A Discussion Paper considering the operation of Part 8A of the Criminal Law Consolidation Act 1935 (SA)
A Discussion Paper considering the operation of Part 8A of the Criminal Law Consolidation Act 1935 (SA)

July 2013
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Foreword by the Chair of the Sentencing Advisory Council

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Foreword by the Chair of the Sentencing Advisory Council

The criminal justice system plays a vital role in keeping South Australians safe. Reports of crime and punishment are frequently in the news with sentencing in particular attracting more public interest than any other aspect of the criminal justice system. In January 2012, the Attorney General, the Hon. John Rau established the South Australian Sentencing Advisory Council (the Council). The Council was established to improve the quality and availability of information on sentencing in South Australia and assist in bridging the gap between the courts and the community.

The Council aims to strengthen public understanding of the sentencing process and by doing so enhance confidence in the criminal justice system. The Council will aim to improve the quality and availability of information on sentencing in South Australia by:

- preparing research papers, advice and reports in connection with sentencing at the request of the Attorney-General;
- publishing information relating to sentencing;
- educating the public about sentencing matters; and
- obtaining the community’s views on sentencing matters.

The Council is an advisory body with a broad membership. It includes people with experience in the criminal justice system such as representatives from the Director of Public Prosecutions, the Parole Board, the Legal Services Commission, the South Australian Bar Association, and the Commissioner for Victims’ Rights, the Law Society of South Australia, the Commissioner for Aboriginal Engagement and South Australian Police. However, one of the key components of the membership of the Council is that it includes community members from a diverse range of backgrounds. They play an integral part in ensuring that the views of the community are taken into account when formulating recommendations for the Government.

One of the pressing issues for the Government and a matter of community concern is the review of the applicability and functionality of the ‘insanity defence’ or more appropriately, the ‘mental impairment defence’. The need for such a review is not unique to South Australia. Western Australia and New Zealand have recently considered their mental impairment laws and New South Wales and the United Kingdom are in the process of undertaking reviews.

The legislation regulating the defence is set out in Part 8A of the Criminal Law Consolidation Act 1935 (SA) (the CLCA). The making of supervision orders and the fixing of limiting terms pursuant to Part 8A of the Act are matters closely related to the sentencing process. Although such orders are not imposed as punishment, they involve a deprivation of freedom and, when the Court fixes a limiting term it must do so by reference to the period of imprisonment that would have been ordered if the defendant had been convicted of the relevant offence.
On that basis the Attorney-General was of the view that the issue was one which would best be considered by the Council and in March 2012, the Attorney-General referred the following terms of reference to the Council for its consideration:

To consider the operation of Part 8A of the Criminal Law Consolidation Act with particular reference to:

- the test of mental incompetence in section 269C;
- the fixing of limiting terms; and
- the supervision of defendants released on licence pursuant to section 269O

The Attorney-General requested that the Council consider the terms of reference, identify any issues or challenges associated with it and where appropriate, make recommendations to the Government. This discussion paper (the Discussion Paper) is the first publicly available product of the review of the terms of reference.

The Discussion Paper is published for public comment and consultation. I encourage stakeholders and the community to consider the questions posed throughout the document and to provide feedback. It should be pointed out that the questions posed throughout the Discussion Paper are not intended to confine the discussion. The Council would appreciate comment on all aspects relevant to the operation of Part 8A of the CLCA.

I would like to thank Dr Arlie Loughnan from the Institute of Criminology at the Faculty of Law, University of Sydney who was our principal writer of the Discussion Paper.

Submissions will be received up until Friday 11 October 2013.

It is hoped that the recommendations eventually made by the Council to the Government, including any proposed legislative reforms, will enhance the operation of Part 8A of the CLCA thereby creating a safer environment for all South Australians.

The Hon. Kevin Duggan
Chair of the Sentencing Advisory Council
Abbreviations

Attorney General’s Department (SA)   AGD
Australian Law Reform Commission   ALRC
CLCA   *Criminal Law Consolidation Act 1935 (SA)*
Department for Correctional Services (SA)   DCS
Office of the Director of Public Prosecutions (SA)   ODPP
South Australia Department of Health and Aging   SADHA
South Australian Forensic Mental Health Service   FMHS
Sentencing Advisory Council, South Australia   the Council
Scoping Paper on Division 4, Part 8A, by Attorney-General’s Department (SA) 2011   Scoping Paper
Introduction

1.1 The Discussion Paper examines the defence of mental incompetence, and associated legal processes, under Part 8A of the *Criminal Law Consolidation Act* (SA) 1935 (the *CLCA*). The purpose of the Discussion Paper is to consider the appropriateness and effectiveness of the current law and associated practices in dealing with persons under Part 8A.

1.2 The defence of mental incompetence concerns those who are considered not responsible under the criminal law. The term ‘insanity’ has been used traditionally to describe a medical condition that can result in no criminal responsibility. All Australian jurisdictions have an insanity defence based upon the *M’Naghten Rules*, though legislative formulations differ. These are discussed in Part 2 of the Discussion Paper. In several Australian jurisdictions the term ‘insanity’, has been changed in recognition of the stigma of the terminology and now includes terms such as ‘mental impairment’ or ‘mental illness’.

1.3 The defence of mental incompetence represents an important safeguard for vulnerable individuals charged with criminal offences. As individuals falling under the mental incompetence defence may be dangerous to themselves or others, practices have developed to deal with such individuals. These practices are analogous to sentencing, but are not the same as sentencing.

1.4 The issues that arise when an individual who has cognitive or mental health impairment comes before the courts charged with a criminal offence can be complex and difficult. On the one hand, criminal law principles and practices have long allowed for special treatment of such individuals. On the other hand, having been charged with a criminal offence, the possibility that such individuals have caused harm must be borne in mind. Fairness to the accused, consideration due to any victims, and adherence to trial procedures all bear on the law of mental incompetence.

1.5 The Discussion Paper consists of four parts. Part 1 of the Discussion Paper identifies material that provides a contextual background for the substantive issues associated with the terms of reference and includes:

- The role of sentencing advisory bodies in Australia;
- Approach taken by the Council to the terms of reference;
- Previous relevant reviews of the law; and
- Summary of the Case File Review undertaken by the Attorney General’s Department (AGD).

1.6 Part 2 considers the legal tests associated with the terms of reference such as the definition of mental impairment (and mental illness) and the legal criteria for raising a defence of mental incompetence. Part 3 of the Discussion Paper examines the fixing of limiting terms, and Part 4 covers the supervision of defendants released on licence.
The role of sentencing advisory bodies in Australia

1.7 Over the last few years, a number of sentencing advisory bodies have been created in various States and Territories in Australia. The New South Wales Sentencing Council was the first such body in Australia, established in 2003.¹ This was soon followed by other states with the Sentencing Advisory Council established in Victoria in 2004,² and the Tasmanian Sentencing Advisory Council,³ and the Queensland Sentencing Advisory Council⁴ both created in 2010. To date, no sentencing advisory body has been established in the Northern Territory or Western Australia, or at the Federal level.⁵

1.8 Each of these sentencing advisory bodies has distinct aims and objectives, but, as the Australian Law Reform Commission (ALRC) has identified, sentencing advisory councils perform three primary functions – research, advice and rule making regarding sentencing.⁶ In undertaking research, and providing advice, sentencing advisory bodies also inform the public on issues relating to sentencing.

1.9 As explained in the Foreword to the Discussion Paper, in January 2012, the Hon. John Rau, Attorney-General, announced the establishment of a Sentencing Advisory Council in South Australia (the Council). The Council was established to improve the quality and availability of information on sentencing in South Australia and assist in bridging the gap between the courts and the community. This reference is the first to be given to the Council.

Approach taken by the Council to Terms of Reference

1.10 In March 2012, the Attorney-General (SA) referred the following terms of reference to the Council for its consideration:

To consider the operation of Part 8A of the Criminal Law Consolidation Act with particular reference to:
- the test of mental incompetence in section 269C;
- the fixing of limiting terms; and
- the supervision of defendants released on licence pursuant to section 269O.

⁵ The Northern Territory Government had announced that it would establish a sentencing advisory council (http://www.nt.gov.au/justice/documents/depart/annualreports/ANNUAL%20REPORT%202008%20DOJ.pdf?search=%22sentencing%22) but no such council has yet been established. It does not appear that the creation of a sentencing advisory body has been considered by Western Australia. The establishment of a federal sentencing advisory council was considered unnecessary by the ALRC: See ALRC Discussion Paper 70, Sentencing of Federal Offenders, 2005 para 19.34.
The Attorney-General requested that the Council respond to the terms of reference and, where appropriate, make recommendations to the Government. The Discussion Paper will allow the Council to receive feedback from stakeholders and represents the Council’s first step in formulating recommendations to put to the Government. These will be provided in a report (the Report) to be published after the period of consultation has closed.

1.11 The terms of reference require the Council to consider the law and practice relating to mental incompetence. The term “mental incompetence”, and the law relating to it, will not be familiar to some, and, in advance of a full discussion in Parts 2-4 of the Discussion Paper, a brief introduction to the law is provided here.

1.12 Mental incompetence refers to an impairment in the cognitive, volitional and moral capacities that an individual is both assumed and required to possess under the criminal law. Mental incompetence relates to the capacities of the person at the time of the alleged offence. Legal principles and practices depend on these capacities.

1.13 Currently, the law provides that a person will be mentally incompetent if he or she is suffering a ‘mental impairment’, and, ‘in consequence of that impairment, he or she does not know the ‘nature and quality’ of the conduct, or does not know the conduct is wrong or is unable to control the conduct (s269C, CLCA). Mental impairment is defined in the CLCA to include ‘a mental illness, or an intellectual disability or a disability or impairment of the mind resulting from senility’ but does not include intoxication (s269A, CLCA). This definition is discussed in Part 2 of the Discussion Paper.

1.14 Where an individual successfully raises this defence, the law provides that such a person cannot be held responsible for committing the offence, and he or she is found ‘not guilty by reason of mental incompetence’. As this verdict indicates, the outcome of a mental incompetence defence is different from the outcome that follows other successful defences. A successful incompetence defence will result in the defendant being subject to special powers of the court.

1.15 These special powers allow the court to release a defendant unconditionally, to commit the defendant to detention or to release him or her on licence (s269O(1), CLCA). As explained in Part 3 of the Discussion Paper, here, detention is not the same as punishment as it is not intended to have a punitive effect. If a court makes a supervision order, it must fix a ‘limiting term’ (a period during which the individual may be subject to a supervision order), which is equivalent to the period of imprisonment or supervision that would have been appropriate had he or she been convicted of the offence charged (s269O(2), CLCA). The issue of the supervision of defendants released on licence is considered in Part 4 of the Discussion Paper.

1.16 As this brief introduction suggests, the terms of reference require the Council to consider the substantive law, as well as the practices of fixing limiting terms, and supervision of individuals on licence, attendant to the substantive law. As this might be considered a larger remit than that typically provided to sentencing advisory bodies, a brief explanation is appropriate.
1.17 As stated in the Foreword to the Discussion Paper, the making of supervision orders and the fixing of limiting terms pursuant to Part 8A of the CLCA are closely related to the sentencing process. This is the case although, under Part 8A, detention is not equivalent to punishment because it is not intended to have a punitive effect. The connection arises from the role of the court in protecting the individual, and others, from further harm, and the relevance of incapacitation and rehabilitation in the sentencing process. These matters are discussed further in Parts 3 and 4 of the Discussion Paper.

