjects killed during their first episode of psychotic illness. A 2006 study in the United Kingdom had similar findings with 56 per cent of subjects having killed in their first year of schizophrenic illness with most undiagnosed or untreated: at 303.
50. *M'Naghten's Case* [1843] 10 Cl & Fin 200, 210. See Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials*, (Sydney: LexisNexis Butterworths, 2005) [17.19].
51. Lanham D, Bartal BF, Evans RC & Wood D, *Criminal Laws in Australia* (Sydney: Federation Press, 2006) 16.
52. Yannoulidis ST, 'Mental Illness, Rationality and Criminal Responsibility: Tropes of Insanity and Related Defences' (2003) 25 *Sydney Law Review* 189, 193–94.
53. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [17.19]. Colvin notes that in some cases reliance on this arm of the insanity defence will negate the mental element of intention for murder. There is some question as to whether an accused who is charged with murder, but because of a finding of insanity is not criminally responsible for the murder *and* could not form the relevant intent for murder, should be acquitted of murder or manslaughter. This issue is discussed below in 'Procedure at trial'.
54. The volitional arm has also been adopted by the Model Criminal Code.
55. This is to be distinguished from 'sane automatism' which refers to unconscious involuntary conduct with no 'underlying pathological infirmity' of the mind. This defence, which results in an absolute acquittal, and its relationship to s 27 of the Code is dealt with in Chapter 4, 'Unwilled Conduct and Accident'.
56. It has been noted that insane automatism will generally also fall under the first arm of the insanity defence at common law – the incapacity to understand what one is doing. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [17.20].
57. VLRC, *Defences to Homicide,* Final Report (2004) [5.27].
58. Carroll A & Forrester A, 'Depressive Rage and Criminal Responsibility' (2005) 12 *Psychiatry, Psychology and Law* 36, 38.
59. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [17.20].
60. *Falconer* (1990) 171 CLR 30, 48–49 (Mason CJ, Brennan and McHugh JJ).
61. Bronnit S & McSherry B, *Principles of Criminal Law* (Sydney: Law Book Company, 2001) 221. It is difficult to support this argument empirically without recourse to the original trial transcripts. However, of those Western Australian cases for which written reasons are available (that is, decisions of appeal courts and judge alone trials), the Commission can only find two cases that have successfully relied solely on the volitional arm of the insanity defence

actions as a result of mental impairment are usually also able to rely upon one of the other two arms of the defence.[62]

Capacity to know that he or she ought not to do the act

The third arm of the defence concerns the accused's capacity to know that he or she ought not do the act or make the omission. Although the wording is slightly different to the comparable arm in the M'Naghten rules, which refers to the accused's capacity to know that the conduct was 'wrong', the underlying concept is the same.[63] The Code's drafter drew a parallel between this element of the insanity defence and the provision in s 29 which excuses children from criminal responsibility on the same basis.[64] Interpretation of this arm in Australian jurisdictions is referenced to the ordinary standards of reasonable people.[65] Therefore 'wrong' or 'ought not to do' is judged on moral, rather than legal, standards.[66]

An example of this arm of the insanity defence in the homicide context would be if an accused killed thinking that he was acting under divine command. Even if the accused knew that the act of killing was against the law, he might believe that the killing was nonetheless a morally righteous act because in his mind it was condoned by God.

Delusions

The second limb of s 27 provides that:

> A person whose mind, at the time of his doing or omitting to do an act, is affected by delusions, 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.

There is little doubt that this limb of the insanity defence springs from the answer to the fourth question put to the judges in *M'Naghten's Case.* The House of Lords asked: 'If a person under an insane delusion as to existing facts commits an offence in consequence of [the delusion], is he thereby excused?' The judges answered:

> To this question the answer must, of course, depend on the nature of the delusion but ... [if] he 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 fact with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposed another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.[67]

This answer assumes that a person may suffer an insane delusion as to a certain fact only, but otherwise be of sound mind. This view has been criticised as being against modern science[68] and, though not inconceivable, certainly unlikely.[69] However, a 1991 case involving an identical provision of the Tasmanian Criminal Code[70] (hereafter 'the delusions provision') has challenged these views.

In *Walsh,*[71] a Korean War combat veteran shot his friend at a distance of three metres at night under the delusion that he was in Korea defending himself from an enemy soldier. There was no evidence of motive or hostility between the accused and the deceased. A witness who arrived at the scene shortly after the killing described the accused as confused with 'no logical order to his conversations'.[72] The accused expressly disclaimed reliance on the defence of insanity, but argued that he had suffered a temporary delusion as a manifestation of his diagnosed post-traumatic stress disorder. Under the delusions provision, he argued, this accorded him the right to have the jury consider self-defence which could lead to an outright acquittal. The judge held that evidence of delusions was relevant to both the defence of insanity and of self-defence and that, if relying on evidence of

without any evidence supporting incapacity under other arms or reference to s 23 (unwilled act) or s 28 (intoxication): *Wray* (1930) 33 WALR 67; *Lavell* [2002] WASC 200.

62. VLRC, *Defences to Homicide,* Final Report (2004) [5.27]. See also *Radford* (1985) 42 SASR 266, 275 (King CJ).
63. It is possible that by excluding reference to the word 'wrong' there is no chance that the arm can be interpreted subjectively.
64. LRCWA, *The Criminal Process and Persons Suffering from a Mental Disorder,* Discussion Paper, Project No. 69 (1987) [3.7].
65. *Stapleton* (1952) 86 CLR 358.
66. As opposed to the United Kingdom where the M'Naghten rules make clear that the relevant standard is whether the accused knew that the act was wrong in law.
67. *M'Naghten's Case* [1843] 10 Cl & Fin 200, 211.
68. *Chaulk* (1991) 62 CCC (3d) 193. See also Fairall P, 'The Exculpatory Force of Delusions – A Note on the Insanity Defence' (1994) 6 *Bond Law Review* 57, 59.
69. Especially in the case where the accused 'has committed some act of savage violence': Walker N, *Crime and Insanity in England* (Edinburgh: Edinburgh University Press, 1968) vol. 1, 100.
70. *Criminal Code* (Tas) s 16(3).
71. (1991) 60 A Crim R 419.
72. Ibid 420.

delusions, insanity must be put to the jury first. However, if the defence of insanity was rejected on the balance of probabilities, the accused could rely on the delusions provision as a basis for pleading self-defence. The burden of proof would then shift to the prosecution to prove beyond reasonable doubt that the accused was not justified in using the force that he did.[73]

To the Commission's knowledge this limb of the insanity defence has never been successfully relied upon in Western Australia and how it operates in practice is not entirely clear on the face of the provision. In particular, it is not clear from the provision whether circumstances like those in *Walsh* will result in a complete acquittal or a qualified acquittal (on account of unsoundness of mind). The projected outcome of a successful argument on the delusions provision in *Walsh* was not made clear by the judge; however, an argument can be made that the court contemplated the potential of a complete acquittal.[74]

The Commission has considered whether there is a need to retain the delusions provision in the Western Australian Code and, if so, what the verdict should be. Although the provision is considered by many to be redundant because most delusions will fall under the first limb of the insanity defence,[75] the Commission believes that the circumstances in *Walsh* demonstrate that its retention is warranted. However, in the Commission's opinion it is not in the public interest to allow a complete acquittal in circumstances where an accused has suffered such delusion as to be capable of killing another person. It is possible, as contemplated by the judge in *Walsh,* that an accused's delusions spring from a mental disorder, but that the accused does not qualify for the first limb of the insanity defence because the disorder was not an 'underlying pathological infirmity of the mind' or did not completely deprive the accused of one of the named capacities.[76]

Because the delusions provision is found in s 27 of the Code, it is the Commission's view that the purpose of the provision is not to differentiate between a finding of guilty and not guilty, but between a finding of guilty and not guilty on account of unsoundness of mind. In these circumstances the Commission believes that it should be made clear in the *Criminal Procedure Act 2004* (WA) that the delusions provision in Western Australia will result in a qualified acquittal on the same basis as the insanity provision.[77] The Commission makes recommendations later in this chapter which seek to introduce flexibility into dispositions consequent upon such a finding in relation to a homicide offence. Such flexibility will allow a judge to make a supervised release order if, for example, an accused was subject to temporary delusions at the time of the killing but does not have a persistent mental illness or condition and is no longer perceived to be a danger to others or to themself. If there is any question as to whether the jury acquitted the accused by reason of mental impairment because of satisfaction of s 27(1) or s 27(2) and, if the judge thinks that this will impact upon the order following from that acquittal, the judge may ask the jury to return a verdict on that fact specifically under s 113(2) of the *Criminal Procedure Act*.

Recommendation 31

Delusions resulting in special verdict

That s 113(1) of the *Criminal Procedure Act 2004* (WA) be amended to provide:

113. Special verdict may be required

(1) If in a trial the question arises whether, under *The Criminal Code* s 27, the accused was not criminally responsible for an act or omission by reason of mental impairment or by the effect of delusions, the judge must direct the jury that if it finds the accused not guilty of the charge on this basis, it must return a special verdict of not guilty by reason of mental impairment.[78]

Burden and standard of proof

Under s 26 of the Code everyone is presumed sane unless the contrary is proved. If the defence of insanity is raised then it is for the party who raises the defence to lead evidence to rebut this presumption *on the balance of*

73. Ibid 428.
74. Fairall P, 'The Exculpatory Force of Delusions – A Note on the Insanity Defence' (1994) 6 *Bond Law Review* 57, 60.
75. Specifically under the first arm of the first limb of the defence; that is, the capacity to understand the nature and quality of the act.
76. See *Walsh* (1991) 60 A Crim R 419, 425.
77. That is, 'by reason of mental impairment': see below, Recommendation 34.
78. For discussion regarding changes to the wording of the special verdict, see below 'Amendment to Statutory Terms and Layout: Wording of the special verdict' and Recommendation 33.

probabilities.[79] Insanity is, therefore, an exception to the general rule that the burden of proof in a criminal trial rests with the prosecution and that a defence must be negated beyond reasonable doubt.[80]

Under common law, the prosecution may raise insanity if the accused's mental state is put into evidence by the defence; for example, if psychiatric evidence is led in support of a defence of diminished responsibility or automatism. However, in Western Australia the Code is silent on this matter and it is generally understood that the prosecution cannot introduce evidence to support a finding of insanity during trial where the defence has not been raised by the accused.[81] But this does not mean that the accused is the only party that can raise insanity in Western Australia. The case of *Holmes* shows that a trial judge can leave the defence of insanity to a jury where evidence led by the accused may support such a finding.[82]

The Commission notes that the Model Criminal Code provides that the prosecution can raise insanity with the leave of the court even where the defence has not put the accused's mental state in issue.[83] A provision of this nature has now been introduced in mental impairment defences in the Northern Territory, South Australia, Tasmania and Victoria.[84] A similar rule at common law[85] was held invalid by the Supreme Court of Canada on the basis that it infringed an accused's right to liberty and security of the person.[86] Although Canada has an entrenched Charter of Rights, in light of the government's commitment to introduce a Human Rights Act in Western Australia,[87] the Commission is concerned that an amendment to allow the prosecution to independently raise the defence of insanity may impinge upon an accused's rights in the same way. It is the Commission's opinion therefore, that any change to the current position in Western Australia should be subjected to further scrutiny than is possible with regard to the Commission's current terms of reference. Because insanity is a general defence, it is important that the impact of such a change is investigated in relation to all offences, not just homicide offences.

When the Commission had the opportunity to consider this matter in its broader context in the past,[88] it concluded that there should be no change to the existing position.[89] In support of this recommendation the Commission cited Deane and Dawson JJ in *Falconer,* who observed that it was somewhat anomalous for the prosecution to raise insanity: the prosecution should not commence proceedings at all if it is seeking an acquittal.[90] The Commission noted that there was sufficient provision for the involuntary civil commitment and detention of an accused who, in the prosecution's opinion, was insane and therefore not criminally responsible for his or her actions. It was the Commission's opinion that, given the potential for indeterminate detention, the choice whether to raise insanity should rest with the defence.

In respect of homicide offences the position is effectively unchanged today: a person acquitted of homicide on the basis of insanity is subject to a compulsory and indeterminate custody order. Such an order also applies to relatively minor offences such as criminal damage and assault occasioning

79. The Western Australia Police submitted that there was a need for clarification of the standard of proof required of an accused who raises the defence of insanity: Office of the Commissioner of Police, Submission No. 48 (31 July 2006). The Commission does not feel that it is necessary that such clarification be made in legislative form and is satisfied that the burden and standard of proof is well understood by the court and legal counsel.
80. Glanville Williams has suggested that insanity is an 'anomalous exception, explicable only as a survival from a time before the present rules of burden of proof were established': Williams G, 'Offences and Defences' (1982) 2 *Legal Studies* 233, 235. For a more in depth examination of the burden of proof of insanity, see Jones TH 'Insanity, Automatism and the Burden of Proof on the Accused' (1995) 111 *Law Quarterly Review* 475.
81. LRCWA, *The Criminal Process and Persons Suffering from a Mental Disorder,* Discussion Paper, Project No. 69 (1987) [3.12].
82. In *Holmes* [1960] WAR 122 the accused was charged with 'wilfully and unlawfully causing an explosion likely to do serious damage to property'. He deliberately excluded the defence of insanity but submitted evidence (in support of a defence under s 23) that the act occurred independently of his will. Evidence was given that the defendant was suffering from a hardening of the arteries and a consequent reduction of the blood supply to the brain which in some circumstances would leave him unable to control his actions. As a result of this evidence, which suggested a disease affecting the mind, the judge instructed the jury to also consider the insanity defence. The jury ultimately returned a verdict of 'not guilty on the ground of unsoundness of mind when the act took place'.
83. Model Criminal Code s 202.3.
84. *Criminal Code 2002* (ACT) s 28(6); *Criminal Code* (NT) s 43F(1)(b); *Criminal Law Consolidation Act 1935* (SA) s 269E(1)(b); and *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 22(1).
85. Established in *Simpson* (1977) 35 CCC (2d) 337 and confirmed in *Saxell* (1980) 59 CCC (2d) 176.
86. *Swain* (1991) 63 CCC (3d) 481, 502 (Lamer CJC; Wilson, Sopinka, Cory, Gonthier and La Forest JJ concurring; L'Heureaux-Dube J dissenting). In her reasons for decision in this matter, Wilson J listed a number of distortions created by allowing the prosecution to raise insanity. These included giving the prosecution a means to deprive a person of his or her liberty upon proof to a standard that is less than a reasonable doubt and permitting the prosecution to place the accused in a position where inconsistent defences must be advanced: at 555.
87. Human Rights Bill 2007 (WA). See in particular s 21 (right to liberty and security) which is in comparable terms to s 7 of the *Canadian Charter of Rights 1982*.
88. LRCWA, *The Criminal Process and Persons Suffering from a Mental Disorder,* Project No. 69 (1976–1991).
89. LRCWA, *The Criminal Process and Persons Suffering from a Mental Disorder,* Final Report, Project No. 69 (1991) [2.27].
90. *Falconer* (1990) 171 CLR 30, 62–63.

bodily harm.[91] In these circumstances the Commission does not think that it is necessarily in the interests of justice to permit the prosecution to lead evidence of insanity and sees no benefit in recommending change to the current law.

Who determines insanity?

