The Criminal Process and Persons Suffering from Mental Disorder

Terms of Reference

In December 1976,² the Commission was asked to consider:

(a) to what extent and on what criteria the law should recognise mental disorder or abnormality in a person accused of a criminal offence as a factor affecting his liability to be tried or convicted;

(b) whether there is any need for the continuance of the power in s 662 of the Criminal Code Act Compilation Act 1913 (W A) (“the Criminal Code”) to impose an indeterminate sentence on a convicted person simply on the grounds of his ‘mental disorder’;

(c) 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;

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

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

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

(g) whether the courts should have power to obtain psychiatric reports, and if so, for what purpose, and in what circumstances, and by what procedure; and

(h) to review Division 6 of Part IV of the Mental Health Act (which deals with security patients) and its relationship to s 34C of the Offenders Community Corrections Act 1963 (W A), formerly the Offenders Probation and Parole Act 1963 (W A).³

Background of Reference

The insanity defence had been criticised for failing to provide a practical rule, causing confusion for juries and leading to erratic results. Some commentators had proposed that it be abolished⁴ whilst others recognised that the defence is essential to the moral integrity of the criminal law and although requiring reformulation, should remain.⁵

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¹ This reference was extended on 11 August 1978 to include a review of the law relating to security of patients.
² This initially also included an examination of the relationship between the Mental Health Act 1962 (W A) Div 6 Pt IV and the Prisons Act 1903 (W A) s 54.
³ As has occurred in some American states (Montana, Idaho and Utah) and has been recommended in Tasmania. See Law Reform Commission of Tasmania, Insanity, Intoxication and Automatism, Report No 61 (1988).
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After beginning its investigation into the law in this area, research was deferred in 1983 pending the release and consideration of the Murray Report. The Attorney-General revived the reference in 1984. In February 1987 the Commission released a discussion paper that outlined the arguments for the retention, abolition and reformulation of the insanity defence. The Commission also considered whether an indeterminate period of detention interfered with a person’s right to review of their detention period by a court or a judicial tribunal. The Commission suggested that a court or tribunal should have the power to order a defendant’s discharge if it is clear they are no longer suffering from a mental disorder. The discussion paper also examined the law in other jurisdictions and discussed whether a partial defence of diminished responsibility should be introduced and whether guidelines should be enacted for determining whether a defendant is fit to stand trial.

In 1988, work was again postponed pending consideration by the government of the report by the Inter-Departmental Committee on the Treatment of Mentally Disordered Offenders, (“the Inter-Departmental report”). Although the primary concern of the Inter-Departmental report was the facilities for mentally disordered offenders, it did consider some of the matters within the Commission’s terms of reference. In 1989, work resumed and the Commission, at the Attorney-General’s request, asked for comments on the Inter-Departmental report and its recommendations.

Nature and Extent of Consultation

To identify the principal problems with the existing regime, the Commission held initial consultations with experts and invited preliminary submissions through advertisements placed in the newspaper. The Commission also consulted with other law reform agencies and in 1985, hosted a visit from Mr George Zdenkowski of the Australian Law Reform Commission. In 1986, Commissioners Mr Charles Ogilvie and Mr Peter Johnston and Executive Officer Dr Peter Handford attended a conference on Health, Law and Ethics where Mr Johnston presented a paper dealing with aspects of the Commission’s work on this project.

A draft discussion paper was circulated to experts for comment. These comments were considered before the release of the formal discussion paper in February 1987. The Commission received 26 responses to the paper including submissions from the Chief Justice, judges of the Supreme and District Courts, a stipendiary magistrate, psychiatrists, the Citizens Against Crime Association, the Authority for Intellectually Handicapped Persons, private organisations and members of the public.

In 1988, Mr Ian Campbell, a senior lecturer at the University of Western Australia, was appointed to assist the Commission in the completion of its work on this project. The Commission released its final report in August 1991.

Recommendations

The Commission made 52 recommendations in total. In relation to the criminal responsibility of mentally disordered offenders, the Commission recommended that:

- The insanity defence should be retained.
- The existing relationship between ss 23 and 27 of the Criminal Code and the burden of proof of the

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The Commission also recommended that:

- The criteria and procedure for fitness to stand trial should be altered.\(^9\)
- Courts, not the Executive, should decide the disposition of a person to be unfit to stand trial and a limit should be placed on the time a person can be detained in custody following a finding of unfitness to stand trial.
- The Parole Board should be responsible for deciding when a person serving an indeterminate sentence under s 662 of the Criminal Code should be released on parole.
- Courts of Petty Sessions should have express powers to acquit a defendant on the grounds of unsoundness of mind, accept a plea of not guilty on account of unsoundness of mind and to discharge the defendant absolutely.
- The prosecution and defence should be obliged to exchange, before trial, all expert reports relating to the mental condition of the defendant which are intended to form the basis of evidence to be adduced at trial. The court should be given a discretion to call an expert witness where the issue of fitness to stand trial has been raised.

A comprehensive outline of the Commission's recommendations may be found at pages 108–117 of the final report.

