LAW REFORM COMMISSIONER
VICTORIA

Working Paper No. 7

DIMINISHED RESPONSIBILITY AS A DEFENCE TO MURDER

MELBOURNE
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Views expressed in this Working Paper are provisional only and any recommendations or suggestions are tentative.

Comment and criticism are invited and it would be greatly appreciated if these could be forwarded before 31st October 1981

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Introduction

1. Following on the publication of Working Paper No. 6 on Provocation as a Defence to Murder a Workshop Meeting was held at the State College of Victoria at Coburg on 26th September 1979 at which one of the papers presented was that of Dr. Neville Parker and Dr. David Sime, two experienced forensic psychiatrists. In this paper a case was made for the introduction of diminished responsibility as a defence for persons charged with murder. This defence had its genesis at common law in Scotland and was clearly established there by 1867 although the term diminished responsibility was not used to describe it until later and it was introduced by statute into England and Wales in 1957, into Queensland in 1961, and in New South Wales in 1974.

Consideration of the paper and subsequent discussion upon it led to the view that there may well be a case for the introduction of such a defence which could probably exist in parallel with the defence of provocation.

After discussion with the Attorney-General it was decided that the question be investigated and, if it seemed feasible, that a Report on both Provocation and Diminished Responsibility be submitted.

Accordingly this Working Paper has been prepared and is now circulated for discussion and comment.

2. For convenience and to avoid unnecessary clumsiness the masculine gender has generally been used throughout the Paper in referring to persons. It must be clearly stated at the outset that arguments for the introduction of this defence may equally if not indeed with greater force, apply with respect to women.

What is Diminished Responsibility?

3. Diminished responsibility is what may be called a short-hand expression used in the criminal law (perhaps inaptly) to characterise a defence available in some jurisdictions to a person guilty of homicide who has some form of mental disorder which is sufficient to reduce the moral blameworthiness of his or her act of killing. If the defence succeeds a verdict of manslaughter rather than of murder is returned. While proof of insanity completely absolves an offender from criminal responsibility for a crime, proof of diminished responsibility, as the name implies, merely reduces it.

The Criminal Law

4. When considering any reform of the substantive criminal law the aims of that law must be ever present to mind and so too must the measures available or desired to make that law effective.

It is well to remind ourselves of the broad aim of the criminal law which may be stated as the promotion of stability, peace and harmony by use of a series of prohibitions against behaviour which upsets the equilibrium of society.

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It is well to remind ourselves of the broad aim of the criminal law which may be stated as the promotion of stability, peace and harmony by use of a series of prohibitions against behaviour which upsets the equilibrium of society.

"Criminally responsible" is a phrase used to characterise those who breach these prohibitions (whether by act or omission) without justification or excuse. "Criminal responsibility" is used to describe the liability of such persons to the sanction of punishment. In imposing punishment the law has to take account of three important factors. These are:

1. Retribution — the desire for vengeance instinctive both in the victim of criminal conduct and in the community — the felt need to make the punishment fit the crime.
2. Deterrence — the need to deter both the particular individual before the court and others who might be disposed to similar conduct.
3. Reform — the need to reform and rehabilitate the offender so that he can take a useful place in society.

5. However there are some excuses which prevent criminal responsibility from attaching to the person who performs a criminal act. Duress can be one such and is dealt with in the Law Reform Commissioner's Report No. 9. Insanity in the sense used in the criminal law is another. A person whom the tribunal decides because of disease of his mind did not know the nature and quality of his act or know that it was wrong, bears no criminal responsibility. In other words, because of his condition he bears no blame for his act and does not deserve punishment. This is not to say that he goes free in the community. He passes out of the control of the court and into the hands of the Executive. He is detained "during the Governor's pleasure". His situation will be kept under review by the prison psychiatric officers if there are any and, as later described, by the Parole Board. He may, when considered cured of his illness or "safe", be released to lead such normal life as he can.

6. Logically it could be argued that the defence of provocation such as has been discussed in Working Paper No. 6 could be subsumed under the classification of diminished responsibility. But this Working Paper has been prepared on the basis that provocation deserves preservation as a separate, though cognate, defence.

The Need for the Defence

7. Drs. Parker and Sime both criticise the law's insistence on the objective nature of the defence of provocation and the difficulties which in their view the test of the "reasonable" or even "ordinary" man has produced, and strongly urge the need for the recognition of a diminished or reduced blameworthiness where the mentally handicapped, the mentally disturbed, the excessively neurotic and over-anxious are involved in a killing. As well they make a case for consideration of what they describe as "the gentle murderer" in whom they see characteristics such as the following:

(a) He has usually been under appreciable provocation over a period of time. This can extend to a number of years or may be over a shorter period, and is usually in a matrimonial setting.

(b) Whilst the final "trigger" for killing can be overt enough to allow a successful defence of provocation in many cases it may be so minimal as to be hardly noticeable.

(c) The essential personality of the individual is gentle, non-aggressive, non-responsive to stirring, and forever trying too desperately to please. There is a long-standing non-reaction to continuous and often considerable provocation.

(d) The individual is very depressed and stressed at the material time.

(e) There is often an obsessional element in a usually quiet, contained and repressed essential personality.

(f) The killing is usually by a sudden impulsive act and one which can be very violent.

In one case cited the accused person was a gentle academic married to an hysterical and shrewish hypochondriac. For years he was downtrodden and outwardly passive. As time went on he grew more and more depressed until one morning after what on any view was a completely minor triggering point he took an axe from the woodshed and committed a bloody killing.

8. The recent case in Adelaide which has attracted so much publicity may well be another outstanding example. The accused who killed her husband by repeated axe blows to the head, had been the subject of violent treatment by him for over 20 years, and had also seen the same type of treatment meted out to her children. A few hours before the killing she had learned of his violent incestuous behaviour towards their daughters and deliberately made up her mind to rid the family (and the world) of him. Her evidence showed a state of extreme and growing nervous tension and it is reasonable to suppose that had the defence of diminished responsibility been available a manslaughter verdict would have resulted instead of that of murder which the jury brought in against her. On the facts before the court (which are not set out in full here) the trial judge ruled against the defence of provocation and she was convicted of murder.

9. It is thought helpful to briefly survey how the defence has developed in other jurisdictions and what is its ambit.

Scotland

10. Lord Deas of the High Court of Justiciary in 1867 held that a weakened state of mind (caused in this case by delirium tremens) might well be an extenuating circumstance reducing murder to culpable homicide (our manslaughter)[1] and later justified this course by reference to the jury's long-standing right to return such a verdict on a charge of murder adding that the doctrine he had initiated

> "was founded on a principle of natural justice, which recognised a distinction between what in other countries, equally enlightened as our own, was termed murder in the first and in the second degree, and which under our own humane system we could act upon better and more conveniently by the distinction between murder and culpable homicide."[2]

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1 *Dingwall* (1867) 5 Irv. 466. Throughout this Working Paper all criminal cases will be referred to only by name of the person accused.
2 *Ferguson* (1881) 4 Coup. 552, 558.

Some evidence of weakness of mind appears to have been all that was necessary to enable the defence to be left to the jury.[3] However early in this century the defence was given a more restrictive nature and by 1923 the modern law in Scotland can be said to have been expressed in a charge to a jury in the following terms:

> ". . . there must be aberration or weakness of mind; there must be some form of mental unsoundness; there must be a state of mind which is bordering on, though not amounting to, insanity; there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility . . . And I think one can see running through the cases that there is implied . . . that there must be some form of mental disease."[4]

Later it was said by Lord Cooper in charging a jury

> "It will not suffice in law for the purpose of this defence of diminished responsibility merely to show that an accused person has a very short temper, or is unusually excitable and lacking in self-control."[5]

England

11. The need for a defence of diminished responsibility in England arose largely from the law's adherence to what is known as the McNaghten test of insanity. The test was formulated in 1843 by the judges who were asked by the House of Lords to consider a definition of legal insanity and is expressed thus:

> "To establish a defence on the ground of insanity; it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."[6]

It is immediately apparent that the test stresses the cognitive aspects of the mind to the total exclusion of the emotions and the will and as has been repeatedly held in England does not allow for irresistible impulse — i.e. the situation where a person may be aware both of the nature of his act and its wrongfulness but is unable, because of a mental disorder, to prevent himself from committing it.

12. In September 1953 a Royal Commission led by Sir Ernest Gowers, a distinguished and experienced public servant, recommended the abrogation of the McNaghten Rules, preferring to leave the question of insanity to the jury without resort to a legal definition.[7] The recommendation was not accepted but in 1957 the government of the day which has long been beset with problems over the retention of capital punishment (the House of Lords having twice rejected a House of Commons Bill in favour of abolition in

[3] In *Gove* (1882) 4 Coup. 598, Lord Deas stressed the evidence of friends of the accused that he was "queer" but not "daft".
[4] *Savage* 1923 J.C. 49, 51.
[5] *Braithwaite* 1945 J.C. 55, 57.
[6] (1843) 10 Cl. & F. 200; 8 E.R. 718.
[7] *Report of The Royal Commission on Capital Punishment* (Cmd. 8932), para. 333 (hereinafter referred to as the Gowers Report).

1948 and 1956) succeeded in having enacted legislation which introduced a defence of diminished responsibility. The enacting section of the *Homicide Act* 1957 was as follows:

Persons suffering from diminished responsibility.

> 2.—(1) 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.
>
> (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.
>
> (3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.
>
> (4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it.

The same Act went on to deal with provocation (see Working Paper No. 6, para. 32) and to provide for the types of murder which should attract the death penalty. The descriptions of the abnormality of mind contained in the bracketed words in sub-section (1) were taken from the *Mental Deficiency Act* of 1913 but the importation of the concept of "mental responsibility" had no precedent.

13. In 1960 Lord Parker (the Lord Chief Justice) in the leading case of *Byrne* construed the constituent elements of section 2 thus:

> " 'Abnormality of mind' . . . means 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 judgement as to whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgement. The expression 'mental responsibility for his acts' points to a consideration of the extent to which the accused's mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise will power to control his physical acts."[8]

The existence of an abnormality of mind is a question for the jury, on which medical evidence is important but not decisive; the jury is quite entitled to disagree with even unanimous medical evidence if in their opinion other evidence, including the accused's acts or statements and his demeanour, conflicts with and outweighs it. Whether the abnormality arises from one of the conditions specified in brackets in the section, however, does seem to be a matter for the experts alone.