1.18 The Council recognises that the issues addressed in the Discussion Paper have great significance for the community. The impact upon a defendant, the victim or victims and the community more broadly may differ depending on the way in which the defendant is dealt with under Part 8A. The different options provided for in the CLCA will affect the availability of treatment, the prospects of rehabilitation, and may affect perceptions of justice and fairness to the victim and his or her family.

1.19 The Council also recognises that the issues addressed in the Discussion Paper have great significance for the criminal justice system. The mental health of offenders is of key policy interest from health services, justice departments and recidivism, or re-offending perspectives. The prevalence of mental disorder among offenders nationally is now well-known.7

1.20 As the terms of reference indicate, the Council has not been asked to examine the law and practice relating to issues of unfitness to plead/unfitness to stand trial. That area of the law requires a determination whether a person’s mental processes are so disordered or impaired that the person is unable to understand the nature of the proceedings or give rational instructions to Counsel. As a result, unfitness to plead/unfitness to stand trial has not been considered in the Discussion Paper.

1.21 The Council was determined to ensure that its considerations were informed by data and statistics. However, there were difficulties in obtaining such statistics. It has become apparent that this issue is not unique to South Australia and other jurisdictions have faced similar difficulties in relation to data storage and statistics on this issue.8

1.22 In light of the difficulties in obtaining statistics and in order to gain a clearer picture as to how Part 8A of the CLCA is currently operating in South Australia, the Council requested the Attorney-General’s Department to undertake a Case File Review (the Case File Review) on its behalf. The results of the Case File Review are included in Appendix A to the Discussion Paper and a summary of the data obtained via the Case File Review is provided in the last section of this Part of the Discussion Paper.9

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8 It was also identified by the UK whereby in order to undertake a similar analysis the authors discovered ‘that official statistics were not kept on the use of the insanity defence and the primary source of information used was the relevant court and post-trial files. These cases were tracked through the kind co-operation of the Home Office Statistical Service, The Home Office Mental Health Unit, and the Court Service. Mackay, R., Mitchell, B.J. and Howe, L. (2006) Yet more facts about the Insanity Defence. Criminal Law Review, May, pp.399-411.

9 The Council is grateful to the ODPP for making a significant number of files available for the Case File Review.
1.23 In addition to obtaining empirical data, the Council sought to consult with professionals who have experience in the operation of Part 8A. As a result, the Council consulted with:

- senior forensic psychiatrists, Dr Ken O’Brien and Dr Craig Raeside, who regularly assess individuals to determine mental competence, prepare psychiatric reports for the courts and work in forensic mental health facilities;
- Ms Bronwen Waldron, a senior solicitor from the Legal Services Commission;\(^{10}\)
- Ms Pauline Barnett, Managing Prosecutor from the ODPP;
- Ms Frances Nelson QC, on behalf of the Parole Board of South Australia who is responsible for supervising licensees as to her views of the legislation and the challenges identified in its operation;\(^{11}\)
- Judge Steven Millsteed of the South Australian District Court, who at the request of the Council was invited to contribute his views on the legal test and court process; and
- Chief Magistrate Elizabeth Bolton, from the Adelaide Magistrates Court as to her views of the legislation and its operation in the summary jurisdictions.

Through these preliminary consultation activities, the Council has been able to identify a number of issues associated with the operation of Part 8A and has incorporated them into the Discussion Paper.

1.24 Except as they concern the supervision of offenders, the availability of resources and the provision of services lie beyond the scope of the Discussion Paper. However, the Council acknowledges that these considerations affect the number of individuals coming into contact with the criminal justice system, and the prospects of diagnosis and treatment of the mental and cognitive impairments that may give rise to a mental incompetence defence.\(^{12}\)

1.25 Before proceeding further, it is appropriate to make a point about terminology. In the Discussion Paper, the insanity defence denotes the defence in general, while the defence of mental incompetence refers to the South Australian defence.

1.26 The Discussion Paper uses the terms insanity or mental incompetence to refer to a relevant impairment in an individual’s cognitive, moral and volitional capacities. This is distinct from the term mental illness, or mental disorder, which is used to refer to those clinical conditions that are recognised by expert medical professionals.

1.27 While a claim that an individual was mentally incompetent at the time he or she committed an offence is likely to be backed up by one or more diagnoses of a particular clinical condition, strictly speaking, this is not determinative – criminal law principles and practices of adjudication are concerned with the effect of these

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\(^{10}\) Bronwen Waldron sits on the Sentencing Advisory Council as a representative of the Legal Services Commission.

\(^{11}\) Frances Nelson QC sits on the Sentencing Advisory Council as an Expert Member.


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conditions, rather than the conditions themselves\textsuperscript{13}. This is significant not just because of the potential for disconnect between expert legal and expert medical understandings of impairment, but because not all mental illnesses will affect an individual in a way considered relevant to criminal law (such as personality disorder), or at the time of the alleged offence.

Previous relevant reviews of the law

1.28 There have been two significant reports associated with Part 8A of the CLCA in the past ten years. The first was the \textit{Operational Review, the Criminal Law Consolidation Act, Mental Impairment Provisions 1995} (2000) (the \textit{Operational Review}) which was undertaken by the Justice Strategy Unit. This report examined the way mental impairment provisions in the criminal justice system were working in practice and how to achieve the best possible interface between justice and treatment support services. This report included a number of recommendations.

1.29 A subsequent review was carried out by the Department of Health in April 2005. It was entitled \textit{Paving the Way - Review of Mental Health Legislation in South Australia} and examined the legislative framework regarding Part 8A of the CLCA. It noted the findings of the \textit{Operational Review} and also made separate recommendations.

1.30 Most recently, in 2011, the Attorney-General issued a scoping paper (the \textit{Scoping Paper}) which specifically considered Division 4 of Part 8A of the CLCA. This section of the Act deals primarily with licences. As such, the Scoping Paper is linked to the current work of the Council. Following the publication of the Scoping Paper, submissions were received from various stakeholders.

1.31 However, as the Council was established shortly thereafter and was asked to consider Part 8A more broadly, no proposals for legislative change were recommended to the Attorney-General at that time. Instead the issues identified in the Scoping Paper and submissions received were referred to the Council in its overall consideration of Part 8A.

1.32 In order to build on the work that has been carried out previously, those issues or recommendations that were raised in previous reviews have been identified throughout the Discussion Paper.

Summary of a recent Case File Review undertaken by the Attorney General’s Department (AGD)

1.33 As mentioned above, in light of the difficulties obtaining statistics and in order to gain a clearer picture as to how Part 8A of the CLCA was currently operating in South Australia the Council requested the Attorney-General’s Department to undertake a Case File Review on its behalf.

\textsuperscript{13} See further Arlie Loughnan, \textit{Manifest Madness: Mental Incapacity in Criminal Law} (OUP, 2012).
1.34 The relative absence of data in South Australia appears to be the result of the way in which data is captured and stored by the Courts Administration Authority, which has been designed with the traditional criminal justice system in mind. The data collection systems do not capture data for those individuals who plead not guilty on the basis of mental incompetence (or who are unfit to stand trial), and who are then dealt with under Part 8A resulting in an unconditional release, limiting term or period of detention at a forensic mental health facility.

1.35 The Case File Review included an analysis of approximately 90% of the total number of cases in which there had been a finding of not guilty on the basis of mental incompetence in the South Australian District and Supreme Courts between 2006 and 2012. This represents a total of 55 cases.

In analysing the data, a number of factors were examined, including:

- the total number of individuals found not guilty on the basis of mental incompetence;
- the percentage of males and females found not guilty on the basis of mental incompetence;
- whether the individuals had any prior offences which had been dealt with through the traditional court process;
- whether there was a pre-existing diagnosis of mental illness;
- which limb of s269C of the CLCA applied;
- whether the judge identified the basis for the finding of mental incompetence;
- the number of individuals who had consumed drugs or alcohol in the weeks or days preceding the offending act(s);
- the classes of offences allegedly committed by the individuals;
- whether the individual had been released unconditionally, detained or released on licence (upon a finding of not guilty and an order as to supervision);
- the length of limiting terms imposed;
- the number of individuals subject to a review of their licence before the court on the basis of a breach of licence; and
- the number of individuals who committed subsequent offences whilst on licence.

The results of this Case File Review are set out in Appendix A to the Discussion Paper. Where appropriate, the Council has drawn on the evidence provided by the Case File Review in addressing particular issues in the Discussion Paper.

1.36 While every effort was made to ensure the accuracy of the data included in the Case File Review, the results of the data collection were not independently verified by a professional statistician, and, on that basis accuracy cannot be guaranteed. Nonetheless, this data was included in order to go some way toward remedying the shortage of empirical material available on the defence of mental incompetence and related procedural practices.
2. The Defence of Mental Incompetence
**Introduction**

2.1 This Part of the Discussion Paper examines the defence of mental incompetence, which is contained in s269C, CLCA.

The Discussion Paper provides discussion of:
- An overview of the history of the law;
- Daniel McNaughtan and the *M’Naghten Rules*;
- The development of the Law in Australia;
- The components of the mental incompetence defence in s269C;
- The definition of mental impairment;
- The significance of Judge-alone proceedings; and
- The law in other Australian jurisdictions.

2.2 As explained in Part 1 of the Discussion Paper, mental incompetence refers to an impairment in the cognitive, moral and volitional capacities of those individuals who are subject to the criminal law. These capacities underpin the fundamental principle that the mental state or fault (*mens rea*) element of the criminal offences centres on what the individual knew, perceived, or intended at the time of the offence.

2.3 Criminal liability and punishment rest on these cognitive, moral and volitional capacities, and a person with such capacities is regarded as responsible in criminal law, while a person with impaired capacities is not criminally responsible. Thus, the defence of mental incompetence represents a boundary around the criminal law, marking out those who are not responsible, rather than just not liable (because they successfully raised self-defence, for example), for alleged criminal conduct.

2.4 As mentioned in Part 1, traditionally, these principles became known as the insanity defence. However, reflecting the stigma associated with the term ‘insanity’, several jurisdictions have altered the language of the law. In South Australia, the defence is known as the defence of mental incompetence. For the purposes of the Discussion Paper, the term “insanity defence” refers to the law in general, while the term “mental incompetence defence” refers specifically to the South Australian law.

2.5 The underlying rationale of the insanity defence is the separation of certain individuals from the usual processes of the criminal law, and the institution of special processes to ensure their protection and the protection of the community. As the NSW Law Reform Commission states, ‘the modern defence of mental illness’ is grounded in ‘recognition of impaired mental functioning as an excuse from criminal responsibility’ and ‘protection of the community through detention of those, who, because of their mental illness, pose a threat to themselves or others’.  