Whether an accused is not guilty of an offence on account of unsoundness of mind is principally a question for the jury. However, under the *Criminal Procedure Act* there is capacity for an accused to elect trial by judge alone[92] or, in certain circumstances, to plead insanity.[93] In the latter case the conditions under s 93 of the *Criminal Procedure Act* must be met. That section relevantly provides:

> **93. Plea of not guilty on account of unsoundness of mind, dealing with**
>
> (1) If an accused pleads not guilty to a charge on account of unsoundness of mind and the judge is satisfied —
>
> (a) that the only fact in issue between the accused and the State is whether, under *The Criminal Code* section 27, the accused is not criminally responsible for an act or omission on account of unsoundness of mind;
>
> (b) that the prosecutor consents, and the accused does not object, to the judge doing so*;* and
>
> (c) that it is in the interests of justice to do so,
>
> the judge —
>
> (d) may decide the issue referred to in paragraph (a) on any evidence and in any manner the judge thinks just;
>
> (e) for that purpose, may ascertain any fact by the verdict of a jury or otherwise;
>
> (f) may find the accused not guilty of the charge on account of unsoundness of mind*;* and
>
> (g) if such a finding is made and a jury has been sworn to give a verdict on the charge, must discharge the jury from giving its verdict on the charge.

This provision was enacted to bring the procedural aspects of the defence into line with other jurisdictions and to 'avoid farcical trials where insanity is not in issue'.[94] Section 93 effectively implemented recommendation 11 of the Commission's 1991 report on *The Criminal Process and Persons Suffering from a Mental Disorder* and a similar recommendation contained in the 1983 Murray Review of the Criminal Code.[95]

Most submissions to the Commission's reference suggested that juries were well equipped to determine the issue of insanity.[96] However, members of the judiciary and the Director of Public Prosecutions also observed that judge alone trials work well and are appropriate where there is difficult psychiatric evidence or where 'there is no substantial challenge to the factual circumstances surrounding the event'.[97] One submission suggested that the question of insanity could be tried by a judge assisted by an expert panel of psychiatrists.[98] Such a system currently exists in Queensland where insanity may be heard before the Mental Health Court.[99]

A mental health court could potentially deal with issues such as insanity and fitness to stand trial, as well as sentencing of mentally impaired offenders. Whether a specialised criminal court for mentally impaired offenders should be introduced in Western Australia requires consideration of offence-types and offenders outside the terms of this reference. The Commission is currently working on a separate reference in relation to problem-orientated courts and judicial case management and will consider the viability of introducing a mental health court in Western Australia during this process. However, the Commission's tentative view is that there is no reason to remove determination of the issue of insanity from the normal trial process.

91. *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) sch 1. It is possible that the prosecution could be in possession of previous psychiatric reports or sentencing transcript revealing psychiatric problems and raise insanity even where the defence has been ignored or disavowed by the accused.
92. *Criminal Procedure Act 2004* (WA) s 118. Previously this power was contained in s 651A of the *Criminal Code* (WA) which was introduced in 1995, but which required the consent of the prosecution for trial by judge alone.
93. *Criminal Procedure Act 2004* (WA) s 93.
94. Model Criminal Code Officers Committee (MCCOC), *General Principles of Criminal Responsibility*, Final Report (1999) 47.
95. Murray MJ, *The Criminal Code: A general review* (1983) 390–92.
96. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006); Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006); Law Society of Western Australia, Submission No. 37 (4 July 2006); Michael Bowden, Submission No. 39 (11 July 2006); Criminal Lawyers' Association of Western Australia, Submission No. 40 (14 July 2006); Office of the Director of Public Prosecutions, Submission No. 51 (8 August 2006).
97. Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 9. See also Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 9; Office of the Director of Public Prosecutions, Submission No. 51 (8 August 2006) 12.
98. Margaret Hunter, Submission No. 23 (14 June 2006). The Criminal Lawyers' Association submitted that a greater role should be played by medical experts: 'Determinations of responsibility in cases of mental illness may be more justly made by experts without the requirement to translate or distort what is essentially a clinical judgment for legal purposes'. Criminal Lawyers' Association of Western Australia, Submission No. 40 (14 July 2006).
99. *Mental Health Act 2000* (Qld) s 382(1)–(2).

Intent and the special verdict

In *Perkins,*[100] Burt CJ suggested that when an accused charged with murder is found not guilty on account of unsoundness of mind, the jury should be instructed to make clear whether the accused is acquitted of the charge of murder (which requires a specific intent) or of the alternative of manslaughter. Burt CJ's concern was that the executive, which is responsible for the eventual release of a mentally impaired accused, 'should know the true position' in case this impacts upon the detention regime and ultimate release of the accused.[101] In its 1991 report on *The Criminal Process and Persons Suffering from a Mental Disorder* the Commission considered this issue and recommended that a jury who returned a verdict of not guilty on account of unsoundness of mind should be required to state the offence of which the person was acquitted.[102] Section 653 of the Code (now repealed) was enacted to give legislative effect to this recommendation.

In practice, s 653 required a jury to consider whether an accused of unsound mind had the necessary intent to commit the offence of murder. If the accused's mental state precluded the forming of an intent for murder, the accused would be found not guilty of manslaughter on account of unsoundness of mind. The requirement in s 653 was criticised in *Ward*[103] on the basis that where an accused is found to have been mentally disordered at the time of the offence, the question whether he or she possessed the specific intent for murder is generally hypothetical.[104] Kennedy J observed that:

> It clearly follows from s 27 of the Western Australian Code that if an accused is found by the jury, on the balance of probabilities, to be of unsound mind, he or she is not criminally responsible for the killing. No question of intent, or lack of intent, then arises. It is, however, still necessary to apply s 653(1) of the Code, which requires the jury, if they have found the accused person not guilty on account of unsoundness of mind at the time of the act or omission, to return a special verdict as to 'the offence of which the person was acquitted'. If there is a finding of unsoundness of mind ... the offence of which the accused must be found not guilty must be the offence with which he or she was charged. Thus, the jury could not acquit the accused of wilful murder and murder but find him or her not guilty of manslaughter on the ground of unsoundness of mind.[105]

With the passage of the *Criminal Procedure Act*, s 653 of the Code was repealed. The new special verdict section is found in s 113 of the *Criminal Procedure Act*. Subsection (2) of that provision reads:

> (2) If the judge is of the opinion that the proper sentence or order to be imposed —
>
> (a) on an accused if convicted; or
>
> (b) on an accused if found not guilty on account of unsoundness of mind,
>
> may depend upon a specific fact, the judge may require the jury to give its verdict on that fact specifically.

This provision allows a judge to take a verdict on the question of intent, but if no intent is found, this verdict will not affect the charge of which the accused is acquitted, only the order consequent upon that qualified acquittal. For homicide offences, this power is meaningless because under the current law a judge is bound to impose a compulsory custody order for a qualified acquittal of a homicide offence. However, if the Commission's recommendations for flexibility of dispositions on a qualified acquittal for a homicide offence are implemented, the question whether a specific intent existed may become relevant to the order made by the judge. In these circumstances s 113 will provide courts with the power to seek a jury's specific verdict on that issue and the true intent of that section will be restored.

Intent and procedure at trial

The case of *Ward* is one of a string of Western Australian cases in recent years that have discussed the broader question whether there is a particular order in which the relevant issues must be considered by the jury when the defence of insanity is raised.[106] The principal issue is whether the subjective elements of an offence (in homicide, the intent to kill or cause grievous bodily harm) must be satisfied along with the objective elements of the offence (the act of killing) before the defence of insanity is considered. This question dovetails with the issue of the verdict

100. [1983] WAR 184.
101. Ibid 189.
102. LRCWA, *The Criminal Process and Persons Suffering from a Mental Disorder,* Final Report, Project No. 69 (1991) recommendation 8.
103. [2000] WASCA 413.
104. Ibid [100]. The finding by three judges in *Ward* that s 653 was not mandatory was disputed by EM Heenan J in *Lavell* [2002] WASC 200 who said that there appears to be 'a statutory imperative requiring the tribunal of fact to consider and return a special verdict under s 653 identifying the offence of which, by reason of the finding of insanity, the accused has been acquitted'.
105. *Ward* [2000] WASCA 413 [20].
106. The primary cases in date order are: *Perkins* [1983] WAR 184; *Nolan* (unreported, Court of Criminal Appeal, Library No 970260, 22 May 1997); *Garrett* [1999] WASCA 169; *Ward* [2000] WASCA 413; *Stanton* [2001] WASCA 189; *Lavell* [2002] WASC 200 and *Tarua* [2005] WASC 290. Being the decision of a five-member bench of the Court of Criminal Appeal, *Ward* is generally considered to be the most authoritative; however, it should be noted that all five members gave separate reasons for decision and no clear *ratio decidendi* can be distilled on this particular issue.

discussed above because a finding that the accused had no intent to commit murder would mean the accused must be acquitted of that offence, leaving open the alternative verdict of manslaughter or a qualified acquittal of manslaughter.

Relying on the High Court decision in *Hawkins,*[107] which stated that '[i]n principle, the question of insanity falls for determination before the question of intent',[108] several members of the Western Australian Court of Criminal Appeal in *Ward* expressed the view that insanity should be considered after the objective elements of the offence are established, but before the subjective element of intent.[109] However, *Ward* cannot be said to have settled the matter whether there is a particular order in which the relevant issues must be considered where insanity is raised on an indictment of murder. As Owen J pointed out in *Stanton*, 'some of the judgments [in *Ward*] make it clear that there is no rule of law that requires a direction that the jury should consider issues in any particular order. It will depend on the circumstances of the case.'[110]

In its 1991 report on *The Criminal Process and Persons Suffering from a Mental Disorder* the Commission considered forms of two-stage or 'bifurcated' trials in other jurisdictions and found no advantage to legislating a procedure to be followed in insanity trials. For this reference the Commission has considered more recently legislated procedures such as that found in South Australia. The *Criminal Law Consolidation Act 1935* (SA) provides that once insanity is raised the issue of whether the accused was mentally competent to commit the offence must be separated from the remainder of the trial.[111] The trial judge then has a discretion to proceed to trial of the objective elements first or, alternatively, to proceed with the trial of the mental competence of the accused.[112] The question of intent (or any other mental element) is reserved for determination only if the accused is found mentally competent to commit the offence.

After reconsidering these issues, the Commission has determined to restate the effect of its earlier recommendation:[113] that there should not be a legislated procedure to be followed in insanity trials in Western Australia. The Commission agrees with the reasons for decision of Wheeler and Pidgeon JJ in *Ward* who stated that, so long as correct directions are given to the jury in respect of the relevant burden of proof and other matters in relation to each issue, there is no reason to require a trial judge to direct a jury to consider the questions of intent and insanity in a particular order.

Recommendation 32

Procedure for determining insanity at trial

That the procedure for determining the issues of insanity and intent (or other required mental elements of an offence) at trial should not be regulated.

AMENDMENTS TO STATUTORY TERMS AND LAYOUT

The Commission invited submissions on whether the requirements of s 27 required change.[114] The majority of submissions considered that the existing provisions of s 27 should be retained;[115] however, both the Law Society of Western Australia and the Criminal Lawyers' Association submitted that consideration should be given to modernising the provisions of s 27.[116] The Commission agrees. Consideration has been given to the definition of mental impairment and the relevance of the two limbs of s 27 above. In this section the Commission makes recommendations for amendment to statutory terms and to simplification of the layout of s 27.

107. (1994) 179 CLR 500.
108. Ibid 517 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ). The primary ratio of this decision is that evidence of mental impairment falling short of insanity may be admissible on the question of intent.
109. See the judgments of Kennedy, Wallwork and Scott JJ in *Ward* [2000] WASCA 413. However, representing as they do, different views on the issue and stating these views somewhat equivocally, they cannot be taken together as representing a strict reading of the law in Western Australia.
110. *Stanton* [2001] WASCA 189, [76].
111. See *Criminal Law Consolidation Act 1935* (SA) ss 269A–269G, which commenced on 29 October 2000.
112. *Criminal Law Consolidation Act 1935* (SA) s 269E.
113. LRCWA, *The Criminal Process and Persons Suffering from a Mental Disorder,* Final Report, Project No. 69 (1991) recommendation 7.
114. LRCWA, *Review of the Law of Homicide*, Issues Paper (2006) Question 19.
115. Members of the judiciary were well represented among those who submitted that the existing provisions were easily understood by juries and should be retained: Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006); Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006); Festival of Light Australia, Submission No. 16 (12 June 2006); Office of the Director of Public Prosecutions, Submission No. 51 (8 August 2006). Other submissions made no comment in relation to this aspect of the insanity defence.
116. Law Society of Western Australia, Submission No. 37 (4 July 2006) 9; Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 9.

Insanity

Western Australia is one of only three Australian jurisdictions to retain the name 'insanity' for the defence. Most other jurisdictions have renamed the defence 'mental impairment'.[117] This is also the wording used in the relevant section of the Model Criminal Code.[118] It is noted that the word 'insanity' does not appear in the text of s 27 and that the term 'mental impairment' is currently used to reference relevant mental disorders or conditions to which the defence applies. These conditions include brain damage and intellectual disability. It is the Commission's opinion that, in these circumstances, it is no longer appropriate to use the word 'insanity' to describe the defence. Accordingly it is recommended that the defence should be renamed 'mental impairment'.

Unsoundness of mind

The Commission has also considered the words 'unsoundness of mind' in the body of s 27 and in the special verdict under ss 113 and 146 of the *Criminal Procedure Act*. The Commission considers that the term 'mental impairment', which encompasses both mental illness and intellectual disability, is a more accurate and more acceptable description of the relevant finding. The Commission therefore recommends that the words 'unsoundness of mind' be replaced in s 27 by the term 'mental impairment'. The Commission makes a similar recommendation below in relation to the wording of the verdict.

Presumption of sanity

As a consequence of the amendments discussed above, the Commission has considered the appropriateness of the wording of s 26 of the Code which allows for the presumption of sanity. That section currently reads:

> **s. 26 Presumption of sanity**
>
> Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes into question, until the contrary is proved.

Because the Commission is removing both the reference to insanity and to unsoundness of mind, it would appear to be appropriate also to amend s 26. The Commission has considered the relevant sections of other jurisdictions (in particular those that have adopted the 'mental impairment' terminology) and has concluded that the presumption of sanity should follow the wording of s 43D(1) of the *Criminal Code* (NT), but be subsumed within s 27.

Statutory layout

One of the Commission's guiding principles for this reference is to make the law as simple and as clear as possible.[119] The Commission's observation of the insanity defence in practice has encouraged consideration of simplifying the statutory layout of the defence. It is the Commission's opinion that the conduct of trials will be assisted by clearer division of the two limbs and three named capacities of the defence.[120] This simple amendment will particularly assist judge-alone trials where all parties will be intimately familiar with the relevant arms of the defence and where there is no need to spell out the relevant capacity for the jury's benefit.

