THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 69

The Criminal Process And Persons Suffering From Mental Disorder

DISCUSSION PAPER

FEBRUARY 1987

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972-1985*.

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PREFACE

The Commission has been asked to consider and report on a number of aspects of the law relating to the criminal process and persons suffering from mental disorder.

The Commission has not formed a final view on the issues raised in this discussion paper and welcomes the comments of those interested in the topic. It would help the Commission if views were supported by reasons.

The Commission requests that comments be sent to it by 16 April 1987.

Unless advised to the contrary, the Commission will assume that comments received are not confidential and that commentators agree to the Commission quoting from or referring to their comments, in whole or part, and to the comments being attributed to them. The Commission emphasises, however, that any desire for confidentiality or anonymity will be respected.

The research material on which this paper is based can be studied at the Commission's office by anyone wishing to do so.

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Contents

CHAPTER 6 - POWERS OF COURTS OF SUMMARY JURISDICTION

CHAPTER 7 - REVIEW OF THE SITUATION OF PERSONS DETAINED IN CUSTODY

Chapter 1

TERMS OF REFERENCE

1.1 The Commission has been asked:

1. To consider to what extent and on what criteria the law should recognise mental disorder or abnormality in a person accused of a criminal offence as a factor affecting his or her liability to be tried or convicted.

2. To consider whether there is any need for the continuance of the power in s 662 of the *Criminal Code* to impose an indeterminate sentence on a convicted person simply on the grounds of his or her 'mental disorder'.

3. To consider what procedures should be provided for reviewing the situation of persons who have been ordered to be detained or kept in custody because of their mental condition by orders made under ss 631, 652, 653, 662 or 693(4) of the *Criminal Code*, with a view to determining whether their detention or custody can be terminated. Such procedure should provide for review by way of administrative routine as well as at the request of the person detained or kept in custody.

4. To consider whether it is desirable for there to be a judicial investigation as to the guilt or innocence of an accused person notwithstanding that he or she has been found to be of unsound mind and ordered to be kept in custody pursuant to ss 631 or 652 of the *Criminal Code*, or admitted to an approved hospital consequent on an order made under s 36(2) of the *Mental Health Act 1962*.

5. To consider whether courts of summary jurisdiction require any powers beyond those in s 36 of the *Mental Health Act 1962* to permit them to deal fully with accused persons who come before them suffering from mental disorder; in particular to consider whether they require powers analogous to those in ss 631, 652 and 653 of the *Criminal Code*.

6. To consider whether it is desirable that the prosecution and defence should be obliged to exchange, before trial, all expert reports relating to the mental condition of the accused person which are intended to form the basis of evidence to be adduced at the trial, and if that is thought to be desirable, to propose appropriate rules for the enforcement of that obligation.

7. To consider whether the courts should have power to obtain psychiatric reports, and if so, for what purpose, and in what circumstances, and by what procedure.

8. To review Division 6 of Part IV of the *Mental Health Act 1962* (which deals with security patients) and its relationship to s 34C of the *Offenders Probation and Parole Act 1963*.

Chapter 2
INTRODUCTION

1. SCOPE OF THE PAPER

2.1 The courts have for many centuries been confronted with people who have committed offences while mentally disordered or who are mentally disordered at the time of the trial, and rules and procedures for dealing with such people have gradually been developed. One response to such people was the development of the insanity defence. Insanity is not a psychiatric term. It is a legal term meant to encompass those persons who are so mentally disordered at the time of committing an offence that they should not be held responsible for their actions. The insanity defence developed with a movement of the criminal law from a basis of strict liability to one in which fault or moral blame-worthiness became an element of many offences.

2.2 In recent years various people have criticised the insanity defence and have proposed that it be abolished. Others, while accepting the need for such a defence, have criticised its formulation. These issues are discussed in the following chapter. The chapter also contains a discussion of the defence of "diminished responsibility" which has been introduced in a number of other jurisdictions.

2.3 Where persons are so mentally disordered that they lack sufficient understanding of the proceedings to make a proper defence, the trial is stopped and not recommenced until they are capable of doing so. This provides protection for defendants. In some cases, however, it may be in their interest for the trial to proceed because they may in fact have a good defence. Chapters four and five contain a discussion of appropriate criteria for determining whether or not a defendant is fit to stand trial and some suggested procedures for enabling the issue of guilt to be determined notwithstanding the defendant's incapacity.

2.4 Other matters discussed in this paper are -

(i) the procedures for reviewing the detention of people acquitted on account of insanity or found to be unfit to stand trial;

(ii) the present power to impose an indeterminate sentence of imprisonment on account of the defendant's mental condition;

(iii) the exchange by the prosecution and the defence of expert reports; and

(iv) the power of courts to obtain psychiatric reports.

2. PRELIMINARY SUBMISSIONS AND CONSULTATIONS

2.5 To help identify problems in this area of the law, the Commission, by means of press advertisements, invited preliminary submissions from persons interested. Nineteen responses were received. The Commission also consulted a number of persons with expertise in this area of the law.[1] The Commission gratefully acknowledges the help of those who have assisted the Commission.

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

Chapter 3
CRIMINAL RESPONSIBILITY AND MENTAL DISORDER

1. THE EXISTING LAW

(a) Section 27 of the *Criminal Code*

3.1 Item 1 of the terms of reference requires the Commission to consider to what extent and on what criteria the law should recognise mental disorder or abnormality in a person accused of a criminal offence as a factor affecting his or her liability to be convicted. In Western Australia the question of whether or not a person suffering from mental disorder should be held criminally responsible for an offence is governed by section 27 of the *Criminal Code*. This section provides that:

> "A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission.
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> A person whose mind, at the time of his doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was induced by the delusions to believe to exist."

The section applies to all offences whether tried summarily or on indictment.[1] Hence no distinction is made between serious offences, such as wilful murder, and less serious offences, such as assault.

3.2 The operation and meaning of the key elements of section 27 and certain ancillary matters are discussed below under the following headings -

(i) Mental disease or natural mental infirmity;
(ii) Lack of capacity to understand what one is doing;
(iii) Lack of capacity to know that what one is doing is wrong;
(iv) Lack of capacity to control one's actions;

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

(v) Delusions;

(vi) Raising the defence;

(vii) Burden of proof;

(viii) Expert evidence.

(i) Mental disease or natural mental infirmity

3.3 For the defence under section 27 to operate, the defendant at the time of committing the act or omission must be in a "state of mental disease or natural mental infirmity". This phrase is not defined in the *Criminal Code*. In the context of an insanity defence based on a want of understanding Dixon J, in *R v Porter*, directed a jury that "disease of the mind" (which appears to have a similar meaning to "mental disease") refers to cases where ". . . the functions of the understanding are through some cause, whether understandable or not, thrown into derangement or disorder".[2] Because of the reference to "capacity to control his actions" in section 27, the term "mental disease" is not confined to disorders or disturbances affecting reasoning or understanding. It extends to disorders affecting the capacity to control one's actions.[3] It includes not only mental disorders which have an organic or physical cause, for example, brain tumours or arteriosclerosis,[4] but also purely functional disorders which, so far as is known, have no physical cause. On the other hand the concept of disease functions to exclude ". . . drunkenness, conditions of intense passion and other transient states[5] . . . attributable either to the fault or to the nature of man."[6] The concept of mental disease is in essence a legal concept with a medical component.

3.4 The term "natural mental infirmity" appears to refer to a congenital incapacity rather than a supervening deterioration which is suggested by the term "mental disease".[7] It has been suggested that it includes ". . . a condition of arrested or retarded development".[8]

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2 (1933) 55 CLR 182, 189. See also *R v Holmes* [1960] WAR 122, 125, per Jackson SPJ.

3 See *Jeffrey v R* [1982] Tas R 199 where this capacity was in issue.

4 *R v Holmes* [1960] WA 122.

5 See paras 3.29 and 3.31 below which give illustrations of transient states of mental disorder which have been held to be not included in the concept of disease of the mind or mental disease. As the Commission notes the distinction is often a difficult one to make.

6 The Rt Hon Sir Owen Dixon, *A Legacy of Hadfield, M'Naghten and McLean* (1957) 31 ALJ 255, 260. The Supreme Court of Canada in *Cooper v R* (1980) 51 CCC (2d) 129, 140 said that the phrase "disease of the mind" had eluded satisfactory definition by medical and legal disciplines. G Williams, *Textbook of Criminal Law* (1983, 2nd ed), 643-644 says that the phrase is no longer in medical use.

7 C Howard, *Criminal Law* (1982, 4th ed), 331-332.

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

3.5 Once the relevant state of mental disease or natural mental infirmity has been established, the defendant must establish one of three incapacities arising from that state. These can be broadly described as follows -

(i) the cognitive incapacity - inability to understand what one is doing;

(ii) moral incapacity - inability to know that one ought not to do the act or make the omission;

(iii) volitional incapacity - inability to control one's actions.

(ii) Lack of capacity to understand what one is doing

3.6 A person will not be held criminally responsible for an offence if a mental disease or natural mental infirmity deprived him or her of capacity to understand what he or she was doing. This branch of section 27 appears to refer to the accused person's capacity to understand the physical nature of the act being done.[9] It does not necessarily include incapacity to understand that it was wrong, that moral incapacity being covered by a separate limb of section 27.[10] Plainly a person would have to be in an unusual mental state not to understand the physical nature of what he or she was doing. An example given in American literature is that of a man who chokes his wife to death believing that he is squeezing an orange.[11]

(iii) Lack of capacity to know that what one is doing is wrong

3.7 The second circumstance in which a person suffering from mental disease or natural mental infirmity will not be held to be criminally responsible for an offence is where the mental disorder has deprived him or her of "capacity to know that he ought not to do the act or make the omission". In comments on his draft *Criminal Code*, which was adopted in this State, Sir Samuel Griffith drew a parallel between this element of the insanity defence and a person between the age of 7 years and fourteen years. Such a person is not criminally responsible for an act or omission unless it is proved that at the time of the offence he or she

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9 In Tasmania the legislation makes this explicit: see para 3.27 below.

10 Para 3.7 below.

11 J M MacDonald, *Psychiatry and the Criminal* (3rd ed 1976), 65.

had capacity to know that he or she ought not to do the act or make the omission. Sir Samuel Griffith said:

> "Why is the distinction drawn at a particular age? Not, surely, because at that age knowledge of the law comes to a child, but because he is then supposed to be capable of knowing that some things ought not to be done - ie, of apprehending the idea of duty. If this is so, there is a third element of criminal responsibility corresponding to the capacity of a child who has reached the age of discretion; and a person who by reason of mental disorder is in the condition of a child as to capacity of apprehending the notion of duty ought to be equally free from criminal responsibility."[12]

It involves a consideration of whether or not the mental disorder left the defendant unable to distinguish right from wrong.[13] The "ought not" involves applying the ordinary standards of reasonable persons to determine whether the defendant had the capacity to know that his or her act or omission was morally wrong. It is not limited to showing that the defendant lacked the capacity to know that the act or omission was contrary to law,[14] so long as it can be shown that the defendant did not have capacity to know that it was morally wrong. Otherwise, it would not include a person who killed another with an insane motive (for example, to ensure that others punished him or her) arising from complete incapacity to reason as to what was right or wrong even though he or she may have had some awareness that it was unlawful to kill another person.

3.8 In *Stapleton v R*[15] the High Court approved a statement of Dixon J in *R v Porter*.[16] Although Dixon J was explaining to a jury the position under the *M'Naghten Rules*, it would seem that his statement is equally applicable to section 27 of the Code. He said:

> "The question is whether he was able to appreciate the wrongness of the particular act he was doing at the particular time. Could this man be said to know in this sense whether his act was wrong if through a disease or defect or disorder of the mind he could not think rationally of the reasons which to ordinary people make that act right or wrong? If through the disordered condition of the mind he could not reason about the matter with a moderate degree of sense and composure it may be said that he could not know that what he was doing was wrong."

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12 Queensland Parliamentary Papers, CA 89-1897, 14.

13 See *R v Holmes* [1960] WAR 122, 126.

14 In England, under the *M'Naghten Rules*, the Court of Criminal Appeal has held that "wrong" means "contrary to law": *R v Windle* [1952] 2 All ER 1, 2. As a result, if a defendant knows that he or she is breaking the law, the issue of insanity cannot be left to the jury. In New South Wales the word "wrong" has been interpreted as referring to "the canons of right and wrong and not to the criminal law": *R v S* [1979] 2 NSWLR 1, 41. The legislation in New Zealand makes this explicit: see para 3.24 below.

15 (1952) 86 CLR 358, 367.

16 (1933) 55 CLR 182, 189-190.

(iv) Lack of capacity to control one's actions

3.9 The third circumstance in which a person will not be held to be criminally responsible is where his or her state of mental disease or natural mental infirmity deprived him or her of capacity to control his or her actions at the material time.[17] The basis for this test is that there are mental diseases which destroy volition or self-control notwithstanding that cognition remains unimpaired. Under this test a person is excused from criminal responsibility for an act where a failure of inhibition due to mental disease or natural mental infirmity results in an inability to do otherwise.

(v) Delusions

3.10 Under the second paragraph of section 27 of the *Criminal Code*, a person who is not entitled to the benefit of the provisions referred to above, but whose mind was affected by delusions on some specific matter or matters, is criminally responsible 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 and not by reference to the actual facts.

3.11 It seems that this rule is based on the doctrine of partial insanity, under which a person whose insanity consisted of delusions was considered to be capable of choosing to act in conformity with the law governing the situation as he or she perceived it. Such a rule has been commented on as follows:

> "If the insanity of the accused is limited to a delusion, then only a delusion which, if true, would have justified his act in law will excuse him from the penalty . . . [T]he objection of later generations of psychiatrists [has been] the underlying assumption that a man could be deluded in this highly restricted way without suffering from any other distortion or impairment of his awareness of reality or his ability to control himself. The Rules established in the minds of several generations of judges the notion that a deluded man could be assumed to be in all other respects normal unless there were evidence to the contrary. It is not of course inconceivable that he should be otherwise normal: but it is unlikely, and especially unlikely if he has committed some act of savage violence."[18]

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17 *Wray v R* (1930) 33 WALR 67.

18 N Walker, *Crime and Insanity in England* (1968), 99-100.

The rule has also been criticised on the ground that it would be difficult or impossible to apply in practice. Williams gives the following example as an illustration of the difficulties in practice:

> "Suppose that a lunatic shoots a person whom he believes to be Guy Fawkes, about to blow up the Houses of Parliament. According to the delusional facts, the act is justifiable, provided that there was no other means of preventing the supposed culprit from executing his nefarious purpose. We therefore have to inquire into the imagination of the accused in order to determine what stage the supposed Guy Fawkes was supposed to have reached in his plot, what help the lunatic supposed was available to arrest the conspirators, at what part of Guy Fawkes' body he supposed he was shooting, and so on. Only an exceptionally clear-headed lunatic would be able to furnish all these details of his delusion."[19]

In view of these criticisms a question arises as to whether a separate rule relating to delusions should be retained.[20]

(vi) Raising the defence

3.12 Although there is no authority in Western Australia it has been held elsewhere that the prosecution may not raise the insanity defence, this being a matter for the defence.[21] However, it has been held that if the trial judge is of the opinion, on the evidence either of the defendant's witnesses or by cross-examination of the prosecution's witnesses, that the insanity defence is an issue, the jury may be directed to consider the defence regardless of the approach adopted by the defendant.[22] In *R v Holmes*,[23] for example, the defendant deliberately excluded the defence of insanity but submitted undisputed evidence to the effect that the act occurred independently of the exercise 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 would in some circumstances leave him unable to control his actions. As a result of this evidence the judge instructed the jury to consider also the insanity defence.

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19 G Williams, *Criminal Law: The General Part* (2nd ed 1961), 502.

20 A consultant psychiatrist at the Prisons Department with extensive experience in criminal cases, says that he does not recall the delusional limb of s 27 having been used in the last 20 years.

21 *R v Joyce* [1970] SASR 184, 188, *R v Jeffrey* [1967] VR 467, 473, and *R v Dickie* [1984] 1 WLR 1031, 1037. But cf *Bratty v Attorney-General for Northern Ireland* [1961] 3 All ER 523, 534.

22 *R v Starecki* [1960] VR 141, 144. For the circumstances in which this might occur in England see *R v Dickie* [1984] 1 WLR 1031, 1037.

23 [1960] WAR 122.

(vii) Burden of proof

3.13 Every person is presumed to be sound of mind, and any person charged with an offence is presumed to have been sound of mind at the time the offence was alleged to have been committed.[24] The Crown must first establish that the act or omission alleged to constitute the offence occurred. Once that is established, the onus is on the defendant to establish the defence of insanity.[25] However, it need only be proved on the balance of probability and not beyond a reasonable doubt.[26] This position could give rise to logical and conceptual difficulties. It could cause confusion for juries where a defendant is charged with an offence such as wilful murder which involves a mental element. In such a case the jury must first consider whether or not the elements of the offence have been established including that the defendant intended to kill a person. If it so finds, it must then consider whether or not the defence of insanity has been established, one element of which involves a consideration of whether or not the defendant was deprived of capacity to understand what he or she was doing.[27]

(viii) Expert evidence

3.14 A court may receive evidence of the expert opinion of a person suitably qualified to express an opinion on matters on which the jury might have difficulty in drawing its own conclusions without such assistance. Generally the facts upon which an expert opinion is based must be proved by admissible evidence and the expert may not be asked to express a conclusive opinion on the issue which has to be determined by a judge or jury, otherwise the expert would usurp the decision-making function on the ultimate issue. Where the insanity defence is invoked it is for the judge to determine whether there is any evidence on that issue to go to the jury[28] and it is for the jury to determine whether the defence of insanity has been established. Nevertheless there is now a greater readiness to allow experts such as psychiatrists to testify on matters that virtually determine the ultimate issue in the insanity defence. They may be asked, for example, to state whether or not the defendant had the capacity to control his or her actions.[29]

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24 Criminal Code, s 26.
25 *Perkins v R* [1983] WAR 184.
26 *Armanasco v R* (1951) 52 WALR 78, 81 and *R v Holmes* [1960] WAR 122, 127.
27 Para 3.6 above.
28 *R v Joyce* [1970] SASR 184, 194-195.
29 See *Fruet v R* [1974] WAR 78.

3.15 It is theoretically possible for a jury to reject uncontradicted expert testimony in favour of insanity, where there is no doubt as to the factual basis upon which the opinion is based and the competence and reliability of a witness is not called in question. A verdict against the weight of that opinion is likely to be rejected by an appellate court unless there are other facts upon which the verdict could be based.

(b) The defence of insanity in trials on indictment

3.16 In trials on indictment, the question whether the defence of insanity has been established is determined by a jury. If the defence is successful the jury is required to state that that is the reason for the acquittal.[30] Where such a verdict is returned, the court is required to order that the person be kept in strict custody until Her Majesty's pleasure is known. The Governor, in the name of Her Majesty, may make an order for the safe custody of the person during the Governor's pleasure.[31] This in effect means that the person is held in custody at the discretion of the Governor[32] acting on the advice of the Government. The Governor may at any time order that that person be admitted to an approved hospital as a patient and may thereafter order that the person be liberated, upon such terms and conditions as the Governor thinks fit.[33]

3.17 There is no statutory provision as to the meaning of the distinction between strict and safe custody. The report of M J Murray QC on the *Criminal Code* contains a recommendation that this distinction, described as being "somewhat artificial", be abolished. He further recommended that the court, instead of making an order for the custody of the person "until Her Majesty's pleasure is known", should be required to make an order that he or she "be detained in safe custody as the Court shall direct, and under such conditions, if any, as the Court may specify, until such further order of the Governor". The Governor could then make an order to change the terms of the order or make an order for the person's release from custody.[34]

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30 *Criminal Code*, s 653.
31 Ibid.
32 Para 7.17 below.
33 *Mental Health Act 1962-1985*, s 48(1).
34 M J Murray QC, *The Criminal Code: A General Review* (1983), 423-425 and 609-611 (hereinafter cited as the "Murray Report").

3.18 Where a person charged on indictment has been acquitted on account of insanity, he or she has a right of appeal against the verdict as if a conviction had been recorded at the trial.[35] If the Court of Criminal Appeal allows the appeal, the Court is required to order either an unqualified verdict and judgment of acquittal or a new trial.[36]

3.19 Where a person has been convicted and the Court of Criminal Appeal considers that the appellant ought to have been acquitted on account of unsoundness of mind, the conviction may be quashed and such a verdict of acquittal entered. The same consequences follow as if the same verdict had been returned by the jury at the trial.[37]

(c) The defence of insanity in trials in courts of summary jurisdiction

3.20 As was stated in paragraph 3.1 above the defence under section 27 of the *Criminal Code* applies not only to offences tried on indictment but also to offences tried summarily. In the case of trials in courts of summary jurisdiction, there is no provision for the manner in which a person is to be dealt with if he or she is acquitted on account of unsoundness of mind.[38] The court has no power to commit the person to an institution for safe custody and it would appear that the only course open to the court would be to dismiss the complaint and, if the defendant were in custody, to release him or her.[39] The defence of insanity is in fact unlikely to arise in courts of summary jurisdiction because defendants may see the stigma of the defence as outweighing any punishment which was otherwise likely to be imposed. The defendant may also be reluctant to raise the defence of insanity because doing so could lead to a committal in custody under section 36 of the *Mental Health Act 1962-1985* for an examination.[40]

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35 Criminal Code, s 692.

36 Ibid.

37 *Criminal Code*, s 693(4). See *Wray v R* (1930) 33 WALR 67 where the Court of Criminal Appeal quashed a conviction and entered a verdict of acquittal on account of unsoundness of mind.

38 Section 36 of the *Mental Health Act 1962-1985* would not be applicable because it only applies where a person "stands charged with an offence".

39 This and other matters relating to powers of courts of summary jurisdiction are discussed in ch 6 below.

40 See paras 6.7 to 6.9 below.

2. THE LAW ELSEWHERE

(a) New South Wales, Victoria, South Australia, New Zealand and England

3.21 In New South Wales, Victoria, South Australia and England the defence of insanity is based on the common law *M'Naghten Rules*. These rules are the result of an opinion given to the House of Lords by a number of judges following the acquittal on the ground of insanity of M'Naghten on a charge of murder. M'Naghten shot and killed the private secretary to the Prime Minister, Sir Robert Peel, believing him to be Sir Robert. It seems that M'Naghten intended to kill Sir Robert while suffering from an insane delusion that he was being persecuted by the Tories. Under these rules it must be 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."[41]

3.22 The principal difference is that, unlike section 27 of the Western Australia *Criminal Code*, the *M'Naghten Rules* contain no reference to a defendant's capacity to control his or her actions.[42] There are also some differences in terminology.

3.23 In South Australia the Criminal Law and Penal Methods Reform Committee has recommended that the *M'Naghten Rules* should be replaced by a provision expressed in the same terms as the first paragraph of section 27 of the Western Australian *Criminal Code*.[43]

3.24 In New Zealand the *M'Naghten Rules* have been codified.[44] However, it has been expressly provided that wrong means "morally wrong, having regard to the commonly accepted standards of right and wrong", and not "contrary to law", as is the case under the *M'Naghten Rules* in England.

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41 *M'Naghten's Case* [1843-1860] All ER (Rep) 229, 233.
42 Para 3.9 above.
43 Fourth Report, *The Substantive Criminal Law* (1977), 43. See para 3.1 above.
44 *Crimes Act 1961-1986* (NZ), s 23(2).

(b) Queensland, the Northern Territory and Tasmania

3.25 In Queensland, section 27 of the *Criminal Code* is identical to section 27 of the Western Australian *Criminal Code*.[45] The provision in the Northern Territory is similar to section 27 of the Western Australian *Criminal Code*.[46] The major difference is that the Northern Territory provision refers to an "abnormality of mind" whereas the Western Australian provision refers to "a state of mental disease or natural mental infirmity".

3.26 In Tasmania the law relating to the defence of insanity is contained in section 16 of the *Criminal Code Act 1924-1986*. The section provides:

> "(1) A person is not criminally responsible for an act done or an omission made by him -
>
> (a) when afflicted with mental disease to such an extent as to render him incapable of -
>
> (i) understanding the physical character of such act or omission; or
> (ii) knowing that such act or omission was one which he ought not to do or make; or
>
> (b) when such act or omission was done or made under an impulse which, by reason of mental disease, he was in substance deprived of any power to resist.
>
> (2) The fact that a person was, at the time at which he is alleged to have done an act or made an omission, incapable of controlling his conduct generally, is relevant to the question whether he did such act or made such omission under an impulse which by reason of mental disease he was in substance deprived of any power to resist.
>
> (3) A person whose mind at the time of his doing an act or making an omission is affected by a delusion on some specific matter, but who is not otherwise exempted from criminal responsibility under the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the fact which he was induced by such delusion to believe to exist really existed.
>
> (4) For the purpose of this section the term 'mental disease' includes natural imbecility."

3.27 It will be noted that, unlike section 27 of the Western Australian *Criminal Code*, the section refers specifically to a defendant being incapable of understanding "the physical

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45 Para 3.1 above.

46 *Criminal Code Act 1983-1984* (NT), s 35.

character" of the relevant act or omission. The section also speaks of a person being at the relevant time "under an impulse which, by reason of mental disease, he was in substance deprived of any power to resist". The fact that a person is unable to control his or her conduct generally is made relevant to the determination of that question.

(c) United States of America

3.28 The law in the various States of the United States of America and the federal jurisdiction is set out in the Appendix below.

