DANGEROUSNESS AND DETENTION: AN AGENDA FOR REFORM OF THE INSANITY DEFENCE

IAN CAMPBELL*

Governor's Pleasure Detention

1. The Purpose of Governor's Pleasure Detention

Following a special verdict of not guilty on account of insanity in Australia,[1] the acquittee must be committed into strict custody pending the determination of the Governor's pleasure. The courts have only "transitory" authority over the acquittee once the insanity verdict has been returned.[2] The court order compels detention of the acquittee in prison.[3] Thereafter, the Governor-in-Council may order continued detention in prison, or may order transfer to hospital.

There is no right to treatment by which corrections authorities

* B.A., LL.M.(Sydney); Barrister-at-Law (NSW. and Qld.); Senior Lecturer in Law, University of Western Australia.

1. N.S.W.: s. 439 *Crimes Act 1900* — it is termed "on account of mental illness", but assumes the M'Naughten Rules meaning, *R. v. S8.*, [1979] 2 N.S.W.L.R. 1 per O'Brien, C.J., in Cr. D. at 38; Vic.: s.420 *Crimes Act 1958*; Qld.: s.647 *Criminal Code 1899*; W.A.: s.653 *Criminal Code 1913*; S.A.: s.292 *Criminal Law Consolidation Act 1935*; Tas.: s.382 *Criminal Code 1924*; A.C.T.: ss.65, 72, 72A *Lunacy Act 1898* (N.S.W.), s.20B *Crimes Act 1914* (Cth.); N.T.: s.382(1) and (2) *Criminal Code 1983*.
2. *R v Judge Martin; Ex parte A-G*, [1973] V.R. 339 per Nelson, J., at 365; *Wilsmore v. Court*, [1983] W.A.R. 190 per Burt, C.J., at 195, Kennedy, J., at 204; *R v. Jabanardi* (1983), 50 A.L.R. 147 per Woodward and Jenkinson, JJ., at 153-154.
3. *Wray v. R.* (1930), 33 W.A.L.R. 67 per McMillan, C.J., Northmore and Draper, JJ., at 71; *R. v. Judge Martin, Ex Parte A-G* , supra, per Little, J., at 354; *R. v. Jabanardi*, supra, per Woodward and Jenkinson, JJ., at 153. In Tasmania, the trial judge's order is that the acquittee be detained as mentally ill, but admission to a hospital depends on executive order, s.382 *Criminal Code 1924*.

can be compelled to provide psychiatric treatment in prison[4] or to transfer the acquittee from prison to a psychiatric hospital. The trial judge may not concern himself with the fact that an acquittee is held in prison under a Governor's decree,[5] and failure by corrections officials to hospitalise detainees in a psychiatric hospital is not unlawful, since the purpose of Governor's pleasure detention is to protect the public from dangerous mentally disordered acquittees.[6]

Concern expressed at the undesirability of continued detention of mentally disordered prisoners or detainees or acquittees in prison, and, in particular, the failure to provide psychiatric treatment,[7] does not reflect any enforceable duty to treat. There are, of course, standards suggesting such a duty. One of the United Nations *Minimum Rules for the Treatment of Prisoners* of 1955 has been incorporated into Rule 53(c) of the *Minimum Standard Guidelines for Corrections in Australia and New Zealand*, adopted in 1987, which provides that:

(a) Prisoners in need of psychiatric treatment shall have access to such services through the prison medical service.

4. *Flynn v. R* (1949), 79 C.L.R. 1 per Dixon, J., at 7; *Bromley v Dawes* (1983), 34 S.A.S.R. 73 per Mitchell, A.C.J., at 106-107; *Smith v Commissioner of Corrective Services*, [1978] 1 N.S.W L.R. 317 per Hutley, J.A., at 329, *R v Board of Visitors of Hull Prison, Ex parte St Germain*, [1979] 1 Q.B. 425 per Megaw, L.J., at 442, 446-447 However, the developing approach is one of pleading breach of statutory duty created by the *Bill of Rights 1688*, which prohibits "cruell and unusuall punishments", as a basis for declaratory orders or for injunctive relief: see *Maybury v Osborne* (1984), 13 A. Crim. R. 180 per Lee, J., at 185, *R v Home Secretary, Ex parte Herbage (No 2)*, [1987] 1 All E. R. 324 per Purchas, L.J., at 338, and *R v Home Secretary, Ex parte Dew*, [1987] 1 W.L.R. 881; the declaratory order, such as *Bromley v Dawes (No. 1)* (1983), 10 A. Crim. R. 98, can be ignored, see *Bromley v. Dawes (No 2)* (1983), 10 A Crim. R. 115.
5. *R v Jabarnadi*, supra, per Woodward and Jenkinson, JJ., at 153-154.
6. *South Australia v O'Shea* (1987), 73 A.L.R. 1 per Wilson and Toohey, JJ., at 13; *Wilsmore v Court*, supra, per Burt, C.J., at 195-197, per Wickham, J., at 200, per Kennedy, J., at 204, 209; *R v Tunaj* (1983), 9 A. Crim. R. 316 per Burt, C.J., at 320; *R. v O'Shea* (1982), 31 S.A.S.R. 129 per Wells, J., at 145, Walters and Matheson, JJ., concurring; *R. v Governor of Pentridge; Ex parte Arthur*, [1979] V.R. 304 per Young, C.J., at 304; *R v Judge Rapke, Ex parte Curtis*, supra, at 645; *Felstead v R*, [1914] A.C. 534 per Lord Reading at 541; *R. v Sullivan*, [1984] 1 A.C. 156 per Lord Diplock at 172; *R v Saxell* (1980), 123 D.L.R. (3d) 369 and *R. v Swain* (1986), 53 O.R. (2d) 609 per Thorson, J., at 634 — neither the Canadian *Bill of Rights* nor s. 7 of the *Charter of Rights and Freedoms* is violated.
7. *Wilsmore v. Court*, supra, per Kennedy J., at 204.

(b) Specialised facilities under medical management should be available for the observation and treatment of prisoners suffering gravely from other (sic. query: "any") mental disease or abnormality.
(c) Arrangements shall be made to remove prisoners who are found to be insane to appropriate establishments for the mentally ill as soon as possible.[8]

This does not have the force of law in Australia, but this standard is almost identical to Article 6 of the *Declaration of the Rights of Disabled Persons*, which is incorporated into domestic law.[9] However, an insanity acquittal carries with it no implication of mental disorder at the time of the court's order committing the acquittee into strict custody,[10] so it is difficult to invoke this and other international obligations[11] as a basis for asserting a duty to provide treatment for insanity acquittees. Indeed, it is in breach of those obligations to detain a person in a psychiatric hospital if he is not thought to be mentally disordered.[12]

This points to the fact that the justification for Governor's pleasure detention is not mental disorder as such, but manifest dangerousness as a product of mental disorder. Detention relies, therefore, upon psychiatric predictions of dangerousness; predictions which are notoriously inaccurate. Given this inaccuracy, it is important that they should be based on clearly established past acts or conduct. There is a fundamental difference between psychiatric predictions of dangerousness based on clearly established past acts or conduct and those based solely upon clinical data or symptomatology of the

8. Conference of Ministers of Corrections, *Minimum Standard Guidelines for Corrections in Australia and New Zealand*, Melbourne, 1987, 26; see also Bevan (ed.), *Minimum Standard Guidelines for Australian Prisons*, (Canberra: Australian Institute of Criminology, 1978), at 29: Rule 82(1) for an earlier version.
9. Article 6 *Declaration on the Rights of Disabled Persons*, incorporated in the Schedule to the *Human Rights Commission Act 1981* (Cth).
10. *Stewart v Director of Psychiatric Services*, [1985] 1 Qd. R. 223 per D. M. Campbell, J., at 226, Kelly, J., concurring, Derrington, J , at 231, see also *Ex parte Stewart*, [1984] 1 Qd. R. 192 per McPherson, J., at 197; M. Somerville, "Refusal of Medical Treatment in Captive Circumstances" (1985), 63 Can Bar Rev. 59, 69-70.
11. *R v Forrester* (1982), 7 A. Crim. R. 167 per Mitchell, J., at 169: such detention may contravene Article 9 of the *International Covenant on Civil and Political Rights*; see also *Wilsmore v Court*, supra, per Burt, C.J , at 197, Wickham, J., at 201.
12. *R v Home Secretary, Ex parte Herbage (No 2)*, supra.

particular form of mental disorder alone, as both psychiatrists[13] and law reformers[14] recognise. However, the past acts or conduct, the factual predicate for detention, are not necessarily determined by the insanity acquittal. The challenge in reform of the insanity defence is to provide such a determination as a proper basis for preventive detention. This suggests, therefore, a need for a credible attempt to be made to determine the acts of violence or harm which the jury finds against the accused with precision and in a manner in which they are linked to the nature of the mental disorder suffered, the nature of beliefs which the accused held at the time of the acts of violence or harm and other matters related to predictability of future conduct.