**Legislative or Other Action Undertaken**

After an extensive review of the law in this area the Mental Health Bill 1996 (WA),\(^11\) together with the Criminal Law (Mentally Impaired Defendants Bill) 1996 (WA) and the Mental Health (Consequential Provisions) Bill 1996 (WA) were introduced into Parliament. The Commission was consulted on various drafts of the legislation throughout the parliamentary process. The package of Bills was assented to on 13 November 1996.

The Criminal Law (Mentally Impaired Defendants) Act 1996 (WA) ("the Mentally Impaired Defendants Act") and the Mental Health (Consequential Provisions) Act 1996 (WA) ("the Consequential Provisions Act") implemented a number of the Commission's recommendations together with the recommendations of various other

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9 The Commission recommended that this board should monitor the position of every person subject to a court order following a special verdict and each case should be reviewed annually and also on the application on the person concerned or an interested person on their behalf. The powers of this board, the onus of establishing whether continued detention is necessary, the appeal process and the criteria for release are outlined in Recommendations 16-20.

10 The Commission recommended that s 631 of the Criminal Code should be supplemented by providing that a person is not capable of understanding the proceedings so as to make a proper defence in certain circumstances. Section 652 of the Criminal Code should be repealed and s 631 should be amended so that it applies at any time during the trial.

11 This resulted in the Mental Health Act 1996 (WA), which replaced the Mental Health Act 1962 (WA). The Mental Health Act 1981 (WA) was never proclaimed.
inquiries.\textsuperscript{12} The Mentally Impaired Defendants Act established the Mentally Impaired Defendants Review Board,\textsuperscript{13} provided that courts should determine whether a defendant should be the subject of a custody order\textsuperscript{14} and outlined the criteria and procedure for fitness to stand trial.\textsuperscript{15} The Consequential Provisions Act redefined mental illness in the Criminal Code\textsuperscript{16} and amended the procedure for mental fitness to stand trial\textsuperscript{17} and the consequences for an acquittal on account of unsoundness of mind\textsuperscript{18} in the Criminal Code.

**Currency of Recommendations**

The Acts departed from the Commission’s recommendations by maintaining that the Governor in Executive Council be responsible for the ultimate release from custody of mentally impaired defendants.\textsuperscript{19} The legislation also failed to implement the Commission’s primary recommendation of introducing a defence of diminished responsibility. To that extent, the Commission’s recommendations remain current.

**Action Required**

Implementation of the remaining recommendations would require amendment to the Mentally Impaired Defendants Act and the Criminal Code.

**Priority – Medium**

Because the legislation was fast-tracked through Parliament,\textsuperscript{20} important debate on the viability of a partial defence of diminished responsibility and the control of indeterminate sentences may have been overlooked. The concept of diminished responsibility has been introduced in England, New South Wales, Queensland and the Northern Territory, whilst in Victoria the courts maintain control of indeterminate sentences.\textsuperscript{21} Implementation of the outstanding recommendations would align Western Australia with these jurisdictions and assist in ensuring that mentally impaired offenders receive just and humane treatment in our justice system.

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\textsuperscript{12} Most particularly, the inquiries resulting in the Murray Report and the Inter-Departmental Report. See, Western Australia, Parliamentary Debates, Legislative Assembly, 5 September 1996, 5283 (Mr K Prince, Minister for Health).

\textsuperscript{13} Criminal Law (Mentally Impaired Defendants) Act 1996 (WA) s 41.

\textsuperscript{14} Where the offence is minor, the court can discharge the defendant either unconditionally or conditionally.

\textsuperscript{15} Criminal Law (Mentally Impaired Defendants) Act 1996 (WA) s 12 provides that this is a question for the presiding officer.

\textsuperscript{16} This was redefined in accordance with the High Court decision in R v Falconer (1990) 96 ALR 545. See Criminal Code 1913 (WA) s 1; Criminal Law (Mentally Impaired Defendants) Act 1996 (WA) s 8.

\textsuperscript{17} Mental Health (Consequential Provisions) Act 1996 (WA) s 14 inserted s 609A into the Criminal Code.

\textsuperscript{18} The Mental Health (Consequential Provisions) Act 1996 (WA) s 17 repealed and substituted s 652 of the Criminal Code while s 18 of the same Act repealed and substituted s 653 of the Criminal Code.

\textsuperscript{19} Although s 662 of the Criminal Code was repealed by s 26 of Act No 78 of 1995, the Criminal Law (Mentally Impaired Defendants) Act 1996 (WA) s 35 maintains the position that the Governor and not the Parole Board is ultimately responsible for the release of mentally impaired defendants.

\textsuperscript{20} Western Australia, Parliamentary Debates, Legislative Assembly, 31 October 1996, 7727 (Mr J McGinty, Deputy Leader of the Opposition).

\textsuperscript{21} Homicide Act 1957 (UK) s 2; Crimes Act 1900 (NSW) s 23A; Criminal Code (Qld) s 304A; Criminal Code (NT) s 37; Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) ss 27, 28 and 35.