2.6 At present, the law provides that a person will be mentally incompetent if he or she is suffering a ‘mental impairment’, and, ‘in consequence of that impairment, he or she does not know the ‘nature and quality’ of the conduct, or does not know the conduct is wrong or is unable to control the conduct (s269C, CLCA). ‘Mental impairment’ is defined in the CLCA to include a mental illness, an intellectual disability and a

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disability or impairment of the mind resulting from senility (s269A, CLCA). An explanation of each of the parts of the defence is set out below.

2.7 Where an individual successfully raises a mental incompetence defence, the law provides that such a person cannot be held to have committed the offence, and he or she is found ‘not guilty by reason of mental incompetence’. As this verdict indicates, the outcome of a mental incompetence defence is different from the outcome that follows other successful defences. A successful incompetence defence subjects the defendant to special powers of the court. These special powers are discussed in Parts 3 and 4 of the Discussion Paper.

2.8 At the outset of this discussion, it is worth noting that the Council appreciates that there may be those in the community or stakeholders in the criminal justice system who consider the defence out-dated or flawed and who believe it should be entirely reconsidered.

2.9 The Council does not take this view and the Discussion Paper proceeds on the basis that there is still a need to provide a legal mechanism for excusing from criminal responsibility those offenders whose mental capacity was significantly impaired at the time of their alleged offence.

2.10 The Council views a defence of mental incompetence as necessary to protect such individuals from themselves and to protect others, and to provide individuals with the opportunity for treatment.

An Overview of the History of the Law on Insanity

2.11 The law on insanity has a long history in the common law world. This history demonstrates a leniency in treating mentally ill offenders. While the absence of sources renders the early history of insanity somewhat opaque, it is generally accepted that the practice of excusing an insane defendant from trial long preceded the appearance of a formal insanity defence. It was usual practice for the insane individual’s family to provide compensation to the victim or his or her family and look after the insane person. As ‘trial by ordeal’ was replaced with trial by jury in the medieval era, insane defendants who had committed serious offences (such as homicide) were likely to be tried and, if convicted, left to the royal prerogative of mercy.

2.12 At ‘some point’ during the early modern period, for reasons that are unclear, it became regular practice to acquit the insane defendant rather than leave him or her to be pardoned by the King. In his seminal historical work, Nigel Walker traces the earliest recorded acquittal on the basis of insanity (‘the felon was of unsound mind’) to 1505. At this time, there seems to have been no substantial elaboration of the

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15 See, for example, N. Walker, Crime and Insanity In England (Vol.1) (Edinburgh University Press, 1968), 19.
meaning of phrases such as ‘unsound mind’ or any particular procedural structure for adjudicating claims of insanity.

2.13 The criminal process underwent significant changes associated with the rise of adversarial criminal procedure during the eighteenth century.\(^\text{19}\) The changes in prosecution and trial processes were accompanied by changes in punishment and sentencing practices. But, the capacity of informal criminal processes to accommodate insane individuals remained at large. If an insane individual was acquitted, no particular disposal was mandated, and what happened to the defendant varied according to his or her personal circumstances.\(^\text{20}\)

2.14 It was in this context that the first famous insanity case of Edward Arnold in 1724 took place.\(^\text{21}\) In his directions to the jury, Justice Tracy stated that ‘when a man is guilty of a great offence, it must be very plain and clear before a man is allowed such an exemption […] it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast’ in order to avoid punishment.\(^\text{22}\) This direction reflects the attitudes to mental illness then prevailing. The judge’s directions in *Arnold’s Case* have come to be called the ‘wild beast’ insanity test. The ‘wild beast’ insanity test was more of an informal standard than a ‘precise formula’ for assessing lack of intent.\(^\text{23}\) Like the structures of criminal liability, exculpatory insanity had not yet undergone any sustained conceptual elaboration in the criminal law.\(^\text{24}\)

2.15 In the absence of conceptual development, and prior to the trial of Daniel McNaughtan and the appearance of the *M’Naghten Rules*, discussed below, the most significant development in this time concerned legal procedures rather than substantive law. Procedural development was advanced early in the new century with another famous insanity trial, that of James Hadfield for high treason in 1800.\(^\text{25}\) It was the legislation enacted by the English parliament in the wake of the *Hadfield* decision, the *Criminal Lunatics Act* 1800,\(^\text{26}\) which set up the modern practice of disposing of insane individuals, charged with offences through the criminal law.

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\(^\text{19}\) Features of the adversarial trial such as prosecution and defence counsel (although the latter had a limited role until the nineteenth century), a distinction between fact and law, and the rudiments of laws of evidence and procedure appeared before 1800: see generally J H Langbein *The Origins of the Adversary Criminal Trial* (Oxford University Press, 2003).


\(^\text{21}\) Edward Arnold (1724) 16 St. Tr. 695. Arnold was charged with maliciously shooting at a prominent local member of the aristocracy, Lord Onslow, under the recently enacted *Black Act* (1723) 9 Geo. 1 c.22. Arnold pleaded that he did not know what he was doing and did not intend any harm (Beattie *Crime and the Courts in England* 1986: 84), but evidence given about the preparation for the offence suggested that Arnold could 'form a steady and resolute design': extracted in R Moran (1985) "The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield" 19(3) *Law and Society Review*, 487-521, 502.

\(^\text{22}\) Extracted in *Crime and Insanity In England* (Vol.1) 56; see also Beattie 1986 *Crime and the Courts in England* 84.


\(^\text{25}\) *R v Hadfield* (1800) 27 St. Tr. 1281.

\(^\text{26}\) *The Criminal Lunatics Act* 1800 (39 & 40 Geo. III c. 94).
significance of this legislation is such that it represents the origins of current disposal practices, and it is discussed further in Part 3 of the Discussion Paper.

Daniel McNaughtan and the M’Naghten Rules

2.16 The modern law of insanity can be traced to the trial of Daniel McNaughtan in London in 1843, and the eponymous M’Naghten Rules which arose from it. These Rules continue to inform the law on insanity in common law jurisdictions around the world. The significance of the M’Naghten Rules for the current law demands that they be explained in some detail.

2.17 In 1843, Daniel McNaughtan, aiming to shoot the Prime Minister, shot and killed his private secretary, Edward Drummond. McNaughtan was charged with wilful murder and pleaded not guilty. At trial, the Solicitor General, referring to previous cases, stated that McNaughtan could not be excused on the grounds of insanity if he had ‘that degree of intellect which enabled him to know and distinguish between right and wrong’. The earlier passage of the Prisoners’ Counsel Act 1836 meant that McNaughtan’s defence counsel, Alexander Cockburn, could address the jury. He argued that, although McNaughtan had done the act, he should not be held responsible for it because the ‘fierce and fearful delusion’ that he was being persecuted subsisted at the time of the killing and meant that he was unable to control his actions. After hearing the medical witnesses, Chief Justice Tindal stopped the proceedings and remarked that ‘the whole of the medical evidence is on one side’. In accordance with the practice carried over from the previous era, the jury found McNaughtan ‘not guilty by reason of insanity’.

2.18 This outcome was controversial. Queen Victoria and others expressed concern that the verdict was unduly lenient. All the judges of the Queen’s Bench were called to appear before the House of Lords to defend the decision.

2.19 In response to five questions put to fifteen judges by the House of Lords, the panel of judges clarified the scope of the insanity defence and this produced what subsequently came to be known as the M’Naghten Rules, the law providing a defence of insanity.

2.20 The elements of the insanity defence were set out by Lord Tindal CJ who stated that:

Every man is to be presumed to be sane, and possess a sufficient degree of reason to be responsible to his crimes, until the contrary be proved to their satisfaction; and to establish a


31 See further Arlie Loughnan, Manifest Madness: Mental Incapacity in Criminal Law (OUP, 2012).
defence on the ground of insanity, it must be clearly proven that at the time of committing
the act, the party accused was labouring under such a defect of reason, from disease of the
mine, as not to know the nature and quality of the active is doing; or if you did know it, that
he did not know that what he was doing was wrong.\textsuperscript{32}

2.21 As this indicates, there are three limbs to \textit{M’Naghten} insanity: the defendant must
have a ‘disease of the mind’, resulting from a ‘defect of reason’ and the effect of this
must be either that he or she did not know the ‘nature and quality’ of their act, or that
it was ‘wrong’. These limbs, or traces of them, can be found in the current law of
insanity and thus, they are discussed below.

2.22 Under the \textit{M’Naghten Rules}, where the defendant raises the defence of insanity he or
she must prove that fact on the balance of probabilities. When the contention that the
defendant was insane is advanced by the prosecution, or is put by the judge of his or
her own motion, the trier of fact (judge or jury) may only find that the defendant was
mentally incompetence if satisfied of that fact on the balance of probabilities\textsuperscript{33}.

2.23 The result of a successful insanity defence was (and remains) a particular trial verdict
– the ‘special verdict’. By contrast with a general verdict (‘guilty’ or ‘not guilty’), the
special verdict includes a statement of the factual basis on which the verdict had been
reached. If an accused succeeds in raising the insanity defence, he or she is liable to
an alternative set of disposal measures which include detention. It is the special
verdict that gives rise to the special powers of the court under which an individual
who has been found ‘not guilty by reason of insanity’ may be detained. These powers
are discussed in Part 3 of the Discussion Paper.

2.24 While the main focus of the law of insanity has been the content of the \textit{Rules}
themselves, with the benefit of hindsight, what has been at least as significant as the
content of the \textit{M’Naghten Rules} has been the way in which they were created. The
unique character of the \textit{Rules} – a judicial formulation, developed independently from
a specific trial, and in a legislative context – has earned them the label of ‘judicial
legislation’\textsuperscript{34} and served to entrench them in England and Wales and in common law
countries around the world.\textsuperscript{35}

\textbf{The Development of the Law in Australia}

2.25 The Australian colonies inherited the \textit{M’Naghten Rules}. The developing nature of
Australian legal regimes, and the small number of cases, alongside other factors,
meant that there was little change in the law until the twentieth century.

2.26 One of the most significant developments in the substantive law on insanity is the
High Court decision of \textit{The King v Porter} in 1933.\textsuperscript{36} This decision is discussed
further below.

\begin{itemize}
\item \textsuperscript{32} \textit{M’Naghten} (1843) 10 Cl & Fin 200.
\item \textsuperscript{33} \textit{R v Meddings} [1966] VR 306 at 307; \textit{R v Ayoub} [1984] 2 NSWLR 511 at 515.
\item \textsuperscript{34} DJA Cairns (1998), \textit{Advocacy and the making of the adversarial criminal trial, 1800-1865} (Oxford:
\item \textsuperscript{35} See further Arlie Loughnan, \textit{Manifest Madness: Mental Incapacity in Criminal Law} (OUP, 2012).
\item \textsuperscript{36} \textit{The King v Porter} (1933) 55 CLR 182.
\end{itemize}
In the years since the *Porter* decision was handed down, Australian jurisdictions have developed their own jurisprudence on the insanity defence. The law in other Australian jurisdictions is canvassed in the final section of this Part of the Discussion Paper.

In addition, each Australian jurisdiction has developed its own practice relating to the disposal of individuals found not guilty by reason of insanity. The law and practice in other Australian jurisdictions is canvassed in the final section of Part 3 of the Discussion Paper.