2. The Length of Governor's Pleasure Detention

The continuing process of reform of the insanity defence in Australia in recent years[15] can, in some measure, be attributed to the widespread concern that the lack of any maximum upon Governor's pleasure indefinite detention is undesirable. That concern is well-founded, but enthusiasm for reform should not be allowed to detract from the principal advantage of indefinite detention, namely that it is not limited by any minimum time during which the acquittee must be detained.

Such evidence as exists, comparing average lengths of detention under life sentence and under Governor's pleasure detention, is confined to New South Wales and Victoria, and is more than a decade out of date, but it does indicate that insanity acquittees are detained for some time less, between one half and two thirds, than the

13. W. E. Lucas, "The Psychiatrist and the Penal System" in *Psychiatric Services for the Penal System*, (Institute of Criminology, University of Sydney, Sydney, 1972); Gibbens, Soothill and Pope, *Medical Remands in the Criminal Court*, Maudsley Monograph No. 25, (Oxford: Oxford University Press, 1977), 17-20; H. Steadman, "Some Evidence on the Inadequacy of the Concept and Determination of Dangerousness in Law and Psychiatry" (1973), 1 J. Psych. Law 409.

14. Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, (Discussion Paper No. 14, 1988), para. 94.

15. N.S.W.: see *Mental Health Act 1983* and *Crimes (Mental Disorder) Amendment Act 1983*; Vic.: Law Reform Commission of Victoria, ibid; Qld.: see *Mental Health and Criminal Code Reform Act 1984*; W.A.: Law Reform Commission of Western Australia, *The Criminal Process and Persons Suffering from Mental Disorder*, (Discussion Paper No 69, 1986).

average time in custody under a life sentence.[16] Since the insanity defence in Australia is, in practice, almost always confined to crimes punishable by life imprisonment, this bespeaks a feature well worth preserving in any discussion of reform of the insanity defence. This points to the need to combat the hoary shibboleth that, if an accused has a choice whether to serve a life sentence in prison or indefinite detention in a psychiatric hospital, he must be insane to choose the latter.[17] This is reinforced by the impression that, with the current wave of reconstruction of secure hospitals or equivalents (in Queensland — albeit that facility was built nearly 20 years ago — South Australia and New South Wales) and the increasing use of newly-commissioned secure wards in the major civil hospitals in Victoria, Tasmania, Northern Territory and Western Australia, there is a chance that a more humane and pleasant environment for detention is to be had per medium of the insanity acquittal than through imprisonment.

The virtue of indefinite detention is not limited, but is indeed enhanced, by regular reviews involving credible attempts to determine dangerousness of the acquittee from time to time.

Dangerousness and the Insanity Defence

1. The Meaning of Disease of the Mind

It is argued here that a precise finding of dangerousness is NOT provided by the jury's verdict of not guilty by reason of insanity, and has the effect of basing Governor's pleasure detention on guesswork.

The Anglo-Australian courts define "disease of the mind" by reference, inter alia, to the potential of the mental disorder for recur-

16. Freiberg and Biles, *The Meaning of Life*, (Canberra: Australian Institute of Criminology, 1975), 105; A. Freiberg and D. Biles, "Time Served by Life Sentence Prisoners in Australia" (1976), 9 A.N.Z. J. Criminology 77, 86; see also Law Reform Commission of Victoria, ibid., 27 n. 36.

17 This suggestion relies on average times under life sentences and under Governor's pleasure, and averages can mislead; Governor's pleasure detention is genuinely indefinite, and there is no doubt that some of the longest-stay inmates in Australian prisons are Governor's pleasure detainees, albeit that they are usually unfit for trial and not insanity acquittees; it may well be that the chances of release on license on the average release date are slimmer under detention than under a life sentence, and this aspect merits further inquiry.

rence.[18] The definition contains inherent contradictions, however, because whether the disorder is permanent or temporary, of short or long duration, is irrelevant. The requirement of potentiality for recurrence as an element of disease of the mind explicitly recognises that the purpose of the insanity acquittal is not to detain in a psychiatric hospital those whose mental derangement is only temporary and unlikely to recur,[19] but that the purpose is to protect the public from those whose mental disorder is such that, having manifested itself in one offence, it is prone to recur.[20] However, acquittal on grounds of insanity is not proof that the accused is presently mentally disordered. The courts acknowledge this, in part, as the justification for denying any duty to provide psychiatric treatment for insanity acquittees. Even if it is proven that the mental disorder is durable and the prognosis is guarded, this is no foundation for concluding that the acquittee is dangerous. That conclusion must rest on the fact that the acquittee has been proven to have committed the crime charged on the first occasion.

2. The Verdict of the Jury

The theory is that the accused may only be acquitted by the jury on the grounds of insanity if the prosecution proves that the accused actually committed the offence charged, based upon the presumption of sanity.[21] The jury may not acquit on grounds of insanity merely upon proof that the accused suffered a durable mental disorder. Although placement of the onus of proof of insanity on

18. *Bratty v. Attorney General for Northern Ireland*, [1963] A.C. 386 per Lord Denning at 412; *R v Sullivan*, supra, per Lord Diplock at 172; *R v Quick and Paddison*, [1973] Q.B. 910 per Lawton, L.J., at 918; *R. v Carter*, [1959] V.R. 105 per Sholl, J., at 110; *R v Cottle*, [1958] N.Z.L.R. 999 per North, J., at 1029; *R. v Meddings*, [1966] V.R. 306 per Sholl, J., at 309; *Williams v R.*, [1978] Tas. S. R. 98 per Neasey, J., at 108; *R v Jeffrey* (1982), 7 A. Crim. R. 55 per Nettlefold, J., at 75; *R v. S*, [1979] 2 N.S.W.L.R. 1 per O'Brien, C.J., in Cr. D. at 44; *R v Radford* (1985), 42 S.A.S.R. 266 per King, C.J., at 274-276
19. *R v Quick and Paddison*, supra, per Lawton, L.J., at 918; *R v. Jeffrey*, supra, per Nettlefold, J., at 75; *Williams v R.*, supra, per Neasey, J., at 108; *R. v Radford*, supra, per King, C.J., at 276; see also D. Wexler, "An Offence Victim Approach to the Insanity Defence Reform" (1984), 26 Arizona L. Rev. 17.
20. *Williams v. R* , supra, per Neasey, J., at 108; *R v Radford*, supra, per King, C.J., at 276.
21. *R. v Porter* (1933), 55 C.L.R. 182 per Dixon, J., at 184, *R v S*, supra, per O'Brien, C.J., in Cr. D. at 61, *Perkins v R* , [1983] W.A.R. 184 per Burt, C.J., at 188.

the accused[22] has been said to be inconsistent and historically anomalous,[23] it is far too late in the day to feasibly contend that the accused is entitled to an acquittal upon a reasonable doubt as to sanity.[24]

One justification for the onus of proof of insanity involves a two-step reasoning process: first, since the offence has been proven against the accused beyond a reasonable doubt, the accused has performed at least one dangerous act and a positive finding has been made that a durable mental disorder manifested itself in that act; and, second, the positive findings are necessary to authorise the final detention order made by the court, which should not be based simply upon a reasonable doubt about insanity.[25] This justification is inadequate. While durability of the mental disorder may have been introduced into the meaning of mental disease, recurrent dangerousness has not. Dangerousness can only be assumed from the fact that the mental disorder, with potential for recurrence, has already manifested itself in a specific offence.[26] However, there are obstacles to making such a confident assumption.

(a) *The Finding of Guilt?*

The special verdict is based on the whole indictment, and it is impossible to say with certainty which of the alternative verdicts upon the indictment the jury found proven as a step in the process to reach that verdict.[27] It may be that, on a murder indictment for

22 *Woolmington v Director of Public Prosecutions,* [1935] A.C. 462; *Sodeman v R* (1936), 55 C.L.R. 192; *Mizzi v R* (1960), 105 C L.R. 659; *Thomas v R* (1960), 102 C.L..R 584; *Armanasco v R* (1951), 52 W.A.L.R. 78; *R v Stones*, [1965] N.S.W.R. 898; *R v Dunbar*, [1958] 1 Q.B. 1; *R. v Foy*, [1960] Qd. R. 225; *R v Hitchens (No 2)*, [1962] Tas. S. R. 35; *R v Fleeton,* (1964) 64 S.R. (N.S.W.) 72; *R v Pantelic* (1973), 1 A.C.T.R. 1; *R v Roulston*, [1976] N.Z.L.R. 644; *O'Neill v R* , [1976] Tas. S. R. 66; *Taylor v R* (1978), 22 A.L.R. 599; *R v Schafferius*, [1987] 1 Qd. R. 381.

23. Walker and McCabe, *Crime and Insanity in England*, Vol. I, (Edinburgh: Edinburgh University Press, 1968), 40; O. Dixon, "The Development of the Law of Homicide" (1935), 9 A.L.J. 64, 67; *R v S* , supra, per O'Brien, C.J., in Cr. D. at 27.