Recommendation 33

Defence of mental impairment

1. That s 26 of the *Criminal Code* (WA) be repealed.
2. That s 27 of the *Criminal Code* (WA) be repealed and replaced with the following formulation:

> **27. Mental Impairment**
>
> (1) A person is not criminally responsible for an act or omission by reason of mental impairment if at the time of doing the act or making the omission he or she is in such a state of mental impairment as to deprive him or her of capacity to –
>
> (a) understand what he or she is doing;
>
> (b) control his or her actions; or
>
> (c) know that he or she ought not to do the act or make the omission.
>
> (2) A person whose mind, at the time of doing or omitting to do an act, is affected by delusions, but who is not otherwise entitled to the benefit of subsection (1), is criminally

117. Mental impairment is the name of the defence in the Commonwealth, the Australian Capital Territory, the Northern Territory and Victoria. The South Australian defence is named 'mental incompetence' and the New South Wales defence is known as 'mental illness'.
118. Model Criminal Code s 302.
119. See Introduction, 'Guiding Principles for Reform: Principle Five'.
120. Such simplification of the statutory layout will allow counsel to refer in argument to section 1(a) of the defence (and so on) instead of requiring counsel to relate the full capacity to which they refer.

responsible for the act or omission to the same extent as if the real state of things had been such as he or she was induced by the delusions to believe to exist.

(3) A person is presumed not to have been suffering a mental impairment unless the contrary is proved.

Wording of the special verdict

As discussed above, the Commission has concluded that the term 'unsoundness of mind' should be removed from the defence in s 27. This requires consequential amendment to the special verdict and related provisions of the *Criminal Procedure Act*. The following recommended amendments will result in the special verdict being given as 'not guilty by reason of mental impairment'.

Recommendation 34

Wording of special verdict

That the words 'on account of unsoundness of mind' in s 93, s 113(1), s 113(2)(b) and s 146 of the *Criminal Procedure Act 2004* (WA) be replaced with the words 'by reason of mental impairment' and that consequential amendments be made to the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) and any other relevant legislation.

Prompted by two submissions[121] to this reference, the Commission has also considered whether the verdict should be more properly one of 'guilty but mentally impaired' rather than 'not guilty by reason of mental impairment'. The basis for these submissions is that the accused is actually found to have committed the relevant act (the act of killing or causing the death of the victim in a case of homicide) and that a guilty verdict more accurately reflects this finding.

This indeed was the view of Queen Victoria who, having survived an attempt on her life, found the verdict of not guilty but insane against the accused unsatisfying and ordered that the law be altered.[122] In 1883 the *Trial of Lunatics Act* was passed which changed the form of the verdict in cases of insanity and gave power to hold the accused in custody at the 'pleasure of the Crown'.[123] Insanity long having been understood to negative guilt,[124] this verdict caused some confusion as to whether the accused was convicted or acquitted. Eventually the House of Lords resolved the problem by stating that the verdict was in essence one of acquittal because it was 'not a verdict that he was guilty of the offence but that he was guilty of the act charged as an offence'.[125] In 1964 the verdict was restored to 'not guilty by reason of insanity'.[126]

In the context of the Code in Western Australia, the Commission believes that the verdict 'not guilty by reason of mental impairment' is appropriate. The defence of insanity acts to negate criminal responsibility for an offence on the basis that it would be unfair to punish someone who is so out of touch with reality as to be unable to appreciate the wrongfulness of their acts.[127] As Dixon J said in *Porter*:

> The purpose of punishing people is to prevent others from committing a like crime or crimes. Its prime purpose is to deter people from committing offences. ... it is perfectly useless for the law to attempt, by threatening punishment, to deter people from committing crimes if their mental condition is such that they cannot be in the least influenced by the possibility or probability of subsequent punishment; if they cannot understand the ground upon which the law proceeds.[128]

As will be clear, a successful defence of insanity does not result in an outright acquittal and release. The special verdict of not guilty by reason of mental impairment activates the provisions of the CLMIA Act which is specifically designed to address the treatment and care of mentally ill offenders. This is an appropriate outcome for the mentally impaired offender and the Commission can see no reason to change the verdict to one of 'guilty but mentally ill'.

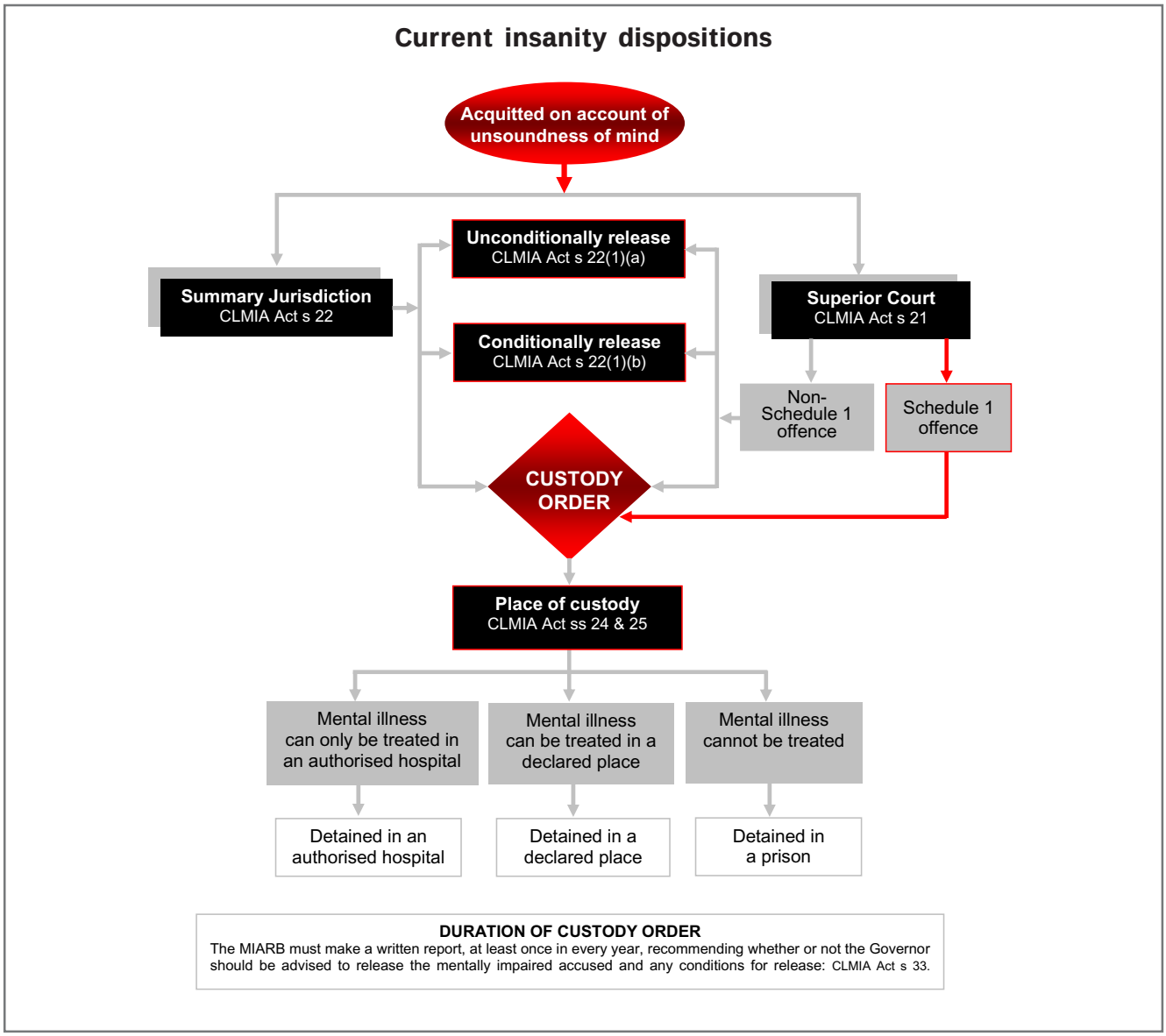
121. Margaret Hunter, Submission No. 23 (14 June 2006); Michael Bowden, Submission No. 39 (11 July 2006). It is noted that Justice McKechnie's submission commented on the inappropriateness of the 'guilty but insane' verdict: Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006).
122. *Maclean* (1882). See Dixon O, 'A Legacy of Hadfield, M'Naghten and Maclean' (1957) 31 *Australian Law Journal* 255, 255.
123. Dixon, ibid 256.
124. *Collinson on Lunacy* (1812) 471, as cited in Dixon, ibid.
125. Dixon, ibid 257.
126. *Criminal Procedure (Insanity) Act 1964* (UK). Twelve American state jurisdictions instituted the 'guilty but mentally ill' verdict from 1975 following the acquittal of John Hinckley (who was charged with the attempted murder of Ronald Reagan) on the grounds of insanity. However, the verdict has been widely criticised by academic commentators. See Sloat LM & Frierson RL, 'Juror Knowledge and Attitudes Regarding Mental Illness Verdicts' (2005) 33 *Journal of the American Academy of Psychiatry and the Law* 208. See also Sherman SL, 'Guilty but Mentally Ill: A retreat from the insanity defense' (1982) 7 *American Journal of Law and Medicine* 237.
127. Victorian Sentencing Committee, *Sentencing* (1988) vol. 2, 410.
128. *Porter* (1933) 55 CLR 182, 186.

5

DISPOSITIONS ON SPECIAL VERDICT OF NOT GUILTY BY REASON OF MENTAL IMPAIRMENT

The disposition system in practice

The CLMIA Act governs the legal administration, care and treatment of a person found not guilty on account of unsoundness of mind (a 'mentally impaired accused'). The following chart sets out the disposition system for a mentally impaired accused. Currently an indefinite term custody order must be made by a court if an accused is found not guilty on account of unsoundness of mind for an offence found in Schedule 1 of CLMIA Act. Homicide[129] and other serious offences (such as sexual offences) are listed in Schedule 1, but it also includes less serious offences such as assault occasioning bodily harm, indecent assault, stealing a motor vehicle in circumstances of aggravation, and criminal damage. Although the Commission is only concerned with homicide offences in this reference, it cannot ignore the fact that such a wide array of offences (varying greatly in seriousness) will result in a single mandatory and indefinite term disposition. The inappropriateness of this becomes clearer on closer inspection of the CLMIA Act regime.



129. Although it is noted that infanticide and killing an unborn child are not included in the schedule.

As can be seen from the chart opposite, a mentally impaired accused subject to a compulsory custody order may be detained in an authorised hospital, a 'declared place' or a prison until released by an order of the Governor. The major determining factor in placement of a mentally impaired accused is whether the accused has a mental illness that is 'treatable'.[130] If an accused has a treatable mental illness, he or she will be held in an authorised hospital.[131] If the accused has no treatable mental illness, he or she will be held in a 'declared place' or a prison. Currently there are no declared places in Western Australia;[132] therefore, all mentally impaired accused who do not have a treatable mental illness are sent to prison. This would include those mentally impaired accused who have an intellectual disability, dementia or an acquired brain injury. It might also include a person found to have a relevant mental impairment at the time of the offence, but who has since recovered from the mental impairment or has responded positively to treatment in the interim.[133]

Clearly prison is not always the most appropriate place for the detention of such people, and programs or services required by these accused are not always available in prison. Further, it is possible that some 'untreatable' mentally impaired accused are not able to be conditionally released because of the lack of facilities in the community to accommodate their special needs.[134] Under the present regime, the potential exists for a brain-damaged person who has been found not guilty under s 27 of a relatively minor offence (such as criminal damage or indecent assault) to be kept in prison indefinitely.

The failure of government to provide appropriate facilities in the community should never be the rationale behind keeping such people incarcerated in prisons. These are welfare issues, not criminal issues. The Law Society, among many others, submitted to the Commission's 1991 report that prison can never be an appropriate place for the detention of a mentally impaired accused who requires treatment, care or supervision.[135] It is important to be cognisant that:

> A society's treatment of its most disadvantaged groups is a pivotal test of that society's standard of civilisation. It is surely difficult to identify a more disadvantaged group than a community's psychiatrically disordered and mentally retarded prison population.[136]

It must be remembered that dispositions for mentally impaired accused are not intended to be punishment-based. They reflect the fairness and social control policies underlying the insanity defence[137] and, therefore, must balance the treatment and care needs of the mentally impaired accused with the safety and protection needs of the wider community.

Current government review of the disposition system

The Commission has been advised that the government is currently drafting legislation to repeal CLMIA Act and replace it with a new Act to improve the administration, treatment and care of mentally impaired accused in Western Australia.[138] The proposed Bill gives effect to the recommendations of the 2001 Holman Review[139] of the CLMIA Act and of the 2004 Davidson Committee[140] and follows a lengthy public consultation process.[141] This includes a commitment to establishing 'declared places' within the community and ensuring that mentally impaired accused detained in prisons are not mixed with the mainstream population, but held in dedicated units or secure facilities. The Attorney General has also advised that the new Act will introduce a more flexible regime for dealing with mentally impaired offenders and that courts and the Mentally Impaired Accused Review Board (MIARB)

130. *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 24.
131. Currently the Frankland Centre or Plaistowe Ward of Graylands Hospital.
132. Although the Commission is aware of government efforts to create declared places for the purpose of detaining mentally impaired accused and for introducing such accused back into the community.
133. Although it is likely that in such a case the person would be quickly assessed as being suitable for staged release into the community.
134. These not only include accommodation facilities but also programs to help accused with brain damage or intellectual disability become aware of and manage the specific triggers behind their offending behaviours (including stress and alcohol).
135. Law Society of Western Australia, submission (19 October 1989).
136. O'Brien KP, 'Prison Health Issues' in Biles D (ed), *Current Australian Trends in Corrections* (Sydney: Federation Press/Australian Institute of Criminology, 1988), as cited in Editorial, 'Dealing with the Diminished Responsibility Offender' (1992) 16(3) *Criminal Law Journal* 135, 136.
137. Victorian Sentencing Committee, *Sentencing* (vol 2, 1988) 410.
138. Jim McGinty MLA, Attorney General, 'New Criminal Law Mentally Impaired Accused Act', letter to LRCWA (4 September 2007).
139. In 2001, the then Minister for Health appointed Professor D'Arcy Holman to undertake the s 215 statutory review of the *Mental Health Act 1996* (WA). The *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA), as it was then known, was incorporated into the same review process. Professor Holman published his report and proposed recommendations in October 2003 with the final report following in December 2003.
140. In October 2004, the Minister for Health sought a report from the state's Chief Psychiatrist, Dr Rowan Davidson, on the Holman Review's recommendations. A committee (the Davidson Committee) consisting of senior officers from the Department of Health, the then Department of Justice, the Public Advocate and the Mentally Impaired Accused Review Board provided advice which was forwarded to the Minister for Health in August 2005.
141. The consultation process for the Holman Review, in particular, was extensive (see list of stakeholder committee members below n 143) and public submissions were invited both in the initial stages of the review and on the proposed recommendations.

will replace the role of the Governor in the leave of absence and release process.[142] Given the active consultation and considerable expertise[143] committed to the government's review of the CLMIA Act, the Commission has kept its comment and recommendations regarding reform of the disposition system for mentally impaired offenders to broad matters of principle.