[8] [1960] 2 Q.B. 396, 403.

As to "substantial impairment", this is a question of degree, and should be approached by the jury in a "broad, common-sense way", since such matters as a person's ability to resist his impulses are incapable of scientific proof.

14. The Privy Council in *Rose*[9] held that the interpretation in *Byrne* was "authoritative and correct", and described as a "serious and vital misdirection" the trial judge's charge that the requisite mental state was "borderline insanity" in the sense of being almost within the McNaghten Rules.

Subsequent cases have added little to the *Byrne* interpretation, the authority of which has not been questioned.

15. Since the introduction of section 2 of the *Homicide Act* there has been a significant drop in the number of persons acquitted on the ground of insanity. Whereas in 1954, 1955 and 1956 the numbers so acquitted were 22, 24, and 18 respectively, the numbers in 1976, 1977 and 1978 have been 2, 1 and 1. On the other hand there has been a steady increase in the number of persons convicted of manslaughter on the basis of diminished responsibility, e.g. 36 in 1961, 66 in 1970, 79 in 1978. In Appendix A a detailed tabulation for the years 1957 to 1978 sets out the numbers so convicted and the range of sentences imposed.

16. The classification now harbours a divergent group of offenders and just about all pathological mental abnormalities from incurable to transitory have attracted the defence. Several groups have featured prominently in the history of its use and these will be briefly referred to.

The Psychopaths

17. Psychopathy is a term which psychiatrists have adopted to describe a mental disorder characterised by inability to conform to basic social requirements. In the words of Sir David Henderson, a witness before the Gowers Commission and an expert on psychopathy, the individuals who constitute this group

> "are social mis-fits in every sense of the term, persons who have never been able to adapt themselves satisfactorily to their fellow-man, and appear to be entirely lacking in altruistic feeling . . .
> Irrespective of all the efforts which are made to assist them, often from their earliest days, they remain at an immature, individualistic, egocentric level. On this account they fail to appreciate reality, they are fickle, changeable, lack persistence of effort and are unable to profit by experience or punishment. They are dangerous when frustrated. They are devoid of affection, are cold, heartless, callous, cynical and show a lack of judgement and forethought which is almost beyond belief . . .
> Such persons are driven by what may be called their collective unconscious to deeds of violence which are as uncontrollable as a tidal wave."[10]

Not surprisingly, some have seen "psychopathy" as amounting to no more than "immorality"[11], and while its classification as a psychiatric disorder

[9] [1961] 1 All. E.R. 859.
[10] See Gowers Report, para. 398.
[11] e.g. Wootton, "Diminished Responsibility: A Layman's View" (1960) 76 L.Q.R. 224.

is generally recognised [12] it has remained a highly contentious subject. However the English courts have not excluded it from the "abnormality of mind" specified in the *Homicide Act;* indeed the accused in *Byrne* (*supra*, para. 13) who strangled and then sexually mutilated a young girl was described as a sexual psychopath who could not control his violent perverted desires. The concept of psychopathic disorder has become an acknowledged and important part of the English criminal justice system.[13]

Intoxication

18. The question of the relationship between intoxication and criminal responsibility has proved one of the most difficult in the law. The Court of Criminal Appeal has rejected the proposition that intoxication could amount to an "abnormality of mind" within section 2[14] of the *Homicide Act* 1957 but it seems in 1975 to have accepted the view that there may be cases where an accused person "proves such a craving for drink or drugs as to produce in itself an abnormality of mind".[15]

Mercy Killing

19. Diminished responsibility has been invoked in a number of cases as a defence to mercy killing.[16] Home Office research indicates that between 1957 and 1968 there were 23 such cases.[17] The cases follow a pattern of people killing their severely retarded children or terminally ill parents; a state of "reactive depression" (an abnormal state of despair) is usually diagnosed and there being no medical evidence called in rebuttal by the Crown and a sympathetic reaction from the jury, a verdict of manslaughter is returned and a sentence of probation or a short term of imprisonment is imposed.

Provocation

20. The defence of diminished responsibility has served to compensate for what many regard as a deficiency in the existing English law relating to killings which although provoked do not satisfy the stringent criteria necessary for a successful defence of provocation. Where the provocative incidents have been occurring over a period of time and the accused finally reaches his breaking point there may be no final provocative act which can be isolated and demonstrated as the direct cause of the accused's lack of self-control. Furthermore, if there is a considerable time lapse between the last demonstrable act of provocation and the killing the defence is unlikely to succeed. In such circumstances however it is often possible to diagnose a

[12] *The Mental Health Act* 1959 (U.K.) recognises "psychopathic disorder" as "a persistent disorder or disability of mind . . . which results in abnormally aggressive or seriously irresponsible conduct . . . "
[13] See A. Ashworth & J. Shapland. "Psychopaths in the Criminal Process" [1980] Crim. L.R. 628.
[14] *Di Duca* (1959) 43 Cr.App.R. 167.
[15] *Fenton* (1975) 61 Cr.App.R. 261, 263.
[16] e.g. *Marples,* Nottingham Evening News June 12, 1958; *Moodie,* The Times Jan. 14, 1959, [1959] Crim. L.R. 373; *Johnson,* The Times, July 2, 1960; *Gray* (1965) 129 Justice of the Peace & Local Government Review 819; *Price,* The Times Dec. 22, 1971.
[17] E. Gibson & S. Klein, *Murder 1957-1968,* A Home Office Statistical Division Report on Murder in England & Wales, Table 42.

state of reactive depression or hysterical dissociation (an imperfect adaptation to stress and conflict) or similar mental disturbance.[18] There are other cases where although provocation exists the reaction may not be thought by the jury to be that of the "reasonable man" but could be regarded as that of a subnormal person or of one suffering from some other form of mental disorder.

In these situations it is not uncommon for both provocation and diminished responsibility to be taken as defences.[19]

Queensland

21. Diminished responsibility was introduced in Queensland in 1961 as part of a general review of those sections of the Criminal Code in which the Minister for Justice perceived a clear need for change and desirable reform. Unlike England and the common law jurisdictions in Australia where the McNaghten Rules as to insanity prevail, the Queensland Criminal Code contains a different formula for the defence of insanity — a formula which includes the defence of "irresistible impulse". This is contained in section 27 which reads as follows:

> "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."

22. Punishment of death was abolished in Queensland in 1922 and was not a factor for consideration in introducing the new defence in 1961. The phrase "mental responsibility" which has caused some difficulty in the interpretation of the English section was not used in the new section in Queensland which based itself on a diminution of capacity and followed the wording of section 27 in this regard whilst importing the causes of diminished responsibility from the English legislation. Section 304A of the Code reads:

"Diminished responsibility:

> 304A. (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute [wilful murder or][20] murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair his capacity to understand what he is doing, or his capacity to control his actions, or his capacity to know that he ought not to do the act or make the omission, he is guilty of manslaughter only."

23. The English case of *Byrne* (*supra*, para. 13) has formed the basis of interpretation of the abnormality of mind required by this section although Mr.

[18] See e.g. *McPherson*, The Times, June 18, 1963; *Slape* [1965] Crim L.R. 320; *Fulker* [1972] Crim.L.R. 579.
[19] See Glanville Williams, *Textbook of Criminal Law*, 495-6.
[20] The distinction between murder and wilful murder was abolished in 1971.

Justice Hanger in the case of *Rolph*[21] thought that the interpretation was not sufficient and that it would be

> "necessary to remind juries that normal people in the community vary greatly in intelligence, and disposition; in their capacity to reason, in the depth and intensity of their emotions; in their excitability, and their capacity to exercise self-restraint, etc., etc., the matters calling for mention varying with the facts of the particular case: and that until the particular quality said to amount to abnormality of mind, goes definitely beyond the limits marked out by the varied types of people met day by day, no abnormality exists."[22]

With such help as the judge can and should give in unravelling any difficulties and contradictions in evidence the defence is clearly one in which the jury should decide whether the abnormality is substantial enough (i.e. "less than total but more than trivial or minimal"[23]) to call for a verdict of manslaughter rather than murder.

New South Wales

24. The only Australian State other than Queensland to adopt diminished responsibility is New South Wales which substantially reproduced the English formula in section 23A of the *Crimes Act* 1900 in 1974:

> "23A(1) Where, on the trial of a person for murder, it appears that at the time of the acts or omissions causing the death charged the person 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 the acts or omissions, he shall not be convicted of murder."

25. The defence was introduced as a result of a recommendation by the Criminal Law Committee which had been convened as a Working Party by the Attorney-General in September, 1971. The Committee consisted of Judge Amsberg, a Crown Prosecutor, the Senior Public Defender, and representatives from the Magistracy, the New South Wales Bar Association and Law Society, the Sydney University Law School, the New South Wales Institute of Criminology, the Police Prosecuting Section, and the Council for Civil Liberties. Its recommendation that the concept be imported was stated to have been

> "impelled chiefly by the continuation of the mandatory life sentence for murder,[24] and the comparative inflexibility of the McNaghten approach. It seemed reasonable to allow the "abnormal", but guilty, accused some degree of reduction in law — rather than solely at the hands of the jury — of the position whereby he is confronted by either life imprisonment or detention at the Governor's pleasure."[25]

[21] [1962] Qd. R. 262.
[22] *Ibid.*, at 288.
[23] *Biess* [1967] Qd. R. 470, 476.
[24] The death penalty had been abolished in New South Wales in 1955.
[25] Report of The Criminal Law Committee on Proposed Amendments to the Criminal Law & Procedure, Parliamentary Paper No. 54, of 1973, p.6.

26. There are no reported cases on the meaning of section 23A, and the courts refer to English precedent for guidance. Lord Parker's judgment in *Byrne* is the accepted interpretation and juries are directed accordingly. In the comparatively short period which has elapsed since its enactment section 23A has not been very much availed of in trials. It has however become the practice for the Crown to accept a plea to manslaughter on the basis of diminished responsibility where satisfied that the facts warrant such a course and this apparently happens on four or five occasions per year.[26]

Sentencing

27. The question of sentencing options open, where there is a plea to or verdict of diminished responsibility, has been one of difficulty and complexity. It seems to have been satisfactorily resolved in England but this can hardly be said to be the position in either Queensland or New South Wales. The functions of and relationship between the prison authorities and the mental health authorities are of prime importance in this area and will next be shortly discussed in relation to those jurisdictions where the defence exists.