24. R.W. Harding, "Sane and Insane Automatism in Australia: Some Dilemmas, Developments and Suggested Reforms" (1981), 4 Int. J. L. Psych. 73, 75.

25. *Jones v United States*, 463 U.S. 354 (1983) per Powell, J. at 364-366, Burger, C.J., White, Rehnquist, and O'Connor, JJ. concurring, Brennan, Marshall, Blackmun and Stevens JJ dissenting as to length of commitment thereby authorised, not the justifiability thereof; detention is a significant deprivation of liberty requiring due process safeguards — *Addington v Texas*, 441 U.S. 418 (1979) and a State must have constitutionally adequate purpose for the confinement — *O'Connor v Donaldson*, 422 U.S. 563 (1975).

26. *Jones v United States*, supra, per Powell, J., at 364-366.

27. *Perkins v. R.*, supra, per Burt, C.J., at 189.

example, a special verdict might indicate a finding by the jury of manslaughter,[28] which carries a quite different implication of dangerousness to a verdict of murder.[29] All that may be said with certainty is that the harm or injury suffered was caused by the accused, but it is by no means certain that, with the current state of authorities in Australia, there has even been a finding that the overt acts of the offence were the voluntary acts of the accused.

(1) The *Actus Reus*

Volition is an essential character of the *actus reus* of an offence, rather than within the terms of the *mens rea*.[30] If the jury must find the offence proven against the accused before it can return the special verdict, the elements which constitute the crime including proof that the acts of the accused were voluntary must be proven to the satisfaction of the jury beyond a reasonable doubt.[31] However, the rule that involuntarism and insanity cannot be left to the jury together[32] has been accepted by the majority of the Australian state courts as the orthodox position.[33] If the trial judge is of the view that the evidence points to a disease of the mind, the jury is not obliged to find that the *actus reus* was voluntary before considering the defence of insanity. One would have thought it rather important to know with some specificity, for purposes of detention on

28 See comments in *Perkins v R*, supra, per Burt, C.J

29. See comments in *Veen v R.* (1979), 53 A.L.J.R. 305 per Jacobs, J., at 317; *R v Rolph*, [1962] Qd. R. 262 per Hanger, J., at 290.

30. *Ryan v R* (1967), 121 C.L.R. 205 per Barwick, C.J., at 217; *R v O'Connor* (1980), 146 C.L.R. 64 per Barwick, C.J., at 87-88, Aickin, J., at 125-126, Murphy, J., at 114; *He Kaw Teh v. R* (1985), 59 A.L.J.R. 620 per Brennan, J., at 639; *R v Tsigos*, [1964] N.S.W.R. 1607 per Moffitt, J., at 1629; *R. v Martin* (1983), 9 A. Crim. R. 376 at 399; *R v Tucker* (1984), 36 S.A.S.R. 135 at 138-9; *R v Tajber* (1986), 23 A. Crim. R. 189 per Gallop, J., at 193; *Vallance v. R.*, (1961) 108 C.L R. 56 per Kitto, J., at 64, per Taylor, J., at 68, per Menzies, J., at 72; *R. v Knutsen*, [1963] Qd. R. 157; *Geraldton Fisherman's Co Operative Ltd v. Munro*, [1963] W.A.R. 129; *R v Payne*, [1970] Qd. R. 260; *Kapronovski v R* (1973), 133 C.L.R. 209; *Stuart v. R* (1974), 4 A.L.R. 545, *Anderson v Basile*, [1979] W.A.R. 53; *Duffy v R.*, [1981] W.A.R. 72; *R v Kissier* (1982), 7 A. Crim. R. 171.

31. *R v Porter*, supra, at 184; *R v S*, supra; *Perkins v R*, supra.

32. *Bratty v Attorney General for Northern Ireland*, supra, per Viscount Kilmuir at 403-404, Lord Morris at 417, Lords Tucker and Hodson concurring, Lord Denning at 412; see also *R v Cottle*, supra, per Gresson, P., at 1013-1014, North, J , at 1028-1029; *R v Roulston*, supra, per Woodhouse, J., with whom Wild, C.J., Richmond, P., and Cooke, J., agreed.

33. *R v Foy*, supra; *R v Tsigos*, supra; *R v Meddings*, supra; *R. v Joyce*, [1970] S.A.S.R. 184 at 186-187; *Williams v R*, supra; *R v S*, supra, at 61; *R v Mursic*, [1980] Qd. R 482; *R v Miers*, [1985] 2 Qd. R. 138.

the ground of dangerousness, whether the acquittee performs acts of violence in a state of involuntarism induced by a disease of the mind, but the jury's verdict cannot provide this specificity. Under the orthodox Australian approach, a mentally disordered accused who has not been proven to have voluntarily committed a criminal offence is treated as if that issue has been proven. Manifest dangerousness is not proven but assumed.

Recent decisions in some Australian states and territories have shown a willingness to strike out in a new direction. This direction accepts that the jury should consider insanity and involuntarism together, since the task of determining whether the evidence establishes volition is one for the jury, not the judge.[34] The consequence is that an outright acquittal might result if the jury finds that the acts were involuntary by reason of some mental disturbance which is not a disease of the mind, although civil commitment might follow if the acquittee is dangerous and the conditions for lawful commitment can be demonstrated.[35] Equally, if the jury determines that the involuntarism was due to the disease of the mind, then the special verdict must be returned, and this at least provides some stronger ground for a prediction as to dangerousness.

In the Code states, Queensland, Western Australia, Tasmania and Northern Territory, there is a volitional element in the insanity defence.[36] It is perfectly proper to say, in these places, that if the jury finds involuntarism due to mental disease, there should be a special verdict and not an outright acquittal. This cannot be said in the non-Code states and territories, however, unless the jury can consider involuntarism and the insanity defence at the same time.

(2) *Mens Rea*

More importantly, there can be no confidence that an insanity acquittal has determined dangerousness of the acquittee because

34. *R v. Pantelic*, supra, per Fox, J., at 3; *Taylor v R*, supra, per Smithers, J., at 613; see also *R v Wiseman* (1972), 46 A.L.J. 412; *Williams v R*, supra; *R v Bedelph* (1980), 1 A. Crim. R. 445 per Green, C.J., at 446-447, Everett, J, concurring; *R. v Radford*, supra, per King, C.J., at 273-276, Bollen, J., concurring, Johnson, J., at 279, *R v Cottle*, supra, at 1014, 1028-1029.

35. *R v Radford*, supra, per King, C.J., at 276, Bollen, J., concurring.

36. Qld.: s. 27 *Criminal Code 1899*; W.A.: s. 27 *Criminal Code 1913*, Tas.: s. 16(1)(b) *Criminal Code 1924*; N.T.: s. 35(1) *Criminal Code 1983*.

the *mens rea* of an offence charged need not be found.[37] The courts insist that the Crown need only establish the supposed overt acts of the offence beyond reasonable doubt, whereupon the insanity defence is to be considered. Only if the mental disorder is not, in law, capable of constituting a disease of the mind, will the jury be asked to consider whether that disorder has negatived *mens rea*.[38]

Again, the Australian courts are divided on this issue. A recent Victorian trial judge's direction required a jury to find that the Crown established the *mens rea* of accessorial liability before it considered whether the defence of insanity had been proven.[39] It must surely be inconsistent for mental disorder (which amounts to insanity) to be relevant to determination of the *mens rea* of accessories, yet not to principals.

The Victorian development is inconsistent with the weight of the Australian authority, and its persuasive value is limited by being a direction at first instance. Limiting its persuasion is the more orthodox view that if insanity is allowed to negative intent, not only will the elements of the insanity defence become subsumed in the *mens rea* of the offence (for example, whether the accused knew the nature and quality of his act will only be material to whether he intended or foresaw as probable that death or grievous bodily harm would result),[40] but also this must mean that the accused will be acquitted of offences of which intent or recklessness are elements. In the orthodox view, if the offence charged has these elements, and the Crown cannot prove the offence because of the absence of *mens rea* (for whatever reasons), the accused should be acquitted.

37. *R v S*, supra per O'Brien, C.J., in Cr. D. at 61, Street, C.J., and Slattery, J., concurring; at 63-4, O'Brien, C.J., in Criminal Division disputed the correctness of dicta of Fox, J., in *R v Pantelic*, supra, at 3 to the contrary, see also *R v Fruet*, [1974] W A R. 78 per Lavan, J., at 88; *R v Nelson*, [1982] Qd. R. 636 per W B. Campbell, J., at 639-40, Kelly and Dunn, JJ., concurring; *R v Cottle*, supra, per Cleary, J , at 1035

38. *R. v. Fruet*, supra; *R. v. Schneidas (No 1)* (1981), 4 A. Crim. R 95; *R v Aarons*, [1985] V.R 974 per Brooking, J., at 976; *Schultz v R* , [1982] W.A.R. 171 per Burt, C.J., at 174, dist *R v Watson* (1986), 69 A.L.R. 145 per Dowsett, J., at 164, Derrington, J., concurring, approved *R v Laurie* (1987), 23 A Crim. R. 219 per Derrington, J. at 222; *R v Pantelic*, supra, per Fox, J , at 5; *R v Ayoub* (1984), 10 A. Crim R. 312 per Street, C.J., at 315; *R v Radford*, supra, per Johnson, J., at 279; *R v Munro* [1986], 2 C.R.N.Z. 249 per Cooke, P, Somers and Hillyer, JJ., at 251, contra *R v Nelson*, supra, and *R v Masih*, [1986] Crim L. R. 395

39. *R v Aarons*, supra, per Brooking, J., at 974-976.