3. AUTOMATISM[47]

3.29 Automatism is a defence which may be raised under either section 27 (insane automatism) or section 23[48] (sane automatism) of the *Criminal Code*. The latter section, so far as relevant, provides that ". . . a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will". Automatism occurs where physical conduct takes place without conscious volition, for example, sleepwalking. Various conditions may result in automatism, including epilepsy, a cerebral tumour and concussion.

3.30 Where automatism is raised as a defence under section 23 of the *Criminal Code*, the burden is on the prosecution to negate the defence and it must do so beyond a reasonable doubt. Where automatism is successfully raised under that section it involves a "complete acquittal" in the sense that a person acquitted must be released from custody. Unlike an acquittal under section 27, the defendant may not be held at Her Majesty's pleasure.

3.31 In the Murray Report it was recommended that where automatism arises from a disease of the mind or natural mental infirmity the defence should only be able to be raised under section 27 of the *Criminal Code* and not section 23.[49] Such an approach would expressly[50] bring the law in this State into conformity with what the law has been held to be in

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47 Automatism is an action performed unconsciously or subconsciously.

48 *R v Holmes* [1960] WAR 122, 125.

49 Murray Report, 39-41.

50 R J Davies, *Criminal Law Defences: Unsoundness of Mind* 1982 Law Summer School, argues that cases meeting the description of a mental disease should be considered only under s 27.

at least three other jurisdictions: Queensland,[51] Tasmania[52] and England.[53] In other words it is only sane automatism which results in a complete acquittal. In some cases the distinction between "sane" and "insane" automatism is not difficult to make, for example, conduct caused by a defect of consciousness resulting from concussion is classified as sane automatism. Other conditions have proved to be more difficult to classify. For example, a person who committed murder while suffering a psychomotor epilepsy[54] was held to have a disease of the mind,[55] but not a person whose mind was malfunctioning due to a high dosage of insulin.[56] This distinction, depending on whether or not the mental disorder was caused by an organic factor, may be explained by a desire to protect society against a recurrence of the dangerous conduct.[57] However, a person who is prone to underestimate the correct dosage of insulin may be as dangerous as one who suffers from epilepsy. Moreover, the classification of epilepsy as a disease of the mind can have unfortunate consequences. In *R v Sullivan*[58] the defendant assaulted a person whilst recovering from a minor epileptic seizure. Evidence was given that during this stage of a seizure the defendant would not have known what bodily movements he was making. When the trial judge ruled that the evidence raised the insanity defence and not automatism, Sullivan changed his plea to one of guilty, thus choosing the stigma of a conviction rather than an indefinite confinement which would have followed from an acquittal on account of unsoundness of mind. The conviction was upheld on appeal to the House of Lords.

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51 *R v Foy* [1960] Qd R 225 and *R v Mursic* [1980] Qd R 482. See R S O'Regan, *Automatism and Insanity Under the Australian State Criminal Codes*, (1978) 52 ALJ 208. At pages 209-212 O'Regan discusses a number of cases in which a distinction is made between automatism which may be raised under s 27 (insane automatism) and automatism which may be raised under s 23 (sane automatism).

52 *Williams v R* [1978] Tas SR 98.

53 *R v Sullivan* [1984] AC 156.

54 A form of epileptic fit characterised by clouding of consciousness and co-ordinated but inappropriate movements.

55 *Bratty v Attorney General for Northern Ireland* [1961] 3 All ER 523.

56 *R v Quick* [1973] 3 All ER 347. See generally E Lederman, *Non-Insane and Insane Automatism: Reducing the Significance of a Problematic Distinction* (1985) 34 ICLQ 819. P A Fairall, *Irresistible Impulse, Automatism, and Mental Disease*, (1981) 5 Crim LJ 136 and P A Fairall, *Automatism* (1981) 5 Crim LJ 335.

57 *R v Sullivan* [1984] AC 156, 172.

58 [1984] AC 156.

4. DISCUSSION

(a) Abolition of the defence of insanity

3.32 In Western Australia the insanity defence provided by section 27 of the *Criminal Code* is raised only occasionally in criminal trials. A survey of criminal trials in the Supreme Court in the ten year period 1970-1979 (inclusive) revealed thirty trials in which the defence was an issue. It was successful on twenty-six occasions. During this period approximately 1,300 charges were dealt with by the Supreme Court, 628 involving pleas of not guilty. In the four trials in which the defence was unsuccessful the defendant was charged with wilful murder. The trials in which the defence was successful involved the following charges: wilful murder (14), attempted murder (6), arson (3), grievous bodily harm (1), breaking and entering with intent to commit a crime (1) and making a false statement that an aeroplane was endangered (1). A study of the criminal calendar of the Supreme Court for the years 1980-1985 (inclusive) revealed six cases in which the defence was successful. All six cases involved charges of wilful murder, murder or attempted murder. The criminal calendar does not show the occasions on which the defence was raised unsuccessfully.

3.33 In a review of this nature it is desirable to consider whether the defence of insanity should be retained. Its abolition is not merely a theoretical possibility. The defence has in fact been abolished in three States of the United States of America (Idaho, Montana and Utah) and its abolition has been advocated in England.[59]

3.34 The defence of insanity has been criticised on a number of grounds -

* It is impossible to establish "any reliable measure of responsibility in the sense of a man's ability to have acted otherwise than as he did".[60]

* The various formulations of the insanity defence do not provide practical rules of criminal law. They cause confusion for juries and lead to results which are erratic. Apart from having to come to terms with the conceptual difficulties involved in the various formulations,[61] juries are required to weigh the

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59 B Wootten, *Crime and the Criminal Law* (1963).
60 Id, 74.
61 Paras 3.3 and 3.31 above.

evidence of medical experts who, in turn, must form conclusions about the defendant's state of mind at some time in the past generally using data furnished by the defendant.

* The defendant's mental condition at the time of the offence should be relevant only following conviction as one factor to be considered in choosing the treatment or sentence most likely to discourage the defendant from offending again.[62]

* The defence of insanity cannot be considered to be a "true" defence to a charge. The consequence of such a successful defence is not the same as that of other defences, such as self-defence, where the defendant is entitled to be discharged from custody. A defendant who succeeds on a defence of insanity is held in custody,[63] not by a civil process but as part of the criminal process, for an indefinite period, usually in a prison.[64] The person may be held in custody for a period longer than that if he or she had been convicted of the offence and sentenced to a finite term of imprisonment or even to "life" imprisonment.[65]

3.35 If the insanity defence were abolished in Western Australia, evidence of the mental state of the defendant could still be given in those cases in which intention was an element of the offence, for example, wilful murder, to show that the defendant did not have the necessary intent. The defendant would be entitled to an acquittal if it were established that he or she lacked the necessary intent. The defendant might, however, be convicted of another offence, such as manslaughter, in which intention is not necessarily an element. However, in some cases there will be no available lesser charge. For example, where the defendant is charged

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62 B Wootten, *Crime and the Criminal Law* (1963), 77.
The Idaho and Montana legislation provides that a defendant's mental condition is not a defence to any charge of criminal conduct. However, this does not prevent the admission of expert evidence on the issue of any state of mind which is an element of the offence: Idaho Code, 18-207 (1982) and Montana Code Ann 46-14-102.

63 This may, however, be justifiable: footnote 65 below.

64 N Morris, *Psychiatry and the Dangerous Criminal* (1967-1968) 41 Southern California Law Review 514, 525 states that such people are considered by prison and mental health authorities to be both "mad" and "bad".

65 Preventive detention may, however, be justifiable where a person has been found to be not responsible on account of mental disorder so long as such persons are not detained as a matter of course, the opportunity for treatment is provided where it may be of benefit to the detainee and review procedures are established to ensure that a detainee is not held in custody longer than is necessary for the protection of the community and the detainee.

with conspiracy to murder or attempted murder, the circumstances may not permit any secondary charge or verdict.

3.36 An acquittal because of the absence of a particular state of mind need not lead to an absolute discharge from custody. In Montana, where the insanity defence has been abolished, a special verdict must be returned where a defendant is acquitted because of lack of the necessary intent due to a mental disorder. If the person is dangerous to others the court must commit him or her to the Superintendent of the Montana State Hospital to be placed in an appropriate institution for custody, care and treatment. The person's condition must be reviewed within 180 days and if no longer dangerous[66] the person must be released from custody.[67]

3.37 Evidence of the defendant's mental condition at the time of the alleged offence would also continue to be admissible to show that the act or omission occurred independently of the exercise of his or her will under section 23 of the *Criminal Code*, in which case the burden would lie on the prosecution to negate the defence beyond reasonable doubt.[68] This could include the defence of automatism whether or not it arose from a disease of the mind or natural mental infirmity.[69]

(b) Retaining a defence of insanity

(i) Introduction

3.38 While the insanity defence has been criticised, it is contended that the defence is essential to the moral integrity of the criminal law because some people suffering from mental disorder at the time they commit an offence cannot justly be blamed for their acts.[70] It has also been argued that the defence is consistent with one of the purposes of the criminal law, namely to deter wrong doing by the threat of punishment, because this purpose is not served by seeking to convict a person for conduct which is beyond his or her inhibiting powers.

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66 As to the difficulty of predicting dangerousness see B L Diamond, *The Psychiatric Prediction of Dangerousness* (1974-1975) 123 Uni of Pennsylvania LR 439; J J Cocozza and H J Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence* (1976) 29 Rutgers LR 1084.

67 J M Bender *After Abolition: The Present State of the Insanity Defence in Montana* (1984) 45 Montana LR 133, 147-148.

68 Para 3.30 above.

69 Para 3.31 above.

70 R J Bonnie, *The Moral Basis of the Insanity Defence* (1983) 69 ABAJ 194, 194.

Such a conviction is also of no value from the point of view of general deterrence of wrong doing because such a person is "too much unlike the man in the street to permit his example to be useful for the purpose of deterrence".[71] A successful defence of insanity also means that a person does not suffer the stigma of a criminal conviction, though there may be stigma attached to such an acquittal.

3.39 In England the use of the insanity defence has declined to the point where it is almost obsolete. The abolition of capital punishment,[72] the introduction of the defence of diminished responsibility,[73] the offence of infanticide[74] and the use of hospital orders[75] are apparently all factors in this decline.[76] However, the Butler Committee, while noting that its use was very rare, believed that the law should nevertheless retain the defence in some form as a matter of principle.

3.40 If it is accepted that there is a basis for retaining the defence of insanity it is necessary to consider in what circumstances guilt should not be imputed to people who are mentally disordered at the time they commit an offence. A number of means of formulating a defence of insanity, that is of defining the circumstances in which guilt should not be imputed to a person, including the criteria provided by section 27 of the *Criminal Code*, are discussed below. The Commission welcomes comment on whether any of these formulae or any other formula should be adopted in Western Australia.

(ii) Cognition and control

3.41 Section 27 of the *Criminal Code* provides three independent tests for a defence of insanity. Two of these are based on cognition, that is, the faculty of knowing or conceiving, as opposed to emotion and volition. Under section 27, a person is not criminally responsible for an act or omission if, at the time of the act or omission, the person was in such a state of

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71 A S Goldstein, *The Insanity Defense* (1967), 15.

72 A study in Victoria suggests that more acquittals on account of unsoundness of mind are likely where capital punishment is a form of punishment for some offences such as wilful murder: I Potas, *Just Deserts for the Mad* (1982), 65. The position in Western Australia may not be strictly comparable. Although capital punishment was abolished in this State in 1984 the court can impose a sentence of strict security life imprisonment which effectively means imprisonment for a minimum term of 20 years: *Offenders Probation and Parole Act 1963-1985*, s 34(2)(ba)(iv).

73 Paras 3.72 to 3.74 below.

74 Para 3.88 below.

75 Para 6.17 below.

76 Report of the Committee on *Mentally Abnormal Offenders* (Cmnd 6244, 1975), para 18.9. This report is hereinafter cited as the "Butler Committee Report".

mental disease or natural mental infirmity as to "deprive him of capacity to understand what he is doing . . . or of capacity to know that he ought not to do the act or make the omission".

3.42 It has been widely suggested that these cognitive tests are wrongly based because they are based on a system of faculty psychology which divided the mind into separate functions. The generally accepted view at present is that "intellect, will and the emotion combine with factors such as environment and education to determine behaviour".[77] According to this view, the knowledge of an act and the willingness to perform the act are interrelated concepts which cannot be separated as the tests in section 27 would suggest.[78] If these tests were the only ones, very few defendants would be able to take advantage of them. A defendant would have to be so grossly mistaken about the physical nature of the act constituting the offence as not to understand what he or she is doing or so "grossly demented, senile or severely delirious" as not to know that it was an act which he or she ought not to do.[79]

3.43 The third part of the test in section 27 is based on control. This provides that a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission the person was in such a state of mental disease or natural mental infirmity as to be deprived of capacity to control his or her actions. Such a test is consistent with the criminal law in this State which is based on the concept of free will, that is, that a person has a capacity to control his or her conduct and to choose between alternative courses of conduct. It was seen as being a particular instance of the general rule provided for in section 23 of the *Criminal Code*, namely that a person is not criminally responsible for an act or omission which occurs independently of the exercise of his or her will.[80]

3.44 It has, however, been suggested that the control test tends to exculpate some persons who should be adjudged guilty.[81] Although a capacity to control actions may clearly be absent in some circumstances, such as an epileptic seizure, it may be impossible to determine in other circumstances. In testimony to the Royal Commission on Capital Punishment, the Director of Public Prosecutions said that a volitional standard which extended beyond cases

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77 P A Fairall, *Irresistable Impulse, Automatism and Mental Disease* (1981) 5 Crim LJ 136, 139.

78 E Goodman and D O'Connor, *Diminished Responsibility - Its Rationale and Application* (1977) 1 Crim LJ 204, 205-206.

79 J M MacDonald, *Psychiatry and the Criminal* (3rd ed, 1976), 64.

80 Sir Samuel Griffith, *Draft of a Code of Criminal Law*, Queensland Parliamentary Papers, CA 89-1897, 14.

81 Report of the Committee on the Judiciary accompanying S 1, United States Senate (1975), 106. J M MacDonald, *Psychiatry and the Criminal* (3rd ed, 1976), 73-74.

such as automatic epilepsy presented a question which "ceased to be one to which objective tests could readily be applied and became a matter of metaphysical speculation which presented an impossible problem to the Judge and jury".[82]

3.45 In the United States of America federal courts generally adopted the test proposed by the American Law Institute in its Model Penal Code, namely that:

> "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."[83]

The element of the test which relieves a person of criminal responsibility based on the person's inability to control his or her conduct has been criticised because of a lack of psychiatric knowledge regarding volition. Among those to express concern is the American Psychiatric Association. It said:

> "Psychiatry is a deterministic discipline that views all human behaviour as, to a large extent, 'caused'. The concept of volition is the subject of some disagreement among psychiatrists. Many psychiatrists therefore believe that psychiatric testimony (particularly that of a compulsory nature) about volition is more likely to produce confusion for jurors than is psychiatric testimony relevant to a defendant's appreciation or understanding."[84]

The Association considered that most psychotic persons who would fail a volitional test would also fail a cognitive test and that the former was superfluous. It accordingly proposed a test involving only whether the defendant was able to appreciate the wrongfulness of his or her conduct at the time of the offence.[85]

3.46 The Model Penal Code test received considerable attention in the United States following the acquittal of John Hinckley of attempting to assassinate President Reagan on account of unsoundness of mind. As a result a number of bills were introduced into the United States Congress to change the insanity defence. Ultimately, the following formulation of the defence, a defence consistent with that advocated by the American Psychiatric Association, was enacted:

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82 Report of the Royal Commission on *Capital Punishment 1949-1953* (Cmd 8932), 95.

83 Model Penal Code, s 4.01(1) (Official Draft 1962).

84 American Psychiatric Association Statement on the Insanity Defense (1983) 140 Am J Psy 681, 685.

85 Ibid.

"It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense."[86]

In effect therefore the formulation of the insanity defence in the federal jurisdiction of the United States of America is in accordance with the *M'Naghten Rules*.[87]

(iii) Responsibility

3.47 One formula proposed for the insanity defence gives the jury a wide scope for the interpretation of the moral values of the society. That formula was proposed by a majority of the United Kingdom Royal Commission on Capital Punishment. They recommended that the jury should be left to determine:

> ". . . whether at the time of the act the accused was suffering from disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible."[88]

A similar approach has been adopted in the State of Rhode Island in the United States of America. In *State v Johnson*[89] the Supreme Court of that State held that a defendant lacks criminal responsibility if at the time of the act a mental disease or defect has so substantially impaired the defendant's capacity either to appreciate the wrongfulness of his or her conduct or to conform his or her actions to the law that he or she cannot justly be held responsible. Both the approach of the Royal Commission on Capital Punishment and that of the Supreme Court of Rhode Island relate responsibility to the existence of a mental disorder, thus presumably excluding states of mind such as jealousy and anger, as is the case with the existing defence in this State.[90]

3.48 The proposals of the Royal Commission and the Rhode Island decision cast on the jury the task of determining whether the accused was suffering from disease of the mind to such an extent that it would be unjust to hold him or her responsible for his or her conduct.

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86 *Insanity Defense Reform Act 1984* (USA), 18 USC 20.

87 Para 3.21 above.

88 Report of the Royal Commission on Capital Punishment 1949-1953 (Cmd 8932), 116. Three of the 12 members of the Commission dissented from this recommendation.

89 399 A 2d 469 (1979).

90 Para 3.3 above.

The rationale for this approach is that it discourages the jury from ". . . basing its legal conclusion of insanity solely on medical diagnosis and encourages the jury to consider insanity in light of a community sense of justice".[91] However, the formulation proposed by the Royal Commission on Capital Punishment could be criticised as giving the jury little or no guidance as to the purposes sought to be achieved by holding people criminally responsible for certain acts. The test adopted by the Supreme Court of Rhode Island at least provides some guidance in this respect by directing the jury to examine whether or not the defendant could appreciate the wrongfulness of his or her conduct or conform his or her actions to the law.

(iv) Mental disease or natural mental infirmity

3.49 Under the existing insanity defence it is necessary to establish that the defendant was, at the time the offence was committed, in a "state of mental disease or natural mental infirmity". The purpose of these terms is to define those people who are entitled to raise the defence of insanity. They do so in both a positive and a negative manner. From a positive point of view the person must be one whose functions of understanding or control are deranged or disordered at the time of the alleged offence. It does not matter whether a psychiatrist would diagnose the person as being manic-depressive, schizophrenic or as being within some other psychiatric category. From a negative point of view it excludes "drunkenness, conditions of intense passion and other transient states attributable either to the fault or to the nature of man."[92]

3.50 Although the concept of mental disease or natural mental infirmity is wide, it does not cover all cases where a person's behavioural controls are impaired. One problem which arises in this context is whether a person suffering from a personality disorder, such as a sociopath or psychopath, should be entitled to raise the insanity defence in an appropriate case. In many of these cases the person cannot show that he or she is suffering from a "mental disease or natural mental infirmity" which section 27 of the Code requires[93] and yet it could be argued that there is no good reason why they should be held criminally responsible for an act or

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91 J A G Hamilton, *M'Naghten Rule Abandoned in Favour of "Justly Responsible" Test for Criminal Responsibility* (1980) 14 Suffolk ULR 617, 626.

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

93 *Hodges v R* (unreported) Court of Criminal Appeal, No 116 of 1985, 22.10.85.

omission if they genuinely lacked the capacity to control their actions at the relevant time. The Commission welcomes comment.

(v) The Butler Committee Recommendations

3.51 In England the Butler Committee recommended that an insanity defence be provided containing two elements. In the first element, if a defendant's mental disorder negated a state of mind required for the offence, such as intention, foresight or knowledge, the jury if it found that the defendant did the act or made the omission would be required to return a special verdict of "not guilty on evidence of mental disorder".[94]

3.52 Where such a verdict was returned, the Butler Committee recommended that the court should have power to make one or more of the following orders -[95]

(a) an order for inpatient treatment in hospital with or without a restriction order;
(b) an order for hospital outpatient treatment;
(c) an order for the forfeiture of any firearm or motor vehicle used in a crime;
(d) a guardianship order;
(e) any disqualification order (for example, from driving) normally open to the court to make on conviction; or
(f) discharge without any order.

3.53 The Committee also recognised that some mental disorders may not prevent a person from forming a positive intention and carrying it out. For example, a person could kill someone under the delusion that he or she had been ordered to do so by God. The Committee said that it was "concerned to provide adequate safeguards in relation to disposal in such cases, in order to ensure that the offender is not subject to punishment".[96] In order to deal with such cases, the Butler Committee proposed a second element of the insanity defence under which a jury should return a special verdict if "at the time of the act or omission charged the defendant was suffering from severe mental illness or severe subnormality".[97]

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94 Butler Committee Report, para 18.20. The report to the Law Commission, *Codification of the Criminal Law* (1985), adopts such a defence: Draft Criminal Code, cl 38(1)(b).
95 Butler Committee Report, para 18.42.
96 Id, para 18.26.
97 Id, para 18.30.

Where a special verdict was returned the court would be able to make one of the orders referred to in the previous paragraph.

3.54 The Committee proposed the following definition of "severe mental illness":[98]

> "A mental illness is severe when it has one or more of the following characteristics:-
>
> (a) Lasting impairment of intellectual functions shown by failure of memory, orientation, comprehension and learning capacity.
>
> (b) Lasting alteration of mood of such degree as to give rise to delusional appraisal of the patient's situation, his past or his future, or that of others, or to lack of any appraisal.
>
> (c) Delusional beliefs, persecutory, jealous or grandiose.
>
> (d) Abnormal perceptions associated with delusional misinterpretation of events.
>
> (e) Thinking so disordered as to prevent reasonable appraisal of the patient's situation or reasonable communication with others."

3.55 Under this approach a person would not be criminally responsible if it were established that he or she had a severe mental illness or severe subnormality at the time of the offence. The determination of this question would involve "a question of fact which psychiatrists can reasonably be expected to answer".[99] It would not be necessary to establish a causal link between the offence and the defendant's mental condition. The Committee was of the view that such a link could be presumed because of the severity of the mental conditions concerned.[100]

3.56 It may be considered that such an approach goes too far in assuming that certain categories of mental disorder, evidenced by one or more specific characteristics, necessarily involve a causative link between the disorder and the offence such that the person should not be held responsible for the offence. Further, even if a causal link were established, it may not

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98 Id, para 18.35. Severe subnormality was defined in s 4(2) of the *Mental Health Act 1959* (UK) as:

> . . . a state of arrested or incomplete development of mind which includes subnormality of intelligence and is of such a nature or degree that the patient is incapable of living an independent life or of guarding himself against serious exploitation, or will be so incapable when of an age to do so."

This definition has, however, since been repealed by the *Mental Health Act 1983* (UK). The report to the Law Commission, *Codification of the Criminal Law* (1985), followed the Butler Committee recommendation and expressly included the definition proposed by the Committee in the Draft Criminal Code, see cl 38(2)(f).

99 Butler Committee Report, para 18.29.

100 Id, para 18.36.

be unjust to hold the defendant criminally responsible for the conduct the subject of the charge.[101]

(vi) Should the prosecution be able to raise the insanity defence?

3.57 As stated above[102] only the defendant, and not the prosecution, may raise the insanity defence. As Lawton J stated in *R v Price*:

> "Prosecutors prosecute. They do not ask juries to return a verdict of acquittal. A criminal trial at common law is concerned with the proof of a charge: it is not an inquisition . . . . If insanity is a defence, it seems to me that it is for the accused and his advisers to decide whether to put it forward."[103]

The defendant may prefer a determinate sentence, if convicted, to the prospect of indeterminate detention at the Governor's pleasure if the insanity defence were successful.

3.58 An argument for allowing the prosecution to raise and tender evidence in support of the insanity defence is that otherwise a dangerous person may go at large if, for example, the defence of automatism were successful.[104] However, if the prosecution believed that the person was still dangerous, it could seek to have him or her admitted to hospital as a civil patient under the *Mental Health Act 1962-1985*.[105]

(vii) Burden of proof

3.59 At present the onus of proof of the defence of insanity is on the defendant. The defence must be proved on the balance of probabilities.[106]

3.60 This rule has been criticised because it requires a jury to return a verdict of guilty even if the jury entertains a reasonable doubt as to whether the defendant had capacity to understand what he or she was doing, control his or her actions or know that he or she ought not to do the act or make the omission. This has led to suggestions that the defendant should

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101 For example, a delusional belief as to a spouse's unfaithfulness. Such a belief should not necessarily excuse a spouse's murder: cf *Criminal Code* s 27, second para and paras 3.10 and 3.11 above.

102 Para 3.12.

103 [1962] 3 All ER 957, 960.

104 Paras 3.29 and 3.30 above.

105 S 29.

106 Para 3.13 above.

have a mere evidential burden so that once there is sufficient evidence to raise the issue, the prosecution would have the burden of proving the sanity of the accused.[107] The Senate Standing Committee on Constitutional and Legal Affairs in a general report on the burden of proof in criminal proceedings recommended that not even an evidential burden should rest on a defendant unless the offence involved matters:[108]

> "(i) where the prosecution faces extreme difficulty in circumstances where the defendant is presumed to have peculiar knowledge of the facts in issue; or
>
> (ii) where proof by the prosecution of a peculiar matter in issue would be extremely difficult or expensive but could be readily and cheaply provided by the defence."

3.61 The Murray Report recommended that the existing law should not be changed. Mr Murray QC considered that a change in the burden of proof would place an intolerable burden upon the prosecution particularly as "such conditions may be easy to fake, but they are generally not hard to establish if genuine by acceptable medical evidence".[109] The Commission has formed no final views on the question and welcomes comment.