In South Australia, the mental impairment provisions in Part 8A of the CLCA came into effect on 2 March 1996. It is these provisions that form the subject matter of the Discussion Paper.

**The components of the mental incompetence defence in s269C**

Section 269C of the CLCA provides:

269C—Mental competence

A person is mentally incompetent to commit an offence if, at the time of the conduct alleged to give rise to the offence, the person is suffering from a mental impairment and, in consequence of the mental impairment—

a) does not know the nature and quality of the conduct; or
b) does not know that the conduct is wrong; or
c) is unable to control the conduct.

This section of the Discussion Paper provides a discussion of each component of the defence. A discussion of the definition of ‘mental impairment’ is provided in the following section of this Part of the Discussion Paper.

In accordance with common law principles a person’s mental competence to commit an offence is presumed unless the person is found to have been mentally incompetent to commit the offence (s269D, CLCA). In order to displace this presumption, the burden of proving that the defendant was mentally incompetent as the time of the offence lies on the party advancing that contention. Ordinarily this would be the defendant but on occasion is raised by the prosecution. This presumption remains intact unless it is proven on the balance of probabilities that the defendant was mentally incompetent at the time of the offence.

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38 *The King v Porter* (1933) 55 CLR 182.
Section 269C(a) - does not know the nature and quality of the conduct

2.32 This component of the mental incompetence defence is drawn from the *M’Naghten Rules*. The *M’Naghten Rules* specify two ways in which a ‘defect of reason’ must affect an individual if he or she is seeking to rely on the insanity doctrine: it must affect either his or her knowledge of the ‘nature and quality’ of the ‘act’, or his or her knowledge that it was ‘wrong’. In s269C, knowledge of ‘nature and quality’ has been separated from knowledge of ‘wrongness’ and these are discussed separately here. s269C also refers to ‘conduct’ rather than ‘act’, but this difference is not significant.

2.33 Each of the first two components of the defence involves making an assessment of the ‘nature and quality’ of the act and of wrongness. The use of the term *knowledge* reflects the reference to what the defendant “knew” in the *M’Naghten Rules*. This term denotes the rational capacity of the defendant and connects to the ‘defect of reason’ component of the *M’Naghten Rules* that was not included in the statutory defence contained in the CLCA.

2.34 Some other Australian jurisdictions have replaced the reference to knowledge with a reference to understanding.

2.35 The legislation in Queensland (as well as in Tasmania and in Western Australia) avoids the actual use of the phrase ‘nature and quality of the conduct’ to describe this first test from *M’Naghten*, instead asking if the accused had the capacity to understand what he or she was doing. Tasmanian legislation also avoids the use of the words ‘nature and quality’ in its codification of the first *M’Naghten* test and reflects the formulation of the English Court of Appeal in *R v Codere*[^39][^40] with the wording ‘the physical character of the act’. Further details of the legislative frameworks in the other jurisdictions are set out in the final section of this Part of the Discussion Paper.

It is suggested that the use of the word ‘understand’ in these jurisdictions reflects the need for a deeper appreciation of the effect of the conduct upon other people, and may be an important discrepancy in relation to the scope of the effect of the mental impairment on the accused’s mental capacities.[^40]

2.36 In relation to the ‘nature and quality’ of the act requirement, it is likely that the *M’Naghten* judges regarded this phrase as ‘too clear to need explanation’,[^41] and it has only been subject to limited judicial attention in the twentieth century. The phrase has been interpreted to refer to an individual’s appreciation of the physical nature of the act and its physical consequences.[^42]

2.37 The effect of this interpretation of the ‘nature and quality’ requirement is to exclude consideration of the defendant’s appreciation of the ‘moral or social nature of his act’.[^43]

[^42]: *R v Porter* (1933) 55 CLR 182; *Sodeman v The King* (1936) 55 CLR 192, *Willgoss v R* (1960) 105 CLR 295
2.38 Critical analysis of this component of the mental incompetence defence has been focussed largely on the *M’Naghten Rules*. A core problem with this limb of *M’Naghten* has been identified by commentators: it is generally regarded as overly-narrow.\(^44\) The effect of this is to restrict the exculpatory potential of the defence. As R D Mackay writes, the effect of the narrow approach is ‘to exclude the vast majority of mentally disordered persons from the realm of the insanity doctrine, as inevitably in most cases they will know what they are doing’.\(^45\)

2.39 The narrowness of the knowledge of the ‘nature and quality’ of the ‘conduct’ component of the defence may be contrasted with the breadth of the definition of ‘wrongness’ which, in Australia, has been accorded a wider meaning than elsewhere in the common law world (to connote ‘moral wrongness’ as in ‘right and wrong’ or ‘good and evil’, as opposed to ‘legal wrongness’ as in England and Wales)\(^46\). In addition, the inclusion of a volitional component to the defence in South Australia (discussed below) further remedies the narrowness of the common law version of the defence. ‘Wrongness’ is discussed further below.

2.40 It appears that, at present, the ‘nature and quality of the conduct’ component of the defence is rarely the basis upon which mental incompetence is found.

2.41 The Case File Review bears out this conclusion. It indicated that the claim of lack of knowledge as to the nature and quality of conduct was relied upon in only 2% of the cases reviewed.\(^47\)

2.42 Further, the Council gathered evidence from forensic psychiatrists who advised that they have little difficulty with respect to the application of this limb. However, they cautioned that psychiatrists or psychologists who are not familiar with forensic matters or did not have an understanding of s269C when providing their expert opinion sometimes alternated between the use of words ‘appreciate’ or ‘were aware of’ when considering whether a defendant knew the nature and quality of his conduct.

2.43 The Council invites comment on whether it might be rendered more useful if a definition of ‘nature and quality’ was provided.

**Question 1.**

Should the CLCA be amended to replace reference to ‘knowledge’ with the word ‘understanding’? Should the CLCA be amended to define ‘nature and quality of the conduct’? If so, should the definition include ‘understanding the physical nature of the conduct and its physical consequences’?

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\(^44\) See NSW LRC 2010: CP 6: 3.22-3.48 for discussion; see also Mackay 1995: 100.


\(^46\) *Willgoss v The Queen* [1960] 105 CLR 295, 301

\(^47\) See Appendix B, Case File Review.
Section 269C(b) - does not know the conduct is wrong

2.44 As mentioned above, this component of the mental incompetence defence is also drawn from the *M’Naghten Rules*. It is the second of the two ways in which an individual must be affected if he or she is seeking to rely on the insanity defence: here, an individual’s mental incompetence must affect his or her knowledge that the alleged conduct was ‘wrong’.

2.45 In the Australian context, ‘wrongness’ for *M’Naghten* insanity has been interpreted broadly, to connote ‘wrongness’ as in ‘right and wrong’ or ‘good and evil’.

Thus, knowledge of ‘wrongness’ does not require the defendant to appreciate that conduct was legally wrong, but, rather, that it was wrong having regard to the ‘everyday standards of reasonable people’. As this indicates, ‘wrongness’ is judged on moral, rather than legal, standards. ‘Wrongness’ has been interpreted more narrowly elsewhere in the common law world.

2.46 An illustration of the approach to ‘wrongness’ adopted by Australian jurisdictions is provided by the recent decision of *R v Ey*. In this decision, the defendant was charged with the manslaughter of her son in 2008, and raised the mental incompetence defence. In his reasons, the Judge held as follows:

In considering what is meant by “wrong”, the question to be asked is: Can I be satisfied, on the balance of probabilities, that the defendant, having regard to her mental impairment, did not know it was wrong to omit to render care or obtain assistance for the baby in the sense that an ordinary or reasonable person would understand right and wrong? Was she so disabled that she was unable to reason that, in leaving the baby exposed in the driveway, her failure to render assistance or obtain help was wrong? Wrongfulness in the context of section 269C(b) is judged by wrongfulness in the eyes of ordinary people having regard to the everyday standards of reasonable people.

2.47 The Case File Review indicated that the ‘wrongness’ component of s269C was the basis for the finding of mental incompetence in 87% of all matters. Therefore, it is important that this aspect of the law be considered carefully.

‘The Porter gloss’

2.48 The meaning of knowledge of ‘wrongfulness’ for the purposes of the common law insanity defence was considered by the High Court in *Porter*.

2.49 In *Porter*, the defendant was accused of administering strychnine to his infant son with the intention of causing his death. He was charged with murder and raised the insanity defence. Justice Dixon’s directions to the jury regarding the insanity defence included a reference to whether the defendant could ‘reason with a moderate degree

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48 *R v Stapleton* (1952) 86 CLR 358, 369; see also *Willgoss v The Queen* 105 CLR 295.
49 *The King v Porter* (1933) 55 CLR 182.
50 See NSW Law Reform Commission 2010: CP 6: 3.29 for discussion.
52 *R v Ey* [2012] SASC 116 [33, 34].

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of sense and composure’. This phrase has been taken up in other decisions, and has become known as ‘the Porter gloss’.

2.50 In directing the jury in Porter, Justice Dixon stated:

The question is whether the defendant’s ‘disease or disorder or disturbance of mind was of such a character that he was unable to appreciate that the act he was doing was wrong. It is supposed that he knew he was killing, knew how he was killing and knew why he was killing, but that he was quite incapable of appreciating the wrongness of the act. That is the issue, the real question in this case. Was his state of mind of that character? The question is whether he was able to appreciate the wrongness of the particular act he was doing at the particular time. Could this man be said to know in this sense whether his act was wrong if through a disease or defect or disorder of the mind he could not think rationally of the reasons which to ordinary people make that act right or wrong? If through the disordered condition of the mind he could not reason about the matter with a moderate degree of sense and composure it may be said that he could not know that what he was doing was wrong. What is meant by “wrong”? What is meant by wrong is wrong having regard to the everyday standards of reasonable people. If you think that at the time when he administered the poison to the child he had such a mental disorder or disturbance or derangement that he was incapable of reasoning about the right or wrongness, according to ordinary standards. Then you should find him not guilty upon the ground that he was insane at the time he committed the acts charged. 

2.51 ‘The Porter gloss’ was taken up in Sodeman v. The King and Stapelton v. The Queen. In each case, it appears that ‘reason with a moderate degree of composure’ was treated as synonymous with ‘wrongness’.

In Stapleton, the High Court referred to Porter and stated:

‘given a disease disorder or defect of reason, then it is enough if it so governed the faculties at the time of the commission of the act that the accused was incapable of reasoning with some moderate degree of calmness as to the wrongness of the act or of comprehending the nature or significance of the act of killing’.

2.52 ‘The Porter gloss’ was also considered in the case of Willgoss v The Queen, an application for special leave. In that case, the High Court noted that the Supreme Court of Victoria had relied upon Porter in its decision. But, the High Court contrasted the facts giving rise to Willgoss’ insanity defence with the facts giving rise to the insanity defences raised in Sodeman v. The King, and Stapelton v. The Queen. The court stated: Such a direction well may be called for in cases where the acts which but for insanity would form the crime charged are committed in a state of frenzy, uncontrolled emotion or suspended reason, the product of mental disease or disorder.