40. *R v S*, supra, per O'Brien, C.J., in Cr. D. at 61.

However, the defect is that this does not preclude the finding that the accused was responsible for an alternative offence (such as manslaughter). It is argued here that it is precisely this finding which is demanded for any credible assessment of dangerousness to warrant Governor's pleasure detention.

(b) *Guilt and Dangerousness*

The result is that the special insanity verdict provides little confidence that the justifying pre-conditions for indefinite Governor's pleasure detention have been found by a court of criminal jurisdiction. In some states and territories, there can be no confidence that the jury necessarily found that the criminal acts were under the accused's volition. In most, one cannot be sure that the *mens rea* of the criminal act charged has been proved, or whether the jury found that the accused really was responsible for some lesser alternative. It can only be said with confidence that the jury has found that the accused was suffering a durable mental disorder of such an extent that it found it was a disease of the mind. Guesswork as a foundation for indefinite Governor's pleasure detention is not acceptable.

Proposals for Reform

In the context of the uncertain basis for a finding of dangerousness as a justification for preventive detention, some of the major reforms of the insanity defence may be considered. Some of these reforms have taken place in Australia, but, by and large, the position in most states and territories remains as it has been for the past century and a half.

1. Pre-Trial Diversion

The State of Queensland introduced in 1985 a pre-trial diversion system, which provides for a reference to the Mental Health Tribunal[41] by the prosecutor or the defence, amongst others, if it is suspected that insanity will be raised at trial. The result, necessarily impressionistic given the short period of operation of the system, has been a great increase in the number of findings of insanity,

41. Qld.: s. 28B *Mental Health Services Act 1974*, the Tribunal is a judicial body comprising a judge of the Supreme Court and two psychiatrist assessors, the proceedings of which are open and are in all respects equated with the Supreme Court's civil proceedings: s. 69.

often on charges for which the defence would not have dreamt of raising the insanity defence at trial.[42]

If the accused is dissatisfied with the Tribunal's finding, he can still call for trial[43] and raise the insanity defence, but the effect of the Tribunal proceeding is to provide pre-trial disclosure of the defence case.[44] The Queensland system does not suffer, however, from the rigid separation of issues of guilt (which was determined first) and insanity which doomed the bifurcated systems in California[45] and other parts of the United States.[46]

The great advantage of the Queensland model of pre-trial diversion is that the resultant order automatically secures psychiatric hospitalisation: that is the only order which the Tribunal can make. The major problem is that the Tribunal is
not given the opportunity to determine dangerousness. Although the Tribunal has a statement of facts of the offence by the Queensland Director of Prosecutions,[47] that may be based on a "paper committal", so there cannot even be confidence that the prosecution case has been put under the scrutiny of cross-examination. Indeed, the Tribunal is not a court of criminal jurisdiction, and its purpose is not to make findings of fact of the offence. It may decline the reference if the facts of the offence and defence are so in dispute that it is felt that they ought to be left to a jury,[48] but this has rarely been done.[49] The main point, however, is that there is a statutory presumption of dangerousness, and consequential inflexibility in disposition, as the Tribunal must order detention in

42. A. Vasta, "Mental Health Tribunal" paper presented at *First Pacific Regional Congress on Law and Mental Health*, Australian Institute of Criminology, Canberra, July 1986.
43. Qld.: s. 43.
44. I.G. Campbell, "Proposed Changes to the Mental Health and Criminal Justice Systems in Queensland" (1983), 7 Crim. L. J. 179.
45. *People v. Wells*, 202 P. 2d. 53 (1949), *People v Gorshen*, 336 P. 2d. 492 (1959), *People v. Conley*, 411 P. 2d. 911 (1966); see D. Louisell and G. Hazard, "Insanity as a Defence: The Bifurcated Trial" (1961), 49 Cal. L. Rev. 805.
46. Louisana: introduced 1928, repealed 1932; Texas: introduced 1939, repealed 1965; Arizona: *State v Shaw*, 472 P. 2d. 715 (1970) ruled unconstitutional; Wyoming: *Sanchez v. State*, 567 p. 2d. 70 (1977); Florida: *State ex rel Boyd v. Green*, 355 So. 2d. 789 (1978).
47. A. Vasta, supra, 4.
48. Qld.: s. 33(2); *R v. House*, [1986] 2 Qd. R. 415 per Connolly, J., at 418, Ambrose, J., concurring; *R. v. Saracino*, [1988] 2 Qd. R. 707 per Connolly J., at 710.
49. A. Vasta, supra, 3.

the Security Patients' Hospital.[50] The Queensland system is inappropriate as a means to determine manifest dangerousness and to warrant indefinite preventive detention.

2. Abolition of the Insanity Defence

The diverse seeds of abolition of the insanity defence[51] have recently borne fruit. In three of the American states,[52] evidence of mental disorder may constitute the basis for a reasonable doubt as to the *mens rea* of an offence, and is relevant to sentence if the accused is convicted, but not otherwise.[53] This does not provide a platform for preventive detention, since the jury's verdict affirms only that the accused committed an offence, not that he is presently mentally disordered.

Mental disorder is also relevant to the sentence hearing. In that hearing in Montana and Utah, upon disproof of dangerousness (on the balance of probabilities), the person convicted is entitled to a discharge (unconditionally or with treatment conditions attached[54]). The corollary is that, upon proof of dangerousness, an order committing the person to a psychiatric hospital is made, limited in time of detention by the statutory maximum under ordinary sentencing statutory grids. The concern has been expressed that this will result in longer time in custody than if the person had been simply found guilty and sentenced, because remissions are not earned in hospital.[55]

Another major defect perceived[56] in the abolition case does not relate to determination of dangerousness, but refers rather to the morality and justice of the abolition. The assumption implicit in

50. Qld.: s. 35(1), which compels detention as a "restricted patient", which under s. 50(1) is the term for dangerous patients.
51. Wootton, *Crime and Criminal Law*, (London: Stevens, 1963), 40; J. Goldstein and J. Katz, "Abolish the Insanity Defence — Why Not?" (1963), 72 Yale L. J. 855; N. Morris, "Psychiatry and the Dangerous Criminal" (1968), 41 *S Cal L. Rev* 514; Morris and Hawkins, *The Honest Politicians Guide to Crime Control*, (Chicago: Chicago University Press, 1969), 174; Morris, *Madness and the Criminal Law*, (Chicago: Chicago University Press, 1982), 64, Wexler D, supra.
52. Montana in 1978; Idaho in 1982; Utah in 1984.
53. J.M. Bender, "After Abolition: The Present State of the Insanity Defence in Montana" (1984), 45 Montana L. Rev. 133, 142.
54. *Zion v Xanthopoulos*, 585 P. 2d. 1084 (1978).
55. J.M. Bender, supra, 149.
56. R.D. Mackay, "Post-Hinckley Insanity in the USA", [1988] Crim. L. R. 88, 91.

the abolition case is that the insanity defence is coextensive with the *mens rea* of an offence, and that (whether sane or insane) the accused should only be entitled to acquittal if the *mens rea* was absent. However, the existing insanity defence is not co-extensive with the Anglo-Australian excuses, justifications and authorisations. The insanity defence is available for an accused who believed himself acting in self-defence, or believed himself provoked by the victim, or believed himself under compulsion by the forces of man or nature, when the irrational beliefs held would not have been held by an ordinary person. The excuses of self-defence, provocation, mistake, duress or necessity are foreclosed, both tactically and doctrinally, to the mentally disordered accused. The yardstick of the "ordinary person" for provocation,[57] self-defence,[58] mistake,[59] duress[60] and necessity,[61] prevents reliance on irrational beliefs.[62]

Furthermore, if the prosecution bases its case on criminal negligence, the accused's failure to give thought to the risk created involves no question of the state of mind of the accused and renders