The Commission's observations on reform of the disposition system

Custody orders should not be compulsory

The Commission concurs with the view of the Model Criminal Code Officers Committee that 'a person found not guilty by reason of mental impairment should not be automatically detained. Detention should be an option of last resort if measures such as release on conditions are inappropriate'.[144] As the Commission expressed in its 1991 report on *The Criminal Process and Persons Suffering from Mental Disorder:*

> 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 epilepsy which can be treated with medication while the person leads a normal life in the community.[145]

It is the Commission's view that a trial or appeal court should be given discretion to impose a range of dispositions following a finding of not guilty by reason of mental impairment for any offence. However, the Commission notes that the CLMIA Act Working Party's recommendation to the Holman Review to abolish compulsory custody orders (by repealing Schedule 1)[146] was watered down in the final report to the following recommendation:

> Schedule 1 ... should remain; however there should be a review of schedule 1 with the aim to reduce the overall number of offences listed, while also considering any offences that should be added to the schedule. All crimes of homicide should continue to be listed in schedule 1.[147]

The Commission has not had the benefit of reviewing the proposed legislation currently being drafted, but acknowledges the likelihood that homicide offences will remain subject to compulsory custody orders. While the Commission appreciates that homicide offences are extremely serious, there may be some—such as mercy killing or infanticide-type killing—where a mentally impaired accused has suffered a temporary (or since-treated) mental illness and where a custody order should not automatically follow a qualified acquittal.[148]

Having regard to the entire framework for reform of the laws of homicide in Western Australia as set out in this Report—including in particular the recommendations to repeal the offence of infanticide and restrict partial defences—the Commission recommends that the disposition regime for mental impairment follow, in principle, the sentencing recommendations in Chapter 7. That is, that there be the *presumption* of a custody order for Schedule 1 offences[149] which may be displaced by strong mitigating factors. Such factors to include that a sentence of imprisonment would not be imposed on the mentally impaired accused in all the circumstances if he or she was found criminally responsible for the crime; that the mentally impaired accused is not considered dangerous to the community or to him or herself (such as in an infanticide-type offence – that offence having been repealed); that

142. Jim McGinty MLA, Attorney General, 'New Criminal Law Mentally Impaired Accused Act', letter to LRCWA (4 September 2007).
143. The Holman Review Stakeholder Committee comprised a broad range of people representative of the following services or organisations: Association of Relatives And Friends of the Mentally Ill, authorised mental health practitioners (metropolitan and rural), Australian Association of Social Workers, Council of Official Visitors, Commonwealth Department of Health, Clinical Psychologists Association, College of Mental Health Nurses, General Practice Divisions (WA), Disability Services Commission, Health Consumers Council, members of the judiciary, Mental Health Consumer Advisory Program, Mental Health Consumer Advocacy Project, Mental Health Law Centre, Mental Health Review Board, Mentally Impaired Defendants Review and Parole Board, Office of the Chief Psychiatrist, Office of Mental Health, Western Australia Police, Public Advocate, Royal Australian and New Zealand College of Psychiatrists and the Association for Mental Health (WA). Other experts, such as a child and adolescent psychiatrist, were co-opted to the Committee during debates related to their area of expertise. The Stakeholder Committee facilitated discussions, collated information and identified major issues for Professor Holman, thereby guiding the development of the recommendations.
144. MCCOC, *General Principles of Criminal Responsibility*, Final Report (1999) 49.
145. LRCWA, *The Criminal Process and Persons Suffering from a Mental Disorder,* Final Report, Project No. 69 (1991) [2.40].
146. Patchett SJR, *Criminal Law (Mentally Impaired Defendants) Act 1996 Working Party Submission,* (undated) recommendation 6.5.
147. Holman CDJ, *The Way Forward: Recommendations of the Review of the Criminal Law (Mentally Impaired Defendants) Act 1996 (WA),* (2003) recommendation 4.1. The Commission points out, however, that not all homicide offences are listed in Schedule 1; for example, infanticide has never featured in the schedule.
148. The Commission also notes that under s 28 of the Code, an involuntary intoxicated accused is also acquitted on account of unsoundness of mind. An example of involuntary intoxication is where a person's drink is spiked with a drug. A compulsory custody order may not be appropriate for such an accused, especially if the evidence demonstrated that there was no ongoing danger to the community.
149. Or the equivalent of Schedule 1 in any future legislation.

it is not in the public interest to order the mentally impaired accused be held in custody; that the mentally impaired accused can be treated within the community (and that appropriate facilities are available for this purpose); or that the mentally impaired accused has no longer any appreciable relevant mental impairment. The court should be able to avail itself of advice from relevant sources such as the MIARB and the accused's treating physicians or the Office of the Chief Psychiatrist in considering whether the presumption of a custody order for a particular offence should be displaced.

Recommendation 35

Presumptive (rather than compulsory) custody orders for homicide offences

1. That the imposition of a custody order on a mentally impaired accused for an offence (including a homicide offence) listed under Schedule 1 of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) or its equivalent in future legislation be presumed but not compulsory.

2. That, in considering whether a custody order should be imposed upon a mentally impaired accused, the court should have regard to the following factors:

   (a) whether a sentence of imprisonment would be imposed on the mentally impaired accused in all the circumstances if he or she was found criminally responsible for the crime;

   (b) whether the mentally impaired accused is currently considered dangerous to the community or to him or herself;

   (c) whether it is in the public interest to order that the mentally impaired accused be held in custody;

   (d) whether the mentally impaired accused can be treated within the community (and whether appropriate facilities are available for this purpose);

   (e) whether the mentally impaired accused currently suffers a relevant mental impairment; and

   (f) the circumstances of the offence for which the mentally impaired accused was found not guilty by reason of mental impairment.

3. That, in considering whether the presumption of a custody order for a particular offence should be displaced, the court may be informed by any relevant source including the Mentally Impaired Accused Review Board, the accused's treating physicians and the Office of the Chief Psychiatrist for Western Australia.

4. That the decision to impose a custody order be subject to appeal.

Custody orders should be capped

It is the Commission's firm view that custody orders should not be indefinite. The Commission is joined in this opinion by the Model Criminal Code Officers Committee.[150] Many Australian jurisdictions 'cap' or limit the period of commitment or custody orders consequent upon an accused being found not guilty by reason of mental impairment. The Commission has examined the relevant legislation in other jurisdictions, which may be summarised as follows:

- In the Australian Capital Territory a mentally impaired accused acquitted by reason of mental impairment of a 'serious' offence is detained 'until the [Mental Health Tribunal] orders otherwise'[151] but the tribunal may not detain the accused longer than the 'limitation period'.[152] The limitation period is a term nominated by the court at the time of the verdict and which is 'the best estimate of the sentence it would have considered appropriate if the accused [was] a person who had been found guilty of that offence'.[153]

- In the Northern Territory a mentally impaired accused may be liable to supervision or released unconditionally. The term fixed for the supervision order is to be equivalent to the period of imprisonment or supervision (or aggregate period of imprisonment and supervision) that would, in the court's opinion, have been the

150. MCCOC, *General Principles of Criminal Responsibility*, Final Report (1999) 49. This also reflects the view of the Interdepartmental Committee on the Treatment of Mentally Disordered Offenders (WA), *Report* (1989) 79.
151. *Crimes Act 1900* (ACT) s 324.
152. *Mental Health (Treatment and Care) Act 1994* (ACT) s 75.
153. *Crimes Act 1900* (ACT) s 302.

appropriate sentence to impose on the accused if he or she had been found guilty of the offence charged. In regard to homicide this would be the non-parole period set if the accused had been found guilty.[154]

- In South Australia, if a court makes a supervision order, the court must fix a limiting term equivalent to the period of imprisonment or supervision (or the aggregate period of imprisonment and supervision) that would, in the court's opinion, have been appropriate if the accused had been convicted of the offence of which the objective elements have been established and without taking the accused's mental impairment into consideration.[155]

- For Commonwealth offences the court must order that the person be detained in safe custody in prison or in hospital for a specified period, not exceeding the maximum period of imprisonment specified for the offence. Despite this provision, a court may still release a mentally impaired accused absolutely or conditionally for any offence. If released conditionally, the conditions may not exceed three years in duration.[156]

- In Victoria a 'custodial supervision order' is indefinite,[157] but the court is required to set a 'nominal term'.[158] For homicide the nominal term is 25 years;[159] other 'serious' offences are referenced to the maximum term of imprisonment; and non-serious offences are referenced to half the maximum term of imprisonment.[160] For any offence a court has the discretion to make a non-custodial supervision order (also indefinite with a nominal term) or release the mentally impaired accused unconditionally.[161]

As will be clear from the above summary, there are two main options for capping of custody orders: capping at the maximum term of imprisonment for the offence acquitted of; or capping at the term of imprisonment that the court would have imposed had the person been found guilty of the offence. The Commission recommends the latter approach. This approach requires the court to actively consider any mitigating or aggravating circumstances of the offence and turn its mind to whether indeed a custody order should be made in all the circumstances.

It is noted that the South Australian legislation precludes the accused's mental impairment from being taken into account by the court in nominating a limiting term. However, given that the court must consider aspects of the accused's mental impairment, including potential dangerousness, when determining whether or not to impose a custody order, the Commission does not believe that it is appropriate for the court to artificially exclude these considerations when setting the limiting term. The court should, however, be required to set the limiting term with the relevant sentencing principles[162] and precedent[163] in mind. While the continuing dangerousness of the accused and the protection of society is an important consideration,[164] it should be remembered that, if at the expiry of a limited term the mentally impaired accused remains dangerous or is assessed as a threat to himself or the community, that person can be managed under the *Mental Health Act 1996* (WA) as an involuntary patient.[165]

154. *Criminal Code* (NT) s 43ZG.
155. *Criminal Law Consolidation Act 1935* (SA) s 269O.
156. *Crimes Act 1914* (Cth) s 20BJ.
157. *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 27(1).
158. The reason for the nominal term was to ensure that supervision orders were reviewed to avoid people being detained unnecessarily. The end of the nominal term triggers a major review – the supervision order may or may not be revoked at the expiry of the term. See VLRC, *Defences to Homicide,* Final Report (2004) [5.50].
159. *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 28(1)(a).
160. *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 28(1) (b) & (c).
161. *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 23(b).
162. While the 'necessary and ultimate justification for criminal sanctions is the protection of society' (*Channon* (1978) 33 FLR 433, 437), it is well established that the overarching principle governing sentencing is proportionality. That is, that the sentence of imprisonment should not exceed 'that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances': *Hoare* (1989) 167 CLR 348, 354. Other factors, such as general and personal deterrence, are said to have less weight in sentencing mentally impaired offenders because the 'full understanding of the authority and requirements of the law ... attributed to the ordinary individual of adult intellectual capacities cannot be expected of a person whose intellectual function is insufficient to have that understanding': *Wright* (1997) 93 A Crim R 48, 51 (Hunt CJ).
163. In *Lauritsen* [2000] WASCA 203 the Western Australian Court of Criminal Appeal held that mental illness should be taken into account in setting the non-parole period in relation to a charge of wilful murder. Of course this must be counter-balanced with the danger the accused poses to the community as a result of an untreatable mental illness: *Veen (No. 2)* (1988) 164 CLR 465, 476. A distinction may also be made between an accused suffering from a 'psychological disturbance' as opposed to a 'psychiatric disorder'. In *Arnold* (1991) 56 A Crim R 63 the Western Australian Court of Criminal Appeal held that a 22-year-old accused suffering from a psychological disturbance manifested by sexually deviant behaviour toward young children should not benefit by mitigation of sentence on the basis of his mental disturbance. One of the contributing factors to this decision was that the accused did not have good prospects for rehabilitation.
164. *Veen (No. 2),* ibid 476.
165. The *Mental Health Act 1996* (WA) s 26 provides that a person can be made an involuntary patient if that person has a mental illness requiring treatment and is considered a danger to self or anyone else or property. The person can be detained in hospital under a Hospital Order or treated in the community under a Community Treatment Order. Consequential amendments will need to be made to *Mental Health Act 1996* (WA) s 27 to allow for the mentally impaired accused to be taken as an involuntary patient on the basis of s 26 after the expiry of the maximum term of a custody order made by a court.

Recommendation 36

Court to nominate limiting term for custody order

That the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) (or its successor) be amended to provide that:

1. when imposing a custody order the court be required to nominate a limiting term that is capped at the term of imprisonment that the court would have imposed had the person been found guilty of the offence; and
2. the limiting term nominated by the court be subject to appeal.

Available dispositions should be enhanced

The Commission's recommended approach of 'presumptive' rather than compulsory custody for mentally impaired accused found not guilty of a Schedule 1 offence will open up judicial discretion in relation to dispositions. Currently the following dispositions are available to a court on a finding of not guilty by reason of mental impairment of a non-schedule offence:

- unconditional release (if the judge is satisfied that it is just to do so having regard to nature of offence; the person's character, antecedents, mental condition and health; and the public interest);
- a conditional release order;
- a community based order;
- an intensive supervision order; or
- a custody order.

Section 22 of the CLMIA Act directs that the above release orders be made pursuant to the *Sentencing Act 1995* (WA). The Commission is not satisfied that the release orders available under the *Sentencing Act* are entirely appropriate for mentally impaired accused found not guilty of a homicide offence. The Commission's primary concerns are the potential need for specialist supervision and the current emphasis (of at least the community-based and intensive supervision orders) on punishment rather than treatment and reintegration into the community. It is the Commission's opinion that, in these circumstances, the court should have available the following disposition options in respect of a Schedule 1 or homicide offence:

1. a limited term or 'capped' custody order (discussed above);
2. a definite term Supervised Release Order (discussed below); and
3. unconditional release.

Proposed new disposition: Supervised Release Order

The Commission recommends the introduction of an alternative disposition for Schedule 1 and homicide offences: a definite term Supervised Release Order (SRO). The SRO would have conditions set by the board,[166] akin to those placed on a release order under s 35 of the CLMIA Act; that is, compliance, treatment, residential and training conditions. A court may make recommendations as to the type of conditions that the board should consider placing on the order, or draw the board's attention to anything in the evidence that, in the court's opinion, should have a bearing on the board's consideration of conditions to be placed upon the SRO.[167] The Commission recommends that the SRO be supervised by a 'designated officer' under s 45 of the CLIMIA Act.[168] This avoids the possibility that a mentally impaired accused is, perhaps inappropriately, supervised by a community corrections officer who may have no experience in supervising mentally impaired offenders.[169]

There should be no minimum period set for a definite term SRO and the length of the order, up to a maximum of five years,[170] should be determined by the court. It may be that the mentally impaired accused has spent time in prison awaiting trial and that his or her mental illness has been successfully treated while in prison. The judge may think that there is no benefit to be gained by a lengthy release order or, it may be that the time spent in custody awaiting

166. This differs from the release order under s 35 which requires the Governor's approval.
167. Such as, for example, that the person has the continuing support of family (bearing in mind that most homicide victims of mentally impaired accused are family), or that the circumstances of the offence suggest that the person should not be permitted to work with young children.
168. The Commission notes the need for more s 45 supervising officers as stated by the Board: Mentally Impaired Accused Review Board, *Annual Report 2006* (2006) 4.
169. The Commission is concerned that this might be a possibility if a conditional release order is made as a defacto *Sentencing Act* order – as is currently available for non-schedule offences.
170. The Commission has nominated a term of five years having regard to the seriousness of the offence; however, the Commission recommends that consultation be had with relevant stakeholders (including the judiciary and the Mentally Impaired Accused Review Board) on the appropriate maximum term for such an order.

trial would be equivalent to the term of imprisonment that would have been ordered by the judge in the event that a custody order were deemed applicable. The SRO will in that case simply serve the purpose of assisting the mentally impaired accused to re-enter the community in a managed way. An infanticidal mother, for instance, will most likely require ongoing treatment in the community to overcome the loss of her child, although the state of mind that she was in at the time of the offence has well passed. An SRO acknowledges this need, but is not punitive.