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53 The King v Porter (1933) 55 CLR 182.
54 The King v Porter (1933) 55 CLR 182, 189, 190.
55 Sodeman v. The King (1936) 55 CLR 192, 215.
56 Stapelton v. The Queen (1952) 86 CLR 358, 367.
57 Stapelton v. The Queen (1952) 86 CLR 358, 367.
58 Willgoss v The Queen (1960) 105 CLR 295.
59 Justice O’Bryan stated ‘Now if he could not really reason about that matter with a moderate degree of composure it may be said he could not know that what he was doing was wrong.’: extracted in Willgoss v The Queen (1960) 105 CLR 295, 301.
60 Willgoss v The Queen (1960) 105 CLR 295, 301.
2.53 The court concluded:

In the case before us the alleged incapacity of the prisoner to comprehend the wrongness of the act seems to have depended on other considerations than a capacity to reason about the matter with a moderate degree of sense and composure. 61

2.54 This suggests that reference to the defendant’s ability to ‘reason with a moderate degree of sense of composure’ was not of general applicability in determining the meaning of ‘wrongness’. Rather, the relevance of this phrase would depend on the facts giving rise to the insanity defence, and thus on the specifics of each case.

2.55 ‘The Porter gloss’ has been widely cited and, despite the High Court’s statements in Willgoss, Justice Dixon’s phrase has become something of a default ‘test’ for knowledge of ‘wrongfulness’.

2.56 For instance, in R v Ey, 62 referred to above, the Judge concluded:

I am not satisfied that the defendant due to her mental impairment was unable to reason about the moral quality of her omissions. I accept the evidence of Dr Tomasic that the defendant had the capacity to know that it was wrong not to seek help after giving birth, but was overborne by her desire to uphold the secrecy of her pregnancy. I accept that the defendant is mentally impaired, and is of low intelligence, at times exhibiting a child-like naivety. I accept that the defendant would have found herself in an overwhelming situation with various pressures affecting her decision to place the infant outside. It does not follow, however, that at that moment she was disabled from knowing that it was a wrong act to commit in the sense that an ordinary person understands right from wrong, and that she was disabled from considering with some degree of composure and reason the wrongfulness of her actions. 63

2.57 Reliance on ‘the Porter gloss’ extends across jurisdictions. In R v Jones, decided under the Crimes Act 1900 (NSW), Justice Sperling referred to the M’Naghten Rules and went on to state that ‘the more recent authorities throw the emphasis under the second limb of the Rules onto a capacity to reason calmly about the wrongfulness of the act’. 64

2.58 It is also clear that ‘the Porter gloss’ has been taken up by expert medical professionals and referred to in psychiatric and other reports adduced in court. For instance, in R v Zilic 65 the defendant was charged with the murder of his son at Cooper Pedy in April 2008, and raised the mental incompetence defence. In providing her reasons for a finding of mental incompetence, Justice Nyland referred to the expert testimony and stated:

Dr Raeside considered that at that time of the offence the defendant was psychotic. He said: Whilst he would appear to have known the nature and quality of his actions in killing his son by using a knife to cut his throat and then putting his body in a mineshaft, it is my opinion

61 The High Court concluded that ‘if O’Bryan J. went further in this respect than the facts of the case demanded, the tendency of it was all in the prisoner’s favour’: Willgoss v The Queen [1960] 105 CLR 295, 301. Special leave to appeal was denied.
65 R v Zilic [2010] SASC 70
that Mr Zilic’s ability to reason with a moderate degree of sense and composure about the wrongfulness of his actions would have been severely impaired. There does not appear to be any non-psychotic motive for Mr Zilic’s alleged behaviour. Dr O’Brien expressed the opinion:... that as a result of his active illness, although he did know the nature and quality of his conduct (the killing of his son) he was not able at the material time to reason about the wrongfulness of his conduct “with a moderate degree of sense and composure”. It would seem to me that his behaviour was driven by the intensity of his psychotic and delusional belief system. He concluded that by virtue of the “wrongfulness” limb, the defendant had available to him a mental impairment defence.66

2.59 Other cases also provide evidence of the use of ‘the Porter gloss’ in expert evidence.67

2.60 The Case File Review indicated that Justice Dixon’s phrase is used frequently by psychiatrists assessing whether, in their opinion, a defendant knew that their conduct was wrong in accordance with the legislation.68

2.61 It is evident that ‘the Porter gloss’, the phrase ‘moderate degree of sense and composure’ forms a critical component in determining the issue of ‘wrongness’.

2.62 ‘The Porter gloss’ has been criticised on the basis that rationality, sense and composure may be too much to expect of many sane people, particularly those committing crimes of violence.69 Conversely, it may be thought to be overly favourable to a defendant by providing a threshold which is too easily met.

2.63 Although ‘the Porter gloss’ has been widely cited and, as mentioned above, become something of a default ‘test’ for knowledge of ‘wrongfulness’, as the High Court pointed out in Willgoss, the reference to the defendant’s ability to ‘reason with a moderate degree of sense of composure’ was not intended to be synonymous with ‘wrongness’. Rather, the relevance of this phrase would depend on the facts giving rise to the insanity defence. As the High Court suggested in Willgoss, ‘the Porter gloss’ pertains to of cases of ‘frenzy, uncontrolled emotion or suspended reason’.70

2.64 The Council invites comment on the ‘wrongness’ limb of the defence of mental incompetence.

**Question 2.**

Should the CLCA provide for a definition of ‘wrongness’ based on whether the defendant was able to ‘reason with a moderate degree of sense and composure’?

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68 See Appendix B, Case File Review.
70 *Willgoss v The Queen* [1960] 105 CLR 295, 301.
Question 3.

Alternatively, should the CLCA be amended so as to provide that a consideration of whether there was an ability to reason with a moderate degree of sense and composure be confined to cases of ‘frenzy, uncontrolled emotion or suspended reason’?

Section 269C(c) - is unable to control the conduct

2.65 The third component of the defence concerns the capacity of the defendant to control his or her conduct (the volitional component). A number of Code jurisdictions include a volitional limb in their insanity defences. 71

2.66 This component of the defence is not drawn from the M’Naghten Rules, but represents an extension of the common law on insanity. This addition to the M’Naghten Rules reflects the shortcomings of the ‘cognitive bias’ of the Rules, which has been much lamented for almost as long as those rules have been around. This has led some commentators to argue that a volitional limb should be included in the insanity defence in jurisdictions without it. 72

2.67 In order to rely on this part of the mental incompetence defence, an individual must not merely demonstrate a partial inability to control his or her conduct but an inability to control his or her conduct.

2.68 This means that anything short of an inability to control conduct will be insufficient to ground the defence. For instance, in the South Australian decision of R v Milka, 73 Justice Kelly stated:

It follows from that, I am not satisfied on the balance of probabilities that the accused was unable to control his conduct as a consequence of his mental impairment. A person who has even some control of the relevant conduct is not a person in my view, who is unable to control his conduct in the relevant legal sense. I am of the view that the accused’s behaviour during the incident demonstrates he had, at the very least, some control of his conduct during the relevant time. For these reasons I am not persuaded that the accused has satisfied the onus on him under s 269C of the Act. On the contrary I am positively satisfied that the accused was able to some degree to control the relevant conduct when committing the offences against his mother. I find therefore that he was mentally competent to commit both offences. 74

2.69 The volitional component of the defence is difficult to prove as it involves proving a complete deprivation of any power to resist an impulse. The difficulty arises from the

71 See below at 2.153.
72 For instance, Stephen Yannoulidis argues that because either absence (or impairment) of control or reason renders an individual ‘not a fit subject of criminal law’, the insanity defence — which distinguishes those who are not responsible from all defendants — should encompass both cognitive and volitional defects: see S Yannoulidis, Mental State Defences in Criminal Law (Ashgate, 2012).
73 R v Milka [2010] SASC 250, [74-79].
problem of distinguishing between a desire or an impulse that is uncontrollable, and one that is simply not controlled by the defendant in his or her disorder.\textsuperscript{75}

2.70 On consultation, some psychiatrists consider that it is nearly impossible to make such a determination. A number of the experts in this field, such as representatives from defence lawyers, the ODPP, the judiciary and forensic psychiatrists, concurred that not only was s269C rarely relied upon by individuals raising the defence of mental incompetence, but it was exceptionally difficult to prove.\textsuperscript{76}

2.71 The fact that this component of the test is rarely relied upon is supported by the Case File Review, which indicates that only 2\% of defendants relied upon this component when raising the defence of mental incompetence.\textsuperscript{77}

2.72 Removing this part of the mental incompetence defence would place South Australia in the minority of Australian jurisdictions. Among Australian jurisdictions, Victoria and New South Wales are the only two which do not include a volitional component to the mental impairment defence.\textsuperscript{78}

2.73 The Council invites comment on whether there is a continuing need for this component of the defence, given the difficulties in proving it, and the rarity with which it is raised by defendants.

**Question 4.**

**Should the CLCA be amended to remove the ‘unable to control conduct’ component of the defence?**

**Definition of mental impairment**

2.74 The definition of a mental impairment is the fundamental basis of the defence as it is critical to determining who can access the mental incompetence defence.

2.75 At the outset of this discussion, it is important to note that the fact that an individual suffers from a mental illness, intellectual disability or a ‘disability or impairment of the mind resulting from senility’ is not on its own enough to give rise to a defence under s269C. The accused must be suffering from a mental illness at the time of the alleged offence,\textsuperscript{79} and it must affect the accused in a relevant way (as provided for in


\textsuperscript{76} In its consultations, the Victorian Law Reform Commission found that, while there was limited and generally qualified support for the introduction of a volitional element to the insanity defence, some forensic psychiatrists said it would be ‘very difficult to give any kind of expert opinion about volition’: Victorian Law Reform Commission, \textit{Defences to Homicide} 2004 available at <http://www.lawreform.vic.gov.au/projects/defences-homicide/defences-homicide-final-report> [5.27].

\textsuperscript{77} See Appendix B, Case File Review.

\textsuperscript{78} The law in other Australian jurisdictions is canvassed in the final section of this Part of the Discussion Paper. The NSW law is currently under review: see NSW Law Reform Commission 2010: CP 6.

\textsuperscript{79} See for example, \textit{R v Kakavand} [2010] SASC 350.
the other parts of the defence of mental illness). This is a question of fact for the court.

2.76 ‘Mental Impairment’ is defined under s269A(1) of the CLCA as follows:

- mental impairment includes -
  - (a) a mental illness;
  - (b) an intellectual disability;
  - (c) a disability or impairment of the mind resulting from senility, but does not include intoxication.

The importance of this definition is such that each part of it is considered separately in the following subsections of this Part of the Discussion Paper.

2.77 As the definition of ‘mental impairment’ suggests, the question of whether an accused person is suffering from a mental impairment for the purposes of this section is not answered by whether his or her condition has been accorded a psychiatric or medical label: rather, it is a matter of law. This is because the courts are concerned with the effects of any particular disease or disorder on the individual.²⁸

2.78 Nonetheless, when courts are determining whether an individual meets the first criterion of the defence, namely, whether they have a mental condition of a relevant nature, they are likely to be informed by medical classifications.