57. *Moffa v R* (1977), 138 C.L.R. 601 per Barwick, C.J , at 606, per Gibbs, J., at 613; *R v Censori*, [1983] W.A.R. 89 per Wickham, J., at 95; *R v Wills*, supra, per Lush, J., at 210; *Helmhout v. R* (1980), 49 F.L.R. 1 per Smithers, Brennan and Deane, JJ., at 4; *R v McManus* [1985], 2 N.S.W.L.R. 448; *Director of Public Prosecutions v Camplin*, [1978] A.C. 705 per Lord Simon at 726.
58. *Zecevic v Director of Public Prosecutions* (1987), 61 A.L.J.R. 374 per Mason, C.J., at 377, Wilson, Dawson and Toohey, JJ., at 379; *R v Train* (1985), 18 A. Crim. R. 353; *R v McManus*, supra, at 461 462; *R v Lawson and Forsythe*, [1986] V.R. 515 at 547 549; *R v Howe*, [1987] 1 All E.R. 771 per Lord Hailsham at 780-781.
59. *Proudman v Dayman* (1941), 67 C.L.R. 536 per Dixon, J., at 540-541; *R v Reynhoudt* (1962), 107 C.L.R. 381 per Menzies, J., at 399; *Zecevic v Director of Public Prosecutions*, supra, per Wilson, Dawson and Toohey, JJ., at 379; this, of course, excludes mistake in form which negatives intention or recklessness, see *Morgan v Director of Public Prosecutions*, [1976] A.C. 182, *He Kaw Teh v R* (1985), 59 A.L.J.R. 620.
60. *Attorney General for Northern Ireland v Whelan*, [1934] I.R. 518 at 526; *R. v Smyth*, [1963] V.R. 737 per Sholl, J., at 737; *R v McCafferty*, [1974] 1 N.S.W.L.R. 89 per Glass, J., at 90; *R v. Hurley and Murray*, [1967] V.R. 526 per Smith, J., at 528-529; *R v Lawrence*, [1980] 1 N.S.W.L.R. 122 per Moffit, P., at 133-135; *R v Graham*, [1982] 1 W.L.R. 294 per Lane, L.C.J., at 298, 300; R. v. Howe, supra, per Lord McKay at 800; c.f. *Director of Public Prosecutions for Northern Ireland v Lynch*, [1975] A.C. 635 per Lord Simon at 686, who left the question open whether the objective standard was applicable to duress.
61 *R v Loughnan*, [1981] V.R. 443 at 448.
62. *R v. Lesbini*, [1914] 3 K.B. 1116 per Lord Reading at 1120; *Mancini v Director of Public Prosecutions*, [1942] A.C. 1 per Viscount Simon at 9; *Bedder v Director of Public Prosecutions*, [1954] 1 W.L.R. 1119 per Lord Simonds at 1121; *R v. Griffin* (1980), 23 S.A.S.R. 264 per Cox, J., at 268; *R. v Jeffrey*, supra, per Cosgrove, J., at 83 84; *R. v Romano* (1984), 36 S.A.S.R. 283 per King, C.J., at 289, per Cox, J., at 293.

psychiatric evidence largely irrelevant.[63] There is an analogy between the objective test of the ordinary man in provocation and the objective criterion of criminal negligence liability.[64] Whether or not an ordinary person would have adverted to the prohibited consequence is not to be decided by investing that ordinary person with the mental disorder of the accused.[65]

3. Diminished Responsibility

The restriction of relevance of mental disorder to *mens rea*, under the abolition of the insanity defence, appears to be of similar effect[66] to the defence of diminished responsibility.[67] This defence is recognised only in New South Wales, Queensland and Northern Territory.[68] It has been proposed and rejected in Victoria,[69] and it has been rejected once in Western Australia,[70] but it is still under review by the Law Reform Commissions of those two states.

It is of similar effect to the diminished responsibility defence for two reasons. First, the introduction of the defence in England has effected de facto abolition of the insanity defence;[71] and, secondly, the corollary is that, whilst this results in conviction of an offence as a platform for determination of dangerousness in the sentencing phase, it necessarily means that the length of detention is con-

63. A. Samuels, "Psychiatric Evidence", [1981] Crim. L. R. 762, 765.
64. *R v Romano*, supra, per King, C.J., at 289.
65. *R v Wills*, [1983] 2 V.R. 210 per Lush, J., at 212, Murphy, J., concurring, Fullagar, J., at 214; c.f. *R v Tonkin and Montgomery*, [1975] Qd R. 1 per D.M. Campbell, J., at 6, *Elliott v C (a minor)*, [1983] 2 All E.R. 1005; see also *R v Rogers* [1984], 79 Cr. App R. 334; *R v Bell*, (1984) 3 All E.R. 842 per Robert Goff, L.J., (obiter) at 847.
66. Apart from the different onus of proof, and the offences to which it can apply.
67 *State v McKenzie*, 608 P. 2d. 428 (1980) at 452.
68. N.S.W. s. 23A *Crimes Act 1900*, Qld : s. 304A *Criminal Code 1899*; N.T.. s. 37 *Criminal Code 1983*
69. Law Reform Commission of Victoria, *Provocation and Diminished Responsibility*, (Report No. 12, 1982); Victorian Law Reform Commission, *Mental Malfunction and Criminal Responsibility*, supra, paras 150-162, c.f paras 141-149.
70. Murray, *The Criminal Code A General Review*, (Perth: Government Printer, 1983).
71 R. Sparks, "Diminished Responsibility in Theory and Practice" (1964), 27 Modern L. Rev. 31-32; Walker and McCabe, *Crime and Insanity in England*, (Edinburgh: Edinburgh University Press, 1968), 159; Butler Committee, *Report of the Committee on Mentally Abnormal Offenders*, Cmnd. 6244 (London: H.M.S.O., 1975), 316 Appendix 9; The Advisory Council on the Penal System, *Sentences of Imprisonment A Review of Maximum Penalties*, (London: H.M.S.O., 1978); S. Dell, "Wanted: An Insanity Defence That Can Be Used", [1983] Crim. L. Rev. 431; A. Ashworth and J. Shapland, "Psychopaths in the Criminal Process", [1980] Crim. L. Rev. 272-276.

ditioned by penal principles based on a conviction. The fear is that this will serve to increase the lengths of detention of accused persons who would (but for the diminished responsibility defence) have been insanity acquittees. Whether this fear has foundation will be explored below.

4. Guilty but Mentally Ill Verdicts

A similar reform, initiated in Michigan and carried over into other states,[72] of a guilty but mentally ill verdict provides a determination both of present mental disorder and of dangerousness where the insanity acquittal does not.[73] The reform was intended as a means for ensuring that treatment would be provided for the mental illness.[74] Like abolition, later detention is theoretically based on a firm finding that the offence was committed by the accused, and like abolition in Montana and Utah, there is also a determination that the person is presently mentally disordered.

Whether the offence has been proven is doubtful. Not all observers are reassured that the *mens rea* of the offence is proven beyond reasonable doubt, as it is thought that the verdict may well be reached as a compromise to avoid acquitting a mentally ill accused.[75]

One further problem with this model is that the guilty but mentally ill person has been treated in the same manner as if simply guilty, regardless of the mental illness. It has not served to secure psychiatric treatment for those convicted under the guilty but mentally ill verdict,[76] and has had little impact in reducing the severity of sentences passed.[77]

The insanity defence is in practice almost always confined to of-

72. Indiana, Illinois, Alaska, Georgia, New Mexico, Delaware, Kentucky, Connecticut, Utah and Pennsylvania.
73. *People v. McQuillan*, 221 N.W.(2d) 569 (1974); see also Mackay R.D., supra, 91-92.
74. *People v Thomas*, 292 N.W. (2d) 523 (1980) at 527.
75. Monahan and Steadman (eds), *Mentally Disordered Offenders* (New York: Plenum Press, 1983), 105.
76. *People v. Thomas*, supra: there is no right to psychiatric treatment following the verdict; see also "American Psychiatric Association Statement on the insanity Defence" (1983), 140 Am. J. Psych. 681, 684; R.C. Petralla et al, "Examining the Application of the Guilty But Mentally Ill Verdict in Michigan" (1985), 36 Hosp. and Comm. Psych. 254, 258; J. Klofas and R. Weisheit, "Pleading Guilty but Mentally Ill: Adversarial Justice and Mental Health" (1986), 9 Int. J. L. & Psych. 491, 498.
77. J. Klofas and R. Weisheit, supra.

fences of very serious violence to the person punishable by life imprisonment, so either of the reform measures adopted in the United States of America can be confidently predicted to increase the average length of time under detention of those presently detained at the Governor's pleasure in Australia.

In short, although there is a clear jury decision of guilt and a judicial determination of dangerousness, neither the abolition model nor the guilty but mentally ill model results in a disposition which satisfies both aims of providing a confident judicial determination of dangerousness without increasing the length of detention.