(viii) Two stage trial

3.62 A two stage trial has been proposed or adopted elsewhere because of a fear that a defendant may be prejudiced by the simultaneous trial of the elements of the offence charged and the insanity defence. Evidence on the latter issue could tend to lead the jury to believe that the defendant did the act or made the omission alleged in those cases in which the defendant mounts a defence on the merits and asserts the insanity defence as an alternative. An advantage claimed for a two stage trial is that the jury's consideration of whether or not the elements of the offence had been established would be less confusing if it did not have to consider expert testimony on the insanity defence.[110]

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

108 Id, 62, para 6.13(b).

109 Murray Report, 41.

110 Para 3.14 above.

3.63 Various forms of two stage trial have been proposed or adopted elsewhere. One form would allow the jury to decide at the first stage the question of whether or not the elements of the offence had been established. If the elements were established, the jury would then hear evidence, including psychiatric evidence, on the insanity defence. This approach, however, assumes that the elements of the offence involve only the establishment of external factors but many offences also involve a mental element such as intent. In the case of such offences, the defendant's state of mind necessarily arises at the first stage and in some trials the jury may have to consider the same evidence at both stages of the trial, unless it was possible for the court to distinguish between evidence which negated a mental element such as intent and similar evidence which would establish the insanity defence. If it could not be so distinguished, the justification for a two stage trial would be undermined.

3.64 A second form of two stage trial would allow the jury to consider at the first stage only those elements of the offence which did not involve the mental state of the defendant. At the second stage the jury would consider whether the defendant lacked the requisite mental state, such as intent, and, if not, whether the insanity defence had been established. Such an approach would avoid the duplication of evidence on the two issues and would remove the possibility that the defence's psychiatric evidence would be used to establish that the defendant committed the act or made the omission alleged. However, the jury would be required to differentiate between the mental element of the offence and the criteria for the insanity defence. Such a differentiation could be just as confusing for the jury as it would be in a normal trial.

(ix) Other procedural matters

3.65 There are three other matters relating to the procedure for dealing with the defence of insanity which warrant consideration. First, section 653 of the *Criminal Code* provides that a jury which finds that a person is not guilty is required to say whether he or she is acquitted by them on account of such unsoundness of mind. Such a verdict could cause community misunderstanding of the insanity defence because it gives the impression that a potentially dangerous defendant is entitled to be immediately released from custody. It may also cause confusion because the verdict of not guilty suggests that the prosecution has failed to establish the elements of the offence. However, the jury is first required to find that the defendant committed the offence. It may then consider whether the defendant has established the

defence of insanity.[111] To avoid confusion, a third verdict of "not responsible on account of unsoundness of mind" could be provided. It would recognise that although the defendant was not responsible for the offence charged, the lack of responsibility arose from mental disorder and not because the defendant did not do the act or make the omission constituting the offence. Secondly, any misunderstanding which a jury might have of the consequences of such verdict could be avoided by requiring the trial judge to instruct the jury as to its consequences.[112] However, giving the jury such information except in special cases has been criticised by the High Court in *Lucas v R*:

> "Not only do we think that a trial judge is not bound to inform the jury of the consequences of a verdict of not guilty on the ground of insanity, but in our opinion it is in general unnecessary and undesirable that he should do so . . . . There is, in our opinion, no need to complicate a trial and the resolution of the issues which arise in it by the introduction of what is truly, so far as the jury are concerned, an extraneous matter. It is, in our opinion, generally undesirable that reference should be made to the possible consequences which may ensue upon any verdict which the jury may properly return.
>
> Of course, there may be occasions when it is appropriate to apprise the jury of the consequences of the special verdict, ie not guilty on the ground of insanity. For example, if counsel should so far exceed his function as to speak to the jury of such consequences it may be not only desirable but necessary in the interests of justice for the judge to advert to the matter in his summing up . . . . There may be other circumstances in which a like intervention by the presiding judge is justified and at times called for. But the conclusion that he may, or should, refer in such cases to the consequences of the verdict can only arise in special circumstances."[113]

3.66 Thirdly, where a defendant wishes to raise the issue of insanity he or she is required to plead not guilty in which case a trial by jury must be held.[114] It does not appear that a plea of not guilty on account of unsoundness of mind can be accepted, thus avoiding the necessity for a trial. The necessity for a trial could be avoided by allowing the court to accept a plea of not guilty (or not responsible) on account of unsoundness of mind without a trial, if satisfied that there was evidence available that would justify such a verdict.[115] If the plea were accepted the court could make an order for the disposition of the defendant.

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111 Para 3.13 above.

112 There is such a provision in New South Wales: *Crimes Act 1900-1986*, s 428z. See also Butler Committee Report, para 18.46. At present, in practice, judges do not instruct the jury as to the consequences of such a verdict.

113 (1970) 120 CLR 171, 175.

114 *Criminal Code*, ss 616 and 622.

115 Provision for such a verdict has been recommended in the Murray Report (at 390-392) and a report to the English Law Commission, *Codification of the Criminal Law* (1985), paras 12.22 to 12.24 and Draft Criminal Code, cl 39 following a recommendation in the Butler Committee Report (para 18.50). There is

(x) Disposition

3.67 Although the question of the manner in which a person should be dealt with after he or she has been acquitted on account of unsoundness of mind, at least in trials on indictment,[116] is not in terms within the Commission's terms of reference, a discussion of the defence of insanity would not be complete without a reference to this matter.[117]

3.68 At present, in the case of trials on indictment, where the insanity defence is successful the court is required to order that the defendant be detained in strict custody until Her Majesty's pleasure is known. The Governor, in the name of Her Majesty, may make an order for the safe custody of the person during his or her pleasure. The Governor may also order that he or she be admitted to an approved hospital.[118] The Murray Report contains recommendations for changes to this procedure. The proposed changes would mean that, where a defence of insanity was successful, the judge would be empowered to make an order for the safe custody of the offender in such place and under such conditions as may be specified until the Governor makes a further order.[119]

3.69 In Western Australia, the result of a successful defence of insanity is that the defendant is held in custody for an indeterminate period of time at the discretion of the Executive. A study of persons charged with wilful murder between 1970 and 1979 who were acquitted on account of unsoundness of mind and have since been discharged from custody shows that they spent an average of five years in custody. The actual time spent in custody, however, varied considerably between individuals. In one case a person spent a period of only 15 months in custody. Another person spent a period of two years in custody. Three people were repatriated to their home countries after having spent periods of three months, two years and two months and eight and one half years in custody. Another person died in custody after being held for a period of six years and nine months. In another case a person spent ten years and five months in custody. These periods spent in custody may be compared

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provision for such a verdict in the State of New York: J L Weyant, *Reforming Insanity Defense Procedures in New York: Balancing Societal Protection Against Individual Liberty* (1981) 45 Alb LR 679, 703.

116 So far as simple offences are concerned it is within item 5 of the terms of reference.

117 The question of the review of the situation of persons held in custody after a verdict of not guilty on account of unsoundness of mind is discussed in paras 7.15 to 7.24 below.

118 Para 3.16 above.

119 Murray Report, 423-425. Generally, in the other States of Australia and the Northern Territory, a person acquitted on account of unsoundness of mind must be held in strict custody: but cf (Tas) *Criminal Code*, s 382.

with those for people convicted of wilful murder who were released from custody in the 11 year period 1 July 1975 to 30 June 1986. Seven such people were released in this period. The average period in custody was nine years ten months. The shortest period in custody was three years eight months and the longest 14 years five months.

3.70 The legal position in Western Australia was criticised by Wickham J in *Wilsmore v Court*:

> ". . . many would say that the law as it stands is inappropriate and unjust. The position now is that a citizen not found guilty of any crime may be kept in prison as if he were a convicted and sentenced criminal (although he is not) and may be kept there indefinitely at the discretion of the Executive. The question does deserve consideration, not necessarily as arising out of the particular case but as a matter of principle."[120]

One rationale for an automatic or mandatory commitment on a successful defence of insanity is that it discourages unjustified pleas of insanity. However, it may also discourage legitimate pleas of insanity. A person may prefer to face a determinate sentence rather than an indeterminate commitment following a successful defence of insanity. The automatic imposition of an indeterminate detention, whether in a hospital or in a prison, also appears to be undesirable because it assumes that a person who succeeds with a defence of insanity is dangerous and in need of restraint, a prediction that is apparently based on 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.[121] A mandatory commitment also means that the court cannot take other factors into account.[122] For example, a person may have been granted bail prior to trial, be living in the community, have a family and job, and be involved in an outpatient treatment programme and not require detention, either, in a prison or a hospital. Moreover, mandatory commitment, particularly to a prison, where a person is dealt with in the same manner as a convicted person, by its very nature must be seen as involving punishment, even though formally the defendant is not considered to be culpable.

3.71 These criticisms suggest that the manner in which a defendant who raises a successful defence of insanity is dealt with should be reconsidered. In England, the Butler Committee

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120 [1983] WAR 190, 201.

121 See *R v Sullivan* [1984] AC 156.

122 See I Potas, *Just Deserts For the Mad* (1982), 44-45.

recommended that the trial court should have a discretion as to disposition, including making a hospital or guardianship order or an order for the person's absolute discharge having regard to the defendant's present mental condition.[123] Such an approach has already been adopted in New Zealand. There the court may, instead of ordering that a person acquitted on account of insanity be detained in a hospital as a special patient,[124] after hearing medical evidence, and being satisfied that it would be safe in the interests of the public[125]

(a) make an order that the person be detained in a hospital as a "committed patient", that is, as a person who has been admitted and detained as a compulsory patient under civil process; or

(b) make an order for his or her immediate release.

If the person is subject to a sentence of imprisonment or detention that has not expired, the court may decide not to make any order. This approach gives the courts, rather than the Executive, a discretion as to the person's disposition after a hearing.

(c) Diminished responsibility

3.72 In England, New South Wales, Queensland and the Northern Territory[126] provision has been made, in the case of murder, for a defence of diminished responsibility.[127] The concept of diminished responsibility was developed in Scotland and subsequently introduced into these jurisdictions. Under the concept of diminished responsibility a person's liability to be convicted for unlawfully killing a person is reduced if his or her mental condition at the time of the killing substantially impaired his or her responsibility for the killing, and a verdict of manslaughter may be returned instead of one of murder.

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123 Para 3.52 above.

124 Such a person may only be discharged from custody by the Minister of Health. Alternatively, the Minister may direct that the person be held as a committed patient under the ordinary civil processes: *Criminal Justice Act 1985* (NZ), s 117.

125 *Criminal Justice Act 1985* (NZ), s 115. Before making an order the court may remand the person to a hospital for any period not exceeding seven days for the purpose of making enquiries to determine the most suitable method of dealing with the case. This enables the court to make a decision on disposition based on the defendant's present mental state.

126 *Homicide Act 1957-1977* (UK), s 2; *Crimes Act 1900-1986* (NSW), s 23A; *Criminal Code* (Qld), s 304A; *Criminal Code Act 1983-1984* (NT), s 37.

127 The South Australian Criminal Law and Penal Methods Reform Committee recommended that the defence should *not* be introduced: Fourth Report, *The Substantive Criminal Law* (1977), 44-46.

3.73 The question whether the defence should be introduced in England was considered by the Royal Commission on Capital Punishment 1949-1953. Although the Commission made no recommendation in this regard, it put the arguments for doing so as follows:[128]

> "It must be accepted that there is no sharp dividing line between sanity and insanity, but that the two extremes of 'sanity' and 'insanity' shade into one another by imperceptible graduations. The degree of individual responsibility varies equally widely; no clear boundary can be drawn between responsibility and irresponsibility . . . The acceptance of the doctrine of diminished responsibility would undoubtedly bring the law into closer harmony with the facts and would enable the courts to avoid passing sentence of death in numerous cases in which it will not be carried out."

The rationale that the courts could avoid passing sentence of death in cases in which it would not be carried out is no longer applicable in England, or in Western Australia, because the death penalty has been abolished. Another rationale is that the defence frees the court from imposing a life sentence on a person who, although not completely incapacitated and therefore not entitled to plead the defence of insanity, has a serious impairment of his or her understanding or control.

3.74 The defence of diminished responsibility was introduced in England in 1957 by section 2(1) of the *Homicide Act 1957* which provides:[129]

"Where a person kills or is a 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 a party to the killing."

3.75 If it is proved that the defendant is not liable to be convicted of murder under section 2(1) he or she must be convicted of manslaughter.[130] The diminished responsibility defence enables the jury to treat the defendant's abnormality of mind as a mitigating factor so that the defendant can be convicted of the lesser offence, manslaughter. Pleas of guilty to diminished responsibility manslaughter may be accepted by the judge in cases where the medical

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

129 For an account of how the provision came to be enacted see N Walker, *Crime and Insanity in England* (1968), 149-152.

130 *Homicide Act 1957-1977* (UK), s 2(2) and (3).

evidence is not challenged.[131] In England, where a person has been convicted of manslaughter the sentencing court has a wide discretion, varying from imposing a life sentence to discharging the defendant from custody. [132] A survey of successful defences in 1974-1977 showed the following dispositions -[133]

Sentence	No	%
Life imprisonment	18	21
Determinate sentence	26	31
Hospital order with restrictions		
to Special Hospital	28	33
to other hospitals	2	2
Hospital order, no restrictions		
to Special Hospital	-	-
to other hospitals	4	5
Probation, conditional discharge, etc	7	8
	85	100

The diminished responsibility defence provides the possibility of a medical disposition for those who kill whilst mentally disordered. It also provides a means of avoiding a murder conviction for some people who evoke sympathy. Those who were sent to hospitals other than special hospitals were almost exclusively elderly depressed men who killed their wives, often when the latter were suffering from serious illness.[134] Other cases falling within the defence involved killings from jealousy or as the result of taunts by a sexual partner or while suffering the effects of a combination of alcohol, drugs and inherent causes. Psychopaths have also raised the defence successfully.[135] At one time people falling within this category tended to be placed in special hospitals but nowadays prison sentences are more likely to be imposed in England.[136] The defence of diminished responsibility does not affect the defence of insanity and, if the insanity defence is established, the jury must return a special verdict of not guilty by reason of insanity.

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131 *R v Cox [*1968] 1 All ER 386. A survey of cases in 1976 and 1977 disclosed that only 15% of cases in which the diminished responsibility was raised went to trial: S Dell, *Diminished Responsibility Reconsidered* [1982] Crim LR 809, 809-810.

132 *Offences Against the Person Act 1861-1984*, s 5; *Criminal Justice Act 1948-1984*, s 1(1); *Powers of Criminal Courts Act 1973-1985*.

133 S Dell, *The Detention of Diminished Responsibility Homicide Offenders* (1983) 23 Brit J Criminology 50, 51.

134 Id, 52.

135 K L Milte, A A Bartholomew and F Galbally, *Abolition of the Crime of Murder and of Mental Condition Defences* (1975) 49 ALJ 160, 166 refer to reported cases involving diminished responsibility. Psychopathy appears to have been relied upon in some 50% of these reported cases.

136 M & A Craft (ed), *Mentally Abnormal Offenders* (1984), 100.

3.76 The English provision is not without its difficulties. The phrase "abnormality of mind" is vague, and has been interpreted very widely. Lord Parker CJ defined it in the following way:[137]

> ". . . a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us 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 whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment."

This extended the defence beyond that provided by the *M'Naghten Rules*, which are based on cognition, to include persons who were unable to control their impulses.[138] In Western Australia, of course, lack of control may be raised under the insanity defence.[139]

3.77 Another difficult phrase is "mental responsibility" which is not found elsewhere in statutes. The difficulties of the phrase are indicated by the following comments of the Butler Committee:

> "It is either a concept of law or a concept of morality; it is not a clinical fact relating to the defendant. 'Legal responsibility' means liability to conviction (and success in a defence of diminished responsibility does not save the defendant from conviction of manslaughter); 'moral responsibility' means liability to moral censure (but moral questions do not normally enter into the definition of a crime). It seems odd that psychiatrists should be asked and agree to testify as to legal or moral responsibility. It is even more surprising that courts are prepared to hear that testimony. Yet psychiatrists commonly testify to impaired 'mental responsibility' under section 2. Several medical witnesses pointed out to us that the difficulty is made worse by the use of the word 'substantial'. The idea that ability to conform to the law can be measured is particularly puzzling. Despite the difficulties of the section in relation to psychiatry the medical profession is humane and the evidence is often stretched, as a number of witnesses remarked. Not only psychopathic personality but reactive depressions and dissociated states have been testified to be due to 'inherent causes' within the section."[140]

3.78 One aspect of the position in England is that it seems that psychiatrists can be placed under great pressure during a trial. The Butler Committee pointed out that:

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137 *R v Byrne* [1960] 3 All ER 1, 4.

138 An attempt to establish a control or irresistible impulse limb of the *M'Naghten Rules* was rejected *in R v Kopsch* (1925) 19 Cr App R 50. In Australia such a ground may form the basis for raising one of the two limbs of the *M'Naghten Rules*: C Howard, *Criminal Law* (1982, 4th ed), 336-338.

139 Para 3.9 above.

140 Butler Committee Report, para 19.5.

> "Sometimes depression and jealousy can properly be diagnosed as mental disorders; but the distinction between conditions which can be so diagnosed and normal depression or normal jealousy may be one of degree only, and the effect of the present law is to put strong pressure on the psychiatrist to conform his medical opinion to the exigency of avoiding a severe sentence, fixed by law, for a person for whom everyone has the greatest sympathy."[141]

3.79 The Butler Committee's first choice was for the abolition of the mandatory life sentence for murder and the abolition of diminished responsibility. If the mandatory life sentence were retained it proposed that the defence of diminished responsibility be reworded to provide:

> "Where a person kills or is party to the killing of another, he shall not be convicted of murder if there is medical or other evidence that he was suffering from a form of mental disorder as defined in section 4 of the *Mental Health Act 1959* and if, in the opinion of the jury, the mental disorder was such as to be an extenuating circumstance which ought to reduce the offence to manslaughter."[142]

The Committee stated:

> "By tying the section to the definition of mental disorder in the *Mental Health Act* the formula provides a firm base for the testifying psychiatrists to diagnose and comment on the defendant's mental state, whilst it leaves the jury to decide the degree of extenuation that the mental disorder merits."[143]

3.80 This recommendation was reviewed in England by the Criminal Law Revision Committee.[144] The Committee had two reservations about the rewording proposed by the Butler Committee. First, it thought that it might exclude some offenders who are now regarded as falling within the defence of diminished responsibility. The Commission had in mind the case of the ". . . depressed father who kills a severely handicapped subnormal child or a morbidly jealous person who kills his or her spouse". After consultations with medical advisers to the Department of Health and Social Security, the Committee was satisfied that the rewording would not exclude these kinds of cases.[145] The second reservation concerned the proposal that a defendant should not be convicted of murder if there is evidence that he or she was suffering from a mental disorder "and if, in the opinion of the jury, the mental disorder

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141 Id, para 19.7.

142 Id, para 19.17.

143 Ibid. The *Mental Health Act 1983-1984*, s 1(2) defines "mental disorder" as ". . . mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind".

144 *Fourteenth Report, Offences Against the Person* (1980, Cmnd 7844).

145 Id, 39 para 92.

was such as to be an extenuating circumstance which ought to reduce the offence to manslaughter". Although the Committee appreciated that these words were intended to leave it to the jury to assess whether in all the circumstances the mental disorder was such as ought to reduce the offence to manslaughter, it considered that the defence should be amended to include an essential matter on which the jury should be directed, namely, that ". . . the mental disorder was such as to be a substantial enough reason to reduce the offence to manslaughter".[146]

3.81 M J Murray QC, in his review of the *Criminal Code*, recommended against the introduction of the concept of diminished responsibility in this State. He concluded that there was no logical justification or other reason for its introduction.[147] On the other hand the Law Reform Commissioner of Victoria in 1982 recommended that a defence of diminished responsibility should be introduced. His major reason for doing so was that:[148]

> "The word 'murderer' still carries a powerful stigma and it is suggested that it is both just and reasonable to reserve that stigma for the deliberately vicious and calculating offender. Moral culpability is still an important element in the administration of the criminal law and should play a real part in evaluating the quality of guilt. Where responsibility for the criminal act of killing a human being is affected by some abnormality of the mind which is beyond the control of the person performing the criminal act, it would seem that fairness and justice demand both that the stigma to be attached to the act should be lessened and that some help should if possible be made available to cure the mental defect both for the comfort of the offender and the good of society. A first step in effectuating these objectives would be to provide a defence which will show that such an offender should not be classed as a murderer."

3.82 If diminished responsibility were introduced in Western Australia it would be necessary to distinguish the insanity defence and diminished responsibility where the evidence was reasonably capable of supporting either defence. This is because, if the insanity defence was supported by the evidence, the defendant would be entitled to an acquittal. On the other hand, if the facts supported the defence of diminished responsibility the defendant would be entitled to be acquitted of wilful murder or murder but would be liable to be convicted of manslaughter. In England the formulation of the defence of diminished responsibility proposed by the Butler Committee makes the distinction in two ways. First, whereas the M'Naghten Rules refer to a disease of the mind the proposed formulation refers to

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146 Id, 39-40 para 93. This approach was adopted in the report to the Law Commission *Codification of the Criminal Law* (1985), Draft Criminal Code, cl 58(1).

147 Murray Report, 179-180.

148 *Provocation and Diminished Responsibility as Defences to Murder* (1982), 37 para 2.53.

a mental disorder as defined in the *Mental Health Act*. Secondly, under the *M'Naghten Rules* the defendant must not know either the nature or quality of the act or that it was wrong. Under the Butler Committee's formulation the jury is required to decide whether the mental disorder was such as to be "an extenuating circumstance which ought to reduce the offence to manslaughter". In Queensland, where the insanity defence is the same as that in Western Australia, another approach has been taken. First, the diminished responsibility defence applies to an "abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury)" whereas the insanity defence applies to a "mental disease or natural mental infirmity". Secondly, under the diminished responsibility defence the effect of the abnormality must be "substantially to impair" the defendant's capacity "to understand what he is doing, or his capacity to control his actions, or his capacity to know that he ought not to do the act or make the omission" whereas under the insanity defence the defendant must be deprived of these capacities. Mansfield C J has held that only the second of these difficulties is material when distinguishing the diminished responsibility and insanity defences.[149] On this basis the difference is only one of degree. However, another case[150] in which automatism was in issue suggests that the use of the term "disease or injury" involves a qualitative difference from "disease". As a result, post-traumatic mental disorder, arising for example from concussion, is not within the insanity defence because it is not a disease but falls within the diminished responsibility defence which applies to a "disease or injury".

3.83 An alternative to making provision for diminished responsibility is to abolish mandatory life sentences, such as strict security life imprisonment or life imprisonment for wilful murder or life imprisonment for murder, as was proposed by the Butler Committee.[151] In Victoria, the Law Reform Commission of Victoria recommended that the penalty for murder of a mandatory sentence of life imprisonment be replaced with a maximum sentence of life imprisonment.[152] As the Commission pointed out, a mandatory sentence precluded the consideration of matters in mitigation. Matters tending to show provocation or diminished responsibility could be presented to the court after conviction for wilful murder or murder as

149 *R v Rolph* [1962] Qd R 262, 271-272.

150 *Cooper v McKenna; Ex parte Cooper* [1960] Qd R 406, 419.

151 Para 3.79 above.

152 *The Law of Homicide in Victoria: The Sentence for Murder* (1985), para 50. Previously, a report of the Law Reform Commissioner of Victoria had recommended that a defence of diminished responsibility be provided: para 3.80 above. He considered that the mandatory penalty should be retained to mark "the public aversion felt to the crime of coldblooded and evil killing": *Provocation and Diminished Responsibility as Defences to Murder* (1982), 37 para 2.54.

part of the sentencing process instead of trying to make them fit the terms of highly technical and complex defences.[153] This recommendation was accepted and legislation enacted.[154]

3.84 A similar approach has been adopted in New South Wales, but with a somewhat different emphasis.[155] The legislation in that State empowers the court to impose a sentence of imprisonment of less duration where "it appears to the Judge that the person's culpability for the crime is significantly diminished by mitigating circumstances, whether disclosed by the evidence in the trial or otherwise". [156]

3.85 Although a number of different interpretations of this provision were initially adopted by trial judges in New South Wales,[157] it has now been settled that the correct construction of the provision requires the trial judge:[158]

> ". . . first to consider whether the accused's culpability for the murder is significantly diminished. If his conclusion is negative . . . the sentence must be penal servitude for life. If it is affirmative . . . the judge then proceeds to consider the appropriate sentence taking account of all the factors commonly applicable to that process."

The circumstances which may be taken into account in determining whether the accused's culpability is significantly diminished are confined to those:[159]

> ". . . which influenced the conduct constituting the commission of the murder and the relevant state of the accused's mind. Hence . . . circumstances arising after the commission of the murder, and ordinarily relevant to sentence, such as the onset of remorse or illness, the provision of information to the police, a plea of guilty, or the cure of drug addiction, cannot be taken into account since they did not bear upon either the conduct or the state of mind in question."

3.86 If diminished responsibility were introduced it would be necessary to consider whether the range of dispositions presently available for manslaughter is satisfactory. It would also be necessary to consider the range of dispositions for wilful murder and murder if, alternatively, mandatory sentences for these offences were abolished. At present the maximum penalty for

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153 Law Reform Commission of Victoria, *The Law of Homicide in Victoria: The Sentence of Murder*, (1985), para 7.