In England

28. In England for the person who is found not guilty of murder but guilty of manslaughter, or from whom the Crown and the court accept a plea of guilty of manslaughter, on the ground of diminished responsibility, there are a number of appropriate sentencing options.

The sentence for manslaughter may range from discharge to life imprisonment, and since the *Mental Health Act* 1959 came into effect in November, 1960, the courts have made extensive use of the hospital order provisions contained in sections 60 and 65 of that Act.

29. Section 60 sets out fairly stringent criteria which must be satisfied before the court can make an order that the offender be committed to a mental hospital. It is as follows:

> "60—(1) Where a person is convicted before a court of assize or quarter sessions of an offence other than an offence the sentence for which is fixed by law, or is convicted by a magistrates' court of an offence punishable on summary conviction with imprisonment, and the following conditions are satisfied, that is to say—
>
> (a) the court is satisfied, on the written or oral evidence of two medical practitioners (complying with the provisions of section sixty-two of this Act), —
>
> (i) that the offender is suffering from mental illness, psychopathic disorder, subnormality or severe subnormality; and
>
> (ii) that the mental disorder is of a nature or degree which warrants the detention of the patient in a hospital for medical treatment, or the reception of the patient into guardianship under this Act; and

[26] No official statistics are kept on the incidence of section 23A manslaughter; these estimates were supplied by the Public Defender.

> (b) the court is of 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,
>
> the court may by order authorise his admission to and detention in such hospital as may be specified in the order or, as the case may be, place him under the guardianship of a local health authority or of such other person approved by a local health authority as may be so specified."

The section further states that an order shall not be made unless arrangements have been made for the offender to be admitted to a specific hospital (subsection (3)), or in the case of guardianship the authority or person is willing to receive him (subsection (4)). An order made under the section, in addition, must specify the form of mental disorder from which the offender is suffering upon which both medical practitioners must agree (subsection (5)).

30. Once a section 60 order is made, the criminal justice system relinquishes its control over the offender and he becomes for most purposes a compulsorily admitted patient under the Act, and can be released by the Mental Health authorities.[27]

Since a hospital order may therefore be a "soft option" for some offenders or may be insufficient to protect the public from dangerous offenders who might be prematurely released, section 65 was enacted to enable higher courts to direct that the offender should not be released without the consent of the Home Secretary. This section empowers the court to make a restriction order where "it is necessary for the protection of the public so to do", and "having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large . . . either without limit of time or during such period as may be specified in the order".

31. A power which the Home Secretary had, to order that a prisoner found to be suffering from a mental disorder be transferred to hospital, was retained in section 72 of the 1959 Act. The existence of this power had often been relied upon by the courts as a justification for imposing a sentence of life imprisonment for diminished responsibility manslaughter, a course which satisfied the demands of security and passed the responsibility for ensuring that the offender received treatment to the Home Secretary.

32. The use of this power was considered by the English Court of Criminal Appeal in the case of *Morris*[28], where it was held that since the enactment of sections 60 and 65 this procedure was no longer appropriate. The "general principle" it stated was that

> "in the ordinary case where punishment as such is not intended, and where the sole object of the sentence is that a man should receive

[27] See Section 63 (3).
[28] [1961] 2 W.L.R. 986.

> mental treatment and be at large as soon as he can safely be discharged, a proper exercise of the discretion demands that steps should be taken to exercise the powers under section 60, and that the matter should not be left to be dealt with by the Secretary of State under section 72 . . . Of course there may be cases where, although there is a substantial impairment of responsibility, the prisoner is shown on the particular facts of the case nevertheless to have some responsibility for the act he has done, for which he must be punished, and in such a case, although as the court reads the sentence imposed by the judge this was not such a case, it would be proper to give imprisonment allowing the Secretary of State to exercise his powers under section 72 in order that any necessary mental treatment should be given."[29]

33. This statement of principle clearly raises the potential for conflict between an offender's treatability and his moral culpability, since the Court suggests that an offender who has "some responsibility for the act he has done" should be sent to prison, irrespective of his amenability to treatment. Whether the principle has actually been applied by courts faced with the conflict between an offender's treatability and his liability to moral censure however, is doubtful. There has been some debate in England but the author of a leading textbook on sentencing practices in the English Court of Criminal Appeal has come to the conclusion that "where an offender satisfies the statutory conditions for a hospital order the Court will usually require a hospital order to be made, even though the offence would normally attract a substantial sentence of imprisonment on the grounds of general deterrence."[30]

34. However there is still a significant proportion of offenders sentenced to imprisonment. Such a sentence may be imposed where a vacancy is not available for an offender in a secure hospital, or where the offender's mental disorder cannot be effectively treated. Available data suggests that many are psychopaths whom the Butler Committee[31] found "are not, in general, treatable, at least in medical terms".[32] The Committee was persuaded on the evidence before it that prison was the most suitable environment for dangerous psychopaths, and it recommended that amendments be made to section 60 of the *Mental Health Act* to ensure that hospital orders are only made for such persons in special circumstances.[33] In fact, while the use of hospital orders has declined generally in the past decade, the use of hospital orders for psychopathic offenders has dropped even more sharply.[34]

35. Again there are cases where the offender's mental disorder is not within section 60 of the *Mental Health Act*. Under that section a court making a hospital order must be satisfied that "the offender is suffering from mental

[29] *Ibid.*, at 991-992.
[30] Thomas, *Principles of Sentencing*, 2nd ed. (1979) p. 296.
[31] A Committee on Mentally Abnormal Offenders was set up in September 1972 under the Chairmanship of Lord Butler and consisted of a High Court judge and a number of persons eminent in law, medicine, and social welfare. It presented its Report (Cmnd. 6244) in October 1975.
[32] Butler Report, para. 5.34.
[33] *Ibid.*, para. 5.40.
[34] See A. Ashworth & J. Shapland, *op. cit.*, (*supra*, note 13) p. 633.

illness, psychopathic disorder, subnormality or severe subnormality" and that "the mental disorder is of a nature or degree which warrants the detention of the patient in a hospital for medical treatment". Some offenders satisfy only one, or neither, of these criteria, for example, Thomas refers to a number of cases in which the accused have been described variously as mildly psychopathic,[35] emotionally immature,[36] suffering from a personality disorder[37], having a weakness of personality[38] or simply "an abnormal person".[39] In some cases the offender is regarded as still unstable and potentially dangerous and attracts a sentence of life imprisonment, but more often the offender is not suffering from a continuing mental disorder and has recovered by the time of trial. The mercy killers, and those who combine provocation and diminished responsibility feature prominently in this latter group.

36. Although the Court of Criminal Appeal had maintained in 1961[40] that three years was the most lenient sentence a mentally disordered person who killed even in "the most tragic circumstances" could expect, probation orders have averaged about 10 per cent each year. In *Gray*[41], a tragic case of a man killing his teenage son who had terminal cancer of the spine, the trial judge, in imposing a sentence of three years' probation, said:

> "I am the last person in the world to think of punishing you for this offence, dreadful though it was. Your circumstances were quite intolerable, and although it may be wrong ethically to take life I can quite understand your motives in this case in that you felt you did the right thing. I am perfectly certain there is not a single person in this court, or outside, who will feel you are in any sense a criminal, and I feel equally certain there is forgiveness hereafter for you just as there will be on earth."

The court, however, will not impose a psychiatric probation order unless there is a real possibility that the accused will profit from treatment.. Thomas states:

> "Where the making of a psychiatric probation order appears to offer a reasonable chance of solving the offender's problems without serious danger to public, an order will usually be made, even though the offence concerned is one of substantial gravity . . . The court is likely to uphold a sentence of imprisonment in deference to the claims of the tariff only where the offence is of the utmost inherent gravity and the need for treatment minimal."[42]

37. In evolving its sentencing principles the courts have conspicuously avoided the potential for conflict between treatability and culpability, no doubt as a recognition of the impossibility, in practical terms, of balancing such competing interests. The result is that there is now a substantial gap between the theory and practice of dealing with diminished responsibility,

[35] *Bland* 21.9.71, *op. cit.*, p. 297.
[36] see cases in *op. cit.*, p. 302 n. 4.
[37] *Williamson* 5.3.70 and *Wilkins* 18.3.74, *op. cit.*, p. 302 n. 3.
[38] *Adams* 11.4.75, *op. cit.*, p. 303.
[39] *Robinson* 13.6.75, *op. cit.*, p. 297.
[40] *Pachy*, The Guardian, Nov. 14, 1961.
[41] (1965) 129 Justice of the Peace & Local Govt. Review, 819.
[42] *Op. cit.*, pp. 293-294.

the former implying some reduced form of punishment according to the degree of responsibility and the latter effectively adopting a non-punitive approach by giving priority to treatability and the protection of the public.

38. Sentences of life imprisonment, which are frequently imposed, are justified on the basis of principles developed by the courts[43] after the enactment of section 57 of the *Criminal Justice Act* 1948 which empowered the Home Secretary to release on licence and recall at any time a person serving a life sentence[44]. The justification for imposing the maximum penalty which would in many cases offend against the principle of proportionality, was recently restated by the Court of Criminal Appeal in *Maun*:[45]

> "Where the accused has some mental deficiency and it is impossible to foresee exactly how that deficiency will continue and develop . . . it is right and proper for the Court to keep a hold, as it were, over the accused by sentencing him for life and then leaving the question of his release to be determined when his condition improves, and as it improves."[46]

Thus the courts are able to characterise life sentences as being more favourable to the offender than a fixed term of imprisonment:

> "Very often a sentence of imprisonment for life is imposed in mercy; it may well be that a man is suffering from some mental element which will clear up very quickly, and in those circumstances with a sentence of life imprisonment it can be reviewed at any time."[47]

In Queensland and New South Wales

39. Neither in Queensland nor in New South Wales is there any provision for hospital orders of the English type.

40. In Queensland a sentencing judge has no power to order that a mentally disordered person who is convicted of an offence be detained in a mental hospital rather than a prison. However the Comptroller-General of Prisons has power under section 16 of the *Prisons Act* 1958 (Qld) to order the transfer of a prisoner to a mental hospital or a "security patients' hospital". By virtue of section 31 of the *Mental Health Act* 1974 (Qld) the prisoner so transferred remains in hospital until he has recovered from his mental illness whereupon he is returned to prison to serve the remainder of his sentence. If however his sentence expires while he is still in hospital, he is not released but becomes subject to the normal procedures for compulsory detention and by virtue of section 50 of the Act cannot be released without the consent of the Director of Psychiatric Services.