A judge contemplating release of a mentally impaired accused on an SRO should be empowered to order that the accused be remanded in custody (whether in a prison or a declared place) to allow for the assessment of the mentally impaired accused by a psychiatrist or other expert, whose opinion may have bearing upon whether the court imposes a custody order or an SRO.[171] Further, there should be a provision which allows for a judge releasing a person on an SRO to order that the mentally impaired accused be remanded in custody (whether in prison or a declared place) until the board has determined the conditions upon which the mentally impaired accused should be released. The first consideration by the board should be within five working days,[172] at which time a determination can be made about the appropriateness of the place of interim custody and whether there is a need for further psychiatric or other assessment. It may be possible at the same time to enable the release of the accused by setting conditions and nominating a supervising officer for the SRO. Notwithstanding this, the supervised release of the mentally impaired accused should take effect within 30 days of the date on which the SRO was imposed by the court. A decision to impose an SRO rather than a custody order is judicial rather than executive and is therefore transparent and should be open to appeal.

Recommendation 37

Supervised release order for mentally impaired accused

1. That a definite term Supervised Release Order be established as an alternative disposition available to a court for a mentally impaired accused found not guilty of a Schedule 1 offence.
2. That the court have complete discretion to set the term of the Supervised Release Order with regard to all the circumstances, but that the term not exceed five years (or such other statutorily limited term deemed appropriate by the government following consultation with relevant groups including the judiciary and the Mentally Impaired Accused Review Board).
3. That provision be made for a court to order interim custody of the mentally impaired accused for assessment by a psychiatrist or other expert, whose opinion may have bearing upon whether the court imposes a custody order or a Supervised Release Order.
4. That the Supervised Release Order have conditions (including compliance, treatment, residential and training conditions) set by the Mentally Impaired Accused Review Board and that the Board take into account any recommendations of the court when setting such conditions.
5. That provision be made for a court to order interim custody of a mentally impaired accused to be released on a Supervised Release Order to enable the Mentally Impaired Accused Review Board to determine the conditions to be placed on such order.
6. That the Mentally Impaired Accused Review Board make its first consideration within five working days of the imposition of the Supervised Release Order and that the mentally impaired accused be released on such order within 30 days of the making of the order by the court.
7. That the Supervised Release Order be supervised by a 'designated officer' under s 45 of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) or such other officer as nominated by the Mentally Impaired Accused Review Board as being sufficiently experienced to supervise mentally impaired offenders.
8. That the decision to impose a Supervised Release Order be subject to appeal.

171. See *Criminal Code* (NT) s 43I and *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 24 for possible models.
172. The current determination period for a custody order is five days under s 25 of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA). The Commission notes recommendation 5.3 of the Holman Review that this be extended to 10 working days; however, in relation to a Supervised Release Order the Commission believes that the first consideration should not be any longer than five working days to ensure that the place of interim custody is appropriate. See Holman CDJ, *The Way Forward: Recommendations of the review of the Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) (2003) recommendation 5.3.

DISPOSITIONS ON GUILTY VERDICT FOR MENTALLY ILL OFFENDERS

The Commission's recommendation for a presumptive life sentence for murder[173] provides greater flexibility for courts to take account of mental impairment falling short of insanity when determining the appropriate sentence. Such occasion might arise when sentencing an accused for an intentional killing in circumstances that may otherwise have amounted to infanticide[174] or where an insanity defence is unsuccessful but the accused nonetheless suffers significant mental impairment. In *Lauritsen,*[175] Malcolm CJ drew attention to the lack of sentencing options available to Western Australian courts where an accused is found guilty of an offence but has a mental condition that clearly requires treatment or specific care.[176] The Chief Justice referred to the necessity of appropriate treatment and rehabilitation of mentally ill and intellectually disabled offenders, and suggested that prison is not always the best place for such offenders. The Commission agrees with these observations and is of the view that courts should be able to specify treatment conditions on a sentence or, where circumstances demand it, make hospital custody orders in lieu of, or by way of, sentence.

Such sentencing options already exist in most Australian jurisdictions.[177] The Commission has examined the legislation enabling these sentencing options[178] and considers that the Northern Territory provisions are the most suitable model for Western Australia. Section 79 of the *Sentencing Act 1995* (NT) provides as follows:

> **79. Assessment orders**
>
> (1) Where a person is found guilty of an offence and the court —
>
> (a) is of the opinion of that the person —
>
> (i) appears to be mentally ill or mentally disturbed; and
>
> (ii) may benefit from being admitted to and treated in an approved treatment facility; and
>
> (b) receives written advice from the Chief Health Officer that facilities are available to undertake an assessment of the person's suitability for an order under section 80,
>
> it may make an order that the person be admitted to and detained in an approved treatment facility for a period not exceeding 72 hours as specified in the order to enable an assessment to be made of his or her suitability for an order under section 80.
>
> (2) At the expiry of an order made under subsection (1), or at any time before then, the court may —
>
> (a) in accordance with section 80, make an order under that section; or
>
> (b) pass sentence on the person according to law.
>
> (3) Where at any time before the expiry of an order made under subsection (1), the court receives written advice from the Chief Health Officer that the person is not mentally ill or mentally disturbed, or that the detention of the person in an approved treatment facility is unnecessary or inappropriate, the court must pass sentence on the person according to law.

Section 80 provides for approved treatment facility orders. The court may impose conditions on such orders including whether the accused must be detained in a particular part of an approved treatment facility; whether the accused must be kept under guard; whether the accused may be granted leave of absence from the facility; and whether the accused is to be subject to the same restrictions as would apply if he or she were in a prison.[179] Unless the court orders otherwise, upon discharge from the treatment facility, an accused may be taken to prison or returned to the court for further orders.[180] The term of detention at a treatment facility must be no longer than the term of imprisonment the accused would otherwise have received.[181] Sections 82 and 83 of the Act require that a court may only make such a treatment order with the consent of the accused or if the accused would qualify for

173. Chapter 7, Recommendation 44. It should be noted that full sentencing discretion exists for other homicide offences such as manslaughter and dangerous driving causing death.
174. As discussed in Chapter 3, 'Infanticide', such offences have historically recognised the potential of mental disorder by allowing for a reduced sentence including conditional release orders with treatment conditions. Removal of the offence of infanticide, as recommended by this Report, will mean that some women who commit an infanticide-type offence will be tried for murder (it should be noted that this is the current situation regardless of the existence of the offence). Giving the courts discretion to attach treatment conditions or make hospital orders for a woman found guilty of such an offence will bring Western Australia into line with other jurisdictions and ensure that these offenders are given treatment to assist them to cope with their actions and the loss of their child.
175. [2000] WASCA 203.
176. Ibid [73]–[80].
177. Treatment options attached to a sentence are currently permitted by express legislation in the Northern Territory, Tasmania, Victoria, the Australian Capital Territory and the Commonwealth. In South Australia courts are permitted to release mentally impaired accused if the condition 'explains or extenuates' a minor indictable or summary offence and the accused is taking steps to seek treatment: *Criminal Law (Sentencing) Act 1998* (SA) s 19C.
178. *Crimes Act 1914* (Cth) s 20BS; *Crimes Act 1900* (ACT) ss 330(b), 331(1) & 331(2); *Sentencing Act 1995* (NT) ss 79–80; *Sentencing Act 1997* (Tas) ss 72 & 75; *Sentencing Act 1991* (Vic) s 93(1).
179. *Sentencing Act 1995* (NT) s 80(3).
180. *Sentencing Act 1995* (NT) s 80(6).
181. *Sentencing Act 1995* (NT) s 80(10).

involuntary treatment under the normal civil commitment procedures. The Commission is satisfied that an accused's civil and human rights are sufficiently protected by such provision.

The Commission notes with approval the commitment of the present government to enhance the administration, treatment and care of mentally impaired accused.[182] As part of this commitment a greater range of facilities will be made available for the detention and treatment of those found not guilty by reason of mental impairment.[183] It is anticipated that a new specialist psychiatric unit will be established at an existing metropolitan prison to cater for these accused. The establishment of a new secure hospital in the community is also being considered. The Commission can see no reason why these facilities might not also cater for those accused found guilty of the relevant offence, but who nonetheless suffer from a mental disorder requiring treatment. The Commission, therefore, recommends that legislative provision be made in the *Sentencing Act* to enable courts to make orders for a convicted accused to take advantage of these facilities. The Commission acknowledges the significant expertise of the MIARB in managing mentally impaired offenders in Western Australia and suggests a review role for the board if such orders are introduced in this state. The Commission, therefore, recommends that the board be responsible for the regular review of continuing treatment orders and the provision of advice to the court in relation to further orders, if required, following an accused's discharge from a treatment facility.

Recommendation 38

Assessment and treatment orders for accused found guilty

1. That provision be made in the *Sentencing Act 1995* (WA) to enable a court to make orders for the assessment and treatment of an accused person found guilty of an offence, but who appears to the court to have a mental condition that requires or would benefit from treatment or specific care.
2. That continuing orders made under such provision be subject to regular review by the Mentally Impaired Accused Review Board.
3. That in drafting these provisions regard be had to Part 4 of the *Sentencing Act 1995* (NT).

182. Jim McGinty MLA, Attorney General, 'New Criminal Law Mentally Impaired Accused Act', letter to LRCWA (4 September 2007).
183. Ibid. This includes those found unfit to stand trial by reason of mental impairment.

Diminished Responsibility

Diminished responsibility is a partial defence which acts to reduce an offence of murder to manslaughter. It is premised on the notion that if insanity can completely excuse an intentional killing, then 'partial insanity' should reduce the criminal responsibility of the accused in relative proportion.[1] The advantage of the partial defence of diminished responsibility is that it offers an alternative verdict for an accused who was mentally disordered at the time of the killing but does not meet the strict criteria for the complete defence of insanity. It also was conceived to avoid two mandatory dispositions: indeterminate detention for the legally 'insane' and life imprisonment, or the death penalty, for convicted murderers.[2]

The defence first found legal expression in Scotland in the 1867 case *HM Advocate v Dingwall,*[3] although the wider concept of diminished responsibility had been recognised for some time in the writings of jurists.[4] In England, where the common law did not recognise diminished responsibility, cases of partial insanity were often recommended to the royal mercy by juries to avoid the death penalty following a conviction for murder.[5] It was this tendency of juries to seek mercy for a mentally disordered accused that eventually motivated the legislature to adopt diminished responsibility as a partial defence to murder in the United Kingdom. The English formulation of the defence is found in s 2 of the *Homicide Act 1957* (UK) which provides:

> Where a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being party to the killing.

Although the death penalty was abolished in England in 1965,[6] the defence is still rationalised in that jurisdiction as a 'mercy verdict' because it avoids the mandatory sentencing regime for murder. In Australia, a partial defence of diminished responsibility exists in four jurisdictions:[7] New South Wales, Queensland, the Northern Territory and the Australian Capital Territory.[8] It is significant that in all but the last of these jurisdictions[9] the defence was introduced in the context of (and to ameliorate the effect of) mandatory life imprisonment for murder.[10]

ELEMENTS OF THE PARTIAL DEFENCE

While inspired by the *Homicide Act 1957* (UK), the legislative formulations of the defence in Australian jurisdictions differ. In fact, only the Australian Capital Territory has retained the original English formulation. The formulations of the Northern Territory, New South Wales and Queensland defences have each been altered to clarify the defence or restrict its operation. However, the following three elements are common to each formulation of the defence.

1. That at the relevant time the accused was suffering from an abnormality of mind.

1. However, an anomaly of diminished responsibility is that the concept of 'partial insanity' does not apply to any other offence. For all other crimes if insanity cannot be established a mentally impaired accused is held criminally responsible.
2. Dawson J, 'Diminished Responsibility: The difference it makes' (2003) 11 *Journal of Law and Medicine* 103, 107.
3. (1867) 5 Irvine 446. The existence of diminished responsibility is attributed to Lord Deas' charge to the jury in *Dingwall* where the accused, who was a drunkard with a peculiar weakness of mind, was found guilty of the culpable homicide of his wife instead of murder. However, the extenuating circumstances listed by His Honour seemed to point more to lack of intention to kill (possibly from self-induced intoxication) than to mental abnormality bordering on insanity: see Walker N, *Crime and Insanity in England* (Edinburgh: Edinburgh University Press, 1968) vol. 1, 143–44.
4. Indeed, legal commentary shows the emergence of the concept in Scotland as early as 1674 with Sir George MacKenzie's *The Laws and Customs of Scotland in Matters Criminal.* Nigel Walker suggests that MacKenzie may have been influenced by continental jurists such as Matthaeus who introduced the concept in Holland in 1644: see Walker, ibid 139.
5. Ibid 141.
6. *Murder (Abolition of Death Penalty) Act 1965* (UK) s 1.
7. *Crimes Act* (NSW) s 23A; *Criminal Code* (Qld) s 304A; *Criminal Code* (NT) s 159; *Crimes Act 1900* (ACT) s 14.
8. The partial defence of diminished responsibility currently exists under the *Crimes Act 1900* (ACT) s 14; however, the Australian Capital Territory is progressively working toward codifying its criminal law using the Model Criminal Code as its guide. While some parts of the Model Criminal Code (such as general principles of criminal responsibility) have already been enacted in that jurisdiction, the section dealing with fatal offences against the person has not yet been implemented. It is unclear at this stage whether the partial defences of diminished responsibility and provocation will survive the codification process in the Australian Capital Territory; however, it should be noted that neither defence is found in the Model Criminal Code.
9. The Australian Capital Territory was the last Australian jurisdiction to introduce diminished responsibility in 1990. At the time of introduction mandatory life imprisonment for murder had been abolished in the territory as a consequence of legislation which abolished the death penalty: see *R v Wheeldon* (1978) 33 FLR 402. However, as noted in the previous footnote, the continuing existence of the partial defence of diminished responsibility in the Australian Capital Territory is not assured and will be reviewed as part of the codification of the criminal law in that jurisdiction.
10. The recommendation that diminished responsibility be introduced in New South Wales was 'impelled chiefly by the continuation of the mandatory life sentence for murder and the inflexibility of the McNaghten approach': Criminal Law Committee, *Report on Proposed Amendments to the Criminal Law and Procedure*, Parliamentary Paper No. 54 (1973) 6. Mandatory life imprisonment for murder was abolished in New South Wales in 1982, but it still exists in the Northern Territory and Queensland. In the enactment of the *Criminal Code* (NT), which was modelled on the Model Criminal Code, the partial defences of provocation and diminished responsibility were explicitly retained (despite the Model Criminal Code rejection) because of the effect of mandatory sentencing. However, both defences were amended to 'clarify ... and restrict their operation': Northern Territory, *Parliamentary Debates,* Legislative Assembly, 31 August 2006 (Dr P Toyne, Minister for Justice and Attorney General).

2. That the abnormality of mind arose from a specified cause,[11] being:
   a. in the United Kingdom, the Australian Capital Territory and Queensland: 'a condition of arrested or retarded development of mind' or an inherent cause or induced by disease or injury; or
   b. in New South Wales and the Northern Territory: a 'pre-existing mental or physiological condition other than of a transitory kind'.