154 *Crimes Act 1958-1986* (Vic), s 3.

155 However, diminished responsibility has not been abolished in New South Wales as yet.

156 *Crimes Act 1900-1986* (NSW), s 19. See generally G D Woods QC, *The Sanctity of Murder: Reforming the Homicide Penalty in New South Wales* (1983) 57 ALJ 161.

157 See *R v Burke* [1983] 2 NSWLR 93, 105-106.

158 *R v Bell* (1985) 2 NSWLR 466, 477.

159 Id, 479.

manslaughter, which would be the verdict in the case of diminished responsibility, is 20 years' imprisonment. However, the court can alternatively impose a fine,[160] make a probation order,[161] discharge the defendant on bond[162] or even discharged unconditionally in the case of a first offence.[163] The mandatory sentences for wilful murder and murder are strict security life imprisonment or life imprisonment, and life imprisonment, respectively. The Butler Committee was of the view that, if diminished responsibility and the mandatory life sentence for murder were abolished, it would be necessary to provide the same range of penalties of dispositions for murder as for manslaughter.[164]

3.87 If diminished responsibility were introduced in Western Australia it would be necessary to ensure that the court had adequate powers to make the most appropriate disposition in the circumstances of the case, including possibly a hospital order.[165] A similar range of dispositions would also seem to be necessary if, alternatively, the mandatory sentences for wilful murder and murder were replaced with maximum sentences. The differences in the moral turpitude of the most serious cases of wilful murder, murder and manslaughter would be marked by their different maximum penalties. The maximum penalty for wilful murder could be strict security life imprisonment, the maximum penalty for murder life imprisonment and for manslaughter 20 years' imprisonment.

(d) Infanticide

3.88 In England, a woman who murders her child, being a child under the age of twelve months, may be charged with infanticide where the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to her child or by reason of lactation consequent upon the birth.[166] The jury is merely required to decide whether the balance of the mother's mind was disturbed as a result of childbirth or lactation. The jury does not have to consider whether there is a relationship between the disturbed mind and the murder of the child. A woman charged with murder may be allowed to plead guilty to

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160 Criminal Code, s 19(3).

161 *Offenders Probation and Parole Act 1963-1985*, s 9(1).

162 *Criminal Code*, s 19(8).

163 Id, s 669(1)(b)(i).

164 Butler Committee Report, para 19.15.

165 See paras 6.16 to 6.24 below where these orders are discussed in the context of powers of courts of summary jurisdiction.

166 *Infanticide Act 1938-1967* (UK), s 1(1). Infanticide is also an offence in Tasmania (*Criminal Code Act 1924-1986*, s 165A), Victoria (*Crimes Act 1958-1986*, s 6), New South Wales (*Crimes Act 1900-1986*, s 22A) and New Zealand (*Crimes Act 1961-1986*, s 178).

infanticide or the jury may return a verdict of infanticide.[167] Where a verdict of infanticide is returned, the woman may be dealt with as if she had been found guilty of the offence of manslaughter of the child.[168]

3.89 In Western Australia, the offence of infanticide has recently been introduced.[169] The definition of infanticide is as follows:

> "(1) When a woman or girl who unlawfully kills her child under circumstances which, but for this section, would constitute wilful murder or murder, does the act which causes death when the balance of her mind is disturbed because she is not fully recovered from the effect of giving birth to the child or because of the effect of lactation consequent upon the birth of a child, she is guilty of infanticide only.
>
> (2) In this section "child" means a child under the age of 12 months."

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

3.90 One issue relevant to this project which arises from the introduction of an offence of infanticide is whether the defence of insanity should be available where a woman is charged with infanticide. In principle the insanity defence should be available because a charge of infanticide involves ascribing criminal responsibility to a defendant though the sentence which may be imposed if she is convicted is substantially less severe than that for murder or wilful murder. Even if the prosecution decided to lay a charge of infanticide rather than wilful murder or murder the defendant's mental state at the time of the offence may justify the raising of the insanity defence. In considering whether or not to raise the defence, the defendant would no doubt take into account the disposition options available either on a conviction for infanticide or on a successful insanity defence.

5. QUESTIONS AT ISSUE

3.91 The Commission welcomes comment, with reasons where appropriate, on any matter arising out of this chapter, and in particular on the following -

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167 G Williams, *Textbook of Criminal Law* (1983, 2nd ed), 695.

168 Between 1969 and 1978, 112 women were convicted of infanticide in England. Only three were sentenced to imprisonment (ranging up to 3 years). One woman was given a suspended sentence, eight were made the subject of a hospital order, one was made the subject of a care order, two were bound over, 86 were released on probation and the balance were either discharged or made the subject of a supervision order: Criminal Law Revision Committee, *Fourteenth Report, Offences Against The Person* (1980, Cmnd 7844), 48-49 para 108.

169 *Criminal Law Amendment Act 1986* (yet to be proclaimed).

The insanity defence

1. Should the defence of insanity be abolished?

Paragraphs 3.32 to 3.36

2. If the defence of insanity is retained, should the existing formulation of that defence be retained?

Paragraphs 3.41 to 3.46

3. If the existing formula for the insanity defence is not suitable what should be the basis of the test and, in particular, should any of the following formulae be adopted -

   (a) that proposed by the United Kingdom Royal Commission on Capital Punishment;

   Paragraphs 3.47 and 3.48

   (b) that adopted by the Supreme Court of the State of Rhode Island;

   Paragraphs 3.47 and 3.48

   (c) that proposed by the English Butler Committee?

   Paragraphs 3.51 to 3.56

4. Should a person whose behavioural controls are impaired but who is not suffering from a mental disease or natural mental infirmity be entitled to raise the insanity defence?

Paragraph 3.50

5. Should the second paragraph of section 27 of the *Criminal Code* relating to delusions be repealed?

Paragraph 3.11

The burden of proof of the insanity defence

6. Should the burden of proof of the insanity defence be changed so that the defence merely has an evidential burden?

Paragraphs 3.60 and 3.61

Procedural matters relating to the insanity defence

7. Should the prosecution be able to raise the insanity defence?

Paragraphs 3.57 and 3.58

8. Should a two stage trial procedure be introduced and, if so, in what form?

Paragraphs 3.62 to 3.64

9. Where the defence of insanity is successful should the jury be required to return a verdict of "not responsible on account of unsoundness of mind"?

Paragraph 3.65

10. Should the trial judge be required to instruct the jury as to the consequences of a successful defence of insanity?

Paragraph 3.65

11. Should the court be empowered to accept a plea of not guilty on account of unsoundness of mind?

Paragraph 3.66

Disposition

12. Where a defence of insanity is successful should the court have power to determine the most appropriate disposition of the defendant?

Paragraphs 3.67 to 3.71

Diminished responsibility

13. In the case of a charge of wilful murder or murder, should the defence of diminished responsibility be introduced and, if so, how should it be formulated?

Paragraphs 3.72 to 3.82

14. If not, should the mandatory life sentences for wilful murder and murder be replaced by maximum sentences?

Paragraphs 3.83 to 3.87

Infanticide and the insanity defence

15. Should it be possible to raise the insanity defence where the defendant is charged with infanticide?

Paragraph 3.90

Chapter 4
CRITERIA OF UNFITNESS TO STAND TRIAL

1. PRESENT LAW

4.1 Item 1 of the terms of reference requires the Commission to consider to what extent and on what criteria the law should recognise mental disorder or abnormality in a person accused of a criminal offence as a factor affecting his or her liability to be tried. Tests of criminal responsibility of the nature of those referred to in the previous chapter are concerned with the mental state of the defendant at the time of the alleged offence. Tests of fitness to stand trial involve the mental state of the defendant at the time of the trial. At present, in trials on indictment, section 631 of the *Criminal Code* provides that a person is unfit to stand trial[1] if he or she is incapable of understanding the proceedings at the trial so as to make a proper defence.[2] This does not involve an incapacity "to understand the substantive law bearing upon criminal responsibility for the act alleged to have been done".[3] In giving directions to a jury empanelled to determine whether or not a defendant is fit to stand trial, judges in Western Australia appear to have been generally guided by the more precise explanation of the issues in question given by Smith J in *R v Presser*:

> "He needs, I think, to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any."[4]

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1 For an account of the historical development of the concept of unfitness to stand trial see N Walker, *Crime and Insanity in England* (1968), 219-239.

2 The procedure for determining this issue is discussed in the following chapter: para 5.2. The Murray Report contains a recommendation which would confine the provision to unfitness arising from "mental disease or natural mental infirmity": Murray Report, 399-400.

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

4 [1958] VR 45, 48.

4.2 The question of fitness to stand trial is determined by a jury. If the accused is found to be capable of understanding the proceedings the trial proceeds in the normal manner. If not, the court may order that the defendant be discharged from custody or that he or she be kept in custody until he or she can be dealt with according to law. The defendant may be indicted and tried for the offence at a later date.

4.3 Trials on indictment may also be stopped if a jury finds that the defendant is not of sound mind.[5] The court is required to order that the defendant be kept in strict custody until he or she can be dealt with under section 47 of the *Mental Health Act 1962-1985*. The defendant may be indicted and tried for the offence at a later date.

4.4 The provisions referred to above do not apply to summary trials in Courts of Petty Sessions. There is no express provision empowering those courts to determine whether or not a defendant is fit to stand trial.[6] Under section 36 of the *Mental Health Act 1962-1985*, Courts of Petty Sessions do, however, have power to obtain, either on a preliminary hearing of an indictable offence or during a summary trial, a psychiatric report on a defendant. If the defendant is found to be suffering from mental disorder he or she may be committed to an approved hospital either by the court or the superintendent of an approved hospital. The purpose of the provision appears to be to divert mentally disordered people from the criminal process to hospitals, and not to provide a means by which their fitness to stand trial can be determined. This section and the question whether or not Courts of Petty Sessions should have express power to deal with the question of fitness to stand trial are examined below.[7]

2. THE LAW ELSEWHERE

4.5 The *Criminal Code*s of Queensland, Tasmania and the Northern Territory have provisions similar to section 631 of the Western Australian *Criminal Code*.[8] In South Australia and Victoria, in the case of trials on indictment, a person is unfit to be tried if he or she is insane such that he or she cannot be tried.[9]

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5 *Criminal Code*, s 652.

6 However, the court may be able to deal with the matter as part of an unexpressed power to control its own procedure: *Sparks v Bellotti* [1981] WAR 65, 69.

7 Paras 6.2 to 6.11.

8 *Criminal Code* (Qld), s 613, *Criminal Code* (Tas), s 357, and *Criminal Code* (NT), s 357.

9 *Criminal Law Consolidation Act 1935-1985* (SA), s 293(1) and *Crimes Act 1958-1986* (Vic), s 393.

4.6 In New Zealand, a defendant is "under disability" if, because of the extent to which that person is mentally disordered, he or she is unable to -

(a) plead;

(b) understand the nature or purpose of the proceedings; or

(c) communicate adequately with counsel for the purpose of conducting a defence.[10]

In England a person is considered to be unfit to plead if he or she is unable to understand the course of proceedings at the trial, so as to make a proper defence, to challenge a juror to whom he or she might wish to object, and to understand the substance of the evidence.[11] In Canada a defendant is considered to be unfit to stand trial if he or she is incapable of conducting his or her defence on account of insanity.[12]

3. PROPOSALS FOR REFORM ELSEWHERE

(a) New South Wales

4.7 In 1974 the Mental Health Act Review Committee carried out a review of the Mental Health Act 1958. In its report, it recommended that the following definition of "unfit to be tried" should be provided:

> "'Unfit to be tried' means in relation to a criminal charge that the person charged is not able (for whatever reason) to understand the nature of the charge or the possible consequences of a finding of guilt, or properly to conduct a defence (or coherently to instruct a legal adviser for that purpose) or adequately to comprehend the course or significance of proceedings up to and including sentence".[13]

At the time, only a person who was considered to be mentally ill could be considered to be unfit to stand trial. The proposed definition therefore involved an extension of the persons who could be considered to be unfit to stand trial. For example, it might include a person who

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10 *Criminal Justice Act 1985* (NZ), s 108.

11 See *R v Podola* [1959] 3 All ER 418, 431.

12 *Criminal Code* (Can), s 543(1).

13 Report of the Mental Health Act Review Committee (1974), 60 and 61.

was deaf and dumb, or amnesic. The provisions relating to fitness to stand trial were amended by legislation in 1983. However, this definition was not accepted.[14]

(b) England

4.8 The Butler Committee, in its report on mentally abnormal offenders, considered whether the use of the phrase "unfit to plead" in England was satisfactory. The Committee concluded that the phrase was misleading and that a more appropriate one would be whether the accused was "under disability in relation to the trial".[15] It then considered whether the existing criteria were adequate.[16]

4.9 In a submission to the Committee, Her Majesty's Judges recommended that the existing tests should be modified by omitting the reference to challenging a juror, and adding the following two criteria -

(i) whether the defendant can give adequate instructions to his or her legal advisers; and

(ii) plead, with understanding, to the indictment.

The Committee recommended the adoption of the criteria so modified.[17]

4.10 The Butler Committee also considered whether amnesia which prevented a defendant from remembering events at the time of the alleged offence should be a ground upon which the defendant could be found to be under disability in relation to the trial.[18] The Committee put forward the following arguments for and against allowing it to be raised as an issue relating to fitness:

> "At present amnesia does not in itself raise an issue of fitness to stand trial. There is an argument against this, since a person who has no recollection of the events charged against him, for example as a result of brain damage, perhaps from concussion, or of a hysterical reaction, is seriously handicapped in instructing counsel and making his defence. On the other hand, it is clear that there are many difficulties which may

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14 *Crimes Act 1900-1986* (NSW), Part XIA.

15 Butler Committee Report, para 10.2.

16 See para 4.6 above for the existing criteria.

17 Butler Committee Report, para 10.3.

18 Amnesia which prevents a person remembering the events at the time of the alleged offence is not a ground for unfitness to stand trial in England at present: *R v Podola* [1959] 3 All ER 418.

> handicap the defence but which should not operate to bar trial. The defendant may have failed to trace essential witnesses through no fault of his own, or he may have lost his diary and so be unable to recollect where he was on the day of the crime, or he may never have kept a diary and simply have forgotten. Obviously, such difficulties cannot be allowed to bar the trial. The question is whether amnesia should be regarded as equivalent to a mental disability of the kind traditionally accepted as a reason for barring trial, or whether it should be regarded as equivalent to other adventitious difficulties affecting the defence". [19]

4.11 All but two of the members of the Committee favoured a continuation of the present rule. The majority's view was expressed as follows:

> ". . . the law of unfitness to stand trial is a concession to notions of justice in certain extreme cases, but it cannot be extended too far. Those extreme cases have been cases where the 'unfitness' has been on grounds of mental disorder or deaf mutism and not on other grounds. A defendant who is unable to remember the events comprising the alleged offence is really saying that there is another witness, namely himself, who would be able to give an account of what happened but who cannot be put in the witness box because he cannot remember. The lack of memory may be caused by forgetfulness, by hysterical dissociation, or by concussion (whether or not connected with the circumstances of the offence). This has not hitherto been within the concept underlying the tests of unfitness to stand trial, and ought not to be brought within it". [20]

The majority distinguished amnesia and mental disorder, so far as they affected fitness to stand trial, in two other ways, namely:

> "(a) The defendant for whom the issue can at present be raised is severely affected in mind, so that in many cases he must in any event be subject to control for a considerable period. Even if he did the act, the public interest will be protected by the fact that he can, if necessary, be confined. In contrast, the amnesic defendant is normally able to maintain himself in the community; he does not need to be a hospital patient, so that keeping him in hospital cannot be represented as a benefit to him.
>
> (b) The defendant for whom the issue can at present be raised not only is severely affected at the time of trial but probably was so affected at the time of the act charged, so that, if he did the act, he is probably not responsible on the ground of insanity or, even if he is convicted, is a fit case for a hospital order. In contrast, retrograde amnesia arising by reason of an event after the act charged is in no way inconsistent with full responsibility for the act. If it were allowed to bar the trial, this would mean, for example, that a murderer could avoid conviction merely because after the crime he tumbled off his motor cycle and suffered concussion with retrograde amnesia. In default of a conviction

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19 Butler Committee Report, para 10.5.

20 Id, para 10.6.

> there would not in practice be anything that could be done with such a person other than to set him free. This would be an unacceptable outcome."[21]

The majority was also concerned that amnesia could be feigned readily.[22] It seems that the majority was concerned that a large number of people, especially concussed drivers of motor vehicles, would take advantage of amnesia.[23]

4.12 The minority[24] argued that:

> ". . . it is inconsistent to concede, on the one hand, that conditions such as severe subnormality, deaf mutism, psychosis, or depression may render a person unable to conduct a proper defence, and on the other to maintain that complete loss of memory can never render anyone unable to conduct a proper defence. If it were not for the loss of memory the defendant might be able to give important evidence on the facts in issue or on the issue of mens rea. Moreover, there are cases in which both retrograde and anterograde amnesia may be caused by an event prior to the act charged, such as an epileptic fit or head injury which can produce an anterograde amnesia."[25]

The minority members did not argue that mere forgetfulness should entitle a person to be found unfit to stand trial. They claimed that mere forgetfulness could be distinguished from amnesia caused by physical illness or injury or severe mental disorder. They wanted unfitness to stand trial limited so that amnesia would provide a ground for unfitness only where it prevented the defendant from giving adequate instructions for his or her defence.[26] As to the majority's argument that a person suffering from amnesia is in the same position as a defendant who cannot trace a witness, they said the argument failed to:

> ". . . recognise that the latter knows what the defence is and merely cannot produce evidence, whereas the amnesic defendant does not know what his defence might be."[27]

(c) Canada

4.13 The criteria which should be provided for determining whether a person is fit to stand trial have also been considered by the Law Reform Commission of Canada. The Commission recommended that a person should be considered to be unfit if, owing to mental disorder:

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21 Ibid.
22 Id, para 10.7.
23 N Walker, *Butler v The CLRC and Others* [1981] Crim LR 596, 600.
24 Professor Sir Denis Hill and Professor N Walker.
25 Butler Committee Report, para 10.8.
26 Id, para 10.9.
27 Ibid.

"(1) he does not understand the nature or object of the proceedings against him, or

(2) he does not understand the personal import of the proceedings, or,

(3) he is unable to communicate with counsel."[28]

As to amnesia, the Commission recommended that a lack of recollection should be specifically excluded as a cause of unfitness to stand trial. The Commission stated:

> "The fitness rule is concerned with present mental ability to communicate. If the accused is rational and is able to tell his lawyer that he does not remember any of the circumstances of the alleged offence, he should be considered fit to stand trial."[29]

4. DISCUSSION

4.14 The question of fitness to stand trial does not arise often in trials in Western Australia. A survey of trials in the Supreme Court in the period 1970-1985 disclosed only six cases in which the issue was raised on account of the defendant's mental condition. In four cases the defendant was found to be unfit to stand trial. In a fifth case the defendant was remanded for a psychiatric report but died before the trial was due to be held. The defendant was found to be fit to stand trial in the other case. Notwithstanding that the issue of fitness is rarely raised, the Commission considers that, as a matter of fairness and humanity, it is an issue which a defendant should continue to be able to raise. A trial is unlikely to be fair if the defendant is not in a position to mount a defence or to instruct counsel.[30] The Commission therefore considers that a provision along the lines of section 631 of the *Criminal Code* should be retained. However, the section could spell out the factors to be taken into account in determining the issue.

4.15 Accordingly, in deciding whether or not a person had the capacity to defend himself or herself the court could be specifically required to take into account whether the defendant had capacity to -[31]

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28 Law Reform Commission of Canada, *Mental Disorder in the Criminal Proc*ess (1976), 14.

29 Ibid.

30 However, a special trial could be held: see paras 5.29 to 5.42 below.

31 These guidelines are based to a large extent on those given in *R v Presser*: para 4.1 above.

(i) understand the offence charged;

(ii) understand that the purpose of the proceeding is to determine whether or not the defendant committed the offence charged;

(iii) plead to the charge with understanding;

(iv) in the case of a trial with a jury, to understand that he or she has a right to challenge jurors;

(v) follow the course of the proceedings so as to understand what is going on in the court in a general sense;

(vi) understand the substantial effect of any evidence given against him or her;

(vii) make his or her defence or answer to the charge, including having an understanding of the defences available to him or her;

(viii) give any necessary instructions to his or her counsel, including evaluating the testimony of witnesses; or

(ix) take the witness stand and testify coherently.

4.16 As indicated above, the Butler Committee and the Law Reform Commission of Canada rejected the view that amnesia should be a reason for stopping the trial. As the Canadian Law Reform Commission pointed out the fitness rule is concerned with the defendant's present mental ability to communicate. From a pragmatic point of view it is also necessary to recognise that it is very difficult to distinguish between malingered and hysterical amnesia.[32] If amnesia could be raised on the question of fitness to stand trial it could lead to considerable abuse. On the other hand, depending on the circumstances of the case, amnesia could have a significant effect on a person's capacity to mount a defence or to give any necessary instructions to his or her counsel. Professor Walker gives the following example to illustrate the problem:

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32 H Prins, *Offenders, Deviants, or Patients*? (1980), 76.

> ". . . B picks a fight with A, who defends himself. A is concussed by B's friends (or by B for that matter) who tell the police that A assaulted B. When tried A cannot recall (because of the concussion) what happened, and so cannot put up his valid defence."[33]

4.17 The terms of reference also refer to section 652 of the *Criminal Code*. This section provides that a person cannot be tried if he or she is not of sound mind. The Murray Report contains a recommendation that this section should be repealed[34] because it was also recommended that the provision relating to unfitness should be widened so that it would apply at any time after the defendant was brought to his or her arraignment. The Commission welcomes comments on this proposal to repeal section 652.

5. QUESTIONS AT ISSUE

4.18 The Commission welcomes comment, with reasons where appropriate, on any matter arising out of this chapter and, in particular, on the following -

1. Should guidelines be provided to assist courts in deciding whether or not a person is fit to stand trial and, if so, are any of the guidelines referred to in paragraph 4.15 above suitable?

   Paragraph 4.15

2. Should a person suffering from amnesia be entitled to have the issue of fitness to stand trial raised?

   Paragraph 4.16

3. Should section 652 of the *Criminal Code*, which provides that a person cannot be tried if he or she is not of sound mind, be repealed?

   Paragraph 4.17

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33 N Walker, *Butler v The CLRC and Others* [1981] Crim LR 596, 599-600.

34 Murray Report, 423.

Chapter 5
FITNESS TO STAND TRIAL: PROCEDURE

1. TERMS OF REFERENCE

5.1 Under item 4 of the terms of reference the Commission is required to consider whether or not it is desirable for there to be a judicial investigation as to the guilt or innocence of an accused person notwithstanding that he or she has been found to be unfit to stand trial under section 631 of the *Criminal Code* or unsound of mind under section 652 of the Code.

2. THE PROCEDURE IN WESTERN AUSTRALIA

(a) Unfitness to stand trial due to mental disorder

5.2 In trials on indictment if it appears to be uncertain whether a defendant is capable of understanding the proceedings, a jury must be empanelled to determine whether or not he or she is capable of understanding the proceedings. A person may be found to be incapable of understanding the proceedings due to some physical or mental infirmity, or because he or she comes from a different cultural background.[1] In this paper, however, the Commission is concerned only with persons who are considered to be unfit to stand trial due to mental disorder. Where a jury finds that a defendant is incapable of understanding the proceedings due to unsoundness of mind this finding must be specifically stated.[2] Where such a finding is made, the court may order that the defendant be discharged or that he or she be kept in custody ". . . in such place and in such manner as the Court thinks fit, until he can be dealt with according to law".[3] If the jury finds that the defendant is capable of understanding the proceedings, the trial proceeds in the normal manner. A person who has been committed to stand trial may also be diverted from the criminal process under section 47(1)(a) of the *Mental Health Act 1962-1985*. Under that provision, if two medical practitioners find that the person is suffering from "mental disorder to the extent that he ought not to stand trial" the Minister

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1 See the case of an Aboriginal, Jambijimba Yupupu, referred to in an article by L Davies, *The Yupupu Case* (1976) 2 Legal Service Bulletin 133, *R v Grant* [1975] WAR 163 and *Ngatayi v R* (1980) 147 CLR 1.

2 *Criminal Code*, s 631. There is a similar procedure in South Australia (*Criminal Law Consolidation Act 1935-1985*, s 293), Victoria (*Crimes Act 1958-1986*, s 393), Tasmania (*Criminal Code*, s 357) and Queensland (*Criminal Code*, s 613).

3 *Criminal Code*, s 631. This would appear to be sufficiently wide to allow the court to order that the person be kept in a prison or hospital. The fact that a defendant has been found to be incapable of understanding the proceedings does not mean that he or she cannot be indicted again and tried: ibid.

may direct that the person be admitted as a patient to an approved hospital until he or she is fit to be discharged. The person may subsequently be indicted and tried.[4]

(b) Unsoundness of mind during the trial

5.3 Section 652 of the *Criminal Code* provides that in trials on indictment, if it appears or it is alleged during a trial that a defendant is unsound of mind, the jury hearing the charge must consider whether or not he or she is sound of mind.[5] If the jury finds that the defendant is unsound of mind the court is required to order that he or she be kept in strict custody[6] until he or she can be dealt with under the laws relating to insane persons.[7] The Minister may order that a person who has been found to be unsound of mind during the trial be admitted to an approved hospital as a security patient.[8] In view of the proposed widening of the scope of section 631 of the *Criminal Code* it may be desirable to repeal section 652 of the Code.[9]

3. DIFFICULTIES WITH THE EXISTING LAW

5.4 Where a defendant is found to be unfit to stand trial or unsound of mind during trial the criminal process is interrupted until he or she is capable of understanding the proceedings.[10] Although the section appears to be for the defendant's benefit, it may be unfair in some cases. It may be in the defendant's interest for the trial to proceed. For example, the defence may have grounds for attacking the criminal charge on its merits. Even if the defendant lacks the capacity to mount a defence, the prosecution may not be able to establish a prima facie case or prove beyond a reasonable doubt that he or she committed the offence charged, for example if it is unable to tender its only or main piece of evidence, such as a confessional statement. In the English case of *R v Stewart*[11] the procedure referred to in paragraphs 5.15 to 5.19 below was used to postpone the determination of the issue of fitness to stand trial until the opening of the case for the defence. As a result of the postponement the prosecution case was tested and the defence successfully challenged the admissibility of a

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4 *Mental Health Act 1962-1985*, s 47(2).