41. Since February 1972 there has been a "security patients' hospital" in Her Majesty's Prison at Wacol. It is understood that this section of the prison is not exclusively for mentally ill people but is also regarded as a secure holding place for those adjudged dangerous although not mentally

[43] *Cunningham* [1955] Crim. L.R. 193; *Grantham* [1955] Crim. L.R. 386; *Holmes* [1955] Crim. L.R. 578.
[44] see now *Criminal Justice Act* 1967, s. 61.
[45] (1978) 71 Cr. App. R. 100.
[46] *Ibid.*, at 102.
[47] *Costelloe* (1970) 54 Cr. App. R. 172, 174.

ill. A criticism has been made that there is no modern psychiatric treatment available in the hospital and the whole emphasis is on security rather than treatment. Doctors from the main mental hospital for the Brisbane area at Woolston attend at Wacol two or three times a week but it is said there are no facilities for psychiatric treatment, no psychiatrically trained nurses and in short there is no adequate treatment available for the mentally disturbed.

42. The maximum sentence for manslaughter in Queensland is life imprisonment. In nearly all of the cases examined long prison sentences have been imposed, apparently with the preventive aspect to the fore. In the first 7 years of the availability of the defence it was raised successfully only 11 times and the majority of the sentences were long, 3 being for life, others being for 20 years, 15 years, 14 years, 12 years, 10 years, 7 years and 6 years, with only one prisoner being released on 2 years' probation with an undertaking to undergo psychiatric treatment.

43. Life imprisonment was a course regarded as proper by the present Chief Justice of the High Court when, as a judge of the Supreme Court of Queensland he delivered judgment in the case of *Pedder* in 1964.[48] Pedder suspected his victim of having stolen some nylon netting and a knife from his hut. The victim, on being confronted, had made some offensive remark whereupon Pedder shot him twice and threw his body into the river. In explanation for the shooting he claimed that the victim had spoken in opprobrious terms of Churchill and the King. He was apparently suffering from a senile delusional state and was sentenced to life imprisonment.

44. The principles to be applied in sentencing offenders convicted of manslaughter because of diminished responsibility were stated by the judge thus:

> "A person found guilty of manslaughter by reason of the provisions of Section 304A of the Code is liable to imprisonment with hard labour for life. Cases of manslaughter by reason of diminished responsibility may, like other cases of manslaughter, vary greatly in their nature, and the appropriate sentence may vary accordingly, but the imposition of a proper sentence is, under the Code, the responsibility of the Court, not of the Executive. In some cases in which it appears that there is no likelihood that the convicted person would be a danger to the public if set at liberty and that there were mitigating circumstances a light term of imprisonment or no imprisonment at all may be appropriate. On the other hand there are cases in which the mental condition of the convicted person would make him a danger if he were at large and in some such cases sentences of life imprisonment may have to be imposed to ensure that society is protected. It is true that the proper place for many of such persons is a mental hospital rather than prison, but the Court has no power (such as that conferred by section 60 of the *Mental Health Act*, 1959, of the United Kingdom) to order that the offender be admitted to hospital, and it cannot abdicate its duty to impose a proper sentence on the assumption that if the offender were sentenced to a short

[48] Unreported, 29 May 1964.

term of imprisonment, he might be transferred to and kept in a security patients' hospital. Even in cases where it is hoped that mental treatment may so ameliorate the condition of the offender that it would eventually be safe to discharge him, although it is not known how long it would take to achieve this result, it may still be necessary, in the present state of the law, for the court to impose a sentence of life imprisonment, *if that is not otherwise inappropriate to the circumstances of the crime,*[49] rather than let loose a man whose abnormality of mind may lead him to commit further killings."

45. The sentence of life imprisonment was justified in Pedder's case on the basis of the protection of the public: the applicant was 78, was suffering from a senile delusional state which could not be cured, and there was medical evidence that violence may well recur. These principles appear to be still applicable in Queensland and were applied in a case in 1975[50] in which a sentence of life imprisonment was imposed because it was impossible to say for how long it would take the prisoner to be rehabilitated and to be freed in the community.

However the case of *Veen*[51] next to be mentioned may lead to a change of approach.

46. In New South Wales there had been no reported cases of the defence of diminished responsibility until the case of *Veen* who was tried for murder in 1975 and convicted of manslaughter, apparently on the ground of diminished responsibility. This case involved a lengthy examination of the principles of sentencing where such a defence is taken, both in the Court of Criminal Appeal of New South Wales and subsequently in the High Court. Veen, an aboriginal homosexual prostitute, met the deceased, Ward, in Kings Cross one Saturday, and Ward invited Veen to his flat. The two men spent the rest of the weekend together and some homosexual activities took place for which Veen expected to be paid. On Sunday night after the two had been drinking heavily, Veen asked for payment whereupon Ward replied: "No, you black bastards are all the same, always wanting handouts". Veen then grabbed a kitchen knife with which he repeatedly stabbed Ward until he died. He then ransacked the flat, stole some money and left wearing Ward's clothing.

At his trial for murder Veen relied on both provocation and diminished responsibility. The defence called a clinical psychologist who stated that on the basis of some intelligence and personality tests he had conducted on the accused he had formed the view that the accused had at some time past sustained a cerebral injury, which under conditions of extreme provocation or with an intake of alcohol would cause him to react with uncontrollable aggression. The Crown psychiatrist on the other hand denied that the accused's responsibility was in any way impaired and claimed that he suffered from nothing more than a personality defect. The jury returned a verdict of manslaughter and when the foreman was asked whether it was based on diminished responsibility he answered "yes".

[49] Emphasis added.
[50] *Tonkin* [1975] Qd. R. 1.
[51] *Veen* (1979) 53 A.L.J.R. 305; (1978-1979) 23 A.L.R. 281.

The trial judge, concluding that the jury had accepted the psychologist's evidence of the accused's brain damage, imposed the maximum sentence for manslaughter in New South Wales, life imprisonment. There was no suggestion, he said, that the accused's condition was curable or in any way responsive to treatment and it was likely that his aggressive conduct would continue. The judge did not think that it could properly be said (as he interpreted the jury's verdict) that Veen should undergo punishment. He had to be imprisoned for the protection of the community from his own uncontrollable urges; as there was no institution he could send him to the only alternatives open to him were to release the prisoner or to imprison him, and the first alternative was in his view an impossible one.

47. The Court of Criminal Appeal, purporting to adopt and follow principles propounded by the English Court of Criminal Appeal (*supra*, para. 38), held the use of the life sentence to be proper in serious cases. As in England, the Executive is in New South Wales empowered to release a prisoner on licence during the unexpired portion of his sentence.[52] Thus it is assumed that a mentally abnormal prisoner, if he is not transferred to hospital by the Minister under section 27 of the *Mental Health Act* 1959 (N.S.W.), will receive psychiatric treatment in prison and be released as soon as his condition is sufficiently improved.

48. However the High Court by a majority (Mr. Justice Stephen, Mr. Justice Jacobs, and Mr. Justice Murphy) substituted a sentence of 12 years imprisonment for the life imprisonment ordered by the trial judge. Mr. Justice Jacobs saw the development in England of the principle that an indeterminate sentence of life imprisonment may be desirable even in the cases where the whole of the circumstances of the offence do not warrant such a sentence as proceeding from two bases. The first was that in such a case the prisoner's mental condition could be kept under constant review and treatment so that if it were to sufficiently improve he could be released on licence, and the second was that the prisoner was proved to be a continuing danger to the community and the longer sentence was felt to be requisite for its protection. As Mr. Justice Jacobs pointed out, "both these bases — constant review and treatment of the prisoner's mental condition with a view to his release if and when he responds, and meanwhile protection of the community — inter-relate with one another."[53]

And as he saw it, the second without the first, would offend against the fundamental principle that a man must be given a sentence appropriate to his crime and no more.

> "It is only by regarding the life sentence for a mentally disturbed offender as no more than appropriate because of the potential advantage which it offers to the offender — proper treatment and possibly earlier release than would otherwise be open —"

he said,

> "that the course has been able to be developed in England. It needs to be emphasised that the protection of the public alone does not justify an increase in the length of sentence."[54]

[52] *Crimes Act* 1900 (N.S.W.) section 463.
[53] *Veen* (1979) 53 A.L.J.R. 305, 313; (1978-1979) 23 A.L.R. 281, 296.
[54] *Ibid.*

The judge went on to compare the treatment available in England and New South Wales for mentally disturbed offenders to the noticeable disadvantage of New South Wales, and he made lengthly reference to the Report of Mr. Justice Nagle sitting as a Royal Commissioner into N.S.W. Prisons, finally referring to the situation as "a bleak picture which Mr. Justice Nagle concludes to be in need of urgent reform". He concluded: "If and when that reform should be effected it would be time to consider the adoption of English development".[55]

49. Mr. Justice Murphy took the uncompromising view that if some definite term of imprisonment should be imposed upon an offender by way of punishment it is a wrong administration of the criminal law for the judge to order a life sentence of preventive detention hopefully leaving it to Executive intervention to examine the prisoner and do what is right. It is wrong, he said, for the courts to impose punishment or greater punishment than is merited, because of the lack of non-punitive preventive detention.

50. The other two judges of the Court (Mr. Justice Mason and Mr. Justice Aicken) thought that as there were cases in which the mental condition of the convicted person would make him a danger if at large in such cases sentences of life imprisonment may have to be imposed to ensure that society is protected. They saw no opposition between a sentence of life imprisonment with the object of protecting the community and the principle of proportionality. In the result the sentence was varied by decreasing the term of imprisonment to 12 years.