3. That the abnormality of mind substantially impaired the accused in at least one of three capacities: the capacity to understand the nature of the relevant act (or omission); the capacity to understand that the act is wrong; or the capacity to control the act.

The capacities that feature in the third element are expressed in all legislative formulations of the defence except the English and Australian Capital Territory formulations where they are nonetheless inferred by case law.[12] These capacities are the same as those found in the insanity defence under s 27 of the Western Australian *Criminal Code*.[13] The difference is that the accused's capacities need only be 'substantially' impaired to raise diminished responsibility, whereas with insanity the accused must have been fully deprived of one of those capacities. A further important distinction is that while the defence of insanity applies to any offence, diminished responsibility applies only to the offence of murder.[14]

Burden and standard of proof

The accused must raise the defence of diminished responsibility and satisfy the burden of proof.[15] For the defence to be made out, the accused must prove the above elements on the balance of probabilities. In all jurisdictions, where the accused raises the defence of diminished responsibility, the prosecution may rebut with evidence of insanity. In some jurisdictions this may leave the accused open to an order for indeterminate detention or hospitalisation.[16]

CRITIQUE OF THE DEFENCE

There are two main areas that have been subject to criticism in relation to the defence of diminished responsibility. The first concerns definitional issues leading to a lack of clarity and broadening of the defence. The second concerns issues of evidence and procedure, specifically the respective roles of expert witnesses and juries.

Definitional issues: lack of clarity and breadth of the defence

Abnormality of mind

Despite attracting significant criticism for its imprecision, the term 'abnormality of mind' still exists in most formulations of the partial defence of diminished responsibility.[17] The difficulty with the term is that it is neither legislatively defined nor a term otherwise used by the psychiatric profession.[18] As a consequence, the meaning of abnormality of mind has been left to judicial interpretation on a case-by-case basis.

The accepted definition of the term abnormality of mind was stated by Lord Parker CJ in *Byrne* as follows:

> A state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears ... to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise

11. It should be noted that while the abnormality of mind must arise from a specified cause, there is no element to the defence that requires that the abnormality caused the accused to commit the murder: Law Commission (England and Wales), *Murder, Manslaughter and Infanticide,* Final Report (2006) [5.122].
12. *Byrne* [1960] 2 QB 396, 403. It should be noted that the Law Commission (England and Wales) has recently recommended that these capacities form part of the legislative definition of diminished responsibility. As mentioned, above n 8, the future of the partial defence of diminished responsibility in the Australian Capital Territory is unknown.
13. See discussion above, 'Mental Impairment: Deprivation of named capacities'. The same capacities appear in the insanity or mental impairment defences of all Australian code jurisdictions: see *Criminal Code* (NT) s 43C, *Criminal Code* (Qld) s 27, *Criminal Code* (ACT) s 28; *Criminal Code* (Tas) s 16. See also *Criminal Law Consolidation Act* (SA) s 269C.
14. Thus for any other offence, evidence of mental impairment falling short of insanity is only ever relevant to sentencing.
15. This is the same as the defence of insanity, but unlike other defences which must be negated by the prosecution on the standard of proof 'beyond reasonable doubt'.
16. The Australian Capital Territory is the only Australian jurisdiction with the defence of diminished responsibility where the period of detention for the criminally insane is capped at the term that the prisoner would have received if found guilty: *Crimes Act 1900* (ACT) s 302(1). New South Wales, Tasmania and Queensland each retain the possibility of indefinite detention for an accused found not guilty on account of unsoundness of mind.
17. The most recent Australian formulation of the defence, found in the Northern Territory Criminal Code, has removed the term 'abnormality of mind', replacing it with the concept of substantially impaired 'mental capacity'. This appears to tie the defence, in that jurisdiction, to its original rationale of 'partial insanity'.
18. Cumes G, 'Reform of Diminished Responsibility in New South Wales' (1999) 6 *Psychiatry, Psychology and Law* 175, 177.

> will-power to control physical acts in accordance with that rational judgment. [19]

In 1997 the New South Wales Law Reform Commission (NSWLRC) completed its review of the operation of the defence in that state. A number of submissions to that review expressed concern about the ambiguity of the term 'abnormality of mind' and the potential breadth of the defence. Importantly, it was argued by psychiatrists that 'almost everyone who kills could be said to suffer some sort of abnormality of mind'.[20]

The term abnormality of mind also assumes that there is some identifiable mental state that is 'normal'. As Mahoney P has observed, there is some difficulty for juries 'in marking out with any precision the boundaries between the normal and the abnormal'.[21] In Queensland it has been held that it is necessary to remind juries that

> normal people in the community vary greatly in intelligence, and disposition; in their capacity to reason, in the depth and intensity of their emotions; in their excitability, and their capacity to exercise self-restraint ... and that until the particular quality said to amount to abnormality of mind, goes definitely beyond the limits marked out by the varied types of people met day by day, no abnormality exists.[22]

Because there is no objective measure of abnormality there is a danger that the more bizarre or heinous the crime the more abnormal the offender is deemed to be. There is no case that demonstrates this problem more graphically than *Byrne.* In that case the accused strangled a young girl and 'committed horrifying mutilations upon her dead body'.[23] He was described as a 'sexual psychopath [who] suffers from violent perverted sexual desires which he finds ... difficult or impossible to control'.[24] At trial the jury convicted Byrne of murder, but on appeal the conviction was downgraded to manslaughter, the court saying that:

> The evidence of the revolting circumstances of the killing and the subsequent mutilations as of the previous sexual history of the [accused], pointed, we think plainly, to the conclusion that the accused was what would be described in ordinary language as on the border-line of insanity or partially insane.[25]

This type of reasoning in explanation of the ambiguous term 'abnormality of mind' can also seduce medical experts who are called to give evidence of an offender's mental state at the time of the offence. In an article in the journal *Psychiatry, Psychology and Law*, forensic mental health specialists Andrew Carroll and Andrew Forrester warn their colleagues in the medical profession that '[c]ircular reasoning is invoked if the *offending behaviour itself* is used as sole evidence for a severe mental disorder, which is then in turn invoked as grounds for exculpation from that very behaviour'.[26]

Conditions to which the defence applies

In *Byrne* it was held that loss of self-control as a result of an abnormality of mind was enough to activate the defence of diminished responsibility, despite there being no express volitional element in the English formulation.[27] Therefore from its earliest days the defence of diminished responsibility has been held to cover conditions such as personality disorders[28] where an accused may have no identifiable or treatable mental illness, but is unable (or unwilling) to exercise appropriate self-control over violent, deviant or psychopathic behaviour.[29] Although the defence of insanity in Western Australia has always featured a volitional element, it does not include personality disorders because they are not a legally defined 'mental illness'.[30] Forensic psychiatrists and psychologists voiced to the NSWLRC inquiry specific concerns about the inclusion of personality disorders and psychopathy within the defence of diminished responsibility, suggesting that this indicated

19. [1960] 2 QB 396, 403 (Lord Parker CJ; Hilbery and Diplock JJ concurring). Approved by the Privy Council in *Rose* [1961] 1 All ER 859, 862; by the Queensland Court of Appeal in *Rolph* [1962] Qd R 262; *Whitworth* (1989) 31 A Crim R 453; and the New South Wales Court of Appeal in *Tumanako* (1992) 63 A Crim R 149; *Chayna* (1993) 66 A Crim R 178.
20. New South Wales Law Reform Commission (NSWLRC), *Partial Defences to Murder: Diminished responsibility*, Report No. 82 (1997) [3.34].
21. *Gieselmann* (unreported, NSWCCA, No 60692/1995, Mahoney P, 12 November 1996) 5.
22. *Rolph* [1962] 2 Qd R 262, 288 (Hanger J).
23. *Byrne* [1960] 2 QB 396, 400.
24. Ibid 401.
25. Ibid 405.
26. Carroll A & Forrester A, 'Depressive Rage and Criminal Responsibility' (2005) 12 *Psychiatry, Psychology and Law* 36, 40 (original emphasis).
27. Undoubtedly this was admitted to overcome the strict criteria of the common law insanity defence (the M'Naghten Rules), which only excused certain mental states that impaired the accused's capacity to understand the nature of the act or that the act was wrong. A volitional element has since become standard in most legislative formulations of diminished responsibility.
28. For a full discussion of personality disorders in the context of the definition of mental illness and the defence of mental impairment, see above, 'Mental Impairment: Should personality disorders be included in the definition of mental impairment?'.
29. See, for example, the descriptions of cases in Susanne Dell's study where accused persons with personality disorders (including dependant, psychopathic, borderline and antisocial types) qualified for the defence of diminished responsibility: Dell S, *Murder into Manslaughter* (Oxford: Oxford University Press, 1984) 33–35.
30. Indeed, it is arguable whether personality disorders are a *medically* defined mental illness. CR Williams argues that 'the fact that a person's behaviour is deviant, maladapted or non-conformist does not necessarily mean that it is the product of any disturbance of mental functioning': Williams CR, 'Development and Change in Insanity and Related Defences' (2000) 24 *Melbourne University Law Review* 711, 729.

that the term abnormality of mind was interpreted too broadly.[31]

Apart from personality disorders and psychopathy, the types of mental conditions that have been held to amount to an abnormality of mind were listed by the Victorian Law Reform Commission (VLRC) as including psychosis, organic brain disorder, schizophrenia, epilepsy, hypoglycaemia, depression (both reactive and endogenous), post-traumatic stress disorder, anxiety and pre-menstrual tension.[32] These conditions cover quite a broad range, prompting the VLRC to argue 'that the defence can be raised on the basis of vague and general diagnoses' and that it is consequently open to abuse.[33] In a submission to the current reference the Law Society of Western Australia argued that the breadth and type of conditions that may be classified as an abnormality of mind have allowed the defence of diminished responsibility to apply to inappropriate cases; for example, to depressed 'men who kill their spouses and children'.[34] The Society warned that '[i]f this experience were repeated here, it would serve only to undermine public confidence in the criminal justice system'.[35]

Cause of the 'abnormality'

A limiting factor on the type of conditions that will amount to an abnormality of mind is the second element described earlier: that the condition arose from a certain specified cause. This is effective in that it restricts the ambit of the defence by excluding 'persons who kill while intoxicated or who act as a result of mere outbursts of rage or jealousy'.[36] But it can also have the effect of excluding persons who kill in circumstances demonstrating less moral culpability from relying on the defence.[37] This is especially so in the United Kingdom, Queensland and the Australian Capital Territory where the cause of the abnormality of mind is restricted to mental retardation or arrested development, an inherent cause, or disease or injury.

It has also been argued that, like the term 'abnormality of mind', these causes 'have no agreed or psychiatric meaning and hence there is a problem in distinguishing between the kinds of mental conditions that may fit into them'.[38] Susanne Dell's examination of the prosecution and court files of diminished responsibility offenders in Britain showed a great deal of variation in how the same conditions were classified by different medical experts in an effort to bring them within the specified causes.[39] The courts have attempted to develop criteria (largely based on the degree of permanency of the abnormality) to distinguish between the causes. But as the NSWLRC has pointed out, it 'is questionable whether any of these distinctions are logical or readily understood by juries'.[40]

New South Wales has attempted to overcome these problems by removing the prescribed causes from its definition of diminished responsibility. It has amended its defence to apply to an abnormality of mind caused by any 'pre-existing mental or physiological condition, other than a condition of a transitory kind'.[41] The Law Commission (England and Wales) has gone one step further, recommending that the cause of the abnormality of mind in that jurisdiction's defence be attributable to any 'recognised medical condition'.[42] This, it was argued, would 'modernise' the defence allowing it to 'evolve with changing diagnostic practice'.[43] However, in this Commission's opinion, the removal of specified causes represents an unnecessary widening of the scope of diminished responsibility and simply

31. NSWLRC, *Partial Defences to Murder: Diminished responsibility*, Report No. 82 (1997) [3.35].
32. VLRC, *Defences to Homicide,* Options Paper (2003) [5.104]. See also Bronnit S & McSherry B, *Principles of Criminal Law* (Sydney: Law Book Company, 2001) 296.
33. VLRC, ibid [5.160]. This matter is investigated further below under 'Diagnosing diminished responsibility'.
34. Law Society of Western Australia, Submission No. 37 (4 July 2006) 10.
35. Ibid.
36. NSWLRC, *Partial Defences to Murder: Diminished responsibility*, Report No. 82 (1997) [3.38].
37. Kerr JA, 'A Licence to Kill or an Overdue Reform?: The case of diminished responsibility' (1997) 9 *Otago Law Review* 1, 7. Cases such as 'battered women' who kill their violent partners after years of abuse and the elderly who kill their terminally ill spouses in mercy and at their request have been proffered as examples.
38. Cumes G, 'Reform of Diminished Responsibility in New South Wales' (1999) 6 *Psychiatry, Psychology and Law* 175, 178. NSWLRC, *Partial Defences to Murder: Diminished responsibility*, Report No. 82 (1997) [3.39].
39. Dell's study also found that the cause of the abnormality was frequently omitted from supporting psychiatric reports, in particular where the cited abnormality was psychopathy. This is an important omission in the context of at least 80% guilty pleas accepted by the prosecution where the offender may not in fact satisfy the second element of the defence: see Dell S, *Murder into Manslaughter* (Oxford: Oxford University Press, 1984) 39.
40. NSWLRC, *Partial Defences to Murder: Diminished responsibility*, Report No. 82 (1997) [3.39]. The same observation could also be made of the psychiatric profession, whose role it is to determine whether an accused has satisfied this second element.
41. *Crimes Act 1900* (NSW) s 23A(8).
42. Law Commission (England and Wales), *Murder, Manslaughter and Infanticide,* Final Report (2006) [5.139]. This recommendation had not been implemented at the time of writing.
43. Ibid. The Law Commission (England and Wales) argues that this will allow 'battered women' suffering neurotic (rather than psychotic) disorders to fall within the scope of the defence; although, it acknowledges that it will still not enable the (perhaps less culpable) rational mercy killer to benefit from the defence: Ibid [5.116].

underlines the overwhelming definitional problems with the defence.

Substantial impairment

Whether the impairment caused by the mental abnormality is substantial is a question of degree and, as discussed below, is reserved for the jury.[44] At law 'substantial' means less than total, but more than merely trivial.[45] This reflects the original rationale of diminished responsibility as a defence of so-called 'partial insanity'.

Although the impairment may be of one of three capacities (as set out in the third element above), most cases of diminished responsibility appear to allege substantial impairment of the capacity to control the relevant conduct resulting in the death of the victim. The inclusion of this volitional capacity has enabled offenders with personality disorders and psychopathic tendencies to rely upon the defence of diminished responsibility. However, it is defended on the basis that it also allows persons with intellectual disabilities and those suffering auditory hallucinations to take advantage of the defence when their conditions impact upon the capacity to control their actions.[46]

The volitional element in diminished responsibility has been criticised because it will often be difficult for psychiatrists (and indeed for juries) to assess whether or not an accused was incapable of controlling their actions or whether they simply chose not to.[47] But this argument misses the point. Unlike the defence of insanity which alleges total impairment of the capacity to control,[48] diminished responsibility only alleges *substantial* impairment of the capacity to control. It is difficult to envisage a situation that does not involve choice where an accused has *some capacity* to control his or her actions, but does not. In the Commission's opinion this illustrates the difficulty of rationalising a defence alleging less than total mental impairment and reinforces the view (discussed below) that such matters are best dealt with in the sentencing process.