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

6 This appears to mean that he or she must be kept in prison.

7 A person who is found to be unsound of mind during the trial can be indicted again and tried for the offence: *Criminal Code*, s 652.

8 *Mental Health Act 1962-1985*, s 47(1).

9 Para 4.17 above.

10 As s 652 of the *Criminal Code* (which relates to unsoundness of mind during the trial) may be repealed the following discussion is concerned only with s 631 of the Code which relates to fitness to stand trial. However, the problems raised by s 652 are similar to those raised by s 631.

11 (1972) 56 Cr App R 272.

confessional statement. As no other evidence was called the result was that the defendant was acquitted and went free. Further, defendants who are held in custody, either in an approved hospital or other institution, may feel aggrieved at being detained without a trial. This may have an adverse affect on their treatment. In England, the National Association for Mental Health (MIND) is reported as having:

> ". . . heard several complaints from patients who feel it is unjust that they are indefinitely confined without having ever been tried for the crime charged. This sense of grievance may in itself make them resist treatment."[12]

MIND considered it desirable for a trial to proceed and for the facts of the case to be examined by the court without undue delay.

5.5 In considering the manner in which the procedure is operating at present it is necessary to examine the consequences of a finding that a person is unfit to stand trial. At present a person may be detained in custody for an indefinite length of time. As Freiberg states:

> "The courts have operated under the assumption that an incompetency commitment is for the defendant's welfare but the reality is that this assumption is sometimes not justified. The problem arises thus. The disposition of a person unfit to stand trial is predicated on the assumption that a presently incompetent person will eventually become of 'sound mind' when he will be able to stand trial on the offence charged. However the danger is that a person who is unfit to stand trial under the present law may have no hope of recovery and may therefore never be brought to trial. Although the offence with which the person is charged may not be serious, he may, in effect, be serving a life sentence for it."[13]

Freiberg referred to the position in Western Australia at 31 December 1974 which was as follows:

> ". . . three persons had been held for 20 years, 19 years and two years respectively. One was considered by the authorities as unlikely to recover. The records show another case, transferred to the Mental Health Service, who was transferred from one authority to another for eight years without standing trial. Another died in custody after 18 years detention."[14]

5.6 A further problem with the existing law referred to by Freiberg is that:

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12 L O Gostin, *A Human Condition* (Vol 2, 1977), 26.
13 A Freiberg, *Out of Mind, Out of Sight* (1976) 3 Mon LR 134, 144.
14 Id, 146.

> "In many cases the lapse of time between the alleged offence and the trial make a trial almost impossible either because of the death or movement of witnesses or simply because of fading memories."[15]

5.7 There is therefore a dilemma. On the one hand it may be in the defendant's best interest that the criminal process is held in abeyance so that his or her right to mount a defence is protected. The defendant is relieved of the stress of an appearance in court and may receive treatment. On the other hand, it may be that if the trial proceeded, and the facts of the case were established, the defendant would be acquitted. In particular, the defendant may be acquitted on grounds unrelated to his or her mental condition.

4. DISCUSSION

(a) Introduction

5.8 The major problem with the existing procedure is that there is no provision for the trial to proceed to determine whether the defendant has a good defence to the charge. It is the Commission's provisional view that this problem should be alleviated by the introduction of a procedure which, while protecting a defendant's right to mount a defence, enables the charge to be tested to see whether an acquittal is justified. The procedure which should be provided, and a number of ancillary matters, are discussed below.

(b) Raising the issue at a preliminary hearing

5.9 At present, in the case of indictable offences, the issues of fitness to stand trial can be raised during a trial but there is no statutory provision which permits the issue to be raised during a preliminary hearing. It is uncertain whether the question could be raised independently of any statutory provision. The major reason for raising the issue of fitness to stand trial is that a defendant's mental condition at the trial might deprive him or her of the ability to mount a defence. The issue would not have the same importance at the preliminary hearing stage, particularly as the defendant's mental condition might improve to such an extent between the date of the preliminary hearing and the trial that he or she may be considered to be fit to stand trial. However, problems can arise at the preliminary hearing if the defendant is not fit to participate in the proceedings. At such a hearing the defendant may

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15 Ibid.

have to make a number of elections or other decisions. For example, the defendant may be asked to elect whether he or she wishes to have the charge dealt with summarily[16] or to elect whether or not to have a preliminary hearing.[17] It may also be necessary for a defendant's counsel to be instructed as to the cross-examination of witnesses and as to submissions that the evidence is not sufficient to put the defendant upon trial for any indictable offence.[18]

5.10 One advantage of allowing the issue of fitness to be raised and determined at the preliminary hearing would be that a defendant who was unfit could be diverted from the criminal process at an earlier stage in order to receive treatment. As in the case of a trial,[19] the issue of fitness could be deferred until the end of the preliminary hearing to test whether the prosecution's evidence was sufficient to justify the defendants being committed for trial.

5.11 An approach along these lines has been adopted in New Zealand, where the question of whether or not the defendant is under disability may be raised at a preliminary hearing. The court may, however, postpone a consideration of the question whether the defendant is under disability until any time before it determines whether he or she should be committed for trial, if it is of the opinion that such a postponement is in the interests of the defendant. Where the determination of the question is postponed and the charge is dismissed the question is not determined. If, however, the charge is not dismissed and the court finds that the defendant is under disability the proceedings are adjourned until the defendant ceases to be under disability.[20] An alternative approach, proposed by the Law Reform Commission of Canada, would be to empower the court to determine whether it was in the interests of justice further to postpone the issue of fitness until the trial itself. In considering whether to order such a postponement the court could take into account whether the defence had demonstrated that it had a case to present and ". . . that it would be in the interests of justice to proceed on the merits of the charge".[21]

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16 *Justices Act 1902-1986*, s 101A.
17 Id, s 101B.
18 Id, ss 106 and 107.
19 Para 5.16 below.
20 *Criminal Justice Act 1985* (NZ), s 110(5).
21 Law Reform Commission of Canada, Report on *Mental Disorder in the Criminal Process* (1976), 15-16.

(c) Raising the issue at the trial

(i) A pre-empanelment hearing

5.12 In this State it was recognised in the Murray Report that the defendant "should not be in custody on an indefinite basis by reason of his mental condition, if in fact he cannot be proved to have committed the offence alleged against him".[22]

5.13 The Murray Report does not recommend the implementation of any specific procedure to overcome the problem. However, it contains a recommendation for express provision for a pre-empanelment hearing,[23] which would involve the determination of certain matters by the court before the jury was empanelled or before any evidence was tendered at the trial. At such a hearing the admissibility of any matter in evidence, including a confessional statement, could be determined as could any question of law. If the determination of such matters meant that the defendant had no case to answer or that the case was too weak to proceed then the Crown could consider entering a nolle prosequi, thus bringing the proceedings to an end without the need to consider whether the defendant was fit to stand trial.

5.14 Although this would bring about an end to criminal proceedings in some circumstances before the issue of fitness to stand trial arose for consideration, it would not do so in all. There could be cases in which the weakness of the Crown case would not be exposed until the evidence was presented in court and tested by cross-examination where a submission of no case to answer would then be successful. For these cases and others in which the defendant's innocence might not emerge until the defence case was presented, it is necessary to consider whether other procedures should be provided. These are discussed below.

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22 Murray Report, 402.

23 Ibid.

(ii) Postponing the issue until the opening of the case for the defence

5.15 In England in 1964 an attempt was made to overcome the dilemma referred to in paragraph 5.8 above, with the enactment of the *Criminal Procedure (Insanity) Act 1964-1983*.[24] A similar procedure has been provided in New Zealand.[25]

5.16 The English Act applies to trials of indictable offences. Where the question arises whether or not a defendant is under such a disability as would constitute a bar to his or her being tried, the court may postpone a consideration of the question of fitness to be tried until any time prior to the opening of the case for the defence. Such a postponement may be made if, having regard to the nature of the supposed disability, the court is ". . . of opinion that it is expedient so to do and in the interests of the accused".[26] In *R v Burles*[27] it was held that this condition is a primary consideration and that it was expedient and in the interests of the defendant to postpone the trial of the issue of fitness to plead because of the near certainty that the prosecution would have been unable to prove its case.

5.17 Where the question of fitness is postponed and the defendant is acquitted there is, of course, no need to consider the matter further.[28] If, however, the question of fitness is postponed and the defendant is not acquitted prior to the opening of the case for the defence, the question of fitness must be considered and determined either by the jury by whom the defendant is being tried or by a separate jury.[29] If such a hearing is held and the jury finds that the defendant is not fit to plead the trial does not proceed further[30] and the court is required to order that the defendant be admitted to such hospital as may be specified by the

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24 The Act substantially enacts the recommendations of the Criminal Law Revision Committee in its third report, *Criminal Procedure (Insanity)* (1963, Cmnd 2149).

25 *Criminal Justice Act 1985* (NZ), s 110.

26 *Criminal Procedure (Insanity) Act 1964-1983* (UK), s 4(1) and (2). In other cases the question of fitness to be tried is determined as soon as it arises: id, s 4(3). If the question of fitness to be tried is determined at the commencement of the proceedings (ie it is not postponed under s 4(1) and (2)) and the trial proceeds the defendant must be tried by a jury other than the one which determined the question of fitness: id, s 4(4)(a). In New Zealand, the determination of whether or not the defendant is under disability can be postponed if it is in the interests of the defendant: *Criminal Justice Act 1985* (NZ), s 110(3).

27 [1970] 1 All ER 642.

28 *Criminal Procedure (Insanity) Act 1964-1983* (UK), s 4(2).

29 Id, s 4(4)(b). In New Zealand, the question whether or not a defendant is under a disability is determined by a judge: *Criminal Justice Act 1985* (NZ), ss 109 and 111.

30 *Criminal Procedure (Insanity) Act 1964-1983* (UK), s 4(5).

Secretary of State.[31] Where a jury has found that a person is under a disability the person may appeal to the Court of Appeal against that finding.[32]

5.18 A finding that a person is under a disability and unfit to plead does not bar that person from being tried once the Secretary of State, after consultation with the responsible medical officer, is satisfied that the person can properly be tried.[33]

5.19 The Butler Committee referred to the following shortcomings with the above procedure:

> "The disability of the defendant must wait to be determined at the Crown Court, as the magistrates cannot deal with it. Once it has been determined that the defendant is under disability there is no provision for the facts to be investigated by the court: even where the prosecution evidence has been given, there is no provision for any evidence by the defence, and unless an acquittal is returned on the evidence of the prosecution alone the person under disability must be committed to hospital under an indefinite order. Finally, a person so committed to hospital must remain there, untried, until the Home Secretary decides otherwise, and this may mean a very long period of detention, even detention for life. As things stand at present it is not in the interests of the defendant to seek the protection of a disability plea unless the charge is very serious. If the trial went ahead he might be acquitted altogether, but even if convicted he could hope to receive from the court a more acceptable sentence than committal to hospital for an indeterminate period".[34]

(iii) Adjournment of the trial

5.20 In South Australia the Criminal Law and Penal Methods Reform Committee of South Australia (the Mitchell Committee), as part of a review of court procedure, examined the procedure for dealing with fitness to stand trial.

5.21 The Mitchell Committee was critical of the *Criminal Procedure (Insanity) Act 1964-1983* (UK). The Committee stated:

> "The provision would appear to avoid the inquiry into fitness of the accused to plead only in cases in which the evidence for the Crown is such that no reasonable jury

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31 Id, s 5(1).
32 *Criminal Appeal Act 1968-1985* (UK), ss 15 and 16.
33 *Criminal Procedure (Insanity) Act 1964-1983* (UK), s 5(4).
34 Butler Committee Report, para 10.18.

> properly directed could convict the accused. In our experience such cases are very rare".[35]

5.22 The Committee recommended that a plea that a person was unfit for trial should only be a ground for an adjournment of a trial.[36] It recommended that the question of fitness should be determined by a judge. If the judge decided, or the parties agreed, that the defendant was not fit, the judge could order an adjournment or adjournments of the trial for a period not exceeding six months. One basis for an adjournment of the trial would be the likelihood that the defendant's condition would improve in the intervening period. If his or her condition improved sufficiently a normal trial would be held.

5.23 If, at the end of the period, the defendant was unable to plead, the trial would proceed in the ordinary manner with the accused regarded as having pleaded not guilty. At the trial the following approach would be taken:

> "The fact that the accused is unable to give any or full instructions to his solicitor or counsel should be admissible in evidence upon the hearing of the charge against him. If there is evidence that the accused is incapable of instructing or properly instructing his solicitor or counsel it should be the duty of the judge in summing up to direct the jury that they must consider such evidence and that if they find, on the balance of probabilities, that the accused is incapable of instructing his solicitor or counsel or of giving either of them full instructions, they may take that fact into consideration in deciding whether they have a reasonable doubt as to the guilt of the accused, particularly as an incapacity fully to instruct his solicitor may prevent an accused person from setting up a defence which would be open to him if he were of full mental capacity. If the accused is found guilty of the offence the judge in sentencing will, as a matter of course, take into consideration any matters concerning the accused's mental capacity which may be relevant to the question of sentence. If a term of imprisonment is ordered then it will be for the authorities to decide whether such term or part of it should be spent in the Security Hospital. At the conclusion of the period of the sentence the prisoner, if he is a mental defective within the meaning of the Mental Health Act, will be treated as any ordinary person of his capacity. There should be a right of appeal to the Court of Criminal Appeal from any granting or refusal of an adjournment of the trial."[37]

5.24 This proposed procedure would enable a trial to proceed notwithstanding that the defendant was unfit to stand trial after an adjournment or adjournments of up to six months. However, the trial may not be a fair trial because the defendant would lack capacity fully to

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35 Criminal Law and Penal Methods Reform Committee of South Australia, Third Report, *Court Procedure and Evidence* (1975), 35.

36 Id, 36.

37 Ibid.

instruct his or her solicitor. While the jury would be required to take the defendant's lack of capacity into account in deciding whether they have a reasonable doubt as to the defendant's guilt, this may not result in a just verdict because it could not be expected that lay people would have an adequate appreciation of the degree to which the defence would have been hampered by the defendant's incapacity.

(iv) Postponing the issue until the end of the trial

5.25 The Law Reform Commission of Canada has examined the law in that country relating to mental disorder and the criminal process.[38] On the question of fitness to stand trial, the Commission recommended that a trial judge should be empowered to hold a hearing on a defendant's fitness to plead immediately the issue was raised if both the prosecution and the defence agreed to such a course of action. The Commission also recommended that a judge should be empowered, either on his or her own motion, or at the request of either party, to postpone the determination of the defendant's fitness until the end of the case for the prosecution if of the opinion that it would be in the interests of justice to do so.[39]

5.26 At the conclusion of the prosecution's case the presiding officer could -

(i) on the motion of the defence, acquit the defendant; or
(ii) order a hearing of the defendant's fitness; or
(iii) further postpone the issue of fitness to the end of the trial.

A further postponement of the issue of the defendant's fitness would only occur where the defence had demonstrated that it had a case to present and that it would be in the interests of justice to proceed on the merits of the charge.[40]

5.27 If there were such a further postponement in the case of a trial without a jury, the Commission recommended that the judge should, having heard all the evidence and summations, either acquit the defendant or direct that the issue of fitness be determined. In

38 Report on *Mental Disorder in the Criminal Process* (1976).
39 Id, 16.
40 Ibid.

the latter case, if the judge found that the defendant was fit to stand trial, he or she would then convict the defendant.[41]

5.28 If there were a further postponement to the end of the trial in the case of a trial by jury, the jury, having heard all the evidence and summations, would be required to consider the guilt or innocence of the defendant. If the jury returned a verdict of not guilty the defendant would be acquitted and no fitness hearing would be held. If, however, the jurors were of the opinion that the defendant was guilty they would deliver a ". . . conditional verdict that on the evidence presented to them they are unable to acquit the accused. The verdict is conditional in the sense that it is a verdict of guilty if the accused is fit".[42] At this point the judge would consider whether the defendant was fit to be tried. If so, the conditional verdict would be made absolute and the defendant would be sentenced. If not, the verdict and the trial proceedings would be set aside and the judge would make an order for the disposition of the defendant.[43]

(v) Holding a special trial

5.29 In England, in view of its criticism of the *Criminal Procedure (Insanity) Act 1964-1983*,[44] the Butler Committee recommended that a new procedure be provided. The Butler Committee recommended that the question of whether a defendant was under a disability in relation to the trial should be decided at the outset of the trial or as soon as it was raised. It also recommended that that question should be determined by a judge unless the medical evidence was in dispute and the defence required that the issue be determined by a jury.[45]

5.30 If it were found that the defendant was not under a disability the trial would proceed in the normal manner. The Committee recommended that if the defendant were found to be under a disability, but the medical evidence showed a prospect of an early recovery, that is, within a few months, the judge should be empowered to adjourn the proceedings for up to three months in the first place, with further adjournments of a month at a time up to a

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41 Id, 16-17.
42 Id, 17.
43 Ibid.
44 Para 5.19 above.
45 Butler Committee Report, paras 10.19 and 10.20.

maximum of six months.[46] The trial would proceed in the normal manner if the defendant recovered during the adjournment.

5.31 If it were found that there was no prospect of the defendant recovering or, if during the adjournment, the defendant proved to be unresponsive to treatment a trial of the facts would then proceed.[47] The Committee recommended that the defendant should not have a right to waive the trial of the facts. The Committee said:

> "By definition the defendant under disability cannot exercise judgment to save himself from a possible miscarriage of justice. To allow him to exercise a waiver in this regard would open the way to criticisms that improper pressure had been applied. Justice must be seen to be done".[48]

If, on a trial of the facts, a finding of not guilty could not be returned,[49] the Committee recommended that the jury should be directed to find ". . . that the defendant should be dealt with as a person under disability".[50] The verdict would not count as a conviction and consequently it would not be followed by punishment. The Committee recommended that the court should have power to make various social or medical orders.[51] The Committee said that the primary object of the proposed procedure was ". . . to enable the jury to return a verdict of not guilty where the evidence is not sufficient for a conviction".[52]

5.32 The Committee recommended that the defendant should be entitled to appeal against a finding that he or she is under a disability in relation to the trial[53] or a finding that he or she should be dealt with as a person under a disability on the trial of the facts.[54] The Committee also recommended that the defendant should be permitted to apply to the Court of Appeal for a normal trial where the disability verdict had been returned following the trial of the facts and the defendant recovered. The Court of Appeal could refuse to permit a normal trial and it was envisaged that the Court would take ". . . account of the lapse of time since the events

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46 Id, para 10.19.
47 Ibid.
48 Id, para 10.46.
49 That is, where the prosecution has established its case.
50 Butler Committee Report, para 10.24.
51 Id, para 10.29.
52 Id, para 10.24.
53 Such a right of appeal exists at present: *Criminal Appeal Act 1968-1985* (UK), ss 15 and 16.
54 Butler Committee Report, para 10.31. The latter refers to the situation where a trial proceeds if the defendant has no prospect of recovering or proves unresponsive to treatment during a trial, and a finding of not guilty could not be returned.

took place and whether witnesses were still available".[55] Except at the instigation of the defendant, the Committee recommended that there should be a bar to further prosecutions after a trial of the facts.[56] These recommendations of the Committee have not, as yet, been implemented.

5.33 In New South Wales an elaborate procedure, similar to that proposed by the Butler Committee, has been developed to deal with the question of fitness to stand trial. Under this procedure the question of fitness to stand trial can be raised either before or after the defendant is arraigned upon a charge of an offence. If it is raised before the arraignment, the Attorney General must determine whether an inquiry should be conducted before the trial.[57] The question of a defendant's fitness to be tried is determined by a jury constituted for that purpose.[58] The court may, however, decide not to conduct an inquiry and may dismiss the charge and order that the defendant be released if the court is of the opinion that it is inappropriate to inflict any punishment having regard to -

(a) the trivial nature of the charge;
(b) the nature of the defendant's disability; or
(c) any other matter which the court thinks proper to consider.[59]

5.34 Where an inquiry is conducted[60] and the defendant is found to be fit to stand trial the proceedings brought against the defendant recommence or continue in the usual manner.[61] If, however, the defendant is found to be unfit to stand trial the court is required to refer the person to the Mental Health Review Tribunal.[62] The person may be granted bail or remanded in custody until effect is given to the determination of the Tribunal.[63]

5.35 The Tribunal is required, as soon as practicable, to determine whether, on the balance of probabilities, the defendant will become fit to be tried during the period of 12 months after

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55 Id, para 10.32.
56 Ibid.
57 *Crimes Act 1900-1986* (NSW), s 428E(2).
58 Id, s 428G(1).
59 Id, s 428F(5).
60 The inquiry must not be conducted in an adversary manner: id, s 428H(2).
61 Id, s 428I(1).
62 The Tribunal consists of a President (who must be a barrister or solicitor) and persons appointed from the following classes of person: barristers and solicitors, psychiatrists, and persons having, in the opinion of the Governor, other suitable qualifications or experience: *Mental Health Act 1983-1985* (NSW), s 38.
63 *Crimes Act 1900-1986* (NSW), s 428I(2).

the finding of unfitness.[64] If the Tribunal determines that the person will become fit during that period it is also required to determine whether or not -

(a) the person is suffering from a mental illness; or

(b) the person is suffering from a mental condition for which treatment is available in a hospital and, where the person is not in a hospital, whether or not the person objects to being detained in a hospital,

and notify the court of its determination.[65] The court may then grant the person bail for a period not exceeding 12 months or make an order for his or her detention in a hospital or some other place for a period not exceeding 12 months.[66]

5.36 If the Tribunal determines that a person will not become fit to be tried for an offence within a period of 12 months it must notify the Attorney General of the determination.[67] The Attorney General may -

(a) direct that a special hearing be conducted in respect of the offence with which the person is charged; or

(b) advise the Minister for Police and the court that the person will not be further proceeded against in respect of the offence.[68]

In the latter case the court must order the release of the person.[69] One circumstance in which the Attorney General might decide not to proceed further against the person is where he or she is mentally retarded and not capable of treatment and cure.

5.37 The purpose of a special hearing by a jury is to ensure that:

". . . notwithstanding the unfitness of the person to be tried in accordance with normal procedures, that the person is acquitted unless it can be proved to the requisite criminal

64 Id, s 428K(1).
65 Id, s 428K(2) and (3).
66 Id, s 428L.
67 Id, s 428K(4).
68 Id, s 428M(1)
69 Id, s 428M(3).

> standard of proof that, on the limited evidence available, the person committed the offence charged or any other offence available as an alternative to the offence charged."[70]

5.38 The special hearing must be conducted as nearly as possible as if it were a criminal trial. The defendant is deemed to have pleaded not guilty and must be represented by counsel. The verdicts available to the jury or the court at a special hearing include the following -

(a) not guilty of the offence charged;

(b) not guilty on the ground of mental illness;

(c) that on the limited evidence available, the defendant committed the offence charged or an offence available as an alternative to the offence charged.[71]

If verdicts (a) or (b) are returned, the defendant must be treated as if the verdict had been returned at a normal trial.

5.39 Verdict (c) constitutes a qualified finding of guilt but does not constitute a basis in law for a conviction for the offence to which the finding relates. Where such a verdict is returned the court must indicate whether it would have imposed a sentence of imprisonment if the special hearing had been a normal trial and, if so, nominate a term, called "a limiting term", being the best estimate of any term of imprisonment which would have been appropriate if the special hearing had been a normal trial.[72] Where the court has nominated a limiting term it must refer the person to the Mental Health Review Tribunal for a report on his or her mental condition. Following the report, the court may order that the person be detained in a hospital or some other place.[73] Verdict (c) constitutes a bar to other criminal proceedings for the same offence or substantially the same offence unless the person has been released from custody as a prisoner or discharged from detention as a forensic patient before the expiration of the limiting term if the proceedings are commenced prior to the expiration of the limiting term.[74]

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70 Id, s 428M(2).
71 Id, s 428O(5).
72 Id, s 428P(1).
73 Id, ss 428P(2)-(4) and 428Q.
74 Id, s 428R(1) and (2).

5.40 Where a person who has been found to be unfit to be tried (whether or not a special hearing has been held) has in the opinion of the Mental Health Review Tribunal become fit to be tried, it must notify the Attorney General of that opinion. The Attorney must then either request the appropriate court to hold a further inquiry as to the person's fitness or determine not to proceed further against him or her.[75]

5.41 The procedure proposed by the Butler Committee and the procedure in New South Wales enable a normal trial to take place if that is at all reasonably possible. In other cases, a defendant is given the opportunity to contest the charge and possibly be acquitted. However, he or she is not prejudiced by mounting a defence because a conviction cannot be recorded if he or she was under disability during the trial.