51. This case at least makes clear the interdependence of the criminal law and mental health legislation where mentally abnormal offenders are before the court.

The Victorian Scene

52. Any consideration of reform of the substantive criminal law cannot be divorced from the question of sentencing and sentencing options. Should the offender be imprisoned? Has he paid sufficient penalty by being caught and convicted, and consequently can he be discharged without further penalty? Would it be appropriate to release him on his undertaking to be of good behaviour and to come up for sentence if and when called upon? Is it better to impose a monetary fine? Would justice be better achieved by ordering him to perform some useful community work? — assuming that the law provides for some or all of these alternatives.

53. Any discussion of the introduction of a defence of diminished responsibility must inevitably include consideration of the disposal of offenders whose responsibility has been decided to have been diminished and this consideration in turn involves questions of moral culpability, punishment, and treatment, and the competing claims of the latter two concepts in sentencing policy.

54. This is a field which has been little dealt with in Victoria. Legislative consideration of mentally abnormal offenders has been haphazard, both in the area of criminal law and of mental health.

[55] (1979) 53 A.L.J.R. 305, 314-315; (1978-1979) 23 A.L.R. 281, 299.

Charges of Murder

55. It seems useful to enter this unmapped field by considering the person charged with murder. Before he is brought to trial a psychiatric examination or maybe several are made and both the accused's fitness to plead to the charge and his mental condition at the time of the homicide are the prime objects of interest at this stage. If he is considered fit to plead and there is material to support a defence of insanity (i.e. a condition of mind which comes within the confines of the McNaghten Rules and that condition existed at the time of the homicide) the defence is faced with the problem of whether or not to plead insanity, the onus of proving which rests upon the accused. Because of the consequences of success in this defence a decision whether or not to plead it can be of deep and painful concern to both the accused and his advisers but further consideration of this aspect of a criminal defence is not germane to this paper.

56. However the result of the trial is germane in two respects. If the defence of insanity is not taken and a verdict of guilty is returned, then the court has no option but to sentence the accused to imprisonment for the term of his natural life. This sentence was substituted for that of death by hanging early in 1975 and so far no policy seems to have emerged with respect to the actual length of imprisonment which must be served or whether and when the prisoner can come under the consideration of the Parole Board with a view to ultimate release.

57. At the present time there are 70 prisoners undergoing a sentence of this type. It has been estimated by Dr. Bartholomew, a consultant psychiatrist at Pentridge, that the mental condition of approximately 50 per cent of these prisoners was at the time of the offence such that evidence of their diminished responsibility could have been produced had that defence been available and consequently in their cases a verdict of manslaughter would have been possible. Dr. Bartholomew is an extremely experienced psychiatrist who has conducted psychiatric examinations of over 850 prisoners convicted of murder.

Not Guilty but Insane

58. If the defence of insanity is successful the verdict of not guilty on the ground of insanity, although it pronounces the person charged to be free of criminal responsibility, leaves the trial judge no option but to order the prisoner acquitted on that ground to be kept in strict custody in such place and in such manner as to the court seems fit until the Governor's pleasure is known. Effect is given to the direction initially by confinement in Pentridge Prison. The Governor then may by order direct that he be kept in safe custody during the Governor's pleasure in the place designated in the order or in such other place as a person or authority designated in the order may from time to time determine.[56]

59. The Governor's practice is to direct that the person be kept in strict custody at Her Majesty's Prison at Pentridge or such other place as the

[56] *Crimes Act* 1958, section 420.

Director-General of Community Welfare Services may from time to time determine. On reception into Pentridge the "prisoner" is again examined psychiatrically and a decision made. Consideration is first given to whether the person is mentally ill or intellectually defective within the meaning of those terms as defined in the *Mental Health Act* 1958. The former is defined as meaning

> "to be suffering from a psychiatric or other illness which substantially impairs mental health"

and the latter as

> "to be suffering from an arrested or incomplete development of mind".[57]

This will be seen as covering a much wider field than the McNaghten Rules. If the person appears to be mentally ill or intellectually defective then section 52 of the *Mental Health Act* may be brought into operation. This section reads as follows:

> "52. (1) If any person while lawfully imprisoned or detained in any gaol or other place of confinement appears to be mentally ill or intellectually defective it shall be lawful for the Minister for Social Welfare* upon receipt of certificates in the prescribed form from two medical practitioners to direct by duplicate order under his hand that such person shall be removed as a security patient to some State institution as the Minister for Social Welfare* thinks proper and appoints.
>
> (2) Every person so removed whether before or after the commencement of this Act as a security patient shall be detained in some State institution until it is certified either by the authorized medical officer alone or by the superintendent of such institution and some other medical practitioner that such person no longer need be treated in an institution, whereupon the Minister for Social Welfare* shall if such person remains subject to be continued in custody issue his order in duplicate to the superintendent of such institution directing that such person be discharged from the institution and removed to the gaol or other place whence he had been taken or to some other gaol or place of confinement to be dealt with according to law or if such person does not remain subject to be continued in custody the Minister for Social Welfare* shall direct that he be discharged and he shall be discharged accordingly."

60. If the Minister for Community Welfare Services directs removal as a security patient to a State institution the person certified passes out of the control of the prison authorities and into that of the mental health authorities. By way of illustration, in August 1980, 7 of the 40 held during the Governor's pleasure under section 420 of the *Crimes Act* were in mental hospitals — 4 in J Ward at the Aradale Hospital at Ararat, 2 in Mont Park, and 1 at the Bundoora Repatriation Hospital. J Ward, which is the old Ararat Gaol is the most secure of these hospitals but has an effective capacity of only 30 patients.

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[57] *Mental Health Act* 1959, section 3.
* Note: Now the Minister for Community Welfare Services.

61. Those who are not certified under section 52 but are mentally disturbed are initially held in G Division at Pentridge. It has been described as a decrepit building but staff care is expert and good and facilities are to some extent improving. However there is only scant provision of education and industrial therapy. Individual and group psychotherapy is undertaken to a limited degree by the two staff therapists. There is also a full-time psychiatrist, whose time is, however, taken up mostly by administration and court appearances, and a consultant psychiatrist employed on a part-time basis.

When the psychiatric state of the "patients" (to use a euphemistic term) has been assessed, a decision is made as to where they shall best be accommodated within the prison system. This depends of course in large part on the availability of accommodation, some remaining in G Division at Pentridge; others are transferred to country prisons; others may be sent to less secure prison institutions.

There are cases where after the killing has taken place the mental condition of the person who has killed quickly returns to normal, and little if any psychiatric treatment is necessary.

62. It must be said also that in the case of persons detained during the Governor's pleasure under section 420 the Adult Parole Board is required once in every year and also whenever so required by the Minister, to furnish to him a report and recommendation with respect to every person who has been ordered pursuant to the provisions of the section to be kept in strict custody. The Adult Parole Board is a body consisting of a judge of the Supreme Court who is its Chairman, the Director-General of Community Welfare Services, a full-time member appointed by the Governor-in-Council, and three other persons, including one woman, appointed by the Governor-in-Council. However it is for the Minister to decide if and when a person detained shall be released.

63. Of the 33 section 420 cases who were not certified under section 52 in August 1980, 10 were in G Division and the remainder were spread throughout the prison system, most of them having prospects of rehabilitation progressing through the country prisons to open camps and then to release supervised by parole officers. Country prisons, however, have no psychiatric staff and must rely on visits from the psychiatrists at Pentridge. If symptoms recur and treatment is required the "patient" must in most cases be returned to Pentridge.

64. An example of this progressive rehabilitation can be given of a person who killed a man whom he believed to owe him money and who was diagnosed as being a schizophrenic who might suffer a similar episode in the future. For some 4 years he remained in G Division at Pentridge under psychiatric care but progressed so well that he was transferred to a country prison where he has learnt a trade in addition to the one which he already had, has been behaving impeccably and will probably be released both as being cured of his mental disability and of no danger to the community.

Guilty of Manslaughter — Diminished Responsibility

65. The relevance of the foregoing is that as matters stand at present persons found guilty of manslaughter on the ground of diminished responsibility

if committed to prison, would be subject to much the same treatment and conditions as those detained during the Governor's pleasure. Section 52 where applicable would be brought into use and otherwise those needing psychiatric care would follow the same pattern.

66. When a prisoner is received into the prison his location within the prison system is considered by a Classification Committee which has the assistance of Dr. Bartholomew.

The prisoner's incarceration may thus range from J Ward at Aradale to the Prison Farm at Morwell.

67. Unlike the compulsory sentence for murder, in the case of manslaughter the court has a greatly increased number of options as to what sentence it may pass, and it is to these options to which attention will now be directed. The maximum sentence of imprisonment for manslaughter is for 15 years but there is no minimum sentence prescribed, so that the court may impose a fine or indeed discharge without penalty if there be a case suitable for that generous treatment. The latter could be the rare (although always possible) result after a verdict of manslaughter on the ground of diminished responsibility following upon a trial for murder.

68. Should such a verdict become possible the relationship between the crime and the punishment can be complex and difficult. Diminished responsibility can follow from mental illness, psychopathic disorder, subnormality of varying degrees, from disease or injury or it may be from some other inherent cause. What is to be the sentence for one who may be regarded as being of diminished responsibility? Is it to be one of punishment or as an alternative, treatment designed to cure his abnormality, or partly one and partly the other? What does the present system allow and what can be achieved within it? Apart from such treatment as is available either under section 52 of the *Mental Health Act* 1959 or within the prison system the following options would seem to be open. Some comments will be made where necessary as to how far they are appropriate.

Alcoholics and Drug-dependent Persons Act 1968

69. Section 13 of this Act provides that where the offender habitually uses intoxicating liquor or drugs of addiction to excess and drunkenness or drug addiction contributed to the commission of the offence, the court may impose a suspended term of imprisonment on condition that the offender attend a treatment centre, whether as an in-patient or out-patient, for a period of between six months and two years. Under section 14 a person who is dependent on alcohol or drugs may be committed to a detention centre for a period of between six months and three years in lieu of a sentence of imprisonment. However, no such detention centres have yet been proclaimed, and it has been held in the case of *Robinson*[58] that until such time as they are, the provisions of section 13 should not be invoked to enable an offender to avoid punishment where this is otherwise appropriate in the public interest.