As mentioned above, given the technical nature of the mental incompetence defence the court may rely on expert evidence provided by psychiatrists, which includes a reliance on the standard diagnostic criteria to support claims of the existence of a mental impairment.

Standard diagnostic criteria are used by mental health professionals to diagnose mental impairment. The most common tools for such diagnosis are the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) and the International Classification of Diseases (ICD-10).²¹ These tools are subject to revisions and changes in the definitions of clinical conditions.

2.79 While medical classification may be used as evidence to support claims of the existence of mental illness, it must be emphasised that the ultimate decision about whether something is a mental illness for legal purposes is a matter of law.²²

2.80 The decision whether an accused is mentally incompetent when he or she acted is always one for the trier of fact. This does not allow for what has been called ‘trial by psychiatrist’. The trier of fact (jury or judge) is entitled to make up its own mind on the quality and weight of the evidence, and the mere fact that a rejection of the defence is inconsistent with the evidence of the medical witnesses does not necessarily mean that the verdict is unreasonable.²³

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²⁸ See further Arlie Loughnan, Manifest Madness: Mental Incapacity in Criminal Law (OUP, 2012).
²² R v Falconer (1990) 171 CLR 30, 60.
²³ R v Rivett (1950) 34 Cr Apps 887 (CA).
Mental Illness

2.81 Section 269A(1) contains the following definition of mental illness:

mental illness means a pathological infirmity of the mind (including a temporary one of short duration)1;

Note
1 A condition that results from the reaction of a healthy mind to extraordinary external stimuli is not a mental illness, although such a condition may be evidence of mental illness if it involves some abnormality and is prone to recur (see R v Falconer (1990) 171 CLR 30).

2.82 In R v Radford84 King CJ reviewed the case law as to the meaning of the concept of “disease of the mind” within the M’Naghten Rules. He said:85

The expression “disease of the mind” is synonymous…with “mental illness”. …The essential notion appears to be that in order to constitute insanity in the eyes of the law, the malfunction of the mental faculties called “defect of reason” in the M’Naghten Rules, must result from an underlying pathological infirmity of the mind, be it of long or short duration and be it permanent or temporary, which can be properly termed mental illness, as distinct from the reaction of a healthy mind to extraordinary stimuli.

2.83 This statement of the law was approved by the High Court in Falconer v R86 subject to the following qualification by Mason CJ, Brennan and McHugh JJ:87

[T]he dichotomy between mental illness and a healthy mind is correctly drawn. However, we would think that it is necessary that a temporary mental disorder or disturbance must not be prone to recur if it is to avoid classification as a disease of the mind. That is because a malfunction of the mind which is prone to recur reveals an underlying pathological infirmity of the mind.

2.84 These passages serve to explain the definition of “mental illness” in s269A(1) and the footnote to the definition. Because the statutory definition of mental illness (pathological infirmity of the mind) draws on the common law concept of “disease of the mind”, common law principles can assist in determining its meaning.88

2.85 The following principles derived from the common law are relevant.

2.86 First, a mental illness is to be distinguished from “mere excitability of a normal man, passion, even stupidity, obtuseness, lack of self control and impulsiveness”.89 In other words, it does not encompass conduct that is simply part of the accused’s personality or emotional state.90 Such conduct may result from an underlying pathological infirmity of the mind but if it does not then the defence of mental incompetence must fail.

84 (1985) 42 SASR 266.
85 (1985) 42 SASR 266 at 274.
87 (1990) 171 CLR 30 at 54.
Second, a mental illness involves a pathological infirmity of the “mind.” The law is not concerned with the brain but with the mind. In this context “mind” is used in its ordinary sense to mean “the mental faculties of reason, memory and understanding”. Such an infirmity may exist without any physical deficiency or deterioration of the brain. While a mental illness may be caused by physical changes to the constitution of the brain, as might occur with a brain tumour, such changes are not essential. Conversely, the mere fact of organic damage is insufficient. It is the fact of disorder or disturbance of the mental faculties which is decisive not the cause of it.

Third, a mental illness may be curable or incurable, temporary or permanent. However the potential for repetition of a temporary disorder is an important factor in determining whether or not the accused’s behaviour was due to a pathological infirmity of the mind. As earlier noted, the High Court stated in Falconer that a temporary mental disorder or disturbance must not be prone to recur if it is to avoid classification as a mental illness. The prospect of recurrence as a relevant consideration has been driven, at least in part, by reasons of policy. As Lord Denning said in Bratty v Attorney General (Northern Ireland):

It seems to me that any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind. At any rate it is the sort of disease for which a person should be detained in hospital rather than be given an unqualified acquittal.

Fourth, a distinction must be drawn between internal and external causes of mental disorder. A mental disorder brought about by an internal cause amounts to a disease of the mind whereas one brought about by external physical influences does not. Consistent with this dichotomy, major mental diseases or psychotic disorders, such as schizophrenia and physical diseases such as cerebral arteriosclerosis (hardening of the arteries causing reduced blood flow to the brain), hyperglycaemia (high blood sugar) and psychomotor epilepsy, (when they have affected the soundness of the mental faculties) have been characterized as diseases of the mind. On the other hand, temporary disturbances of the mind caused by external physical factors such as the consumption of alcohol or drugs or a physical blow to the head have been held not to be diseases of the mind.

91 R v Kemp [1957] 1 QB 399 at 407 per Devlin J.
92 R v Porter (1933) 55 CLR 182 per Dixon J at 189; R v Kemp [1957] 1 QB 399.
93 R v Kemp [1957] 1 QB 399 at 407; R v Porter (1933) 55 CLR 182 per Dixon J at 189.
94 R v Kemp [1957] 1 QB 399 at 407.
96 [1963] AC 386 at 412.
97 Bratty v Attorney General for Northern Ireland [1963] AC 386 per Lord Denning at 412; R v Radford (1985) 42 SASR 266 per King CJ at 274.
98 R v Kemp [1957] 1 QB 399.
100 R v Sullivan [1984] AC 156: not all forms of epilepsy constitute a mental illness or disease of the mind - see Youssef (1990) 50 A Crim R 1 (CCA NSW).
101 R v Radford (1985) 42 SASR 266 per King CJ at 274.
102 R v Meddings [1966] VR 306; intoxication as a source of mental illness is now specifically excluded as mental illness (s269A(1)).
103 R v Carter [1959] VR 105; Cooper v McKenna; Ex parte McKenna [1960] Qd R 407.
The external factors test has been criticized because of the anomalous results it may produce in respect of complex medical conditions.\textsuperscript{104} For example, in \textit{R v Hennessy}\textsuperscript{105} the condition hyperglycaemia (high blood sugar), caused by a diabetic failing to take insulin, was held to be a disease of the mind because the cause was internal to the accused, whereas in \textit{R v Quick}\textsuperscript{106} the condition hypoglycaemia (low blood sugar), caused by a diabetic taking too much insulin, was held not to be a disease of the mind as the cause was external to the accused. Nonetheless, the distinction between internal and external causes remains intact law subject to a refinement of the test in \textit{Radford} and \textit{Falconer} directed at cases where the accused is said to have been in a “dissociative state” due to psychological trauma or stress (“psychological blow”).

The Council invites comment on whether a distinction should be drawn between hyperglycaemia and hypoglycaemia and any other complex medical conditions.

**Question 5.**

Should the definition of mental illness in s269A of the CLCA be amended to specifically include hypoglycaemia or exclude hyperglycaemia? Should the definition of mental illness in s269A of the CLCA be amended to specifically include or exclude any other problematic medical conditions?

It is also necessary to consider dissociative states and the concepts of sane and insane automatism.

It is a fundamental principle of the criminal law that a person is not responsible for an involuntary act i.e. an act which was not performed by the person in the exercise of his or her conscious will.\textsuperscript{107} Causes of involuntary acts are diverse and may include circumstances where an act was performed while a person was in a state of impaired consciousness (“automatism”). Such impaired consciousness may result from mental illness (“insane automatism”) or from other factors (“sane automatism”). Instances of sane automatism are quite confined. They include sleepwalking in some circumstances, some cases of epilepsy, concussion, hypoglycaemia, dissociative states, hypnosis and intoxication.\textsuperscript{108}

The distinction between sane and insane automatism is important in two respects. First, in the case of sane automatism the accused is entitled to a complete acquittal whereas a successful plea of insane automatism (mental incompetence) the accused is absolved of criminal responsibility but is liable to a supervision order (s269O). Second, in the case of sane automatism the prosecution bears the onus of disproving automatism beyond reasonable doubt whereas in the case of insane automatism the

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\textsuperscript{104} \textit{R v Falconer} (1990) 171 CLR 30 Toohey J at 75-76; see also B Mc Sherry, \textit{Defining What is a “Disease of the Mind”: The Untenability of Current Legal Interpretations}, (1993) 1 Journal of Law and Medicine 76 for an instructive critical analysis of the internal/external test.

\textsuperscript{105} [1989] 2 All ER 9.

\textsuperscript{106} [1973] QB 910.

\textsuperscript{107} \textit{Ryan v R} (1967) 121 CLR 205 at 214.

accused carries the onus of proving mental incompetence on the balance of probabilities.

2.95 Difficulties can arise in distinguishing between sane and insane automatism where the accused claims to have been in a dissociative state at the time of the offence. In general terms such a condition involves a disruption of a person’s memories, sense of self, and awareness of his or her surroundings, so as to cause that person to feel dissociated from reality. For example, a person may feel as if he is watching himself perform the act.\textsuperscript{109}

2.96 \textit{Radford} and \textit{Falconer} were both cases in which there was evidence that the defendant was in a dissociative state at the time of the charged offence. The difficulty the courts had to wrestle with was how does one apply the external factors test in the case of dissociation or “psychological blow” automatism?

2.97 In \textit{Radford}\textsuperscript{110} King CJ considered that there was no reason in principle for making a distinction between disturbance of the mental faculties by reason of stress caused by external factors and disturbance of the mental faculties caused by the effects of physical trauma. He concluded that the significant distinction was between the reaction of an unsound mind to its own delusions or to external stimuli on the one hand and the reaction of a sound mind to extraordinary external stimuli, including stress producing factors, on the other hand.\textsuperscript{111} The use of the word “extraordinary” implies that the ordinary stresses and disappointments of life are insufficient to induce a state of sane automatism.\textsuperscript{112}

2.98 In \textit{Falconer}\textsuperscript{113} the High Court was divided on the issue of onus of proof in respect of sane automatism.\textsuperscript{114} However, all of the members of the court agreed that sane automatism could be caused by an extraordinary psychological blow and approved of the sound/unsound mind test formulated by King CJ for distinguishing between sane automatism and insane automatism.\textsuperscript{115}

2.99 Mason CJ, Brennan and McHugh JJ, however, recognized that it may difficult to determine whether or not the extraordinary psychological blow triggered an underlying pathological infirmity of the mind (insane automatism) and posited an objective test to deal with the problem. They stipulated that the accused had to have the powers of self control of an “ordinary person.” If the psychological blow would

\textsuperscript{109} J Clough and C Mulhern \textit{Criminal Law}, 2\textsuperscript{nd} ed Lexis Nexis Butterworths, Australia, 2004, at [15.65]; The essential nature of the Dissociative Disorders is a disruption in the usually integrated functions of consciousness, memory, identity, or perception of the environment. The disturbance may be sudden or gradual, transient or chronic: American Psychiatric Association, \textit{Diagnostic and Statistical Manual of Mental Disorders}, 4\textsuperscript{th} ed, Washington, 1994, at 477.