5.42 A difficulty with the procedure recommended by the Butler Committee is that it is necessary to assess whether a defendant under a disability has any prospect of recovering. This could prove to be very difficult to assess. It has, however, been suggested that this poses a quite proper medical question for a psychiatrist[76] A similar difficulty arises in New South Wales where, following a determination that a defendant is unfit to stand trial, the Mental Health Review Tribunal must determine whether the defendant will become fit to be tried during the period of 12 months after the finding of unfitness.[77]

(d) Who should be able to raise the issue?

5.43 At present it appears that the defence, the prosecution[78] and the court may raise the issue of whether a defendant is fit to stand trial. On the one hand it may be considered that this issue is a matter of such importance to the trial process that it should continue to be possible for it to be raised by the defence, prosecution or the court. On the other hand, the fact that the prosecution and the defence are adversaries may suggest that the prosecution should not be permitted to raise an issue which may prevent the defendant from challenging the prosecution's case. This ground of objection would be removed if some procedure were provided to enable the guilt or innocence of the defendant to be investigated judicially.

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75 Id, s 428S.

76 A A Bartholomew, K L Milte & W C Canning, *Unfitness to Plead and the Admissibility of Confessions* (1980) 13 ANZJ Crim 37, 40.

77 Para 5.35 above.

78 *Ngatayi v R* (1980) 147 CLR 1, 9.

(e) Who should determine the issue?

5.44 At present a jury, not the judge presiding at the trial, determines whether the defendant is fit to stand trial.

5.45 The Butler Committee recommended that the issue of a defendant's disability should be determined by a judge unless the medical evidence was in dispute and the defence wished to have the issue determined by a jury.[79] The Law Reform Commission of Canada went further and recommended that fitness to stand trial should be a question of law to be determined by the presiding officer in all cases.[80] The Commission made this recommendation because it considered that the issue was procedural in nature and because the defendant's culpability was not at issue.[81] In this State, the Murray Report also contains a recommendation that this issue should be determined by a judge.[82] The issue is determined by the trial judge in New Zealand.[83]

5.46 The question of fitness to stand trial does involve the determination of a question of fact to some extent. In the case of trials with a jury questions of fact have traditionally been determined by a jury. However, the defendant's culpability is not at issue. The reason given in the Murray Report for recommending that the issue of fitness should be determined by a judge was that it is difficult to convey to a jury an adequate understanding of fitness to stand trial which involves an appreciation of "not only the factual matters likely to be raised in the course of the trial, but also the legal issues which arise, both as matters of substance and as procedural matters in relation to how the accused would be best served in conducting his defence".[84] Providing for a judge to determine the matter would also avoid the need for two jury trials, one to determine the issue of fitness and the other to determine the defendant's guilt or innocence.

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79 Para 5.29 above.
80 Para 5.25 above.
81 *Mental Disorder in the Criminal Process* (1976), 16.
82 Murray Report, 400-401.
83 See footnote 29 above. This is also the position in the Northern Territory: *Criminal Code*, s 357; *R v Bradley* (1986) 40 NTR 6.
84 Murray Report, 401.

(f) A defendant's right of appeal

5.47 Where the issue of fitness to stand trial has been determined and the trial proceeds,[85] the defendant, if convicted, may appeal against the conviction on a question of law or fact relating to a preliminary issue.[86] However, there is a no right of appeal against a determination that a defendant is unfit to stand trial.[87]

5.48 The Butler Committee recommended that a defendant should continue to be entitled to appeal against a finding that he or she was under a disability.[88] In Victoria, the defendant may appeal to the Full Court against a finding that he or she is under a disability rendering him or her unfit to stand trial.[89] If the prosecution continues to be permitted to raise the issue of fitness,[90] the Commission considers that, in the interests of fairness to the defendant, a defendant should have a right to appeal against a determination that he or she is unfit to stand trial.

5. QUESTIONS AT ISSUE

5.49 The Commission welcomes comment (with reasons where appropriate) on any matter arising out of this chapter and, in particular, on the following -

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

1. Should it be possible for the issue of fitness to stand trial to be raised at a preliminary hearing?

Paragraphs 5.9 to 5.11

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85 That is, if the accused is found to be fit to stand trial

86 *Criminal Code*, s 688(1)(a) and (b). See *R v Podola* [1959] 3 All ER 418, 427-428.

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

88 Para 5.32 above.

89 *Crimes Act 1958-1986* (Vic), s 570C. There is also a right of appeal in New Zealand: *Criminal Justice Act 1985* (NZ), s 112.

90 Para 5.43 above.

Judicial investigation notwithstanding that the defendant is or may be unfit to stand trial

2. Should there be a procedure for the determination of the guilt or innocence of a defendant notwithstanding that he or she is or may be unfit to stand trial?

Paragraph 5.8

3. If so, what procedure should be provided and, in particular, do any of the following provide a suitable model -

(a) the procedure under the *Criminal Procedure Insanity Act 1964-1983* (UK) *(paragraphs 5.15 to 5.19);*

(b) the proposals of the Mitchell Committee (*paragraphs 5.20 to 5.24)*;

(c) the proposals of the Law Reform Commission of Canada (*paragraphs 5.25 to 5.28)*;

(d) the proposals of the Butler Committee *(paragraphs 5.29 to 5.32);* or

(e) the procedure in New South Wales *(paragraphs 5.33 to 5.40)*?

Should the prosecution be able to raise the issue of fitness to stand trial?

4. Should it be possible for the prosecution to raise the issue of fitness to stand trial?

Paragraph 5.43

Who should determine the issue of fitness to stand trial?

5. Should a judge, and not a jury, determine the issue of fitness to stand trial?

Paragraphs 5.44 to 5.46

A defendant's right of appeal

6. Should a defendant have a right to appeal against a determination that he or she is unfit to stand trial?

Paragraphs 5.47 and 5.48

Chapter 6
POWERS OF COURTS OF SUMMARY JURISDICTION

1. INTRODUCTION

6.1 Item 5 of the Commission's terms of reference requires it to consider whether courts of summary jurisdiction require any powers beyond those contained in section 36 of the *Mental Health Act 1962-1985*[1] to permit them to deal with defendants who come before them suffering from mental disorder. In particular, the Commission is required to consider whether such courts should be invested with powers analogous to those given to courts hearing charges of indictable offences under sections 631, 652 and 653 of the *Criminal Code*. These sections permit superior courts to deal respectively with fitness to stand trial, soundness of mind during the trial and the defence of insanity.

2. FITNESS TO STAND TRIAL

(a) The present law

6.2 Unlike trials on indictment, there is no statutory provision under which the question of a defendant's fitness to stand trial can be raised and dealt with in a summary trial before a Court of Petty Sessions. Apart from using section 36 of the *Mental Health Act 1962-1985*,[2] the purpose of which appears to be to determine whether or not a person should be committed to an approved hospital and not to determine fitness to stand trial, one course of action that may be open to a court which concludes that a defendant may be unfit to stand trial is to enter a plea of not guilty.[3] If not, it would appear that any conviction subsequently recorded could be set aside. On the other hand, there is authority for the view that the court should go no further and should desist from hearing the charge.[4]

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1 This Act is repealed by the *Mental Health Act 1981*. However, the latter Act has not been proclaimed. Since it was enacted the mental health legislation in this State has been reviewed by the Mental Health Legislation Review Committee. This review led to the enactment of the *Authority for Intellectually Handicapped Persons Act 1985-1986* and may result in legislation replacing both the *Mental Health Act 1962-1985* and the *Mental Health Act 1981*.

2 Paras 6.7 to 6.9 below.

3 *R v Martin* (1904) 4 SR (NSW) 720, 725.

4 *Pioch v Lauder* (1976) 13 ALR 266, 272.

(b) Discussion

6.3 Two persons[5] have suggested to the Commission that it would be desirable to have an express procedure whereby the question of a defendant's fitness to stand trial can be raised in Courts of Petty Sessions.

6.4 In the case of trials on indictment, if it appears to be uncertain, for any reason, whether the defendant is capable of understanding the proceedings at the trial, so as to be able to make a proper defence, a jury of twelve must be empanelled to determine whether or not he or she is so capable.[6] The incapacity is not confined to incapacity caused by insanity or by infirmity or defect of the mind.[7] In one case, involving an Aborigine, incapacity was successfully based on cultural differences, one culture having concepts not appropriate to another culture.[8] Whatever the incapacity, it must be established that it renders the defendant incapable of understanding the proceedings at the trial so as to make a proper defence.[9] The Commission suggests that whatever criteria should apply to trials on indictment[10] should also apply in summary trials but that the issue should be determined by the presiding judicial officer.[11]

6.5 In the previous chapter various procedures were discussed which would enable a judicial investigation of the charge of an indictable offence to be held notwithstanding that the defendant was or could be unfit to stand trial. Any such procedure adopted in respect of indictable offences could also be adopted for trials of simple offences by courts of petty sessions.

6.6 The following chapter contains a discussion of possible means of reviewing the custody of persons charged with indictable offences in the Supreme or District Court who are found to be unfit to stand trial.[12] Any procedure adopted could also be applied to persons found to be unfit to stand trial in summary proceedings. However, there may be a case for having an additional or separate procedure in the case of those found to be unfit to stand trial

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5 Mr M J McGuire, SM and Mr P S Michelides, SM.

6 Para 5.2 above.

7 *Ngatatyi v R* [1980] WAR 209, 210. Although the defendant was granted special leave to appeal to the High Court the appeal was unsuccessful: *Ngatayi* (1980) 147 CLR 1.

8 *Fast End to Trial: Law Too Hard For Youth To Follow*, The West Australian, 18.5.1976. See also *R v Grant* [1975] WAR 163.

9 Para 4.1 above.

10 Para 4.15 above.

11 The question of whether or not the court should have power to obtain a psychiatric report is raised in paras 9.7 to 9.11 below.

12 Paras 7.3 to 7.14 below.

during summary proceedings. These proceedings involve offences which are less serious than those dealt with on indictment. The public interest in the detention of such persons as part of the criminal process and the continued prosecution of the charges concerned is therefore not as great, and civil processes relating to mentally disordered persons may be more appropriate. In the case of a finding of unfitness to stand trial during summary proceedings the superintendent of any institution in which the defendant was held could be required to review the defendant's fitness to stand trial and, if of the opinion that the defendant had become fit to stand trial, report that fact to the court. The superintendent should, in any case, be required to report periodically to the court on the defendant's condition. The court could also be given power to order, at any time, that the defendant be brought before it for a consideration of whether or not he or she was then fit to stand trial or to reconsider whether he or she should be discharged from custody. In addition, the Attorney General after receiving a report from the same source could be authorised to apply to the court for the complaint to be withdrawn. The report would have regard to the mental condition of the defendant, any relationship between the mental disorder of the defendant and the alleged offence, the likely duration of the disorder and the likely outcome of treatment and other matters likely to assist the Attorney General. Such a power would provide a simple and speedy way of disposing of a complaint where, for example, the defendant was unlikely to respond to treatment for a long time or a conviction was likely to interfere with or delay recovery. The consequence of withdrawal of the complaint would be that the defendant would no longer be subject to any special procedures relating to mentally disordered defendants but would remain subject to the civil law relating to mentally disordered persons.

3. SECTION 36 OF THE MENTAL HEALTH ACT 1962-1985

(a) The present law

6.7 This section provides that where it appears to a court of summary jurisdiction that a person charged with an offence is, or may be, suffering from mental disorder,[13] the court may order that he or she be remanded for any period not exceeding 28 days,[14] either -

(a) on bail, for examination by a medical practitioner; or

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13 S 5 of the *Mental Health Act 1962-1985* provides that "mental disorder" means "any illness or intellectual defect that substantially impairs mental health but, except for the purposes of section 47 and Part VI [ss 62-78], does not include a handicap whereby a person is an intellectually handicapped person".

14 Under the *Mental Health Act 1981* (s 50(1)) the period is seven days.

(b) in custody, for reception into, and observation in, an approved hospital.

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

6.8 If the defendant is released on bail for examination by a medical practitioner and the practitioner is of the opinion that he or she appears to be suffering from mental disorder, the practitioner is required to refer the defendant to an approved hospital and the court may then order that the defendant be conveyed to, and received into, an approved hospital.[15] Where the defendant is remanded in custody for observation in an approved hospital and the superintendent of the hospital is of the opinion that he or she is suffering from mental disorder, the superintendent is required to admit the defendant as a patient and inform the court of that fact.[16]

6.9 When a person who has been admitted to an approved hospital under section 36 is to be discharged, the superintendent, unless the court which made the order otherwise directs, is required to inform the court of the proposed discharge, and if so required by the court, discharge the defendant into his or her former custody.[17]

(b) Discussion

6.10 At present, the power contained in section 36 of the *Mental Health Act 1962-1985* is the principal power which Courts of Petty Sessions have to deal with a person who appears to be mentally disordered. Under this section it is possible for a person to be diverted from the criminal process and detained as a patient in an approved hospital without the charge being determined.

6.11 Diversion from the criminal process under section 36 is not, however, without problems. The section in its terms is not related to fitness to stand trial and appears to empower a Court of Petty Sessions to set proceedings in train for what is effectively an

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15 *Mental Health Act 1962-1985,* s 36(2).
16 Id, s 36(3).
17 Id, s 36(4).

involuntary commitment of a person who happens to appear before the court on a criminal charge. While it may be in a defendant's interest to receive treatment in hospital, he or she may resent an involuntary commitment, particularly if it is for a period longer than the likely sentence under the offence charged. It also deprives a defendant of an opportunity of exoneration. For these reasons it may be considered that the only ground on which a defendant should be able to be diverted from the criminal process before a charge is determined is where the trial cannot proceed because the defendant is unfit to stand trial.[18]

4. THE INSANITY DEFENCE

(a) The present law

6.12 Although the insanity defence provided by section 27 of the *Criminal Code* can be raised by a person who is charged with a simple offence[19] there is no requirement that the court record a finding that the defence of insanity has been raised successfully and the court has no power to make orders for the disposition of a person who successfully raises this defence. It would appear that the court should dismiss the complaint and, if the defendant is in custody, release him or her.

(b) Discussion

6.13 Where a court finds that the defence of insanity under section 27 of the *Criminal Code* has been established, the Commission considers that there should be an express requirement for the court to record such a finding.[20]

6.14 Where the defence of insanity under section 27 of the *Criminal Code* is successfully raised in trials on indictment, the court is required to order that the defendant be kept in strict custody until Her Majesty's pleasure is known.[21] The Governor, in the name of Her Majesty, may give such order for the safe custody of such person during his or her pleasure, in such

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18 Paras 6.2 to 6.6 above.

19 Para 3.1 above. The Commission's inquiries indicate that it is rare for the defence of insanity to be raised in Courts of Petty Sessions.

20 A recommendation similar to this has been made in England: Butler Committee Report, para 18.19.

21 *Criminal Code*, s 653.

places of confinement and in such manner as the Governor may think fit. The purpose of this provision is to protect the community and to protect the person concerned.[22]

6.15 In Courts of Petty Sessions, one option would be to provide for the court to acquit the defendant and leave the question of his or her disposition to the existing civil procedures.[23] In support of this view, it could be argued that the defendants dealt with in summary courts are unlikely to be of such a dangerous character as to require special dispensing powers. Alternatively, whichever approach was adopted in respect of persons acquitted on account of unsoundness of mind in trials on indictment could be adopted in the case of defendants so acquitted in summary proceedings.[24]

5. OTHER POWERS

(a) Hospital orders

6.16 In a number of jurisdictions studied by the Commission, where a person is convicted or it is established that the defendant committed the offence, courts of summary jurisdiction have power to make a hospital order.[25] The legislation in England and aspects of the legislation in the other jurisdictions are discussed below.

6.17 In England, where a person is convicted of an offence punishable with imprisonment, a Magistrates' Court may authorise his or her admission to and detention in a specified hospital. The court must be satisfied, on the written or oral evidence of two medical practitioners, that the offender is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment and that:[26]

> (i) "the mental disorder from which the offender is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and, in the case of psychopathic disorder or mental

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22 *Wilsmore v Court* [1983] WAR 190, 200.

23 For example, s 29 of the *Mental Health Act 1962-1985* provides that a justice may, upon the application of any person, order that a person be apprehended and conveyed to and received into an approved hospital if the justice is satisfied that the person is suffering from mental disorder and that it is in the interest of that person or of the public that he or she should be admitted to an approved hospital for treatment under the Act.

24 See paras 3.67 to 3.71 above.

25 England: *Mental Health Act 1983-1984*, s 37; Victoria: *Mental Health Act 1986*, s 15; New Zealand: *Criminal Justice Act 1985*, s 118.

26 *Mental Health Act 1983-1984* (UK), s 37(2).

impairment, that such treatment is likely to alleviate or prevent a deterioration of his condition;" and

(ii) "the court is of the opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section."

A hospital order may be made without convicting the person, and without a trial being held,[27] if the court is satisfied that the person is suffering from mental illness or a severe mental impairment and that the defendant did the act or made the omission charged.[28] Where a hospital order is made, the court may not pass a sentence of imprisonment or impose a fine or make a probation order in respect of the offence.[29]

6.18 In England a person the subject of a hospital order is generally treated in the same way as a person compulsorily admitted to a hospital as a result of civil processes.[30]

6.19 In New Zealand a hospital order may be made where a person is convicted of any offence, whether or not the offence is punishable with imprisonment. Instead of passing sentence on him or her, the court may order that he or she be detained in a hospital if the court is satisfied by the production of a certificate by two medical practitioners that the defendant is mentally disordered and that his or her mental condition requires that he or she be detained in a hospital either in his or her own interest or for the safety of the public.[31]

6.20 The approach adopted in England and the other jurisdictions referred to above involves a significant departure from the traditional approach to criminal law because it involves the foregoing of punishment. It is a utilitarian approach which looks beyond the defendant's culpability to consider what is expedient or suitable with the future of the defendant in mind. Such an approach would not be novel in Western Australia. Probation orders involve a similar approach.

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27 *R v Lincolnshire Justices; ex parte O'Connor* [1983] 1 All ER 901.

28 *Mental Health Act 1983-1984* (UK), s 37(3). This power is ". . . an acknowledgment of the fact that some offenders . . . are so disordered that the magistrates cannot be sure that they understand the proceedings sufficiently to be fairly tried": N Walker, *Sentencing: Theory, Law and Practice* (1985), 336.

29 *Mental Health Act 1983-1984* (UK), s 37(8).

30 There are exceptions, however: see *Mental Health Act 1983-1984* (UK), s 40(4).

31 *Criminal Justice Act 1985* (NZ), s 118(1).

6.21 In England, a hospital order can be made only if the offence with which the defendant is charged is punishable with imprisonment. There is no such limitation in New Zealand. The limitation in England to offences punishable with imprisonment may have been provided because it was considered to be unfair to deprive a person of his or her liberty if he or she would not otherwise have been liable to be deprived of his or her liberty on conviction. Such a limitation may be unwarranted if one views a hospital order as not being of a retributive nature.

6.22 In England an offender may be detained in a hospital for up to six months under a hospital order.[32] That period may be extended.[33] Generally, the offender is treated in the same way as a patient who has been compulsorily admitted as a result of a civil process and may be discharged at any time by the responsible medical officer.[34]

6.23 The Commission welcomes views on whether provision should be made in Western Australia for hospital orders and, if so, in what circumstances. If it is considered to be desirable to introduce the concept of hospital orders, the Commission suggests that the court should be required to have regard to the following criteria -

1. Is it in the defendant's interest that he or she be detained in a hospital? [It may be desirable that the defendant receive basic nursing care or treatment in a hospital, particularly if the alternative is a term of imprisonment and prison psychiatric facilities are inadequate.]

2. Would treatment in a hospital have or be likely to have any effect on the defendant's mental disorder? [If not the hospital would only be giving custodial care at the expense of limited medical resources.]

3. Is there any other method of disposing of the case which might be more desirable? [It might be more desirable to make a probation order subject to the condition that the defendant undergo psychiatric treatment.[35]]

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32 *Mental Health Act 1983-1984* (UK), ss 20(1) and 40(4).

33 Id, s 20(2).

34 Id, ss 23 and 40(4). An application may also be made to a Mental Health Review Tribunal for a direction that the offender be discharged: id, s 69(1).

35 Paras 6.25 to 6.27 below.

4. Is a hospital order in the public interest? [The nature of the offence, the character of the defendant, his or her criminal record and the lack of a connection between the offence and the defendant's mental condition might suggest that he or she should be punished rather than given a hospital order.]

5. Does the hospital agree to the defendant's admission? [In England, the court must be satisfied before making a hospital order that arrangements have been made for the admission of the person to a specified hospital.[36] This condition may be an obstacle to admission if defendants are known to misbehave or have committed offences which make them appear to be dangerous. It has been suggested to the Commission that it would not be possible to provide for hospital orders in this State unless special security hospitals were provided along the lines of those in England such as Broadmoor or, alternatively, unless hospital orders were only made in respect of those sufficiently tractable to be managed in a non-secure hospital setting.]

6.24 It would be incongruous if provision were made for hospital orders in Courts of Petty Sessions but not in the Supreme or District Court. Although the matter is not in terms within the Commission's terms of reference, the Commission suggests that, if hospital orders are considered to be desirable, all of the above courts should be empowered to make them.

(b) Psychiatric probation orders

6.25 Courts of summary jurisdiction have power to make a probation order under which the offender agrees to submit to medical, psychiatric or psychological treatment, including treatment in a hospital.[37]

6.26 Psychiatric probation orders provide a relatively cheap and a humane means of dealing with an offender. However, according to the Butler Committee, there is conflicting evidence as to their value and effectiveness.[38] Although it is necessary for a defendant to consent to a psychiatric probation order, it has been suggested that a person is "less likely to be motivated

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36 *Mental Health Act 1983-1984* (UK), s 37(4).

37 *Offenders Probation and Parole Act 1963-1985*, s 9(6)(a).

38 In England a psychiatric probation order may be made under s 3 of the *Powers of the Criminal Courts Act 1973-1985*.

to co-operate than a patient who has sought treatment himself".[39] It has also been suggested that some offenders, such as alcoholics and drug-addicts, who accept treatment under a probation order change their minds after the court hearing.

6.27 The Butler Committee also referred to a study which suggested that attendance at clinics did not decrease the likelihood of reoffending.[40] Nevertheless, the Committee had no doubt that the order should be retained. It said:

> "The order is a recognition by the court that the offender needs treatment, and gives him the opportunity of receiving it. It enables the court to take a positive step in relation to the offence without inflicting harm, and there is always the hope that it may do good. From their own experience of involvement with probationers some of our members were able to support the value of the psychiatric probation order. Where a team approach had developed, with the doctor and the probation officer playing active, mutually supportive roles in giving the probationer the encouragement he needed, the arrangements had proved effective".[41]

The Commission considers that the psychiatric probation order should be retained in Western Australia.

6. QUESTIONS AT ISSUE

6.28 The Commission welcomes comment (with reasons where appropriate) on any matter arising out of this chapter and, in particular, on the following -

Fitness to stand trial

1. Should a Court of Petty Sessions have express statutory power to deal with the question of fitness to stand trial?

   Paragraphs 6.4 and 6.5

2. If so, how should a defendant be dealt with if he or she is found to be incapable of understanding the proceedings?

   Paragraph 6.6

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39 Butler Committee Report, para 16.2.
40 Id, para 16.3.
41 Id, para 16.4.

Section 36 of the *Mental Health Act 1962-1985*

3. Should the power contained in section 36 of the *Mental Health Act 1962-1985* be retained?

Paragraph 6.11

The defence of insanity

4. Should there be an express provision enabling a Court of Petty Sessions to record a finding that a person is not guilty[42] under section 27 of the *Criminal Code*?

Paragraph 6.13

5. What powers should a Court of Petty Sessions have to deal with a person who is found to be not guilty under section 27 of the *Criminal Code*?

Paragraphs 6.14 and 6.15

Hospital orders

6. Should a Court of Petty Sessions be given power to make a hospital order and, if so, in what circumstances?

Paragraphs 6.17 to 6.23

Psychiatric probation orders

7. Should psychiatric probation orders be retained?

Paragraphs 6.25 to 6.27

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42 Or not responsible: see para 3.65 above.

Chapter 7
REVIEW OF THE SITUATION OF PERSONS DETAINED IN CUSTODY

1. TERMS OF REFERENCE

7.1 Under item 3 of the terms of reference, the Commission is required to consider the procedures which should be provided for reviewing the situation of persons who have been detained or kept in custody under the following provisions of the *Criminal Code* -

1. Sections 631 (unfit to stand trial) and 652 (unsound of mind during the trial);
2. Sections 653 and 693(4) (both involve an acquittal on account of unsoundness of mind); or
3. Section 662 (a person imprisoned for an indeterminate period because of his or her mental condition after being convicted of an indictable offence).

7.2 These three categories involve the detention of a person at different stages of the criminal trial process. Under the first, a person may be detained prior to a determination of his or her guilt or innocence. Under the second, a person may be detained where he or she has been found to be not guilty on account of unsoundness of mind. Under the third, a person who has been convicted of an indictable offence may be detained for an indeterminate period. As different considerations may apply to the review of the situation of a person detained in each of these circumstances they are discussed separately below.

2. PERSONS FOUND TO BE UNFIT TO STAND TRIAL OR INSANE DURING THE TRIAL

(a) Present law and practice

7.3 Where a person is found to be unfit to stand trial by a jury, the court may order that he or she be kept in custody in such place and in such manner as the court thinks fit.[1] There is no statutory procedure for the review of the situation of a person so detained. The person's mental state can, however, as a matter of administrative practice, be kept under review by the Prisons Department or the Health Department, as the case may be.