[58] [1975] V.R. 816 (Full Court of Victoria).

Section 51, *Mental Health Act* 1959

70. Section 51 of the *Mental Health Act* 1959 reads as follows:

> 51. (1) Where a person is convicted of any criminal offence by a court of competent jurisdiction the court on being satisfied by the production of a certificate of a medical practitioner or by such other evidence as the court may require that such person is mentally ill or intellectually defective may in lieu of passing sentence order such person to be admitted into an appropriate State institution to be named in the order and the person shall forthwith be conveyed to and upon the production of the order and certificate shall be admitted into and detained in such institution accordingly.

71. The disadvantage of this section is the absence of any accompanying power to specify the length of the offender's detention or otherwise place restrictions on his release[59]; under section 51 (2) the offender becomes a recommended or approved patient and his discharge or detention is entirely in the hands of the hospital superintendent (section 42).

72. The unsuitability of this section was highlighted in a case in the County Court at Melbourne in 1975 in which a man who had pleaded guilty to three counts of indecent assault was ordered to be admitted to Royal Park Psychiatric Hospital. There he was examined by the Medical Superintendent and another doctor soon after admission, and they formed the opinion that there was no treatment they could carry out and that he should be released. It so happened that because of a technical informality the judge was able to withdraw his order before that release and a sentence of 4 years imprisonment was imposed.[60]

73. In a subsequent case the Full Court in rejecting a contention that a prisoner sentenced for a number of sexual offences should have been dealt with under section 51 pointed out that there was no way in which the prisoner could be compelled to remain in a recommended hostel. The court was of the opinion that the use of section 51 was limited to cases "where the court is satisfied in all the circumstances that the making of an order under the section is *preferable* to passing sentence".[61]

Something will be said later about directions in which section 51 might be amended.

Release on Recognisance

74. The court is empowered to release a person convicted on a recognisance to be of good behaviour and to appear when required before the court to receive sentence for the offence for which he has been convicted. This type of recognisance is not often used and the *Crimes Act* 1958 directs that a person convicted of any indictable offence shall not be released upon such a recognisance if in the opinion of the court he can properly and conveniently be released upon probation.

[59] See *Mayne*, unreported, 9 December 1975 (Full Court of Victoria).
[60] *R. v. Rapke; ex parte Curtis* [1975] V.R. 641.
[61] *Carlstrom* [1977] V.R. 366, 367-368.

Probation

75. Section 508 of the *Crimes Act* 1958 allows the court to make a probation order where it is of the opinion that having regard to the circumstances (which include the nature of the offence and the character and antecedents of the offender) it is expedient to do so. This is an order requiring him to be under the supervision of a probation officer for not less than 1 and not more than 5 years as specified in the order. Such an order may require the offender to comply during the whole or any part of the probation period with such requirements (including a requirement that the offender submit himself to medical, psychiatric or psychological treatment) as the court considers necessary for securing good conduct or for preventing a repetition of the same offence or the commission of other offences.

Treatment in Prison

76. The availability of treatment in prison has already been discussed (*supra*, para. 61). The court, when considering what punishment to impose, may seek assurances that some treatment for a mentally disturbed offender will be given. Those assurances may be given but the court has no power to order treatment. It may of course recommend it.

In a recent case in the Federal Court of Australia in its appellate jurisdiction Sir Gerard Brennan of the High Court who was then a judge of the Federal Court remarked:

> "If there be statutory provisions governing the making of hospital orders or the giving of directions as to psychiatric treatment the statute would probably specify both the occasion for and the conditions of exercise of particular statutory power . . . "

He went on to say:

> "but where there is no statutory power which might authorise the application of force to a prisoner without his consent during his incarceration, I know of no jurisdiction impliedly vested in a court to direct the application of force in order to effect some psychiatric treatment. The compulsory administration of drugs or the compulsory application of electro-convulsive therapy are not treatments which may be ordered by a court in the absence of special statutory powers. Much less may a court devoid of those powers purport to authorise the application of force at the discretion of prison authorities".[62]

Prison without Treatment

77. In effect a sentence without any recommendation as to treatment leaves it to the Classification Committee and the Government Psychiatrist to recommend and implement such treatment as is possible with the resources available. However if a fixed term of imprisonment is imposed with a minimum period to be served it is always open to the Parole Board upon expiry of the minimum term to release the offender under a parole order requiring him to consent to undergo psychiatric treatment.[63]

[62] *Channon* (1978) 20 A.L.R. 1, 7-8.
[63] *Community Welfare Services Act* 1978, section 195.

78. It is to be remembered that psychiatric treatment whenever contemplated for the rehabilitation or the promotion of mental health of an offender must be undertaken with an awareness on the part of the prisoner of what the treatment involves and with his consent to undergo it. These matters were highlighted in the recent case of *Tutchell*[64] in the Victorian Full Court.

Tutchell had pleaded guilty to a number of sexual offences involving (*inter alia*) young boys and girls and had been sentenced to a long term of imprisonment. He appealed against the sentences imposed and the Full Court heard evidence from psychologists and Dr. Bartholomew and received a report from them and other psychiatrists. It was shown to the court that Tutchell had an established tendency to commit offences of the type of which he had been convicted and it seemed likely that if he was given a prison sentence without receiving any treatment he would on his release resume the commission of these kinds of offences. The court was concerned mainly to take a course which if possible would protect young girls and boys from sexual offences by him. The provision of satisfactory treatment in the prison was problematical and the court was compelled to a conclusion that he could not be treated outside, principally for two reasons.

Firstly, treatment would depend on Tutchell's consenting to a requirement in a probation order that he submit himself to psychiatric or psychological treatment and the court felt there was serious reason to doubt whether he understood what would be involved and whether he was capable of expressing a real and informed willingness to submit to it. Secondly, because of the necessity for the various persons and authorities involved in carrying out the plan to provide treatment agreeing to fulfil their respective responsibilities, the proposed plan of treatment was not feasible. Because of what were undoubtedly good reasons the Mont Park Hospital could not undertake the responsibility of accepting Tutchell as a voluntary patient. In the result the court sentenced him to a reduced term of imprisonment.

Attitude of the Courts

79. Although there is no defence of diminished responsibility in Victoria mitigating effect has been given to mental disorder in sentencing. In *Rudd*[65] there was a plea of guilty to the manslaughter of Rudd's de facto wife whom he had strangled after an argument about her unexpected pregnancy. There was evidence that Rudd had a history of fits of depression over many years, that he had previously consulted a psychiatrist and had on three occasions attempted to commit suicide. The trial judge accepted a plea to manslaughter and sentenced him to 12 years imprisonment. On his appeal the Full Court reduced the sentence to 9 years with a minimum of 6, taking into account *inter alia* the applicant's "mental and nervous deficiency calculated to affect the control of his conduct" and that he had reacted emotionally and in provocative circumstances. Referring to this part of the evidence the Court said:

> "This material shows that this has to be treated as a case of diminished responsibility. Diminished responsibility is not a factor in account-

[64] [1979] V.R. 248.
[65] Unreported, 6 February 1974, (Full Court of Victoria).

ability in this State but the factor of mental responsibility is one which may and ought to be taken into account in mitigation of punishment . . . "

80. However as was stated in *Wright*[66]

> "mental abnormality will not inevitably lead to an offender being treated for sentencing purposes differently from a mentally normal offender. The mental condition of the applicant was a relevant matter to take into account but it was not such as to lead to a reduction in the sentence otherwise appropriate."

Wright had pleaded guilty to two counts of rape and had asked for two indecent assaults and one further rape to be taken into account. The offences involved different victims on separate occasions and one rape was committed whilst he was on bail for the other two. There was evidence that he was suffering from a personality disorder with "marked psychosexual pathology". Mention was also made of the need "on the medical evidence" to protect the public. The Full Court refused to alter the sentence of 15 years with a minimum of 13 years.

81. In the same month in the case of *Mooney*[67] who had pleaded guilty to one count of assault occasioning actual bodily harm and one of wounding with intent to resist lawful apprehension, and had been sentenced to 4 years imprisonment with a minimum of 18 months, the Full Court laid more stress on the treatability of the appellant than on his responsibility for the offence. Mooney had attacked two policewomen causing them severe injuries. There was evidence that his display of violence was totally out of character and that he was at the time of the occurrence suffering from a mental disorder known as "manic depressive psychosis". Since the offence he had undergone treatment which had brought his condition substantially under control. The Chief Justice and Mr. Justice Lush in separate judgments expressed the view that the trial judge had given too much attention to the element of deterrence in the sentence and considered that general deterrence should be given very little weight in sentencing a mentally abnormal offender "who is not an appropriate medium for making an example to others". In the view of the Chief Justice, in passing sentence,

> "the question to be answered is whether the interests of society permit or the interests of the offender require that the sentence to be passed be reduced from what would otherwise be appropriate rather than whether the offender's responsibility for the offence should be regarded as having been reduced."

Mooney had been largely rehabilitated and was unlikely to offend in the same manner again but he required continuing treatment which would not be assisted by incarceration. The interests of society and the offender would be best served in the court's view by a sentence of 5 years probation with a condition of psychiatric treatment.

Mr. Justice Jenkinson added that

> "an evaluation of the offender's moral responsibility for his crime is always required in the exercise of the sentencing discretion".

[66] Unreported, 8 June 1978 (Full Court of Victoria).
[67] Unreported, 21 June 1978 (Full Court of Victoria).

82. This case and *Tutchell's* case (*supra*, para. 78) evidence the court's willingness and indeed wish to favour treatment as against punishment where it is of opinion that the former is likely to benefit both the prisoner and those segments of society which are endangered by a repetition of the person's conduct. As has been seen in *Tutchell* unfortunately there was no adequate hospital available.

Is There Need for Reform?

83. **It is suggested** that there is a need to make more adequate provisions for the mentally abnormal offender both in the better definition of his position when he intentionally kills a human being and in the options open to a court in disposing of him.