Evidential issues: the role of the expert witness

Whether the accused suffered from an abnormality of mind at the time of the offence and whether that abnormality of mind substantially impaired the accused's relevant capacities are questions for the jury. However, the cause of the abnormality of mind is a matter to be determined on expert medical (usually psychiatric) evidence.[49] Whether or not the defence of diminished responsibility is available to an accused therefore depends on an appropriate diagnosis.

Diagnosing an abnormality of mind

In most cases the accused is the primary source of information for a psychiatrist assessing whether a relevant abnormality of mind existed at the time of the offence. Thus it is sometimes said that there is a danger that relevant conditions can be fabricated.[50] Psychiatrists often base their opinions on factual assumptions which accord to the version of events related by the accused. In some cases there will be witness evidence or forensic evidence against which these assumptions of fact can be tested.[51] In other cases there will not.[52]

Psychiatrists will also often take a history from the accused, including such matters as whether the accused had been abused as a child, had experienced depression or severe mood swings, had been the victim of marital or family violence, had attempted suicide or had suicidal thoughts, or had experienced trauma. This history may support a diagnosis of depression, personality disorder or post-traumatic stress disorder – all of which may ground a defence of diminished responsibility. However, this too is vulnerable to fabrication or manipulation and cannot always be independently verified.[53] On the other hand, a lack of

44. *Byrne* [1960]2 QB 396, 404.
45. *Lloyd* (1967) 1 QB 175, 178–79; *Biess* [1967] Qd R 470, 485.
46. NSWLRC, *Partial Defences to Murder: Diminished responsibility*, Report No. 82 (1997) [3.54]. It should be noted that such persons are covered under the definition of mental illness in Western Australia and can therefore avail themselves of the complete defence of insanity.
47. Ibid [3.52].
48. Except in common law jurisdictions such as Victoria, New South Wales and England where the volitional element is not included in the insanity defence.
49. *Byrne* [1960] 2 QB 396, 403.
50. VLRC, *Defences to Homicide,* Options Paper (2003) [5.161]; Bronnit S & McSherry B, *Principles of Criminal Law* (Sydney: Law Book Company, 2001) 296.
51. Whether by the psychiatrist before a diagnosis is made or by a jury after a diagnosis is made.
52. For example, in *Majdalawi* [2000] NSWCCA 240 the accused was convicted of the murder of his wife by shooting outside the Family Court. He told one psychiatrist that there was no violence in his marriage and that he had taken the gun intending to kill himself and had attempted to do so. The psychiatrist supported diminished responsibility on the basis of depression and mood disorder. When, under cross-examination it was revealed that these assertions were wrong. The psychiatrist retracted his diagnosis stating that in the absence of those circumstances it was 'very difficult to support a defence of diminished responsibility': at [17]. Another psychiatrist said that facts as later revealed by the evidence 'would detract from ... my confidence in the diagnosis [of diminished responsibility] to some extent': at [22].
53. It is also worth noting that psychiatrists do not always have the opportunity to observe an accused for an extended period before a trial and that this may impact upon the accuracy of a diagnosis: Law Commission (England and Wales), *Partial Defences to Murder*, Final Report (2004) [5.30].

communication by the accused (for example, in situations of feigned or actual amnesia) can mean that no finding of diminished responsibility or insanity at the *time of the offence* can be made, even despite an immediate and verifiable history of severe mental illness.[54]

Disagreement among experts

The imprecision of the defined elements of the defence of diminished responsibility can invite disagreement among expert medical witnesses which is potentially confusing to a jury.[55] *Chayna* [56] provides a good example of this. In that case the accused—who had killed her sister-in-law and her two daughters—was assessed by seven psychiatrists, each arriving at different diagnoses and conclusions as to whether the defence of diminished responsibility was available. On appeal against her conviction of murder, Gleeson CJ noted the difficulty faced by the jury.

> Thus, the jury had before them opinion that the appellant was schizophrenic, and opinion that the appellant was not schizophrenic; opinion that the appellant was suffering from a major depressive illness, and opinion that the appellant was not suffering from depression. This was a relatively young woman of previously impeccable character and apparently gentle disposition. Over a period of about three days she cut the throats of her sister-in-law and her two daughters and left their bodies lying around the house. There seems to have been a strong prima facie case of some form of mental disturbance, but the experts disagreed as to what was wrong with her.[57]

Chayna has been used to illustrate the perception in diminished responsibility cases 'that it is open to the prosecution and defence to "shop around" for experts sympathetic to their case'.[58] Highlighting the practical problems with medical evidence of diminished responsibility, the appeal court in *Chayna* called for law reform, commenting that the 'variety of psychiatric opinion with which the jury were confronted strongly suggests that the operation of [the defence] depends upon concepts which medical experts find at least ambiguous and, perhaps, unscientific'.[59] Although the defence has been reviewed by the NSWLRC and its recommendations implemented, it is certainly arguable that the retention of imprecise non-medical terms such as 'abnormality of mind' will continue to cause disagreement among experts.

Determining diminished responsibility: whose decision?

Jury or expert?

Although medical evidence is essential to raising a defence of diminished responsibility and satisfying the second element, it is not definitive of a finding of diminished responsibility. It is the jury's role, having regard to the entire body of evidence, to determine the first and third elements of the defence. That is, whether the accused was suffering from an abnormality of mind at the *time of the offence* and, if so, whether the abnormality of mind *substantially impaired the accused's capacity* to understand the nature of the act, know that the act was wrong or control the act.[60] The jury are required to consider all of the evidence put before them including the accused's acts, statements and demeanour; the nature of the killing; the accused's conduct before, at the time of, and after the killing; and any history of mental disorder.[61] They are also entitled to reject the medical evidence 'if there is other evidence before them which, in their good judgment, conflicts with it and outweighs it'.[62]

The jury's task is therefore said to be one of 'moral assessment ... reflecting community standards ... and not a question which medical experts can properly answer'.[63] This is because, as discussed above, expert opinion is reliant

54. In *B v Director of Mental Health* [2005] QCA 67 the accused, who had a history of schizophrenia and anti-social personality disorder and had been hospitalised immediately before the offence, claimed amnesia about the killings and rape of two children. A psychiatrist found that the accused was suffering a mental illness at the time of the offence based on history given by the accused's family, on diagnoses by other psychiatrists prior to the offence, and on the accused's behaviour in a police interview following the offence. This was rejected by the Queensland Mental Health Court as a hypothesis because the accused had not spoken about his mental processes at the time of the offence. The court determined that the accused did not meet the criteria for insanity or diminished responsibility at the time of the offence and that these defences were not available to the accused. An appeal against this finding was dismissed.
55. Dawson J, 'Diminished Responsibility: The difference it makes' (2003) 11 *Journal of Law and Medicine* 103, 105.
56. *Chayna* (1993) 66 A Crim R 178.
57. Ibid, 182–83 (Gleeson CJ; Priestly JA and Studdert J concurring). The conviction of murder was overturned and a verdict of manslaughter was substituted by the Court of Criminal Appeal. Mrs Chayna was subsequently sentenced to 12 years' imprisonment (for all three murders) with a minimum non-parole period of six years.
58. VLRC, *Defences to Homicide,* Options Paper (2003) [5.161].
59. *Chayna* (1993) 66 A Crim R 178, 189.
60. *Biess* [1967] Qd R 470, 485 (Matthews J; Hart J concurring).
61. *Whitworth* (1989) 31 A Crim R 453, 461 (Thomas J; Matthews J concurring); *Walton* [1978] AC 788, 793; *Simcox* [1964] Crim LR 402, 403; *Byrne* [1960] 2 QB 396, 404; *Trotter* (1993) 68 A Crim R 537, 537–38; *Purdy* [1982] 2 NSWLR 964; *Tumanako* (1992) 63 A Crim R 149.
62. *Byrne,* ibid 403 (Lord Parker CJ).
63. Cumes G, 'Reform of Diminished Responsibility in New South Wales' (1999) 6 *Psychiatry, Psychology and Law* 175, 179–80. See also *Trotter* (1993) 68 A Crim R 537, 537–38; *Byrne*, ibid 404.

on what the accused says to the psychiatrist: the psychiatrist is not necessarily privy to witness, physical or forensic evidence that may support a different view of the accused's behaviour. Nonetheless, psychiatrists routinely comment on the severity of the abnormality of mind and whether, in their opinion, the accused was substantially impaired at the time of the offence and his or her responsibility for the offence was thereby diminished. This is said to breach the 'ultimate issue rule'[64] which renders inadmissible any expert evidence that answers the ultimate issue of a case.[65] With diminished responsibility the ultimate issue is the third element; that is, whether one or more of the accused's relevant capacities was substantially impaired.

In its review of the defence in 1997, the NSWLRC expressed concern about experts straying into jury territory by giving evidence of substantial impairment.[66] It was suggested that the formulation of the defence (which at that time was identical to the English formulation of substantial impairment of 'mental responsibility') allowed juries to abdicate responsibility for the decision and excessively rely on the opinions of expert witnesses.[67] In response to this, the NSWLRC recommended that the defence be amended to remove the term 'mental responsibility' so that the ultimate issue became whether the impairment was 'so substantial as to warrant liability for murder being reduced to manslaughter'.[68] This reformulation of the defence reflects the reality of the jury's decision; that is, a moral assessment about the extent of the accused's culpability for the crime.[69] This amendment has been implemented and a provision inserted into the defence to expressly preclude expert witnesses from giving an opinion on this matter.[70] However, there is no guarantee that such amendment will make any difference to the reliance placed on expert medical evidence by juries. Expert witnesses are still permitted to give evidence in relation to the first and third elements, including of the substantial nature of the impairment – so long as they avoid suggesting that the accused should be convicted of manslaughter rather than murder.

Jury or prosecution?

The primary argument for retention of the defence of diminished responsibility in New South Wales was that it allows the jury to decide the level of culpability of an accused.[71] This, it was argued, reinforces community participation in the justice system and invites greater community acceptance of sentencing outcomes because they flow from a jury's decision about culpability.[72] But in reality the question whether an accused's responsibility for an intentional killing is diminished by reason of a mental abnormality falling short of insanity does not always fall to the jury. More often it 'is decided privately between doctors, prosecution and judges' by way of a guilty plea.[73]

In her widely cited study of 194 diminished responsibility cases over a three-year period in Britain, Dell found that 155 cases (80%) were dealt with by a plea of guilty to diminished responsibility manslaughter.[74] In New South Wales the Judicial Commission found that of 126 cases between 1990 and 2004 that raised the defence of diminished responsibility, the prosecution accepted a plea of guilty in 57 cases (45.2%).[75] A further 10 cases (7.9%) were tried by judge alone with the consent of the

64. Model Criminal Code Officers Committee, *Fatal Offences Against the Person*, Discussion Paper (1998) 125–27; Griew E, 'Reducing Murder to Manslaughter: Whose job?' (1986) 12 *Journal of Medical Ethics* 18, 20.
65. It should be noted that jurisdictions that have adopted the Uniform Evidence Act have now abolished the ultimate issue rule. These jurisdictions include New South Wales, Tasmania, Australian Capital Territory, Commonwealth and Victoria.
66. Such concern has also been expressed by the Royal College of Psychiatrists which gave evidence to an inquiry into the equivalent English provision that this issue is one for the jury alone: see Law Commission (England and Wales), *Murder, Manslaughter and Infanticide,* Final Report (2006) [5.118]–[5.119].
67. NSWLRC, *Partial Defences to Murder: Diminished responsibility*, Report No. 82 (1997) [3.61].
68. *Crimes Act 1900* (NSW) s 23(1)(b). See also Ibid [3.42].
69. This was noted by Griew in 1985 after an analysis of the English decision as being 'the true ultimate issue', even in relation to the English formulation, because it goes to the question what the liability should be: see Griew E, 'Reducing Murder to Manslaughter: Whose job?' (1986) 12 *Journal of Medical Ethics* 18, 21.
70. *Crimes Act 1900* (NSW) s 23(2).
71. NSWLRC, *Partial Defences to Murder: Diminished responsibility*, Report No. 82 (1997) [3.11].
72. Ibid. However, the sentencing outcome does not necessarily flow directly from the jury's decision. In some cases, a sentencing judge will have to decide whether to sentence the offender on the basis of lack of intent or diminished responsibility (or possibly other partial defences such as provocation). Because the jury does not give reasons for its decision, a sentencing judge may not know the basis on which the offender was convicted of manslaughter. Although the sentence reflects the jury's decision about what offence the offender should be convicted of, it does not necessarily reflect the jury's decision about why the offender should be convicted of manslaughter.
73. Dell S, 'The Mandatory Sentence and Section 2' (1986) 12 *Journal of Medical Ethics* 28, 31. Since 1968 it has been held that, if the medical evidence of diminished responsibility is undisputed, the prosecution may accept a plea of guilty to manslaughter on the basis of diminished responsibility: *Cox* (1968) 52 Cr App R 130.
74. Dell S, 'Diminished Responsibility Reconsidered' [1982] *Criminal Law Review* 809, 811 & 817. Of the 39 cases that did go to trial, 20 (52%) successfully raised diminished responsibility before a jury and were convicted of manslaughter.
75. Indyk S, Donnelly H & Keane J, *Partial Defences to Murder in New South Wales 1990–2004* (Judicial Commission of New South Wales: Sydney, 2006) 17. Of the 69 cases that proceeded to trial 25 (36%) successfully raised diminished responsibility and were convicted of manslaughter.

prosecution.[76] The study also revealed that since the 1997 amendments to the defence of diminished responsibility in New South Wales 'plea rates have increased'.[77] These data show that the majority of cases alleging diminished responsibility are in fact never assessed by a jury. This would appear to undermine the argument that diminished responsibility enhances community participation in (and acceptance of) the justice system by leaving decisions about an accused's level of culpability to a jury.[78]

SHOULD DIMINISHED RESPONSIBILITY BE INTRODUCED IN WESTERN AUSTRALIA?

The Commission received a total of 15 submissions addressing the defence of diminished responsibility. Nine submissions—including submissions from the Law Society of Western Australia, the Director of Public Prosecutions, the Western Australia Police and Justice McKechnie—argued against the introduction of a defence of diminished responsibility in Western Australia.[79] Of the remaining six submissions, five supported its introduction[80] and one stated that it was deserving of 'serious consideration'.[81] After considering these submissions, the extensive research in the area and the conclusions of law reform bodies in other jurisdictions, the Commission has determined that the partial defence of diminished responsibility should not be introduced into the Western Australian Criminal Code. There are a number of reasons for this decision, some of which stem from the criticisms of the defence discussed above. Other reasons, specific to the Western Australian context and taking into account the Commission's other recommendations for reform, are set out below.

Diminished responsibility is against the guiding principles for reform

Perhaps the most prominent reason for the Commission recommending against introducing a partial defence of diminished responsibility in Western Australia is that it breaches several of the Commission's guiding principles for reform of the laws of homicide. In particular, the partial defence of diminished responsibility runs counter to the first four of the Commission's guiding principles.[82] In brief, these provide that murder should be distinguished from manslaughter on the basis of intention and lawful purpose and that the relative degrees of moral culpability of offenders and circumstances of offences should be taken into account during sentencing.