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1 *Criminal Code*, s 631.

7.4 Where a defendant is found to be of unsound mind during a trial, the court must order that he or she be kept in strict custody until dealt with under the law relating to insane persons.[2] Section 47(1) of the *Mental Health Act 1962-1985* provides that the Minister may direct that such a person be admitted as a patient in an approved hospital. If this is done, the person must be detained in the hospital until the superintendent or another psychiatrist certifies that he or she is fit to be discharged. His or her case may therefore be kept under review within the hospital as a matter of medical routine.[3]

7.5 The situation of a person who is held in strict custody having been found to be unsound of mind during the trial is required to be reviewed by the Parole Board. The Board is required to make an annual report and recommendation to the Attorney General with respect to each such person.[4]

(b) Discussion

7.6 The existing capacity for informal administrative review of those unfit to stand trial is desirable. However, there is a good case for also providing for a statutory review procedure in such cases. This would at least help alleviate any fear of the person concerned that his or her situation was being overlooked. In Tasmania, for example, the responsible medical officer is required to report to the Attorney General on the person's progress at intervals of three months during the first year in custody and thereafter annually.[5]

7.7 An alternative or additional approach to that of Tasmania would be to provide for a periodic review by a tribunal or court.[6] Such a review would also be appropriate where a person considered that he or she was fit to stand trial and the custodial authority did not agree. Review by either a court or specialist tribunal would have the advantage that the review would be carried out by an independent body, a body which could provide a means of testing the diagnosis of the custodial authority and receive evidence from or on behalf of the person concerned. A specialist tribunal would have an advantage over one of the existing courts or

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2 Id, s 652.

3 S 55 of the *Mental Health Act 1962-1985* relating to review by the Supreme Court of a person detained as a patient in any approved hospital does not apply to a person admitted under s 47: *Mental Health Act 1962-1985*, s 56.

4 *Offenders Probation and Parole Act 1963-1985*, s 34(2)(a).

5 *Criminal Code* (Tas), s 382(7B).

6 In New Zealand there is provision for review by a court: *Mental Health Act 1969-1985* (NZ), s 74(4).

the Parole Board in that some of its members could be required to be selected on the basis of their expertise in the mental health area.[7] A specialist tribunal would be likely to be speedier and more flexible than a court and more suited than a court to carrying out periodic reviews.

7.8 In at least two jurisdictions the responsibility for carrying out such reviews has been given to a tribunal with expertise in the mental health area. In Queensland, for example, persons who have has been found to be unfit to stand trial on account of their mental condition must be detained as a restricted patient in a security patients' hospital. Their mental condition must be reviewed in relation to fitness for trial once every three months for the first 12 months by a Patient Review Tribunal. The Tribunal must consist of not less than three members and not more than five members, of whom one must be a judge of the District Court, one a medical practitioner and one a person qualified to practise a profession that requires a special knowledge and interest with respect to mental illness.[8] At the end of 12 months the Tribunal must determine the likelihood of the person being fit for trial within a reasonable time.[9] If the Tribunal determines that the defendant is fit for trial it must inform the Minister for Justice who may order that proceedings be continued against the defendant. If, however, the Tribunal finds that it is unlikely that the defendant will be fit for trial within a reasonable time it must report to the Minister accordingly. The report, together with the Minister's recommendation must be submitted to the Governor in Council. The Governor may order that proceedings against the defendant be discontinued or defer the decision for consecutive periods of six months. The Patient Review Tribunal is required to report on the defendant's mental condition before each such consecutive period.

7.9 A person aggrieved by a report of the Patient Review Tribunal may appeal to the Mental Health Tribunal.[10] The appeal is heard and determined by way of a full rehearing.

7.10 In New South Wales where a person is ordered to be held in custody following a special hearing,[11] the Mental Health Review Tribunal is required to review the person's case within 14 days after the making of the order. On such a review the Tribunal must determine

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7 The Parole Board consists of seven members, four of whom are a judge, the Director of Prisons, the Director, Probation and Parole Services and a member of the Police Force. The other members are not required to have any special qualifications.

8 *Mental Health Services Act 1974-1984* (Qld), s 14(3).

9 Id, s 34(1).

10 Id, s 37(1).

11 Para 5.39 above.

whether the person has become fit to be tried for an offence and whether the safety of the person or any member of the public will be seriously endangered by the person's release.[12]

7.11 Where the Tribunal determines that the person is fit to be tried it must notify the Attorney General accordingly.[13] The Attorney General must then take the action referred to in paragraph 5.40 above.

7.12 Where the Tribunal finds that the person has not become fit to be tried and that the safety of the person or any member of the public will not be seriously endangered by the person's release it must make a recommendation to the Minister for the person's release.[14] The Minister must notify the Attorney General of the recommendation. The Attorney General then has 30 days in which to object to the person's release. If no objection is made, the person may be released unconditionally or subject to conditions.[15] The person cannot be released if the Attorney General objects on the ground that the person has served insufficient time in custody or under detention or the Attorney General intends to proceed with criminal charges against the person.[16]

7.13 Where a person is not released from custody the Tribunal is involved in an ongoing review of him or her. Such a review may be carried out at any time but must in any case be carried out every six months or at the request of the Minister for Health, the Attorney General, the Minister for Corrective Services, the Chief Medical Officer or a medical superintendent.[17] The Tribunal must not make a recommendation for the release of a person unless it is satisfied that the safety of the person or any member of the public will not be seriously endangered by the person's release.[18]

7.14 While the existing *Mental Health Act* in Western Australia does not provide for a mental health tribunal possible new legislation in this area[19] could make provision for such a tribunal. If established, the tribunal could be given responsibility for periodically reviewing the situation of persons found to be unfit to stand trial or unsound of mind during the trial.

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12 *Mental Health Act 1983-1986* (NSW), s 117(1).
13 Id, s 117(2)
14 Id, s 117(3).
15 Id, s 117(5).
16 Id, s 117(6).
17 Id, s 119(1) and (2).
18 Id, s 119(3).
19 See footnote 1, ch 6.

Provision could be made for an appeal from the tribunal to the Supreme Court on questions of law. Such an appeal would be consistent with the recommendations of the Commission in its report *Review of Administrative Decisions: Appeals (1982).*

3. PERSONS ACQUITTED ON ACCOUNT OF UNSOUNDNESS OF MIND

(a) The present law

7.15 Where a person is acquitted on account of unsoundness of mind either at the trial[20] or on appeal[21] the court is required to order that the person be kept in strict custody until Her Majesty's pleasure is known. The Governor, in the name of Her Majesty, may order that the person be kept in safe custody during his or her pleasure, in such place and in such manner as the Governor may think fit. Such a person may be released from custody by the Governor on such conditions as he or she thinks fit, including the condition that the person be under the supervision of a parole officer.[22] Also, under section 48(1) of the *Mental Health Act 1962-1985*, the Governor has power to order that that person be admitted as a patient to an approved hospital and may thereafter order that he or she be liberated subject to specified terms and conditions.

7.16 The purpose of the Governor's order that a person be held in safe custody is "to protect the public and in certain cases to protect the person made the subject of the order".[23] The merits of such a determination cannot be reviewed by the courts. However, different considerations would apply "if it could be shown that [the power to continue the safe custody order] was being exercised for a purpose which is foreign to it as would . . . be the case if it could be made to appear that the safe custody order was being continued for no purpose other than punishment".[24]

7.17 Where a person has been ordered to be held either in strict or in safe custody the *Offenders Probation and Parole Act 1963-1985*[25] requires the Parole Board to make a report and recommendation to the Attorney General with respect to that person annually or

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20 *Criminal Code*, s 653.
21 Id, s 693(4).
22 *Offenders Probation and Parole Act 1963-1985*, s 34A(1).
23 *Wilsmore v Court* [1983] WAR 190, 195.
24 Id, 196.
25 S 34(2)(a). A detainee is not shown the report, nor is he or she entitled to reasons for the recommendation made in the report.

whenever requested by the Attorney General. The provisions of that Act do not apply where the person has been admitted to an approved hospital.[26] A person so admitted may be liberated upon such terms and conditions as the Governor thinks fit.[27] If a person so liberated breaches any term or condition of the release, he or she may be retaken and returned to such hospital as the Governor may order.[28]

7.18 There is an inconsistency in the drafting of the *Offenders Probation and Parole Act 1963-1985* and the *Mental Health Act 1962-1985*. Section 34C(2) of the *Offenders Probation and Parole Act* provides that when the Governor makes an order pursuant to section 48(2) of the *Mental Health Act* that "a person be returned to strict custody" the *Offenders Probation and Parole Act*, including the provision for an annual report and recommendation to the Attorney General, once again applies to the person. However, section 48(2) of *the Mental Health Act* does not provide for the person to be returned to strict custody. This lacuna could be overcome by providing that a person could be returned to strict or safe custody as the case may be on the Governor's order. It would also be necessary to amend the *Offenders Probation and Parole Act* so that it applied whenever a person was returned to either strict or safe custody. The result would be, as was probably intended, that the *Offenders Probation and Parole Act* would apply to those persons being held in safe or strict custody but not to those being held as patients under the *Mental Health Act*.[29]

7.19 The provisions of the *Mental Health Act 1962-1985* relating to the discharge of patients do not apply to a person ordered to be admitted to an approved hospital by the Governor unless the Governor orders otherwise.[30] A person's mental condition may, however, be kept under continuous review by a psychiatrist and the person may eventually be released on such terms and conditions as the Governor thinks fit.[31]

(b) Discussion

7.20 At present in Western Australia, the procedure for reviewing the situation of a person held in custody who has been acquitted on account of unsoundness of mind varies, depending

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26 *Offenders Probation and Parole Act 1963-1985*, s 34C(1).
27 *Mental Health Act 1962-1985*, s 48(1).
28 Id, s 48(2).
29 Appropriate provisions were enacted in the *Mental Health Act 1981* which has not been proclaimed: see footnote 1, ch 6.
30 *Mental Health Act 1962-1985*, s 49(1).
31 Id, s 48(1).

on the institution in which he or she is held. If held in a prison the person's position is reviewed periodically by the Parole Board.[32] If, however, the person is being held in an approved hospital the position is kept under review by psychiatrists at the hospital. Neither the Parole Board nor the superintendent of the hospital has power to release the person from custody. The decision whether or not the person should be released is made by the Government after taking into account the advice of the Parole Board or the mental health authorities, as the case may be.

7.21 There is no specific statutory guidance as to the factors which should be taken into account in determining whether or not a person detained following a finding of not guilty on account of unsoundness of mind should be released from custody. However, consideration should be given to whether or not continued detention is necessary "to protect the public and in certain cases to protect the person made the subject of the order".[33]

7.22 In New South Wales, where statutory guidance is provided, consideration is required to be given to whether the safety of the person or any member of the public will be seriously endangered by the person's release.[34] This criterion may provide a suitable model for this State though it should be noted that it would not include a person who might endanger property.

7.23 At present the decision whether or not to release a person acquitted on the ground of unsoundness of mind is made by the Executive with the advice of the Parole Board or the mental health authorities, depending on the manner in which the person is being held in custody. In the Commission's view it is desirable to retain such review by the Executive because it can be carried out with comparative informality on a periodic basis. In the case of the Parole Board there is a statutory requirement that a report be made to the Attorney General annually. There is no similar requirement in the case of a person being held in an approved hospital. The Commission suggests that the superintendent of the approved hospital in which a person is being held should also be under a statutory duty to make a periodic report. The period of one year provided in the *Offenders Probation and Parole Act 1963-1985* seems to be excessive and the Commission suggests that both the Parole Board and the superintendent should be required to make a report at least once every six months. It should

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32 Para 7.17 above.
33 Para 7.16 above.
34 *Mental Health Act 1983-1986* (NSW), s 118(1).

of course continue to be possible to make an earlier report if the person's condition warrants release from custody. Such a report should be required to be made having regard to the criteria adopted for the detention of a person.

7.24 As with persons being held in custody having been found to be unfit to stand trial,[35] it may also be desirable to provide for review by the Executive to be supplemented by review by a body such as a court or a tribunal. The criterion (namely dangerousness)[36] is one which could be applied by a court or tribunal and so one on which such a body could make an order as to the person's release, either unconditionally or conditionally.[37] The respective merits of review by a court or a tribunal have already been discussed in paragraph 7.7 above. The Commission suggests that the same body, be it a court or tribunal, should conduct reviews of those acquitted on the ground of unsoundness of mind and those found to be unfit to stand trial.

4. PERSONS SUBJECT TO INDETERMINATE SENTENCE

(a) The present law

7.25 When a person is convicted on indictment of an offence, the court may, having regard to various matters, including the offender's mental condition -

(a) direct that the offender be detained at the Governor's pleasure at the expiration of any term of imprisonment then imposed; or

(b) sentence the offender to detention at the Governor's pleasure, without imposing any term of imprisonment.[38]

The offender's position is kept under review by the Parole Board and he or she may be released on parole by the Board.[39]

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35 Para 7.7 above.

36 Whether in the present general form or in the more specific form provided in the New South Wales legislation.

37 Conditions which might be imposed could include undergoing treatment as an outpatient of an approved hospital, taking medication or supervision by a probation and parole officer.

38 *Criminal Code*, s 662.

39 *Offenders Probation and Parole Act 1963-1985*, s 41(1)(c) and (d).

(b) Discussion

7.26 One matter which the Commission is required to consider is whether or not there is any need to retain the power contained in section 662 of the *Criminal Code* to impose an indeterminate sentence because of a person's mental condition. This matter is discussed in the following chapter.

7.27 If this power is retained, the Commission considers that it would be desirable to maintain the present position whereby the offender's release is determined by the Parole Board. This is a function which the Board performs in the case of most other convicted prisoners and the fact that a person's mental condition has been a factor in the imposition of an indeterminate sentence is not a sufficient reason for providing for the review to be carried out by some other body. The person's mental condition would be only one factor to be considered in deciding whether or not his or her release on parole was justified. In any case the Parole Board can obtain psychiatric and psychological advice to assist it in its determination.

5. QUESTIONS AT ISSUE

7.28 The Commission welcomes comment, with reasons where appropriate, on any matter arising out of this chapter and, in particular, on the following -

Persons found to be unfit to stand trial

1. Should a formal procedure for periodic administrative review of persons found to be unfit to stand trial or unsound of mind during the trial be introduced?

   Paragraph 7.6

2. Should a formal procedure for the review of persons found to be unfit to stand trial or unsound of mind during the trial be introduced and, if so, should that review be conducted by -

   (a) a mental health review tribunal; or
   (b) a court?

   Paragraphs 7.7 to 7.14

3. If provision is made for review by a mental health review tribunal, should there be a further appeal to the Supreme Court on questions of law?

Paragraph 7.14

Persons found to be not guilty on account of unsoundness of mind

4. Should a formal procedure for periodic administrative review of persons acquitted on the ground of unsoundness of mind and held in an approved hospital be introduced?

Paragraph 7.23

5. Should a formal procedure for the review of persons found to be not guilty on account of unsoundness of mind be introduced and, if so, should that review be conducted by -

(a) a mental health review tribunal; or
(b) a court?

Paragraph 7.24

6. Should the body carrying out such a review be required to consider whether the safety of the person or any member of the public will be seriously endangered by the person's release and, if not, what criteria should be provided?

Paragraphs 7.21 and 7.22

Persons subject to indeterminate imprisonment on account of mental condition

7. Should the Parole Board continue to be responsible for reviewing the detention of a person held in custody under section 662 of the *Criminal Code* on account of his or her mental condition?

Paragraph 7.27

Chapter 8
INDETERMINATE SENTENCES

1. INTRODUCTION

8.1 Under item 2 of the terms of reference,[1] the Commission is required to consider whether there is any need to retain the power contained in section 662 of the *Criminal Code* to impose an indeterminate sentence because of a person's mental condition.

8.2 Under section 662, where a person has been convicted of an indictable offence, the court may, having regard to the person's antecedents, character, age, health, mental condition, the nature of the offence or any special circumstances of the case, direct that the offender be detained during the Governor's pleasure in a prison either at the expiration of a finite term of imprisonment then imposed or without imposing a finite term of imprisonment.

2. THE ORIGINAL PURPOSE OF SECTION 662

8.3 Section 662 was enacted in 1918 by the *Criminal Code Amendment Act 1918*. At that time only an "habitual criminal"[2] could be held in indeterminate custody upon conviction. The purpose of such custody was to enable the person to be reformed. Section 662 was seen as an extension of that purpose so that:

> ". . . the reform of the criminal may be taken in hand on his first conviction for a crime . . . The object of these proposed provisions is to enable the reform to begin before the offender has developed into what is called an habitual criminal."[3]

It was required that the indeterminate sentence be served in a "reformatory prison".[4] At the same time an Indeterminate Sentences Board was established to make recommendations as to whether or not a prisoner was sufficiently reformed to be released on probation. The development of the indeterminate sentence was associated with a belief that punishment should fit the criminal rather than the crime.[5]

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1 Para 1.1 above.

2 As defined in s 661 of the Code. A person must have committed an indictable offence on at least two previous occasions to be declared an habitual criminal.

3 Western Australian Parliamentary Debates (1917-1918) Vol 56, 355.

4 Reformatory prisons no longer exist. S 662 of the Code has been amended by deleting the reference to them.

5 Para 8.6 below.

3. RELEASE ON PAROLE

8.4 Under the existing law, a person serving an indeterminate sentence under section 662 may be released by the Parole Board[6] on parole for any period not exceeding two years. During the period of parole he or she must be under the supervision of a parole officer.[7] A person released on parole may be required to comply with such requirements as are prescribed in regulations and with such other requirements as the Board considers necessary.

8.5 Where a person has been released on parole, the Board may, at any time before the expiration of the parole period, cancel, amend, suspend or vary the parole order[8] A person's parole is automatically cancelled if he or she is sentenced to another term of imprisonment.[9]

4. DISCUSSION

8.6 As stated in paragraph 8.3 above, section 662 was enacted for the purpose of enabling a convicted person to be reformed before he or she fell into a life of crime. In the early part of this century the question of the indeterminate sentence was very much to the fore:

> "It had its roots in the development of the search for a science of crime and punishment, and in the growing conviction that the punishment should not in the Gilbertian phrase, fit the crime, but should rather, after the Lombrosian school, fit the criminal. The feeling was growing that if there is to be a scientific study of the individual criminal, then the courtroom is not the place to carry it out for two main reasons. First, in the bustle of the courtroom there is not time to spend on such a study, and secondly, the awarding of a sentence which is 'fixed' is likely to fail in allowing for the factors of human growth and change in a prisoner. As 'scientific penology' came into vogue, bringing its Lombrosian undertones with it, its advocates felt sure that the transfer of the decision about how long a prisoner would serve from the courtroom to officials would be more just and more effective."[10]

8.7 The indeterminate sentence was seen both as an incentive towards reform and as a means of allowing the sentence to fit the criminal. The latter purpose could be achieved by the decision as to the release of a prisoner being made by an administrative body, the

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6 *Offenders Probation and Parole Act 1963-1985*, s 41(1)(c) and (d) and 3(b). The Parole Board is the successor of the Indeterminate Sentences Board.

7 *Offenders Probation and Parole Act 1963-1985*, s 41(3).

8 Id, s 44(1).

9 Id, s 44(2).

10 J E Thomas and A Stewart, *Imprisonment in Western Australia* (1978), 85.

Indeterminate Sentences Board, after observing the prisoner's conduct and development in prison.

8.8 The indeterminate sentence has been seen as providing the sentencing court with flexibility. In one case,[11] in which a person had been convicted of rape, the judge concluded that a lengthy term of imprisonment was unlikely to do the prisoner or the community any good. On the other hand, the judge did not consider that the defendant could be released on probation because his state of mind or state of emotional health was not stable enough to take the risk of releasing him. The judge imposed an indeterminate sentence in the hope that the offender would receive treatment for his mental and emotional imbalance. The judge also expressed the hope that the term of imprisonment would not be very long. The defendant was released on parole after a period of three months in custody and successfully completed his parole.

8.9 More recently, the Court of Criminal Appeal has laid down that an order under section 662 should be made only for the purpose of protecting the public. Burt CJ stated:

> "Section 662 of the Code must now be construed in the overall legislative setting which includes and which for present purposes is, I think, dominated by the *Offenders Probation and Parole Act.* In that setting the command of the section that in making an order under s 662 of the Code the court should have regard to the 'antecedents, character, age, health and mental condition of the person convicted, the nature of the offence or any special circumstances of the case' cannot mean, if it ever did mean, that a court can make an order under that section if, having had regard to such matters it considers that such an order would, in some general sense which does not include the safety of the public, advance the 'welfare' of the convicted person. In my opinion, the enactment of the *Probation and Parole Act* now requires one to say that an order should be made under s 662 only in very exceptional circumstances and those circumstances must indicate and firmly indicate that the convicted person has shown himself to constitute a danger to the public."[12]

8.10 The judgment in this case disposes of the suggestion that section 662 may be used to incarcerate indefinitely "for his own good" a person who did not represent any danger to the public. However, it remains possible to use the section to impose an unlimited sentence of imprisonment on an offender because of his or her predicted dangerousness. This could

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11 *R v Giorgio* (unreported) Supreme Court of Western Australia, (1975, No 36).

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

amount to lifetime imprisonment if the offender's mental condition is such that little improvement could be expected.[13]

8.11 The imposition of what was in effect an indeterminate sentence in order to protect the public was criticised in *Veen v R.*[14] Veen who was said to have a severe abnormality of mind, was convicted in New South Wales of manslaughter on the ground of diminished responsibility. He was sentenced to life imprisonment without a non-parole period (in effect an indeterminate sentence). This sentence was imposed because the trial judge considered it necessary to protect the public. On appeal to the High Court a sentence of 12 years' imprisonment with no non-parole period was substituted. Jacobs J emphasised that a fundamental principle of sentencing was that a "man must be given the sentence appropriate to his crime and no more", and that a longer sentence would offend against this principle unless there were an inter-relation between the protection of the community and "constant review and treatment of the prisoner's mental condition with a view to his release if and when he responds".[15] It could accordingly be suggested that, if the power given in section 662 is to remain, the court should be required to be satisfied that the offender's condition would be constantly reviewed and appropriate treatment given.

8.12 Section 662 of the Code was based on legislation in Victoria. The Victorian legislation has been repealed on the ground that its purpose - reform of offenders carried out in special "reformatory prisons" - had not been realised[16] and it could be argued that section 662 of Western Australia's *Criminal Code* should also be repealed for the same reason. Safety of the public is, of course, a very important consideration but in a case where that is at risk because of an offender's mental condition, a more appropriate solution might be to introduce the concept of hospital orders.[17]

5. QUESTIONS AT ISSUE

8.13 The Commission welcomes comment on the following -

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13 It is to be noted that, theoretically, the offence which can bring s 662 into play need not be a serious one, nor one where any other person was endangered. Sufficient indication of dangerousness could arise from circumstances not associated with the offence. See *Criminal Code*, s 663.

14 (1979) 143 CLR 458.

15 Id, 478.

16 See Victorian Parliamentary Debates (Legislative Assembly) 1 December 1955, 2383-2386. Similar legislation in Tasmania (*Criminal Code*, s 393) was repealed by the *Parole Act 1975*.

17 Paras 6.16 to 6.24 above.

1. Should the power contained in section 662 of the Code to impose an indeterminate sentence because of a person's mental condition be retained.

Paragraph 8.11

2. Should section 662 of the Code as a whole be retained, and, if so, should specific statutory criteria be laid down for its use.

Paragraph 8.12

Chapter 9
EXPERT REPORTS

1. INTRODUCTION

9.1 Two items of the Commission's terms of reference require it to examine matters relating to expert reports. Under item 6 of the terms of reference,[1] the Commission is required to consider whether it is desirable that the prosecution and the defence be obliged to exchange, before trial, all expert reports relating to the mental condition of the defendant which are intended to form the basis of evidence to be adduced at the trial. If this were thought to be desirable, the Commission is also required to propose appropriate rules for the enforcement of that obligation. Under item 7 of the terms of reference, the Commission is also required to consider whether the courts should have power to obtain psychiatric reports, and if so, for what purpose, in what circumstances and by what procedure. These matters are discussed in this chapter.

2. EXCHANGE OF REPORTS

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

9.3 The present position means that theoretically the prosecution may be taken by surprise if the defence of insanity is raised at the trial without prior notice. In those cases in which the defence did not provide a copy of an expert report, the prosecution will have had no opportunity to prepare to cross-examine the defence experts or to carry out an investigation to

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1 Para 1.1 above.

2 *R v Casey* (1947) 32 Cr App R 91.

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

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

rebut the defence if necessary. The exchange of expert reports relating to the mental condition of the defendant also enables areas of dispute to be defined, with a consequent reduction in the duration of trials and their cost, particularly if the prosecution accepted the diagnosis of the expert witness proposed to be called by the defence.