5. The Judicial Determination of Dangerousness

The call for a credible attempt to assess dangerousness as a condition precedent to the making of the judicial order committing the acquittee into strict custody, and for flexibility in the judicial order if that condition precedent is not found,[78] is the product of concern over inaccuracy of psychiatric diagnoses and predictions of dangerousness.[79] That such predictions are so fundamental to Governor's pleasure detention makes it imperative that the basis is proven crime and not guesswork.[80]

There is clearly a need for the trial judge to make a determination of dangerousness of the insanity acquittee, and to have the flexibility of disposition of ordering admission directly to a secure hospital or an ordinary psychiatric hospital, or ordering out-patient treatment, or even immediate and unconditional discharge which other jurisdictions, such as New Zealand,[81] have adopted. The

78. Butler Committee, supra, para 18.42; S. Dell, supra, 437.

79. A A. Bartholomew and K.L. Milte, "The Reliability and Validity of Psychiatric Diagnoses in Courts of Law" (1977), 50 A.L.J. 450; B.J. Ennis and T.R. Litwack, "Psychiatry and The Presumption of Expertise: Flipping Coins in the Courtroom" (1974), 62 U. Cal. L. Rev 693; S. Morse, "Crazy Behavior, Morals and Science. An Analysis of Mental Health Law" (1978), 51 S. Cal L. Rev. 527; Ziskin, *Coping with Psychiatric and Psychological Testimony*, 2nd ed , (California: Law and Psychology Press, 1981),7; Bartholomew, *Psychiatry, The Criminal Law and Corrections*, (Melbourne: Wileman, 1987), Ch. 3; J Monahan, "The Prediction of Violence", in *Violence and Criminal Justice*, ed. Monahan and Chappell, (Lexington: Heath, 1975); Floud and Young, *Dangerousness and Criminal Justice*, (London: Heinemann, 1981), 180-202.

80 A.A. Bartholomew and K.L. Milte, supra, 454; S.J. Pfohl, "Predicting Dangerousness. A Social Deconstruction of Psychiatric Reality", in *Mental Health and Criminal Justice*, ed. Teplin L.A., (Beverley Hills: Sage, 1984).

81. N.Z.: s. 115 *Criminal Justice Act 1985*.

New Zealand model is for the simplest reform of all, the introduction of a disposition hearing not unlike the ordinary, contested sentence hearing.[82] That hearing will oblige a particularised finding of facts of the offence and a conclusion thereon of dangerousness. In the absence of such a finding of dangerousness, neither secure hospitalisation nor commitment to prison can be ordered, but psychiatric hospitalisation (either in-patient or out-patient) might be ordered.

Although it differs from preventive detention following acquittal, section 688 of the *Canadian Criminal Code* (which authorises a sentence of preventive detention on a determination of dangerousness following conviction) is illustrative of an attempt to provide, in legislative form, the criteria for such a determination in a judicial forum. It provides (paraphrasing the relevant parts) that it must be established beyond reasonable doubt[83] that the person has engaged in conduct endangering, or likely to endanger, the life or safety of another person, or behaviour of such a brutal nature such as to compel the conclusion that the person is unlikely to be inhibited by normal standards of behavioural restraint. This is far from precise, or perfect, but, supplemented by the requirement that the likely or probable re-offending must be of the same or similar form, it offers a guide as to suitable standards on which detention of an insanity acquittee should be based. It also makes plain the need to anchor any determination of dangerousness in the demonstrable facts of a criminal offence.

Reform of the Release Process

1. Release by Order of the Executive Council

The decision to release a Governor's pleasure detainee is formulated in several stages — medical examinations and social inquiries, advisory board recommendations and finally the decision of the Governor-in-Council (if the detainee is in prison) or Minister

82. Recommendations to this effect have come from R.W. Harding, supra, the Australian Law Reform Commission, *Sentencing Penalties* (Discussion Paper No 30, 1987), 197, the Western Australian Law Reform Commission, *The Criminal Process and Persons Suffering From Mental Disorder*, supra, paras 3.6-3.71, and the Victorian Law Reform Commission, *Mental Malfunction and Criminal Responsibility*, supra, paras 80-98.

83. *Kirkland v R*, [1957] S.C.R. 3.

of Health (if he is in a hospital). None of the advisory boards (parole boards if the detainee is in prison,[84] mental health review tribunals if held in a hospital[85]) have the ultimate responsibility for the decision to release. That is confined to the third stage.[86] The basis for the legislature reposing the release decision in the Governor-in-Council or the Minister is because that body or person has the political responsibility[87] to consider a "wider element of public interest", namely the gravity of the charge[88] and preservation of confidence in the administration of justice.[89] It is not immediately obvious why confidence in the administration of justice should be regarded as such a "high level general policy" matter that it cannot be considered in a judicial forum. Public confidence in the administration of law is as much a product of the court process as executive decisions. Furthermore, the move is firmly under way to depoliticise executive decisions to prosecute by taking them away from ministers of the Crown.[90]

The primary issue in any decision to release must be the level of risk or dangerousness.[91] Hence, advisory boards are often obliged by statute to give consideration to the safety of the public in

84. Vic : s. 498 *Crimes Act* 1958; S.A.: s. 68(2) *Correctional Services Act 1982*; Tas.: s 9 *Parole Act 1975*; A.C.T.: *Parole Ordinance 1976*; N.T.: *Parole of Prisoners Act 1971*

85. Vic.: ss. 3, 44-46, 57 *Mental Health Act 1986*; S.A.: ss. 35(1) and (3) *Mental Health Act 1976-77*; Tas.: ss. 68(1), 69, 70 *Mental Health Act 1963*; W.A., A.C.T. and N.T. have no mental health review tribunals: in W.A. the parole board has the responsibility, while in the two territories, the advice is departmental; in the case of a federal detainee held in a state institution, the relevant State board offers advice informally.

86. *South Australia v O'Shea*, supra, per Mason, C.J., at 5, Wilson and Toohey, JJ., at 18-19, Brennan, J., at 26.

87. *South Australia v. O'Shea*, supra, per Wilson and Toohey, JJ., at 17-18, Brennan, J., at 25; *Findlay v Home Secretary*, [1984] 3 All E.R. 801 per Lord Scarman at 826-828, Lords Diplock, Roskill, Brandon and Brightman concurring.

88. *Stewart v. Director of Psychiatric Services*, supra, per Derrington, J., at 231; *Wilsmore v. Court*, supra, per Burt, C.J., at 195; *South Australia v O'Shea*, supra; *R. v. GH*, [1977] 1 N.Z.L.R. 50 per Roper, J., at 52; *Findlay v Home Secretary*, supra, per Lord Scarman at 827, Lords Diplock, Roskill, Brandon and Brightman concurring.

89. *Wilsmore v. Court*, supra, per Burt, C.J., at 195-6, Kennedy, J., at 200, Wickham, J., at 208; *Stewart v Director of Psychiatric Services*, supra, per Derrington, J., at 231; *R. v G H*, supra, per Roper, J., at 52.

90. *Clyne v. Attorney General* (1984), 55 A.L.R. 92 per Wilcox, J., at 99; and see Royal Commission on Criminal Procedure, *The Investigation and Prosecution of Criminal Offences in England and Wales — The Law and Procedure*, Cmnd. 8092-1, (H.M.S.O., London, 1981), para 7.67.

91. *South Australia v. O'Shea*, supra, per Mason, C.J., at 7, Brennan, J., at 25.

recommending, or refusing to recommend, release.[92] However, medical opinion and advisory board recommendation about success of treatment of the detainee are not decisive.[93] Adverse departmental advice, especially from the prison medical service, is likely to be conclusive against following an advisory board's recommendation for release.[94]

More significantly, since political considerations are of fundamental concern to the Governor-in-Council or the Minister, while the parole boards must consider psychiatric opinions on the dangerousness of the applicant, the Governor-in-Council or Minister may take into account the opinions of leader writers in Sunday tabloids on the very same point. The political risk in releasing a person to the community serves to inject a capacity for inflammatory and often misleading opinions into the decision making process when dispassionate and careful contemplation appears to be warranted.[95] There is a need to remove the release decision from major political organs.

2. Factors for Recommendation of Release

The only Australian advisory board to publish in full its guidelines for recommending release of Governor's pleasure detainees has been the New South Wales Release on Licence Board, the predecessor to the present New South Wales board, namely the Mental Health Review Tribunal. The guidelines focused on two factors. The first was a requirement that the detainee serve a minimum or "tariff" period of detention, and the second was a "dangerousness" factor,

92. N.S.W.: s. 61(2)(a)(iii) and (b)(iii) *Prisons Act 1952*, s. 119(3) *Mental Health Act 1983*; Vic.: s. 51(2) *Mental Health Act 1986*; Qld.: s. 39(6) *Mental Health Services Act 1974*; W.A.: s. 34(8) *Offenders Probation and Parole Act 1963*.

93. *Stewart v Director of Psychiatric Services*, supra, per Derrington, J., at 231; *Kynaston v Home Secretary* (1981), 73 Cr. App. R. 281 per Lawton, L.J. at 285-286; *South Australia v O'Shea*, supra, per Wilson and Toohey, JJ., at 17-18.

94. M. Maguire, F. Pinter and C. Collis, "Dangerousness and The Tariff" (1984), 24 Br. J. Criminology 250, 260-263.

95. *Stewart v Director of Psychiatric Services*, supra, per Derrington, J., at 231; see also J Braithwaite, D. Biles and R. Whitrod, "Fear of Crime in Australia", in *The Victim in International Perspective*, ed. Schneider, (Muenster: de Gruyter, 1982); H. Steadman and J. Cocozza, "Selective Reporting and Public Misconceptions of the Criminally Insane" (1978), 41 Public Opinion Qtly. 512; H. Steadman, "Critically Reassessing the Accuracy of Public Perception of the Dangerousness of the Mentally Ill" (1981), 22 J. Health and Soc. Behavior 310.

requiring a favourable psychiatric report and evidence of satisfactory progression through each stage of a graduated-security program.