The criminal law already recognises the effect of anger and fear in conflict situations and allows for human frailty by its recognition of the defence of provocation in murder cases. However apart from the effect it gives to legal insanity, it makes no allowance for the emotional disturbance and distortion of reason brought about by intense jealousy, by pity and by pain both mental and physical. And so the person who kills out of depression, or in agonizing concern for a terminally and painfully ill parent, spouse or child, he who feels driven to kill by an obsessive jealousy brought about by behaviour which taunts and humiliates him, or the battered wife who, fearful, confused and resentful at last in an irrational explosion of violence destroys her tormentor, all must submit to the punishment for murder, *viz.* imprisonment for the term of natural life. So too the 30 year old man with the mentality of a child of 6 who kills in an access of childish anger also faces a verdict of murder with its mandatory punishment.

84. The provision of a defence of diminished responsibility would be, it is suggested, a step forward. At the one time it would remove the stigma of "murderer" from those whose moral culpability does not deserve such a stigma and would allow the court flexibility in sentencing those whose criminal responsibility does not deserve a sentence of imprisonment for the term of natural life.

85. It is of interest to note that there is already such a recognition in the provision of the crime of infanticide. Section 6 of the *Crimes Act* 1958 provides:

> "(1) Where a woman by any wilful act or omission causes the death of her child, being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child, or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for this section the offence would have amounted to murder, she shall be guilty of felony, to wit of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child."

The section also provides that upon the trial of a woman for murder of her child if the jury are satisfied that the balance of her mind was disturbed in the way just referred to it may return a verdict of infanticide rather than one of murder.

Definition of Defence

86. In what way the recognition of a defence should find expression has led to differing views. The English section[68] has led to difficulties as for example when psychiatrists have been required to testify whether the defendant's abnormality of mind substantially impaired his mental responsibility, this being a legal concept, not a medical one. The Butler Committee recommended that the Act should be reworded and suggested the following:

> "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 (Eng.)[69] 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."

87. This suggested wording was recently considered by the Criminal Law Revision Committee in England in its Fourteenth Report presented in March 1980.[70]

The Committee thought that the final words of the Butler draft were rather too wide and that if implemented a judge would have to direct a jury to consider first whether a defendant was suffering from a mental disorder as defined by section 4, secondly if he was, whether the disorder was an extenuating circumstance and thirdly whether that extenuating circumstance was such that it ought to reduce the offence from murder to manslaughter. In that final question the Committee thought that the judge would have to give some guidance to the jury as to what extenuating circumstance ought to reduce the offence and in practice that would mean that the mental disorder would have to be substantial enough to reduce the offence to manslaughter. The Committee thought that the definition should be tightened up and suggested that the latter part of the definition should read ". . . the mental disorder was such as to be substantial enough reason to reduce the offence to manslaughter."

88. The Butler Committee was of the view that by tying the section to a definition of mental disorder the formula would provide a firm base for the testifying psychiatrists to diagnose and comment on the defendant's mental state while leaving it to the jury to decide the degree of extenuation that the mental disorder merits. There is something to be said for leaving this matter completely to the jury and if the jury finds sufficient extenuation for a manslaughter verdict the sentence is still at large for the judge.

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[68] For convenience the section is repeated here:
Section 2 (1).
"Where a person kills or is party to the killing of another he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing".

[69] Section 4 defines "mental disorder" as meaning mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind.

[70] Cmnd 7884.

Extension of Penalties

89. It will be remembered that the maximum penalty for manslaughter in England, New South Wales and Queensland is life imprisonment. It is not hard to envisage cases where the gravity of the offence can justify such a penalty particularly so when the offender suffers from a mental disorder and has shown himself to be a likely continuing danger to the community.

For that offender it can be argued that the court should, for greater flexibility, be enabled to impose a life sentence. As there is no legislation in Victoria dealing with parole where a life sentence is involved it would follow that there should also be provision allowing the Parole Board to release the offender on parole on being satisfied that his mental condition justifies this course. Parole in such a case would involve both psychiatric treatment and recall where considered necessary.

Burden of Proof

90. Where a defence of provocation is taken it is for the defence to point to evidence either in the case for the prosecution or in its own case that there was such provocation. But this having been done, the prosecution must prove beyond reasonable doubt to the satisfaction of the jury that the killing was not brought about as a result of provocation. In the English *Homicide Act* 1957 which introduced the defence of diminished responsibility it was provided that the burden of proof should be on the defence, although it is for the defence to satisfy a jury not beyond reasonable doubt but rather on the balance of probability that the accused was suffering from diminished responsibility.[71] Where the defence exists it is common and indeed natural for both provocation and diminished responsibility to be urged on behalf of the person accused. It can be and undoubtedly often is confusing to a jury to be told that on the one hand the prosecution must satisfy them in one way in the case of provocation and on the other hand the accused must satisfy them to a different degree in the case of diminished responsibility. The English Criminal Law Revision Committee in its Fourteenth Report recommended that provision should be made to adopt the same burden of proof for both defences i.e. that described above in respect of provocation. This seems to be an eminently sensible course.

Additional Matters

Charge of Manslaughter

91. There are two other possible reforms in relation to diminished responsibility which merit consideration, both of which have led to recommendations by the Criminal Law Revision Committee after consideration of the 20 years of operation of the defence in England.

92. Paragraph 95 of its Report reads:

> "Under the present law diminished responsibility is a defence to a charge of murder. A person cannot be charged or indicted for unlawful killing by reason of diminished responsibility. Many practitioners think there ought to be such an offence. A commonly met situation is this. A man is killed. An hysterical woman telephones for the

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[71] *Dunbar* [1958] 1 Q.B. 36.

police. When they arrive, she admits that she has killed the man. She is arrested, charged with murder and committed in custody for trial on that charge. Once she gets to prison it is obvious to the medical officer there that she is suffering from a mental disorder. Following the usual practice in murder cases an independent consultant psychiatrist is retained to examine the defendant and report on her condition. He agrees with the diagnosis of the prison medical officer. Nevertheless the defendant still, in practice, has to be indicted for murder."

For some years as a result of a Court of Criminal Appeal decision judges had to leave the jury to decide whether a defence of diminished responsibility had been made out and pleas of guilty on this basis could not be taken.[72] The Report went on to say:

"This [situation] resulted in some distressing trials. In the early 1960's the judges decided that when there was no dispute that the defendant was suffering from mental abnormality amounting to diminished responsibility, he could plead "not guilty to murder but guilty to manslaughter by reason of diminished responsibility" and that such a plea could be accepted by the court. This was approved by the Court of Appeal in *Cox** . . . Even this more humane and sensible procedure is not completely satisfactory. The mental condition of a disturbed person is not likely to be improved by having a charge of murder outstanding. Further, it cannot be right that charges should be preferred in the most solemn way known to the law, i.e. on indictment, when the prosecution know that there is a defence to the charge which is likely to succeed. In our Working Paper we suggested that if relevant medical evidence is available provision should be made for allowing a person to be indicted for manslaughter although he has been committed for trial on a charge of murder. A number of those who commented on our Working Paper welcomed this suggestion. They included the Law Society, the Association of Chief Police Officers, the Metropolitan Police Solicitor, the Women's National Commission and the National Council of Women of Great Britain. The Senate of the Inns of Court and the Bar also welcomed our suggestion . . . "

The Committee recommended that provision be made enabling a Magistrates' Court, if the defendant consents, to commit for manslaughter by reason of diminished responsibility or, if he has been committed for trial on a charge of murder, allowing a defendant, if he consents, to be indicted for manslaughter by reason of diminished responsibility. The inclusion of the requirement for the consent of the defendant was based on the difficult situation which can arise where a person's mental condition may be in issue, e.g. the possibility of prejudice to a defendant who wishes to plead another defence such as alibi or mistaken identity.

Provocation and Diminished Responsibility and Attempted Killing

93. Here again the position can best be expressed in the words of the English Committee in paragraph 98 of its Report which reads as follows:

"During the nineteenth century it was clear law that provocation was a defence not only to murder but to wounding with intent to

[72] *Matheson* [1958] 1 W.L.R. 474.
* [1968] 1 W.L.R. 308.

murder*, this being a kind of attempt to murder (now merged in the general offence of attempt to murder). The technical reason for the rule is that a charge of attempt to commit a crime presupposes that the defendant will be liable for that crime if it is committed; if he attempts to kill under provocation, he will not be liable for murder if he succeeds, and therefore cannot be guilty of an attempt to murder if he fails. But the point is not only a technical one: if killing under provocation is a crime less than murder, it would look unjust to convict the unsuccessful attempter of an attempt to commit a greater crime. Suppose that a man finds his wife in bed with her lover and stabs both of them: the lover dies, but the wife survives. The verdict is guilty of manslaughter of the lover (by reason of provocation). It would be strange if the verdict in respect of the wife had to be one of attempted murder. The defendant's guilt should be of attempting to commit manslaughter. The nineteenth-century cases do not appear to have been referred to in two recent trials**. We propose that it should be enacted, for the avoidance of doubt, that in such circumstances the defendant can be convicted of an attempt to commit manslaughter but not murder. The same rule should apply, for the same reasons, to an attempt to kill in circumstances involving diminished responsibility. We do not think that allowing the defence will add substantially to the length of trials, because on a charge of attempt to murder the defendant will in any case generally wish to bring out any evidence he has of provocation or diminished responsibility in the hope that the jury will acquit or convict of a lesser offence. Indeed we think it likely that it may lead to a reduction in the number of contested cases if a plea can be tendered to attempted manslaughter. Provision should also be made enabling magistrates' courts to commit for attempted manslaughter if appropriate medical evidence is adduced at the committal proceedings with the defendant's consent. We do not, however, propose that provocation and diminished responsibility should be defences to any charge of crime other than murder and attempted murder: in other offences they should, as at present, be matters of mitigation only."

Provocation has here been bracketed with diminished responsibility although this matter of attempted killing was not discussed in Working Paper No. 6. The views expressed in the paragraph seem worthy of adoption. However a final view will not be attempted until all comments to be made on the matter have been received.