\textsuperscript{110} (1985) 42 SASR 266.

\textsuperscript{111} (1985) 42 SASR 266 at 274, 276.

\textsuperscript{112} See \textit{Rabey v The Queen} (1977) 37 CCC (2d) 461 at 482.

\textsuperscript{113} (1990) 171 CLR 30.

\textsuperscript{114} The minority (Mason CJ, Brennan and McHugh JJ at 56) held that the persuasive burden rested with the defence to prove automatism on the balance of probabilities. The majority held that the persuasive burden rested with prosecution to disprove automatism beyond reasonable doubt: Deane and Dawson JJ at 63, Toohey J at 77 and Gaudron J at 86.

\textsuperscript{115} (1990) 171 CLR 30 Mason CJ, Brennan and McHugh JJ at 55, Toohey J at 76, Gaudron J at 85. Deane and Dawson JJ (at 59) expressed their general agreement with the reasoning of Toohey and Gaudron JJ.
have produced a dissociative state in an ordinary person then the mind is sound (sane automatism) if it would not have the mind is infirm (insane automatism).

2.100 Their Honours said: 116

The problem of classification in a case of a transient malfunction of the mind precipitated by psychological trauma lies in the difficulty in choosing between the reciprocal factors – the trauma and the natural susceptibility of the mind to affection by psychological trauma – as the cause of the malfunction. Is one factor or the other the cause or are both to be treated as causes? To answer this problem, the law must postulate a standard of mental strength which, in the face of a given level of psychological trauma, is capable of protecting the mind from malfunction to the extent prescribed in the respective definitions of insanity. That standard must be the standard of the ordinary person: if the mind’s strength is below that standard, the mind is infirm; if it is of or above that standard, the mind is sound or sane. This is an objective standard which corresponds with the objective standard imported for the purpose of determining provocation.

2.101 Mason CJ, Brennan and McHugh JJ held that when considering the powers of self control of an ordinary person the unusual temperaments of the accused are to be ignored: 117

In determining whether the mind of an ordinary person would have malfunctioned in the face of the physical or psychological trauma to which the accused was subjected, the psychotic, neurotic or emotional state of the accused at the time is immaterial. The ordinary person is assumed to be a person of normal temperament and self-control.

2.102 Gaudron J expressed a similar view but used the expression “normal person”. 118

2.103 For the purposes of distinguishing between sane and insane automatism in cases of dissociation it is likely that that the objective test postulated by Mason CJ, Brennan and McHugh JJ will continue to be a requirement. However, the point is yet to be determined by the Court of Criminal Appeal in this state.

2.104 The Council invites comment on whether the definition of mental illness in s269A of the CLCA should be amended to expressly declare that the objective test formulated by Mason CJ, Brennan and McHugh JJ in Falconer must be applied for the purpose of distinguishing between sane and insane automatism in cases involving dissociation.

Question 6.

Should the definition of mental illness in s269A of the CLCA be amended to expressly declare that the objective test formulated by Mason CJ, Brennan and McHugh JJ in Falconer must be applied for the purposes of distinguishing between sane and insane automatism in cases involving dissociation?

118 Falconer v R (1990) 171 CLR 30 at 84.
**Intellectual Disability**

2.105 Intellectual disability is not defined in s269A or elsewhere in the CLCA.

In the *Child Sex Offenders Registration Act* 2006 (SA), intellectual disability is defined as ‘permanent or temporary loss or imperfect development of mental faculties resulting in reduced intellectual capacity’.

2.106 There is a difference between a mental illness and an intellectual disability. Individuals with an intellectual disability may have distinct treatment and care needs.

This raises issues about the general applicability of principles and practices set up around individuals with mental illnesses for those with intellectual disabilities. Some of these issues are considered in Part 4 of the Discussion Paper, in relation to the supervision of individuals released on licence.

**Senility**

2.107 The phrase ‘disability or impairment of the mind resulting from senility’ owes a debt to the ‘disease of the mind’ limb of *M’Naghten* insanity.

2.108 ‘Senility’ is not defined in the legislation but presumably encompasses any impairment resulting from old age, on the basis that this would comprise an ‘internal’ cause of mental impairment. It has been suggested that it would be preferable to use the term ‘dementia’ so as to include brain damage caused by trauma to the head.

2.109 As this part of the definition of ‘mental impairment’ implies, intoxication is excluded from the scope of ‘disability or impairment of the mind resulting from senility’. Intoxication is discussed below.

**Disorders Amounting to Mental Impairment**

2.110 The Case File Review, as indicated in Diagram A, below, sets out the disorders that were found to provide a clinical or diagnostic basis for successful defences of mental incompetence, in the period under review (2006-2012).

Diagram to follow on next page

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119 *Child Sex Offender Registration Act* 2006 (SA) s4.

120 See Millsteed J, ‘Mental Competence’, paper presented to Law Society of South Australia, 21 March 2012, on file with SA AGD.

The Council invites comment on whether it would be desirable to leave the definition of the mental impairment open-ended, but explicitly exclude some kinds of disorders or diseases. Specific exclusions could include personality disorders or psychopathy or those cases where an accused presents with a co-morbid condition. Information about the current law on these types of conditions is set out below.

### Personality Disorders

Personality disorder is not used or defined in s269A or elsewhere in the CLCA.

Personality disorder is included in the definition of mental impairment in the *Criminal Law (Sentencing) Act* 1988. In that Act, mental impairment is defined as ‘impaired intellectual or mental function resulting from a mental illness, an intellectual disability, a personality disorder, or a brain injury or neurological disorder (including dementia)’.

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122 It is important to note that a personality disorder and substance abuse/dependence only formed a basis of the defence in conjunction with other psychological or psychiatric disorders.

123 *Criminal Law (Sentencing) Act* 1988 (SA), s19C.
2.113 There are a number of different types of personality disorder.\(^{124}\)

2.114 The definition of mental impairment in the Commonwealth Model Criminal Code specifically includes ‘severe personality disorder’.\(^{125}\)

2.115 However, South Australia and the Northern Territory, each of which implemented the model provision, omitted ‘severe personality disorder’ from the statutory definitions of mental impairment.\(^{126}\) The inclusion of severe personality disorders had been controversial and, after lobbying from psychiatrists and others, it was omitted from the definition.\(^{127}\)

2.116 In its review of the law, carried out in 1991, the Law Reform Commission of Western Australia recommended no change to the existing law, concluding:

> It is inconsistent with fundamental notions of criminal responsibility to excuse a person's acts or omissions arising from a personality disorder evidenced merely by a lack of self control or indifference to standards of morality.\(^{128}\)

2.117 However, in \(R v \text{McMillan}\) the New Zealand Court of Appeal held that there will be a defence of insanity even if the accused person knows that his or her act is morally wrong in the eyes of the community as long as it is not morally wrong in the eyes of the accused.\(^{129}\)

2.118 A controversial issue is whether severe manifestations of personality disorders may constitute mental illnesses for the purposes of s269C of the CLCA notwithstanding the decision to omit reference to them in the statutory definition of mental impairment, as discussed above.

2.119 The issue has been considered in two District Court cases. In \(R v \text{Bini}\)\(^{130}\) David DCJ (as he then was) found that the defendant who was charged with armed robbery was mentally incompetent. He accepted psychiatric evidence to the effect that manifestations of the defendant’s borderline personality disorder\(^{131}\) amounted to a mental illness and that by virtue of his condition he was unable to control his conduct. In a subsequent case of armed robbery involving the same defendant\(^{132}\) Muecke DCJ also found on the tendered psychiatric evidence that Mr Bini suffered

\(^{125}\) Criminal Code (Cth) 7.3.
\(^{126}\) The exclusion was included in the draft bill considered by Parliament but subsequently omitted from the act: see Millsteed J, ‘Mental Competence’, paper presented to Law Society of South Australia, 21 March 2012, on file with SA AGD.
\(^{127}\) See for discussion S Bronitt and B McSherry, \textit{Principles of Criminal Law}, 3\textsuperscript{rd} Edition (Thomson, 2010), [4.45].
\(^{128}\) The Law Reform Commission of Western Australia, \textit{The Criminal Process and Persons Suffering from Mental Disorder} (Report No. 69), 1991 [2.13].
\(^{129}\) \(R v \text{Macmillan} [1966]\) NZLR 616 (CA) cited in JB Robertson, \textit{Adam’s on Criminal Law} Volume 1 (Brokers, 1992), CA23.17.
\(^{130}\) \(R v \text{Bini} [2000]\) SADC 137.
\(^{131}\) Borderline Personality Disorder is a pattern of instability in interpersonal relationships, self-image, and affects, and marked impulsivity: DSM-IV at 685, 706-710.
\(^{132}\) \(R v \text{Bini} [2003]\) SADC 35
from a mental illness but concluded that he was mentally competent because he was able to control his conduct. The issue, however, has not been considered by the Court of Criminal Appeal.

2.120 In Willgoss v R\textsuperscript{133}, R v Jeffrey\textsuperscript{134} R v Hodges\textsuperscript{135}\textsuperscript{136} the courts were called upon to consider whether the defence of insanity was available to a person suffering from an antisocial personality disorder (formerly called “psychopathy”).\textsuperscript{137} In each case the defence failed not because an anti-social personality can never amount to a mental illness but because the evidence relied upon by the defendant failed to establish that his condition deprived him of the capacity to know that his conduct was wrong. As Wallace J observed in Hodges “[t]he emphasis is not upon the label which a psychiatrist may place upon a prisoner’s personality,”\textsuperscript{138} but on the effect of the disorder on that particular person’s mental functioning.

2.121 Mental incapacity defences based on personality disorders may be made in other jurisdictions.\textsuperscript{139}

In McDermott v Director of Mental Health; Ex parte A-G (Qld)\textsuperscript{140} the Queensland Court of Appeal held that it was not the law that a personality disorder could never constitute ‘an abnormality of the mind’ (disease of the mind) for the purposes of the Queensland Criminal Code. The Court held it must always be a question of fact whether a particular disorder either alone, or in combination with other facts, gives rise to that state of mind. The Court stated that the question is necessarily one of degree and the finder of fact, whether a judge or jury, is entitled to approach it in a broad common sense way and not necessarily in accordance with medical evidence.

In addition, the New Zealand Court of Appeal has held that a recognised and severe personality disorder could be an “abnormal state of mind” and, by extension, could constitute a mental disorder.\textsuperscript{141} It could be argued that there is no reason in principle to conclude that a diagnosed severe personality disorder could never constitute or contribute to a “disease of the mind” where its effect was to render the accused incapable of knowing what he or she was doing, or that the act was morally wrong.\textsuperscript{142}

2.122 In preliminary consultations, Council received feedback from forensic psychiatrists in South Australia to the effect that there is an unofficial agreement between forensic practitioners that psychopathic and personality disorders do not and should not come within the scope of the defence.