9.4 In the Murray Report it was recommended that a party to criminal proceedings should be required to serve, before the trial, a copy of a report made by an expert witness containing the substance of his or her evidence on every other party.[5] In England provision has been made for the making of rules requiring any party to proceedings before the Crown Court to disclose to the other party or parties any expert evidence which he or she proposes to adduce in the proceedings. The rules may also prohibit a party who fails to comply with such a requirement from adducing that evidence without the leave of the court.[6]

9.5 There are, however, reasons why it may be considered to be undesirable to require the defence to disclose expert reports to the prosecution. Although a requirement that the defence provide the prosecution with copies of expert reports merely requires a defendant to disclose information that he or she would shortly reveal at the trial in any event, it could be argued that it would deny a defendant an advantage he or she presently has. The following quotation from an American author illustrates this point:

> "Of course, there is some similarity between defendant's pre-trial and at-trial choices: in each case the defendant must weigh his critical need to produce exculpatory evidence against the risks of revealing incriminating information. But because of the prosecutor's heavy burden of proof, the defendant is best advised not to open up any source of potentially adverse information unless he feels that the state has in all likelihood proved its case; and it is only after the prosecutor has presented his evidence in court that the defendant can adequately make this judgment. By contrast, there is no way the defendant can know before trial the actual strength of the evidence against him as it will appear to the trier of fact, even if he has himself benefited from extensive discovery . . . the at-trial choice to present evidence is far less speculative."[7]

9.6 If it is considered undesirable to require the defence to supply the prosecution with a copy of an expert report, the question arises whether the defence should be required to notify the prosecution before the trial that it intends to raise the insanity defence.[8] There is a

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5 Murray Report, 413-415 and 606-607.

6 *Police and Criminal Evidence Act 1984-1985* (UK), s 81.

7 Note, *Prosecutorial Discovery Under Proposed Rule 16* (1972) 85 Harvard LR 994, 1007-1008.

8 The Butler Committee recommended that the defence should be required to give notice of its intention to raise the defence of insanity or sane automatism on conditions similar to those on which notice must be

precedent for such a notice provision at present in Western Australia. Where a defendant intends to adduce evidence in support of an alibi he or she must give the prosecution notice of the alibi before the trial.[9] If notice that the defence of insanity was going to be raised were given, the prosecution could carry out its own investigation, and if necessary, arrange to call its own expert witness at the trial. At present, if the prosecution is caught by surprise, it can seek an adjournment of the trial. However, an adjournment may involve inconvenience and an increase in the cost of the trial.

3. THE POWER OF COURTS TO OBTAIN PSYCHIATRIC REPORTS

9.7 At present, courts have a statutory power to obtain a psychiatric report in two circumstances. The first of these powers, section 36 of the *Mental Health Act 1962-1985* has already been discussed.[10] This section enables a court of summary jurisdiction to remand a person charged with an offence for examination. The second statutory power applies where a person has been convicted of an offence. Under section 8(a) of the *Offenders Probation and Parole Act 1963-1985* a court may require the Director, Probation and Parole Services to prepare and submit to the court such reports and information as the court requires for the purpose of determining the appropriate sentence.

9.8 In New Zealand the court may obtain a psychiatric report if it is satisfied that such a report would assist it in determining if the defendant is under a disability in relation to the trial.[11] The court may also obtain a report if it would assist it in determining an insanity defence.[12] A copy of the report must be given to the defendant.[13] The prosecutor is entitled to access to the report.[14]

9.9 The advantage of giving the court power to obtain a psychiatric report in these circumstances is that what might be considered to be a neutral report can be obtained. However, in a discipline with different schools of thought on the definition and causes of mental disorder the appearance of neutrality might be deceptive. Moreover, it may be

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given in England of a defence of alibi under s 11 of the *Criminal Justice Act 1967*: Butler Committee Report, para 18.49.

9 *Criminal Code*, s 636A.

10 Paras 6.7 to 6.11 above.

11 *Criminal Justice Act 1985* (NZ), s 121.

12 Ibid.

13 Id, s 122.

14 Id, s 123.

considered to be inappropriate for the court to become involved in such matters, particularly if the defendant is legally represented.

9.10 Another difficulty is the method of selection of the psychiatrist to make the report. In New Zealand, this matter is dealt with by giving the court power to grant the defendant bail on condition that he or she attend a place approved by the court for psychiatric examination. Alternatively the defendant may be remanded in custody, either in a penal institution or psychiatric hospital for the examination.[15] In some United States jurisdictions the court may itself appoint the examiners.[16] In some of those States the legislation requires that the examiner must be "disinterested".[17]

9.11 Another matter which should be taken into account is that a report prepared for the court would not be privileged.[18] Consequently a self-incriminating statement made by the defendant during an examination for the purpose of a report might be admissible in a trial of the offence charged. The statement would not be admissible if it were not made voluntarily. Although an examination carried out at the direction of a court would not be a voluntary examination, a confession made during such an examination could still, depending on the circumstances in which it was carried out,[19] be made voluntarily and so be admissible in a subsequent trial. It might be argued that the requirement that the confession must be made voluntarily provides adequate protection for the defendant. On the other hand, it might be considered that further protection was warranted and that the psychiatrist's report and statements made by the defendant during the examination should be admissible only for the purpose of determining the issue of fitness to stand trial.

4. QUESTIONS AT ISSUE

9.12 The Commission welcomes comment, with reasons where appropriate, on any matter arising out of this chapter and, in particular, on the following -

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15 Id, s 121(2).

16 F D Berry, *Self-Incrimination and the Compulsory Mental Examination: A Proposal* (1973) 15 Arizona LR 919, 924.

17 Id, 925.

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

19 See generally, D Byrne and J D Heydon, *Cross on Evidence* (3rd Aust Ed 1986), 856-878.

Exchange of reports on defendant's mental condition

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

Paragraphs 9.2 to 9.5

Notice of defence of insanity

2. If not, should the defence be required to give the prosecution notice before the trial that it intends to raise the insanity defence?

Paragraph 9.6

The power of the courts to obtain psychiatric reports

3. Should the courts be empowered to obtain a psychiatric report where -

(i) it appears to a court that a defendant may not be fit to stand trial because of his or her mental condition; or

(ii) the defendant has raised the insanity defence?

Paragraphs 9.9 to 9.11

Chapter 10
QUESTIONS AT ISSUE

10.1 The Commission welcomes comment, with reasons where appropriate, on any matter arising out of the terms of reference or this paper, and in particular on the following -

CRIMINAL RESPONSIBILITY AND MENTAL DISORDER

The insanity defence

1. Should the defence of insanity be abolished?

Paragraphs 3.32 to 3.36

2. If the defence of insanity is retained, should the existing formulation of that defence be retained?

Paragraphs 3.41 to 3.46

3. If the existing formula for the insanity defence is not suitable what should be the basis of the test and, in particular, should any of the following formulae be adopted -

   (a) that proposed by the United Kingdom Royal Commission on Capital Punishment;

   Paragraphs 3.47 and 3.48

   (b) that adopted by the Supreme Court of the State of Rhode Island;

   Paragraphs 3.47 and 3.48

   (c) that proposed by the English Butler Committee?

   Paragraphs 3.51 to 3.56

4. Should a person whose behavioural controls are impaired but who is not suffering from a mental disease or natural mental infirmity be entitled to raise the insanity defence?

Paragraph 3.50

5. Should the second paragraph of section 27 of the *Criminal Code* relating to delusions be repealed?

Paragraph 3.11

The burden of proof of the insanity defence

6. Should the burden of proof of the insanity defence be changed so that the defence merely has an evidential burden?

Paragraphs 3.60 and 3.61

Procedural matters relating to the insanity defence

7. Should the prosecution be able to raise the insanity defence?

Paragraphs 3.57 and 3.58

8. Should a two stage trial procedure be introduced and, if so, in what form?

Paragraphs 3.62 to 3.64

9. Where the defence of insanity is successful should the jury be required to return a verdict of "not responsible on account of unsoundness of mind"?

Paragraph 3.65

10. Should the trial judge be required to instruct the jury as to the consequences of a successful defence of insanity?

Paragraph 3.65

11. Should the court be empowered to accept a plea of not guilty on account of unsoundness of mind?

Paragraph 3.66

Disposition

12. Where a defence of insanity is successful should the court have power to determine the most appropriate disposition of the defendant?

Paragraphs 3.67 to 3.71

Diminished responsibility

13. In the case of a charge of wilful murder or murder, should the defence of diminished responsibility be introduced and, if so, how should it be formulated?

Paragraphs 3.72 to 3.82

14. If not, should the mandatory life sentences for wilful murder and murder be replaced by maximum sentences?

Paragraphs 3.83 to 3.87

Infanticide and the insanity defence

15. Should it be possible to raise the insanity defence where the defendant is charged with infanticide?

Paragraph 3.90

CRITERIA OF UNFITNESS TO STAND TRIAL

16. Should guidelines be provided to assist courts in deciding whether or not a person is fit to stand trial and, if so, are any of the guidelines referred to in paragraph 4.15 above suitable?

Paragraph 4.15

17. Should a person suffering from amnesia be entitled to have the issue of fitness to stand trial raised?

Paragraph 4.16

18. Should section 652 of the *Criminal Code*, which provides that a person cannot be tried if he or she is not of sound mind, be repealed?

Paragraph 4.17

FITNESS TO STAND TRIAL: PROCEDURE

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

19. Should it be possible for the issue of fitness to stand trial to be raised at a preliminary hearing?

Paragraphs 5.9 to 5.11

Judicial investigation notwithstanding that the defendant is or may be unfit to stand trial

20. Should there be a procedure for the determination of the guilt or innocence of a defendant notwithstanding that he or she is or may be unfit to stand trial?

Paragraph 5.8

21. If so, what procedure should be provided and, in particular, do any of the following provide a suitable model -

(a) the procedure under the *Criminal Procedure Insanity Act 1964-1983* (UK) *(paragraphs 5.15 to 5.19);*

(b) the proposals of the Mitchell Committee *(paragraphs 5.20 to 5.24);*

(c) the proposals of the Law Reform Commission of Canada *(paragraphs 5.25 to 5.28);*

(d) the proposals of the Butler Committee *(paragraphs 5.29 to 5.32);* or

(e) the procedure in New South Wales *(paragraphs 5.33 to 5.40)*?

Should the prosecution be able to raise the issue of fitness to stand trial?

22. Should it be possible for the prosecution to raise the issue of fitness to stand trial?

Paragraph 5.43

Who should determine the issue of fitness to stand trial?

23. Should a judge, and not a jury, determine the issue of fitness to stand trial?

Paragraphs 5.44 to 5.46

A defendant's right of appeal

24. Should a defendant have a right to appeal against a determination that he or she is unfit to stand trial?

Paragraphs 5.47 and 5.48

POWERS OF COURTS OF SUMMARY JURISDICTION

Fitness to stand trial

25. Should a Court of Petty Sessions have express statutory power to deal with the question of fitness to stand trial?

Paragraphs 6.4 and 6.5

26. If so, how should a defendant be dealt with if he or she is found to be incapable of understanding the proceedings?

Paragraph 6.6

Section 36 of the *Mental Health Act 1962-1985*

27. Should the power contained in section 36 of the *Mental Health Act 1962-1985* be retained?

Paragraph 6.11

The defence of insanity

28. Should there be an express provision enabling a Court of Petty Sessions to record a finding that a person is not guilty[1] under section 27 of the *Criminal Code*?

Paragraph 6.13

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[1] Or not responsible: see para 3.65 above.

29. What powers should a Court of Petty Sessions have to deal with a person who is found to be not guilty under section 27 of the *Criminal Code*?

Paragraphs 6.14 and 6.15

Hospital orders

30. Should a Court of Petty Sessions be given power to make a hospital order and, if so, in what circumstances?

Paragraphs 6.17 to 6.23

Psychiatric probation orders

31. Should psychiatric probation orders be retained?

Paragraphs 6.25 to 6.27

REVIEW OF THE SITUATION OF PERSONS DETAINED IN CUSTODY

Persons found to be unfit to stand trial

32. Should a formal procedure for periodic administrative review of persons found to be unfit to stand trial or unsound of mind during the trial be introduced?

Paragraph 7.6

33. Should a formal procedure for the review of persons found to be unfit to stand trial or unsound of mind during the trial be introduced and, if so, should that review be conducted by -

(a) a mental health review tribunal; or
(b) a court?

Paragraphs 7.7 to 7.14

34. If provision is made for review by a mental health review tribunal, should there be a further appeal to the Supreme Court on questions of law?

Paragraph 7.14

Persons found to be not guilty on account of unsoundness of mind

35. Should a formal procedure for periodic administrative review of persons acquitted on the ground of unsoundness of mind and held in an approved hospital be introduced?

Paragraph 7.23

36. Should a formal procedure for the review of persons found to be not guilty on account of unsoundness of mind be introduced and, if so, should that review be conducted by -

(a) a mental health review tribunal; or
(b) a court?

Paragraph 7.24

37. Should the body carrying out such a review be required to consider whether the safety of the person or any member of the public will be seriously endangered by the person's release and, if not, what criteria should be provided?

Paragraphs 7.21 and 7.22

Persons subject to indeterminate imprisonment on account of mental condition

38. Should the Parole Board continue to be responsible for reviewing the detention of a person held in custody under section 662 of the *Criminal Code* on account of his or her mental condition?

Paragraph 7.27

INDETERMINATE SENTENCES

39. Should the power contained in section 662 of the Code to impose an indeterminate sentence because of a person's mental condition be retained?

Paragraph 8.11

40. Should section 662 of the Code as a whole be retained, and, if so, should specific statutory criteria be laid down for its use?

Paragraph 8.12

EXPERT REPORTS

Exchange of reports on defendant's mental condition

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

Paragraphs 9.2 to 9.5

Notice of defence of insanity

42. If not, should the defence be required to give the prosecution notice before the trial that it intends to raise the insanity defence?

Paragraph 9.6

The power of the courts to obtain psychiatric reports

43. Should the courts be empowered to obtain a psychiatric report where -

(i) it appears to a court that a defendant may not be fit to stand trial because of his or her mental condition; or

(ii) the defendant has raised the insanity defence?

Paragraphs 9.9 to 9.11

APPENDIX
REFORMS IN THE UNITED STATES OF AMERICA

1. THE DURHAM EXPERIMENT

1. In the United States of America since 1954 a number of reforms of the defence of insanity have been adopted. Prior to 1954 all jurisdictions, with the exception of the State of New Hampshire, provided a defence based on the M'Naghten Rules. In 29 States it was the sole test of responsibility. In at least 14 States and in the federal courts there was in addition an "irresistible impulse test".[1]

2. In New Hampshire both of these tests had been rejected. It was held that there was no legal test of responsibility and the question of responsibility was one of fact for the jury.[2] The question of responsibility was determined in the context of whether the defendant committed the prohibited act while having a guilty intent, or mens rea. In *State v Jones* Judge Ladd held that where a defence of insanity is raised:

> ". . . the real ultimate question to be determined seems to be, whether, at the time of the act, he had the mental capacity to entertain a criminal intent - whether, in point of fact, he did entertain such intent."[3]

Judge Ladd went on to say that the following direction to the jury was proper:

> ". . . the verdict should be 'not guilty by reason of insanity' if the killing was the offspring or product of mental disease in the defendant."[4]

3. It was in this context that the United States Court of Appeals for the District of Columbia Circuit considered the case of *Durham* in 1954.[5] In the District of Columbia, at that time, criminal responsibility was determined in accordance with the M'Naghten Rules, supplemented by the irresistible impulse test.

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1 H Weihofen, *Mental Disorder as a Criminal Defence* (1954), 51.
2 Id, 113.
3 Id, 114.
4 Id, 114-115.
5 *Durham v United States* 214 F 2d 862 (DC Cir 1954).

4. In giving the judgment of the court, Judge Bazelon noted criticism of the right and wrong test of the M'Naghten Rules[6] and concluded:

> ". . . that as an exclusive criterion the right-wrong test is inadequate in that (a) it does not take sufficient account of psychic realities and scientific knowledge, and (b) it is based upon one symptom and so cannot validly be applied in all circumstances. We find that the 'irresistible impulse' test is also inadequate in that it gives no recognition to mental illness characterised by brooding and reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong test."[7]

The judgment concluded that the following broader test, which is based on *State v Jones*,[8] should be adopted:

> ". . . an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[9]

The term "disease" was used to mean a condition considered capable of either improving or deteriorating while the term "defect" was used to mean a condition which was not considered capable of either improving or deteriorating being either congenital, or the result of injury, or the residual effect of a physical or mental disease.[10]

5. The court considered that the questions of fact laid down by the test were capable of determination by a jury. The jury could take into account all relevant evidence in determining whether the defendant was criminally responsible. The role of a psychiatrist would be to inform the jury of the character of the accused's mental disease or defect.[11] A psychiatrist would be able to give evidence as to the whole of the personality of the accused and would not be restricted to particular symptoms or to the specific question:

> "Does the defendant know the difference between right and wrong?"

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6 Id, 869-874.
7 Id, 874.
8 Para 2 above.
9 *Durham v United States* 214 F 2d 862 (DC Cir 1954), 874-875.
10 Id, 875.
11 Id, 875-876.

2. THE CURRENS RULE

6. The Currens Rule arose from a decision of the United States Court of Appeals for the Third District in *US v Currens*.[12] At the trial of Currens the judge gave a direction to the jury on the defendant's criminal responsibility in terms of the M'Naghten Rules based on the right and wrong test. The defendant was convicted and appealed on the ground that the direction should have been in terms of the Durham formula.

7. The Court of Appeals reviewed the M'Naghten Rules and concluded that they were unworkable. The court said:

> "How, conceivably, can the criminal responsibility of a mentally ill defendant be determined by the answer to a single question placed on a moral basis? To state the question seems to us to answer it. All in all the M'Naghten Rules do indeed, as had been asserted so often, put the testifying psychiatrist in a strait-jacket.
>
> Moreover, the question as to the defendant's knowledge of right and wrong puts the psychiatrist, if he can answer the question and does answer it, in a position in which he must state a moral judgment, and in doing so he cannot avoid usurping to some extent the function of the jury."[13]

8. The Court referred to the fact that psychiatry recognised that a man was an integrated personality who cannot be compartmentalised; cognitive faculties could not be detached from emotions.[14] The Court noted that the Durham formula recognised this and did not restrict psychiatrists to particular symptoms. However, it said that the Durham formula had been severely criticised because it was too vague and indefinite to provide a workable rule for the determination of criminal responsibility. It said (at 771) that the words "disease" and "defect" were defined to a limited extent in the judgment and that "product" was not defined at all. The phrase "product of" was explained in *Carter v US* in the following terms:

> "The simple fact that a person has a mental disease . . . is not enough to relieve him of responsibility for a crime. There must be a relationship between the disease and the criminal act; and the relationship must be such as to justify a reasonable inference that the act would not have been committed if the person had not been suffering from disease."[15]

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12 290 F 2d 751 (Third Cir 1961).
13 Id, 767.
14 Id, 771.
15 252 F 2d 608, 615.

9. The Court approved of the Durham formula to the extent that it permitted a psychiatrist to give a complete picture of the defendant's mental condition. However, it said:

> "It is not enough . . . to give the jury a complete picture of the defendant's mental condition. The jury must be further provided with a standard or formula by means of which it can translate that mental condition into an answer to the ultimate question of whether the defendant possessed the necessary guilty mind to commit the crime charged."[16]

The Court said that the Durham formula failed to do this.[17] Furthermore, the Court said, by stressing a cause or connection between the mental disease of a defendant and the act, it lead one to think of the mental disease as a distinct force in the defendant's mind, producing some acts but not others. The Court said, in so far as the Durham formula had this effect, it, like the *M'Naghten Rules*, is subject to the criticism that it wrongly assumes that the mind can be broken up into compartments.[18] The Court concluded that the Durham formula, like other tests, failed to:

> ". . . take account of the fact that an 'insane' defendant commits the crime not because his mental illness causes him to do a certain prohibited act but because the totality of his personality is such, because of mental illness, that he has lost the capacity to control his acts in the way that the normal individual can and does control them."[19]

The Court, therefore, put forward the following rule:

> "The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated."[20]

3. THE MODEL PENAL CODE OF THE AMERICAN LAW INSTITUTE

10. In 1962 the American Law Institute in its Model Penal Code provided the following formulation of the defence of insanity:[21]

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16 *US v Currens* 290 F 2d 751, 772-773.
17 Id, 773.
18 Id, 773-774.
19 Id, 774.
20 Ibid.
21 The American Law Institute: Model Penal Code (Official Draft 1962), s 4.01.

"(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

(2) The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."

11. In 1972 the first paragraph of this formulation was accepted by the United States Court of Appeals for the District of Columbia in *US v Brawner*.[22] In doing so it overruled *Durham v US*. The Court, however, adopted the following reshaping of paragraph (2) of the Model Penal Code test:

> "The introduction or proffer of past criminal and anti-social actions is not admissible as evidence of mental disease unless accompanied by expert testimony, supported by a showing of the concordance of a responsible segment of professional opinion, that the particular characteristics of these actions constitute convincing evidence of an underlying mental disease that substantially impairs behavioural controls."[23]

12. By 1984 all circuits of the Federal Court of Appeals, 24 of the 50 States and the District of Columbia had adopted the Model Penal Code formulation but with minor modifications in most jurisdictions.[24]

13. Following the acquittal of John Hinckley on account of unsoundness of mind of attempting to assassinate President Reagan the federal law was altered statutorily to provide:

> "(a) AFFIRMATIVE DEFENSE - It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offence, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.
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> (b) BURDEN OF PROOF - The defendant has the burden of proving the defense of insanity by clear and convincing evidence."[25]

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22 471 F 2d 969 (1972).

23 Id, 994.

24 I Keilitz and J P Fulton, *The Insanity Defense* (1984), 14-15.

This is in effect a return to the M'Naghten Rules, including placing the burden of proof on the defendant. Formerly, under federal law, once the defendant raised the insanity plea the prosecution bore the burden of proving the defendant's sanity beyond a reasonable doubt.

4. GUILTY BUT MENTALLY ILL

14. A number of States have provided a verdict of "guilty but mentally ill" (GBMI) as a supplement to the insanity defence.[26] In Michigan, for instance, where the verdict was first introduced, where the insanity defence has been pleaded, the GBMI verdict may be returned if the defendant is guilty of the offence charged and mentally ill at the time of the offence but is not entitled to be acquitted on the grounds of insanity. A defendant may also enter a GBMI plea, but a court cannot accept it until it has held a hearing on the issue of mental illness and is satisfied that the defendant was mentally ill when the offence was committed.

15. Where a GBMI verdict is returned, the court may give the defendant the same sentence as a defendant who is found to be guilty but not mentally ill. However, if the defendant is imprisoned his or her condition must be evaluated and he or she must be provided with whatever treatment is indicated. Probation and parole can be conditional on continued psychiatric treatment.

16. There appear to have been a number of reasons for the introduction of the GBMI verdict. First, it avoided constitutional problems in the United States raised by abolishing the insanity defence, yet provided the jury with another dispositional option. It seems to have been expected that the number of insanity acquittals would fall. However, an empirical study in Michigan indicates that there has not been a fall in the number of successful insanity defences.[27]

17. Secondly, it was seen as ensuring that criminally responsible but mentally ill defendants received treatment while incarcerated or on probation or parole. Thirdly, it was seen as assuring the public that a criminally responsible and mentally ill defendant received any necessary psychiatric care after sentencing. However, in the United States mental health

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25 *Insanity Defense Reform Act 1984* (USA), 18 USC 20.

26 It has been adopted in at least 11 States: Michigan, Indiana, Illinois, Alaska, Georgia, New Mexico, Delaware, Kentucky, Connecticut, Utah, and Pennsylvania.

27 I Keilitz and J P Fulton, *The Insanity Defense* (1984), 43.

facilities have been no more readily available for those found GBMI than for other convicted persons.[28]

18. One criticism of the GBMI verdict is that juries "may avoid grappling with the difficult moral issues inherent in adjudicating guilt or innocence" [29] when the insanity defence is raised. This does not seem to have occurred in Michigan and Illinois where studies have been conducted following the introduction of the GBMI verdict. In Michigan a similar number of acquittals on account of insanity per annum have been returned since the GBMI verdict was introduced while in Illinois the number has increased. Studies in Michigan indicate that those found GBMI did not meet the insanity defence standard and would have been found guilty in any case.

19. A second criticism of the GBMI verdict is that it is not necessary to have such a verdict in order that defendants receive treatment whilst incarcerated. In any case, it is illogical for commitment procedures to be based on a jury verdict which does not take into account the defendant's mental condition at the time of the trial. Moreover, a defendant does not necessarily receive meaningful treatment following a GBMI verdict. The GBMI verdict has been described as a "hoax on the public" because it "does not abolish the insanity defense, as the public often thinks, and it does not guarantee that the individual will receive treatment while incarcerated."[30]

5. ABOLITION OF THE INSANITY DEFENCE

20. Montana, Idaho and Utah have abolished the insanity defence altogether. The court's dispositional powers in Montana as regards a person who is acquitted because his or her mental condition negated an element of the offence is indicated in paragraph 3.36 above.

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28 Id, 45.

29 *American Psychiatric Association Statement on the Insanity Defence* (1983) 140 Am J Psy 681, 684.

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

6. SUMMARY OF THE PRESENT POSITION[31]

21. At present 16 States still retain the M'Naghten Rules and a further 4 States have retained the M'Naghten Rules together with a test based on irresistible impulse or lack of capacity to control one's actions. The American Law Institute standard referred to in paragraph 10 above has been adopted in whole or part in 23 States and the District of Columbia. Three States have abolished the insanity defence. New Hampshire has retained the product standard referred to in paragraph 2 above. The other three States have unique standards. In federal law the standard is that provided by the *Insanity Defense Reform Act 1984*.

[31] This summary is based on a table of standards of insanity prepared by I Keilitz and J P Fulton, *The Insanity Defense* (1984), 15, and subsequent developments of which the Commission is aware.