(a) *The "Informal Tariff" for the offence*

(1) Life Sentence Offences

Certain minimum periods in detention under either a Governor's pleasure order or under a life sentence have been adopted by advisory boards around the world.[96] The New South Wales "informal tariff" has been ten years for both insanity acquittees and life sentence prisoners.[97] The Victorian Law Reform Commission has referred to a similar "rule of thumb", being "a slightly shorter time than those found guilty",[98] although it is unclear whether this refers to Parole Board policy or observation from past releases.

Despite the prevalent view that Governor's pleasure detainees and life sentence prisoners present common penological features and problems,[99] the employment of an "informal tariff" or "rule of thumb" for insanity acquittees is *patently* unlawful,[100] and demonstrates the unsuitability of adoption of penal concepts suitable for life sentence prisoners for Governor's pleasure detention. The temptation to equate Governor's pleasure detention and life imprisonment must not only be resisted, it must also be statutorily proscribed. The very informality of the presumption or supposed

96. V. Quinsey, "The Long Term Management of the Mentally Abnormal Offender", in *Mental Disorder and Criminal Responsibility*, ed. Hucker S.J., Webster C.D. and Ben-Aron M.H., (Toronto: Butterworths, 1981), 152-153; N. Morris, "Acquittal by Reason of Insanity", in *Violence and Criminal Justice*, supra, 77; H. Steadman and J. Braff, "Defendants Not Guilty by Reason of Insanity", in *Violence and Criminal Justice*, supra, 116; M. Maguire, F. Pinter and C. Collis, supra, 257-258.

97. Aitkin and Gartrell, *Sentenced to Life: Management of Life Sentence Prisoners in New South Wales Gaols*, Corrective Services Commission, Sydney, 1982, Appendix E, the Release on License Board's "Responsibilities, Procedures and Criteria", 145, and 8; *Rendell v Release on License Board* (1987), 10 N.S.W.L.R. 499; a similar term is considered appropriate in the federal sphere in the practice of the Attorney General of the Commonwealth to ask the Parole Board of the A.C.T. to review life sentence prisoners: M. Kelleher, "Federal and Australian Capital Territory Offenders", in *Sentencing in Australia*, ed. Potas I, (Canberra: Australian Institute of Criminology, 1987), 416-418; see also the ten year minimum period under a life sentence for A.C.T. and federal prisoners before they become eligible for review recommended by the Australian Law Reform Commission, supra, 149.

98. *Mental Malfunction and Criminal Responsibility*, supra, para 27.

99. Australian Law Reform Commission, supra, 77-8.

100. *Rendell v. Release on License Board*, supra; *R v Mental Health Review Tribunal; Ex parte H*, [1981] Tas. R. 194 per Cosgrove, J., at 203.

tariff courts disparity,[101] and has been detected in New South Wales. There, disparity has been found to revolve around ethnic origin of Governor's pleasure detainees: non-English speaking detainees are more likely to be held in a mental hospital and to be detained longer than those with English as a first language, a factor attributed to lack of facilities for coping with the former group of detainees rather than any more severe disturbances or any greater danger.[102]

(2) Finite Sentence Offences

Sentencing tariffs are an inevitable corollary of the defence of diminished responsibility. They will vary. In New South Wales, Queensland and the Northern Territory, which have the defence, a maximum life sentence may be awarded for manslaughter.[103] In Victoria and Western Australia, where the defence is under contemplation, the maximum is fifteen and twenty years imprisonment respectively.[104] Realistically, for offences of serious violence to the person, mentally disordered and dangerous offenders are likely to receive a life sentence (where that can be awarded) or a substantial tariff sentence, simply because of the factor of dangerousness.[105] The fear, expressed earlier, is that under the diminished responsibility defence, a mentally disordered manslaughterer will be detained longer than if he had availed himself of the insanity defence. It is time to test this hypothesis.

Because of the inadequacy of data, any conclusions must necessarily be tentative, but some speculation is possible. The Victorian and Western Australian statutory maxima will serve as il-

101. N. Stoneman, "Probation and Parole in the Australian Capital Territory and New South Wales. More Problems Than Prospects", in *Sentencing in Australia*, ed. Potas I., (Canberra: Australian Institute of Criminology, 1986), 273, suggests that, notwithstanding these guidelines, a 15 year "tariff" operates in New South Wales for life sentence prisoners and Governor's pleasure detainees.

102. L. Craze, "Governor's Pleasure Detainees of Non-English Speaking Background: A Review of Case Studies", in *Forensic Patients in New South Wales* (Sydney: Law Foundation of NSW, 1987), 65-70; T. Clark, "And What Governs Your Pleasure?", in *Forensic Patients in New South Wales*, ibid, 41-48.

103. N.S.W.: s. 24 *Crimes Act 1900*; Qld.: s. 310 *Criminal Code 1899*; N.T.. s. 167 *Criminal Code 1983*.

104. Vic.: s. 5 *Crimes Act 1958*; W.A.: s. 287 *Criminal Code 1913*.

105. *Veen v. R.*, supra; *Veen v R (No 2)* (1988), 62 A.L.J.R. 224 per Mason, C.J., Brennan, Dawson and Toohey, JJ., at 227; I.G. Campbell, "Justice and Utility in Sentencing: Gascogne Revived?" (1981), 12 U.Q.L.J. 43.

lustration. Remissions and parole may be expected to reduce the nominal term to about ten years in each state.[106] Both these finite terms are greater (by two and half years and by almost three and a half years respectively) than the average periods under insanity acquittal detention in the two states.[107] The caveat issued earlier for these data on average insanity detentions must be re-issued here. Nonetheless, they do suggest confirmation of the major hypothesis of this article, namely that any reform of the insanity defence which involves conviction for an offence and introduces penal concepts such a tariff length of detention should be undertaken very cautiously, and only if (as an integral part of the reform package) there is real prospect of substantial reduction in tariff sentences for offences of serious violence to the person. There is a climate for reduction in prison tariffs generally,[108] but the crucial point is that those who attempt to reform the insanity defence without corresponding reform of sentencing practices and policies must face the charge that they may lead to a more, rather than a less, punitive environment, and harsher and longer periods in detention.

(b) *Dangerousness*

Psychiatric reports that the detainee was unlikely to re-offend were regarded by the New South Wales Release on Licence Board as critical prerequisites to recommendations for release.[109] Further, as empirical corroboration for psychiatric assessments, the Board operated a policy of graduated-security detention, in three distinct phases: an initial phase of maximum security (in the range of five to six years), a middle phase of lesser security, and a third phase of lowest security (for two to three years).[110] Graduated-security progression is well known in the penal system with its gradations in prisons and prisoner classificatory systems,[111] and this particular

106. Vic.: Victorian Sentencing Committee Report, *Sentencing*, Vol 1, Attorney-General's Department, Melbourne, April 1988, para 6.11.13 and table at 309; W.A.: s. 37A(2)(b) *Offenders Probation and Parole Act 1963*.
107. A. Frieberg and D. Biles, supra, 106.
108. See, for example, Victorian Sentencing Committee Report, supra, 309-321; and see also, Australian Law Reform Commission, supra, 30-33.
109. J. Aitkin and G. Gartrell, supra, Appendix E, 148; see also Can.. s. 547(5)(d) *Criminal Code*.
110. Ibid, 146-147.
111. P. Coleman, "Prisoner Classification" in *Corrective Services in New South Wales*, eds. Cullen B., Dowding M. and Griffin J., (Sydney: Law Book Co, 1988), 63-65.

policy was obviously designed primarily for life sentence prisoners rather than Governor's pleasure detainees. The periods in each phase appear unwarranted for Governor's pleasure detention, and should suffer the same fate as the "informal tariff". This again shows the perils of relying on penal concepts in dealing with Governor's pleasure detention.

Graduated-security progression cannot be expected to operate smoothly when graduation relies on inter-system transfers. The well established graduated-security programs in NSW were disrupted by the switching of secure hospitals from the mental health system to the corrections system.[112] Even greater disruption may be expected whenever inter-system transfers are relied on. Once a detainee is released from a mental hospital and returned to prison, even if for the purpose of lessened security, it is the practice to give such detainees a maximum security classification.[113] In precisely the same manner as in other parts of the world,[114] Australian open psychiatric hospitals have shown reluctance to admit forensic patients from corrections facilities[115] because of the security risk they present and the disruption to ordinary ward regimes which their particular security demands place on the hospital. This reluctance has also been experienced at departmental level in Western Australia, and is the apparent cause for tardiness in implementing a recom-

112. L. Craze, "Forensic Patients in New South Wales: New Legislation in Need of Services", supra, 121.

113. L. Craze, idem, 120.

114. Gostin (ed.) *Secure Provision* (London: Tavistock, 1985), esp M. Faulk, "Secure Facilities in Local Psychiatric Hospitals" and R. Bluglass, "The Development of Regional Secure Units"; Orr. J. H., "The Imprisonment of Mentally Disordered Offenders" (1978), 139 Br. J. Psych. 198; M. Treves Brown, "Indefinite Detention: Hospitalization Criteria", in *Dangerousness. Problems in Assessment and Prediction*, ed. Hinton J., (London: Allen and Unwin, 1983), 52; Chiswick, McIsaac, and McClintock, *Prosecution of the Mentally Disturbed* (Aberdeen: Aberdeen U. Press, 1984), 91; Bean, *Mental Disorder and Legal Control*, (Cambridge: Cambridge U. Press, 1986), Ch. 6; T. Black, "Criminal Offenders and the Psychiatrically Disordered", [1981] N.Z.L.J. 113.