Evidence by Prosecution

94. Finally, the question has arisen of the necessity for a provision to deal with the calling of evidence of insanity by the prosecution where an accused person puts forward a defence of diminished responsibility, and of evidence of diminished responsibility where a defence of insanity is put forward. There has long been a rule of practice by virtue of which the prosecution is

* *Thompson* (1825) 1 Mood 80; *Bourne* (1831) 5 C. & P. 120; *Beeson* (1835) 7 C. & P. 142; *Thomas* (1833) ibid 817; *Hagan* (1837) 8 C. & P. 167.
** *Bruzas* [1972] Crim. L.R. 367; *Peck*, The Times, 5th December, 1975.

in general not allowed to call evidence that the accused is insane, even with his consent. There is a presumption that the defendant at the relevant time was in full possession of his faculties until the contrary is shown and he can refuse to permit evidence potentially raising the issue of insanity being adduced. This matter was dealt with in England by the Criminal Law Revision Committee in its Third Report of September 1963. The Committee acceded to the argument in favour of allowing the prosecution to call evidence of insanity, that when the defence have put the accused's state of mind in issue by arguing diminished responsibility it should be open to the prosecution to call evidence to show what his true state of mind was and therefore to ask for a verdict of guilty but insane — this being the then English form of verdict.

95. Following on the Third Report the *Criminal Procedure (Insanity) Act* 1964 was enacted in England. Section 6 of the Act provided as follows:

> "6. Where on a trial for murder the accused contends —
>
> *(a)* that at the time of the alleged offence he was insane so as not to be responsible according to law for his actions; or
>
> *(b)* that at that time he was suffering from such abnormality of mind as is specified in subsection (1) of section 2 of the Homicide Act 1957 (diminished responsibility)
>
> the court shall allow the prosecution to adduce or elicit evidence tending to prove the other of those contentions, and may give directions as to the stage of the proceedings at which the prosecution may adduce such evidence."

It seems that if the defence were to be allowed in Victoria a section along similar lines would be needed.

Mental Health Legislation

96. Whilst provision of a defence of diminished responsibility would undoubtedly add to the flexibility of sentencing there would seem to be a need for complementing legislative measures to assist the mentally deficient and disturbed — measures designed to provide treatment where such can be shown to be of likely benefit. Hospital orders after the English pattern immediately come to mind.

97. Early this year a Consultative Committee was set up to review the Victorian Mental Health Legislation. At its invitation a submission was made by the Law Reform Commissioner in which amendments to section 51 of the *Mental Health Act* 1959 were recommended. A summary of those recommendations is set out hereunder.

1. A court making a hospital order should be empowered to further order that the release of an offender regarded as dangerous be subject to special restrictions.
2. The ultimate decision to release such offender should be taken by the original Court of Commitment upon referral by the hospital superintendent.
3. As it is not desirable to impose time limits on hospital orders, all such orders should be of indefinite duration.

4. Offenders admitted to hospital under a hospital order should be treated in the same way as compulsorily admitted patients except (where a restriction order is also made) in relation to discharge.
5. The use of hospital and restriction orders should be subject to statutory prerequisites similar to those delineated in sections 60 and 65 of the *Mental Health Act* 1959 (U.K.) (*supra*, paras. 29-30). (Sections 60 and 65 of course refer to all offenders wherever charged, and this Working Paper sets out to deal with persons charged with the crime of murder only.)
6. Provision should be made for "interim hospital orders" as suggested by the Butler Committee.

   (In England it was found that some problems arose where a person was committed to hospital under section 60 and refused to co-operate with treatment or became intolerably disruptive or where it was sometimes found that a defendant had been feigning a mental disorder. The idea of the "interim hospital order" was that the defendant be committed to a specified hospital for a limited period for compulsory detention for a diagnosis and assessment. At the expiration of this period the court would again consider the case and would have discretion as to whether a further hospital order or a custodial order should be made.[73] It will be appreciated that for any of these recommendations to be effectuated substantial provision for treatment either in local hospitals or as the case may require, in a secure prison hospital such as exists at Grendon in England or, it is understood, in British Columbia, Canada, would be required.)

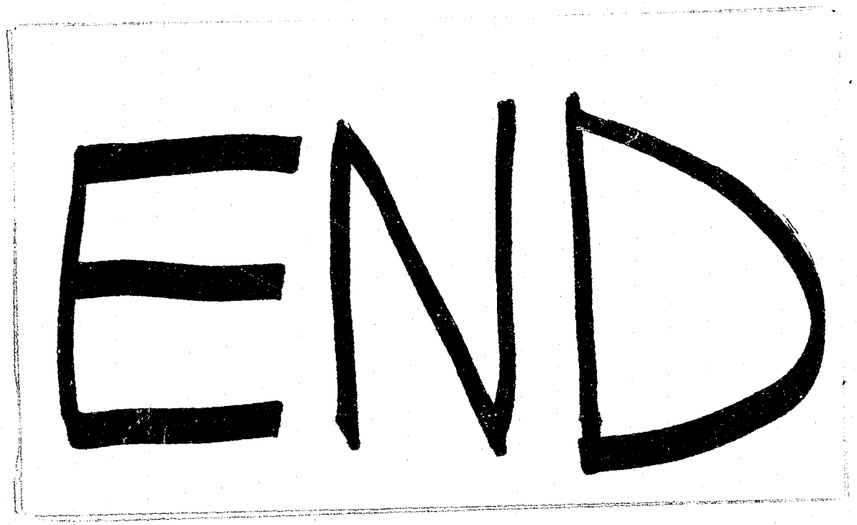
[73] See Butler Report, paras 12.5 to 12.6.

APPENDIX A

PERSONS CONVICTED OF MANSLAUGHTER ON THE BASIS OF DIMINISHED RESPONSIBILITY (ENGLAND & WALES) — SENTENCE

	1957	1958	1959	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978
Imprisonment for up to 1 yr.	—	—	—	1 *4.3*	1 *2.8*	—	—	1 *2.4*	—	2 *3.9*	1 *2.0*	—	—	—	1 *1.5*	2 *2.6*	—	—	1 *1.5*	—	—	1 *1.3*
1-2 years inc.	—	4 *16.0*	2 *9.5*	3 *13.0*	5 *13.9*	2 *5.9*	3 *6.5*	—	2 *4.3*	2 *3.9*	1 *2.0*	3 *6.8*	1 *2.1*	4 *6.1*	4 *5.9*	5 *6.6*	4 *5.0*	6 *7.6*	3 *4.5*	8 *8.7*	4 *4.9*	9 *11.4*
3-4 years inc.	—	3 *12.0*	3 *14.3*	2 *8.7*	—	1 *2.9*	2 *4.3*	1 *2.4*	—	2 *3.9*	3 *6.1*	3 *6.8*	1 *2.1*	1 *1.5*	3 *4.4*	4 *5.3*	9 *11.2*	3 *3.8*	4 *6.1*	7 *7.6*	12 *14.6*	3 *3.8*
5-9 years inc.	4 *36.4*	4 *16.0*	7 *33.3*	4 *17.4*	1 *2.8*	1 *2.9*	2 *4.3*	2 *4.9*	2 *4.3*	5 *9.8*	—	2 *4.5*	2 *4.3*	5 *7.6*	3 *4.4*	3 *3.9*	2 *2.5*	6 *7.6*	6 *9.1*	6 *6.5*	8 *9.8*	5 *6.3*
10 years & over	3 *27.3*	1 *4.0*	—	—	3 *8.3*	1 *2.9*	—	—	—	2 *3.9*	—	—	—	—	—	—	2 *2.5*	—	2 *3.0*	1 *1.1*	2 *2.4*	—
Life	3 *27.3*	10 *40.0*	8 *38.1*	11 *47.8*	9 *25.0*	7 *20.6*	14 *30.4*	9 *21.9*	12 *25.5*	5 *9.8*	8 *16.3*	2 *4.5*	6 *12.8*	11 *16.7*	12 *17.6*	7 *9.2*	10 *12.5*	19 *24.0*	14 *21.2*	20 *21.7*	21 *25.6*	21 *26.6*
Total Imprisonment	10 *90.9*	22 *88.0*	20 *95.2*	21 *91.3*	19 *52.8*	12 *35.2*	21 *45.7*	13 *31.7*	16 *34.0*	18 *35.3*	13 *26.5*	10 *22.7*	10 *21.3*	21 *31.8*	23 *33.8*	21 *27.6*	27 *33.7*	34 *43.0*	30 *45.5*	42 *45.6*	47 *57.3*	39 *49.4*
S.60 Order	—	—	—	—	)	)	)		5 *12.2*	5 *10.6*	7 *13.7*	1 *2.0*	6 *13.6*	6 *12.8*	3 *4.5*	6 *8.8*	9 *11.8*	8 *10.0*	5 *6.3*	7 *10.6*	10 *10.9*	7 *8.5*	7 *8.9*
S.65 Order	—	—	—	—	) 16 *44.4*	) 20 *58.8*	) 25 *54.3*		18 *43.9*	19 *40.4*	24 *47.1*	29 *59.2*	22 *50.0*	27 *57.4*	32 *48.5*	32 *47.1*	36 *47.4*	27 *33.7*	26 *32.9*	20 *30.3*	21 *22.8*	18 *22.0*	20 *25.3*
Other*	)				)	)	)		2 *4.9*	1 *2.1*	—	2 *4.1*	2 *4.5*	1 *2.1*	4 *6.1*	1 *1.5*	—	5 *6.2*	4 *5.1*	1 *1.5*	9 *9.8*	2 *2.4*	5 *6.3*
Probation	) 1 *9.1*	3 *12.0*	1 *4.8*	2 *8.7*	1 *2.8*	2 *5.9*	—		3 *7.3*	6 *12.8*	2 *3.9*	4 *8.2*	4 *9.1*	3 *6.4*	6 *9.1*	6 *8.8*	10 *13.2*	13 *16.2*	10 *12.7*	8 *12.1*	10 *10.9*	8 *9.8*	8 *10.1*
GRAND TOTAL	11	25	21	23	36	34	46	41	47	51	49	44	47	66	68	76	80	79	66	92	82	79

* Includes conditional discharge, approved school, recognizance, suspended sentence, Borstal training.
Source: Criminal Statistics for England & Wales Tables III & V (1957-63), Tables 11(a) & III (1964-1977) and Tables 5(a) & 6 (1978).
Italicised figures represent percentages of the Grand Total in each year.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