As noted in the introduction, diminished responsibility acts to reduce an offence of murder to manslaughter. However, unlike a conventional verdict of manslaughter which reflects that the accused did not intend to kill or cause serious injury to the victim, a verdict of manslaughter on the basis of diminished responsibility does not negate the mental element required for murder. A diminished responsibility killing, therefore, is an intentional killing.

This argument was also persuasive for the Law Commission (England and Wales) which recently reviewed the defence of diminished responsibility in that jurisdiction. The Law Commission supported retention of diminished responsibility to overcome the harsh effects of mandatory sentencing; however, it refused to accept that the defence should be able to reduce a killing which has all the ingredients of murder to manslaughter. It stated that 'someone who unjustifiably kills with the fault element for … murder deserves to be labelled as a "murderer"'.[83] On this basis (and because it was bound by its terms of reference to

76. Ibid. Five of these 10 cases dealt with by judge alone were successful in raising diminished responsibility. The former Chief Justice in New South Wales has commented that there is a 'marked reluctance on the part of juries to make a finding which results in the application of the description of manslaughter to a crime which appears to them to be murder' and as a result there has been a tendency for accused persons to prefer a trial by judge alone: *Chayna* (1993) 66 A Crim R 178, 191 (Gleeson CJ).
77. Ibid.
78. The Commission also notes with interest the existence of diminished responsibility in Singapore where the jury system has been abolished. In that jurisdiction it is clear that diminished responsibility is retained to ameliorate the effects of mandatory sentencing: see Yeo S, 'Improving the Determination of Diminished Responsibility Cases' (1999) *Singapore Journal of Legal Studies* 27, 28.
79. Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 6; Festival of Light Australia, Submission No. 16 (12 June 2006) 6; Margaret Hunter, Submission No. 23 (14 June 2006) 1; Coalition for the Defence of Human Life, Submission No. 32 (16 June 2006) 3; Law Society of Western Australia, Submission No. 37 (4 July 2006) 9–10; Department for Community Development, Submission No. 42 (7 July 2006) 9; Office of the Commissioner of Police, Submission No. 48 (31 July 2006) 11–12; Women's Law Centre of Western Australia, Submission No. 49 (7 August 2006); Office of the Director of Public Prosecutions, Submission No. 51 (8 August 2006) 15.
80. Alexis Fraser, Submission No. 30 (15 June 2006) 7; Michael Bowden, Submission No. 39 (11 July 2006) 3; Criminal Lawyers' Association of Western Australia, Submission No. 40 (14 July 2006) 9; Office for Women's Policy, Submission No. 44 (17 July 2006) 5–6; Aboriginal Legal Service (WA), Submission No. 45 (21 July 2006) 2.
81. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 5.
82. For a fuller discussion of the Commission's guiding principles for reform, see Introduction, 'Guiding Principles for Reform'.
83. Law Commission (England and Wales), *Murder, Manslaughter and Infanticide,* Final Report (November 2006) [2.156].

accept the 'continuing existence of the mandatory life sentence for murder')[84] the Law Commission recommended a new offence of second degree murder to sit between first degree murder and manslaughter. This offence opens up discretionary sentencing for offenders who kill in circumstances of diminished responsibility while still recognising that the offence is properly one of murder.[85]

In Australia it has also been recognised that the primary emphasis of the defence of diminished responsibility is on the question of disposition rather than on responsibility. In their text on Australian criminal laws, Naylor and McSherry observe that:

> In reality, the defence exists only where the essential elements of murder are present. In truth it is the sentence that is being diminished rather than the accused's responsibility.[86]

Diminished responsibility should be taken into account during sentencing

Almost all submissions that rejected diminished responsibility argued that discretionary sentencing would avoid the need for introduction of a defence of diminished responsibility. This is because any substantial mental impairment at the time of the offence could then be taken into account as a mitigating factor when sentencing the accused.[87] Indeed most law reform bodies that have examined the viability of a defence of diminished responsibility in their jurisdiction have concluded that it is either not desirable,[88] or is only required so long as mandatory sentencing remains.[89]

Unlike the Law Commission (England and Wales), the terms of reference given to this Commission do not constrain its consideration of the appropriateness of mandatory life imprisonment for murder in Western Australia. As will be clear from its guiding principles, the Commission believes that there should be sufficient flexibility in the sentencing process to reflect the different circumstances of offences and the relative culpability of offenders. The Commission has therefore recommended that mandatory life imprisonment be abolished and replaced by a *presumption* of life imprisonment. As discussed in Chapter 7, the presumption of life imprisonment can be displaced if there are matters peculiar to the offence or offender that would make a sentence of life imprisonment 'clearly unjust'.[90] When making its recommendations regarding sentencing for murder, the Commission had in mind the possibility that a mentally impaired accused who did not satisfy the criteria for the Commission's revised defence of total mental impairment, may nevertheless have been so substantially impaired at the time of the offence that a judge would consider a sentence less than life imprisonment to be appropriate.

In arriving at the conclusion that factors going to degrees of culpability are best dealt with during the sentencing process, the New Zealand Law Commission observed that:

> There are many circumstances that may reduce the culpability of an intentional killer and it seems unfair and illogical to single out one particular situation. The 'lesser culpability' argument would in logic require a partial defence for every set of circumstances which renders intentional killing less culpable or a system of degrees of murder which recognises all levels of seriousness, from an aged pensioner assisting a spouse to gain release from an excruciatingly painful, incurable condition, to an armed robber callously killing a policeman in order to gain access to a bank vault.[91]
>
> The argument for jury participation in determining levels of culpability should logically extend to all crimes and not be confined to murder. For good reason this has never been suggested. Instead the task of crafting penalty to fit blameworthiness has long been the daily diet of judges.[92]

Because of the high rate of pleas of guilty to diminished responsibility manslaughter (and the ability to elect 'judge alone' trials), judges have long been required to assess substantial mental impairment for the purpose of verdict and sentencing. The above quote shows that an important benefit of allowing judges to assess the level of culpability of an accused at the sentencing stage is that cases deserving of sympathy and where the accused is morally

84. Ibid [1.1].
85. Ibid [1.67].
86. Naylor B & McSherry B, *Australian Criminal Laws: Critical perspectives* (Melbourne: Oxford University Press, 2004) 544.
87. It is noted that certain forms of mental disorder, in particular personality disorder, may not be held to be mitigating because of the dangerousness of the accused: see discussion below of *Veen (No. 2)* (1988) 164 CLR 465.
88. These include the Murray Review of the Criminal Code in Western Australia (1983); South Australian Criminal Law and Penal Methods Reform Committee (1977); New Zealand Law Commission (2001); Law Reform Commission of Victoria (1990); Victorian Law Reform Commissioner (1981); Victorian Law Reform Commission (2004); Model Criminal Code Officers Committee (1998); and United Kingdom's Butler Committee (1975).
89. The following law reform bodies have expressed that abolition of an existing defence of diminished responsibility in their jurisdiction would be possible if discretionary sentencing were introduced: Queensland Criminal Code Advisory Working Group (1996); Scottish Law Commission (2004); Law Commission (England and Wales (2004).
90. See below Chapter 7, Recommendation 44.
91. New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No. 73 (May 2001) [114]–[115].
92. Ibid.

less culpable are *always* able to be reflected in the outcome. Cases of 'battered women' and rational mercy killers are often unable to rely upon diminished responsibility because they do not meet the mental abnormality requirement.

A further benefit of considering evidence of diminished responsibility during sentencing (as a mitigating factor) rather than at trial (as a defence) is that the definitional and evidential problems discussed earlier are substantially resolved. In its submission to the Law Commission inquiry in the United Kingdom, the Royal College of Psychiatrists asserted that:

> At least as far as psychiatric evidence is concerned, the vast majority of problems that arise in homicide cases could, and would, be abolished with the abolition of the mandatory life sentence on conviction of murder. Once psychiatry is placed solely within sentencing hearings, rather than within hearings directed towards jury decisions about verdict, the effect of the mismatch between legal and medical thinking is all but abolished.[93]

Flexible dispositions for mental impairment are more appropriate

The primary advantages of the partial defence of diminished responsibility when it was first introduced were that it avoided the strict M'Naghten rules that governed the application of the complete defence of insanity; it allowed mentally impaired offenders to reduce their culpability for murder on the basis of lack of self-control; and it provided a defence for those accused whose impairment stemmed not from mental illness, but from intellectual disability or brain injury. But as will be clear from the discussion earlier in this chapter, the insanity defence in Western Australia has always featured a volitional element and conditions such as intellectual disability, brain damage and senility are expressly included in the defence. Further, the Commission has recommended that the dispositions available upon acquittal by reason of mental impairment be improved and broadened to include community treatment options in appropriate circumstances. These improvements to the defence of insanity (mental impairment) should encourage counsel for those accused who were relevantly impaired at the time of the offence to utilise the defence without fear of indeterminate detention. This regime will provide a better outcome for mentally impaired offenders, especially those who require ongoing medical treatment.

This last point is an important argument against introducing diminished responsibility. There is currently no scope for dispositions recognising a psychiatric disorder in Western Australia as part of a general sentencing regime upon conviction for a homicide offence.[94] There might, therefore, be a risk that diminished responsibility offenders would serve their sentences and be released back into the community without their underlying medical conditions being treated. Even if provision is made (as the Commission recommends above)[95] for the assessment and treatment of mentally impaired offenders while in detention, some mental conditions admitted under the defence of diminished responsibility—such as reactive rage conditions and personality disorders—are untreatable.[96]

The Queensland case of *Brown,*[97] tragically demonstrates that reduced sentences via a manslaughter verdict are not the most appropriate way to deal with an offender who has killed because of an abnormality of mind. Brown was charged with the murder of his wife whom he stabbed approximately 40 times after a domestic argument. Brown argued diminished responsibility on the grounds that he had substantially lost control of his actions. Medical evidence gave the relevant abnormality of mind as 'dependent personality disorder' which caused 'neurotic depression' and 'anger to a pathological degree'.[98] The jury convicted him of manslaughter on the grounds of diminished responsibility and he was sentenced to eight years' imprisonment.[99] He served five years in total. While in prison Brown met and married another woman. Only 10 months after his release from prison, and while still on parole, Brown killed his second wife by strangulation. He was subsequently convicted of murder and sentenced to life imprisonment.

93. Law Commission (England and Wales), *Partial Defences to Murder*, Final Report (2004) [5.44]. See also Freckelton I, 'Current Issues in Forensic Psychiatry' in *Homicide: Patterns prevention and control* (Canberra: Australian Institute of Criminology, 1993).
94. Although the Commission has recommended that the ability to make assessment and treatment orders on a finding of guilt should be established in Western Australia: see discussion above, 'Mental Impairment: Dispositions on guilty verdict for mentally ill offenders', Recommendation 38.
95. Ibid.
96. The Victorian Branch of the Royal College of Psychiatrists has stated that 'there is little evidence that personality disorders change significantly as a result of any psychiatric treatments available at present': Submission to the Victorian Parliamentary Social Development Committee Inquiry into Mental Disturbance and Community Safety (1989), as cited in Williams CR, 'Development and Change in Insanity and Related Defences' (2000) 24 *Melbourne University Law Review* 711, 730.
97. *Brown* [1993] QCA 330.
98. Ibid 7–8. Brown gave evidence before the jury that he had a history of antisocial behaviour including breaking and entering, car stealing and drug addiction and that he had spent time in prison for various crimes. Undoubtedly this supported the medical evidence of personality disorder.
99. An appeal against sentence was dismissed.

The oft-cited New South Wales case of *Veen*[100] tells a similar story. Veen suffered from brain damage caused by alcohol abuse and could not control his aggressive behaviour when drinking heavily. From a young age he had worked as a homosexual prostitute. After a bout of heavy drinking Veen killed a client who had refused to pay by stabbing him over 50 times. He was convicted of manslaughter on the basis of diminished responsibility and sentenced to life imprisonment. The judge took the view that while life imprisonment was not normally appropriate for manslaughter, Veen's violent history[101] and his 'uncontrollable urges' meant that he represented a continuing danger to society.[102] On appeal to the High Court the sentence was reduced to 12 years and he was released on parole after having served eight years. Veen killed his second victim in a frenzied stabbing attack nine months after his release.[103]

Under the Commission's recommended regime in the absence of diminished responsibility such an offender would either be convicted of murder or acquitted on account of mental impairment. A conviction of murder would allow for a sentence appropriately reflecting the gravity of the intentional killing along with other factors including the offender's background and mental condition. If the offender represented a continuing danger to society on the basis of a psychiatric or medical condition, life imprisonment would most likely be imposed.[104] If, on the other hand, the offender successfully raised the defence of mental impairment, there would be scope to recognise continuing dangerousness by civil commitment as an involuntary patient under the *Mental Health Act 1996* (WA). For untreatable conditions such as brain damage or intellectual disability, there is also the potential to control violent behaviour by closely managing the offender's environment upon release. As discussed earlier in this chapter, there is a clear need for more flexible dispositions and improved community treatment options to ensure adequate management of mentally impaired offenders in Western Australia.

CONCLUSION

It is clear from the preceding discussion that the existence of substantial impairment by mental abnormality does not always accurately reflect the culpability of the accused or the seriousness of the offence. Some cases that fit within the partial defence of diminished responsibility (such as *Veen* and *Brown*) are not equivalent in culpability to unintentional killings. Other cases—where leniency is clearly desirable—are excluded from the ambit of the defence. As can be seen from the circumstances of *Veen*, even where it is recognised that an accused represents a continuing danger to society and should be jailed for life,[105] the principle that the sentence must be proportionate to the gravity of the offence precludes this outcome. Therefore the *fiction of diminished responsibility resulting in a verdict of manslaughter for an intentional killing* can cause inappropriate sentencing outcomes and enable the premature release of violent offenders.

In the absence of mandatory life imprisonment for murder, the Commission believes that partial defences are not justified unless the circumstances giving rise to the defence *always* demonstrate a significant reduction in moral culpability. Diminished responsibility does not stand up to this analysis: some examples of substantial mental impairment reduce the blameworthiness of the accused and others do not. In the Commission's opinion the sentencing process is flexible enough to assess the culpability of the accused and at the same time take into account other equally relevant considerations, such as the dangerousness of the accused and the objective seriousness of the offence.

Recommendation 39

No partial defence of diminished responsibility

That no partial defence to murder of diminished responsibility or substantial mental impairment be introduced in Western Australia.

100. *Veen (No. 1)* (1979) 143 CLR 458; *Veen (No. 2)* (1988) 164 CLR 465.
101. He had previously, at the age of 16, stabbed and wounded his landlady after he had been drinking.
102. *Veen (No. 2)* (1988) 164 CLR 465, 468.
103. The prosecution accepted a plea of guilty to manslaughter on the basis of diminished responsibility to this second offence. He was again sentenced to life imprisonment on the basis of dangerousness. A subsequent appeal to the High Court was dismissed: *Veen (No. 2)* (1988) 164 CLR 465.
104. If a finite term of imprisonment was considered appropriate, in certain circumstances a court may impose an indefinite imprisonment order under s 98 of the *Sentencing Act 1995* (WA).
105. Life sentences enable the potential dangerousness of the prisoner to be reconsidered at regular intervals: see Chapter 7, 'Sentencing: Is life imprisonment an appropriate penalty?'