115. Potas, *Just Deserts for the Mad* (Canberra: Australian Institute of Criminology 1982), 122-124; *R v. Tutchell*, [1979] V.R. 248 at 257; *R. v. Judge Rapke; Ex parte Curtis*, supra, at 643; *R. v Carlstrom*, [1977] V.R. 366 at 367; *R v Clay* (1979), 22 S.A.S.R. 277 per Jacobs, J., at 281-2; *R. v. Trew* (1984), 12 A. Crim. R. 422 per Brinsden, J., at 424; see Bates, *Models of Madness* (St Lucia: U. Queensland Press, 1977), 84-85.

mendation to construct a new "hospital-within-a-prison" in that state.[116]

Care must be taken not to magnify the impact of hospital reluctance. Two states (South Australia and Queensland) have secure hospitals within the health system, and four others (Victoria, Western Australia, Tasmania and Northern Territory) have no separate facility but rely on secure wards within open psychiatric hospitals. But, not all detainees are held in these systems, and disparity in graduated-security release programmes depending on transfers becomes a real possibility. This points to the need for one body to monitor the two tracks (corrections and health) of graduated-security progression for Governor's pleasure detainees to avoid disparity. It is important that the virtue of graduated-security progression, namely the anchoring of predictions of future dangerousness in overt acts (both in the offence charged and in the responses to custodial regimes) be preserved and finely-tuned.

Moreover, graduated security for prisoners does not end at the prison gate, and it is doubly important for Governor's pleasure detainees that adequate out-patient care and supervision in the community be provided to monitor things such as abstinence from alcohol and non-prescription drugs, maintenance of prescribed drugs and other treatment regimes and so forth. There is a need, not presently provided for at common law,[117] to "snatch" a recalcitrant releasee from the street for a stabilisation period, simply in order to prevent irretrievable deterioration and imminent danger.

The appropriate paradigm for release of Governor's pleasure detainees must be parsimony in length and manner of detention consistent with the need to protect the public from dangerousness established in a judicial forum to the acceptable level of probabili-

116. Cramond and Harding, *Report of Inquiry Into The Appropriate Treatment of Mentally and Intellectually Handicapped Offenders*, (Perth: W.A. Departments of Prisons and Health, 1985); the recommendation was rejected by the Department of Corrections, which argued for "normalisation" or location of the facility within the health system; now a working party, comprising representatives of the Health and Crown Law Departments are examining the issue further; this continues a longstanding procrastination, Harz-Karp, *The Mentally Ill Within The Criminal Justice System*, (Perth: Department of Corrections, 1979), 7-9.

117. *R v Hallstrom, Ex parte W (No 2)*, [1986] 2 W.L.R. 883; *CCR v PS (No 2)* (1986), 6 N.S.W.L.R. 622, 639; J. Jacob, "The Right of a Mental Patient to his Psychosis" (1976), 39 Modern L. Rev. 17.

ty. This indicates that any prima facie minimum period in detention must be spelt out by statute, that it must bear no relationship to sentencing tariffs or to the offence determined against the detainee, that it must be the minimum necessary for a settled diagnosis and treatment regime to be established (if that is feasible) and thereafter regular review with the object of graduated-security progression towards final release.

The model of reform in this respect, in compliance with international obligations,[118] is that adopted in England,[119] requiring that the decision for release be given to a specialist judicial body, such as the Mental Health Review Tribunals.[120] The political responsibility of the executive is expressed and given due consideration, but is not conclusive. It is in breach of natural justice to fail to allow the Home Secretary to be heard upon the issue of release.[121] This model demands that information regarding dangerousness and risk of harm and public alarm must be placed before the body with authority to decide to release, and that the detainee is given opportunity to refute it. This model was not without controversy when introduced into England. Initial fears were expressed that the taking of the final release decision away from the Home Secretary would result in a flood of premature releases of dangerous acquittees and sentenced offenders.[122] The early evidence indicates, however, that the Mental Health Review Tribunals have proven to be cautious in deciding to release,[123] with roughly the same proportion of in-

118. Article 9(4) of the *International Covenant on Civil and Political Rights*; Article 5(4) of the European *Convention for Protection of Human Rights and Fundamental Freedoms*

119. *Mental Health Act 1983* (UK), enacted following the decision of the European Court in *X v United Kingdom*, European Human Rights Court, 5 November 1981, Series A, No. 46 p. 20 para 43 — see *R. v Oxford Regional Mental Health Review Tribunal, Ex parte Home Secretary*, [1986] 3 All E.R. 239 per Lawton, L.J., at 244 — applying Article 5(4) of the European *Convention for Protection of Human Rights and Fundamental Freedoms*.

120. U.K.: s. 73 *Mental Health Act 1983*; see *R v. Oxford Regional Mental Health Review Tribunal, Ex parte Home Secretary*, supra, per Lawton, L.J., at 244-5; L.O. Gostin, "Human Rights, Judicial Review and the Mentally Disordered Offender", [1982] Crim. L. R. 779, 785-786.

121. *Campbell v Home Secretary*, [1987] 3 W.L.R. 522 per Lord Bridge at 526; *R v Oxford Regional Mental Health Review Tribunal, Ex parte Home Secretary*, supra, per Lawton, L.J. at 247, Megaw and Stephen Brown, JJ., concurring.

122. *Offenders Suffering from Psychopathic Disorder*, Joint D.H.S.S./Home Office Consultation Document, London, 1986, para 1.

123. M.J. Gunn and D.J. Birch, "Special Category of Offenders - The Mentally Disordered", paper presented at conference on *Reform of Sentencing, Parole and Early Release*, Ottawa, 1-4 August 1988, 16.

correct or premature releases as the Home Secretary had.[124] This suggests that there is no justification for the release decision process being secretive and inscrutable, and that the risk to the community is not measurably increased by provision of a judicial forum for the determination of dangerousness.

Whether such a model will be acceptable in Australia is uncertain. A similar model has been recommended in Victoria for the release of Governor's pleasure detainees,[125] but recent legislation in Western Australia has removed any duty of procedural fairness by, inter alia, the Governor, any minister of the Crown or the parole board of that state on issues which include recommending release and ordering release of Governor's pleasure detainees in this State.[126]

Conclusion

At a time when the proponents of reform of sentencing stress just deserts and equality of punishment and the movement away from utilitarian ends (such as incapacitation), the reform of the insanity acquittal should not follow this direction. In the Australian context, it appears to be a mistake to adopt either of the two most significant reforms of the last decade in the United States of America, namely the abolition of the defence or the guilty but mentally ill verdict. Restricted solely to the insanity and the related diminished responsibility defence, any reform measure is likely to increase the time detainees are held in detention. On the other hand, the process by which dangerousness as a foundation for detention is determined does require reform, and this should be by adopting a disposition hearing for the purpose of determining both dangerousness and the disposition, with flexibility in those dispositions which might be ordered.

While a judicial determination of dangerousness must be based on particular findings of fact about the charged or alternative of-

124. J. Peay, "Offenders Suffering From Psychopathic Disorder" (1988), 28 Br. J. Criminology 67, 71-72.

125. Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, supra, paras 99-100.

126. W A.: s. 50(a), (c) and (d) *Offenders Probation and Parole Act 1963*, amended by s. 22 *Acts Amendment (Imprisonment and Parole) Act 1987.*

fence as a justification for the commitment into detention, that finding cannot constitute an impediment to determinations of dangerousness from time to time as part of regular review and formulation of the decision whether to release or not. In particular, it should not constitute a presumption against release from detention, if that is otherwise indicated.

This does not assume any greater accuracy of predictions of dangerousness than they deserve. It does assume, both at point of entry into detention and at all points of attempted departure from detention, that predictions be anchored in overt actions of the detainee established in a judicial forum.[127]

127 This paper is a revised version of a paper presented at the Conference on *Reform of Sentencing, Parole and Early Release*, Ottawa, Canada, 1-4 August 1988; I am deeply indebted to my colleagues Richard Harding and George Syrota for their valuable criticisms of an earlier draft, and to Bronwyn Davies, a student in the Law School of the University of Western Australia, for allowing me the benefit of her views of the US reforms of the insanity defence.