\textsuperscript{133} (1960) 105 CLR 295
\textsuperscript{134} (1992) 7A Crim R 55
\textsuperscript{135} (1985) 19 A Crim R 129
\textsuperscript{137} Antisocial Personality Disorder is characterized by a pattern of disregard for , and violation of the rights of others:.
\textsuperscript{138} Hodges (1985) 19 A Crim R 129 at 134 per Wallace J.
\textsuperscript{140} McDermott v Director of Mental Health; Ex parte A-G (Qld) (2007) 175 A Crim R 461.
\textsuperscript{141} Waitemata Health v A-G (2001) 21 FRNZ 216; [2001] NZFLR 1122, at 1141, per Elias CJ.
\textsuperscript{142} JB Robertson, Adam’s on Criminal Law Volume 1 (Brookers, 1992) CA23.09.
2.123 The Council invites comment on whether personality disorders should be specifically included or excluded from giving rise to a defence of mental incompetence under the definition of ‘mental impairment’.

**Question 7.**

**Should the definition of mental impairment under the CLCA be amended to specifically exclude personality disorder including psychopathy?**

**Intoxication by Drugs or Alcohol**

2.124 The definition of mental impairment in Part 8A specifically excludes intoxication, which is defined as a 'temporary disorder, abnormality or impairment of the mind that results from the consumption or administration of intoxicants and will pass on metabolism or elimination of intoxicants from the body'. That statutory exclusion reflects distinctions both at common law and in social attitudes between the exculpatory effects of mental illness and intoxication when criminal responsibility is in issue. Intoxication is the subject of a separate set of CLCA provisions in Part 8 Intoxication. Part 8 and Part 8A were enacted at different times and for different purposes. Part 8 was meant to eliminate the so-called ‘drunks’ defence’. Part 8A was meant to modernise the procedure and consequences of a finding that an offender was either unfit to stand trial or not guilty on the ground of mental impairment. Both Part 8 and Part 8A have been substantially amended since their original enactment. Though criminal conduct is frequently a consequence of mental impairment and intoxication in combination, the relationship between Part 8 and Part 8A remains unclear in some respects. The absence of an integrated approach in the CLCA provisions is apparent from the fact that the definition of ‘intoxication’ in Part 8A ‘mental impairment’, has no application in Part 8 Intoxication, which leaves the concept undefined. Similarly, Part 8A draws no distinction between voluntary and involuntary intoxication while Part 8 is restricted to voluntary intoxication. No provision was made for the increasingly common situation in which offenders who engage in criminal conduct are both mentally impaired and affected by past or present abuse of drugs or alcohol or the combined effects of drugs and alcohol.

2.125 The effect of this statutory separation between the effects of intoxication and mental impairment on criminal responsibility is that intoxication alone, no matter how severe or disorienting its effects, cannot provide the basis for a defence of mental incompetence. Questions relating to the criminal responsibility of a merely drunken or drug affected offender are relegated to the provisions of Part 8 Intoxication. There

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143 CLCA s269A(1) ‘intoxication’
144 See, for example, *R v Martin (No 1) 2005* 159 A Crim R 314, in which the Victorian Supreme Court held that common law did not recognise a cannabis induced psychosis as a ‘disease of the mind’. See further, Arlie Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (OUP, 2012) 184-5.
145 Criminal Law Consolidation (Mental Impairment) Amendment Act 1995; Criminal Law Consolidation (Intoxication) Amendment Act 1999
146 CLCA, s267A Definitions. Compare the Queensland and Western Australian Criminal Codes in which the mental impairment defence extends to impairments of mental capacity resulting from involuntary or accidental intoxication. In practice, reliance on the involuntary intoxication defence in those jurisdictions is very rare.
are, however, unresolved issues at the intersection between the provisions of Part 8
and Part 8A in cases of 'co-morbidity', when there is evidence that a defendant
engaged in criminal conduct as a consequence of a mental impairment in
combination with the effects of drugs or alcohol. There are two areas of significant
concern. The first relates to criminal conduct by a person who is both mentally ill and
intoxicated at the time of the offence. The mental illness may have been either known
and established by prior diagnosis or it may have been latent and stimulated to florid
expression by the offender's state of intoxication. The second area of significant
concern concerns those cases in which criminal conduct occurs after a course of
habitual or intensive abuse of drugs or alcohol which resulting in a more or less
persistent state of mental impairment which continues or manifests itself though the
person is no longer intoxicated.

Mental Illness and Intoxication: The Problem of Co-Morbidity

2.126 Co-morbidity generally refers to the co-existence of two or more psychiatric
conditions, but the term may also be used to refer to the co-existence of a mental
illness and substance abuse.147

2.127 The Case File Review undertaken by the Council indicated that:

- the primary psychiatric diagnosis of defendants successfully raising mental
  incompetence defences was schizophrenia (47%) followed by drug-
  induced psychosis and substance abuse and dependence (24%) and bipolar
  disorder (10%) (there were often multiple diagnoses for individuals); and
- 80% of all individuals indicated that drugs and/or alcohol had been a
  problem for them in the past; and
- 73% of all individuals had ingested drugs and/or significant amounts of
  alcohol in the weeks or days leading up to the commission of the offence.

2.128 These findings echo the data available on mental illness, substance abuse and
criminality. People who suffer from schizophrenia or affective disorders are
significantly more likely to be convicted of criminal offences than others.148 The
increased likelihood of offending by individuals who are mentally ill is further and
substantially increased among those who have a history of substance abuse.149 That
is not to say that mental illness or substance abuse or their combination cause
criminal conduct. The relationships among these predisposing factors and criminal

147 See generally on co-morbidity: National Drug Strategy and National Mental Health Strategy, National Co-
morbidity Project, edited Maree Teeson & Lucy Burns, National Drug and Alcohol Research Centre, 2001
comorbidity.htm>

148 See Lubica Forsythe and Antonette Gaffney, Mental Disorder Prevalence at the Gateway to the Criminal
Justice System, Australian Institute of Criminology, Trends and Issues, No 438, July 2012.

149 See, for example, the longitudinal study of Victorian offenders in Cameron Wallace, Paul Mullen, Phillip
Burgess, 'Criminal Offending in Schizophrenia over a 25-year Period Marked by Deinstitutionalisation and
no4, 716-27. See also the summary of various empirical studies by Michelle Edgely, ‘Common Law Sentencing
of Mentally Impaired Offenders in Australian Courts: A Call for Consistency and Coherency’ (2009) 16(2)
conduct are complex and the subject of continuing investigation. The correlations among mental illness, drug and alcohol abuse and criminal conduct are nevertheless a significant cause for concern.

2.129 In some cases it will be unequivocally clear to a psychiatrist and to a court which relies on psychiatric evidence that an offender has a mental illness that falls within the definition of ‘mental impairment’ and provides grounds for exculpation under CLCA Part 8A. An example from the Case File Review conducted by the Council provides an illustration of an uncontroversial application of the mental incompetence defence. An individual who had a long standing history of schizophrenia and no prior contact with the criminal justice system got into financial difficulties and was unable to buy his medication. As a consequence of his inability to control his condition with medication he suffered a psychotic episode linked to his schizophrenia and assaulted a random passer-by. Such a case clearly falls within the exculpatory provisions of Part 8A. The position is far less clear, however, when there is evidence that an accused was both intoxicated and affected by a mental impairment or incapacity at the time of their criminal conduct. It is similarly uncertain whether the defence of mental incompetence is available in cases where an accused suffered some impairment of capacity as a consequence of prior habitual or intensive use of drugs or alcohol but was not intoxicated at the time of their offence.

2.130 There is a reported South Australian decision on the question whether the defence of mental incompetence is open to a defendant who was both intoxicated and suffering from a mental illness at the time of the alleged offence. In Police v Hellyer the defendant burglar was intoxicated from the combined effects of alcohol, cannabis and LSD. Medical evidence suggested that he was suffering from a drug-induced psychosis or an evolving schizophrenic disorder at the time of his offence which may have been precipitated by his use of drugs and alcohol. Justice Perry, the trial judge, concluded that the defence of mental incompetence was not open to Hellyer. Whatever name was given to the mental disorder he suffered at the time of his offence, it was either directly induced by drugs or precipitated by drugs. His mental state had to be characterised as intoxication: a temporary disorder, abnormality or impairment of the mind resulting from a consumption or administration of intoxicants that will pass on metabolism or elimination of the intoxicants from the body. The decision in Police v Hellyer is controversial. Courts in Victoria and New South Wales, where insanity is a common law defence, have taken a different view about the availability of the defence in cases of co-morbidity. In R v Meddings, a trial in the Victorian Supreme Court for an offence of causing injury, the defendant sought a complete acquittal on the ground of automatism or involuntary conduct. There was evidence that the defendant, who was epileptic, was drunk at the time of the attack. He argued that the alcohol that he had consumed triggered an epileptic state in which his conduct was unconscious and involuntary. Sholl J, who was the trial judge, held that the jury should consider, as an alternative to acquittal on the

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150 Cameron Wallace, et al, ibid: 'Conclusions': 'The strong relationship between co-morbid substance abuse and offending in schizophrenia is confirmed, but the data on convictions over a 25-year period during which co-morbid substance abuse escalated dramatically cast doubt on the role of substance abuse alone in accounting for the higher rates of offending. .....The association between schizophrenia and a higher rate of criminal convictions is likely to reflect the concatenation of a range of deleterious influences.
151 Police v Hellyer [2002] SASC 61
152 R v Meddings [1966] VR 306
ground of automatism, acquittal on the ground of insanity, which would result in an order for Meddings’ indefinite detention. Sholl J acknowledged that ‘mere transient causes such as alcohol alone or anger alone would not result in a mental impairment defence within the meaning of the M’Naghten Rules’. 153 If, however, the defendant had a disease predisposing to a particular condition then, for the purpose of the defence of mental impairment, it does not matter whether the trigger is a factor internal to the defendant or an external factor such as the consumption of alcohol.154

2.131 The New South Wales Court of Criminal Appeal took a similar view in *R v Derbin*155 and held that the defence of insanity was available to an individual with schizophrenia who committed an assault while in a psychotic state, which was triggered on the night of the offence by a ‘lethal cocktail of alcohol, cannabis and butane fume ingestion’. In common law jurisdictions courts may be more inclined to extend the application of the insanity defence in order to avoid the risk that dangerous individuals might gain a complete acquittal on the ground that their conduct was involuntary. In South Australia, by comparison, CLCA Part 8 Intoxication bars the possibility of an acquittal on the ground of involuntariness or automatism resulting from self-induced intoxication.

2.132 In the Queensland case of *Re Clough*156 the court was presented with the problem of co-morbidity arising from prior intensive use of cannabis and methylamphetamine in combination with a pre-existing psychotic disorder. The defendant was not intoxicated at the time of the offence. He killed his wife during a psychotic episode, which occurred one or two days after his last use of methylamphetamine, when the drug had been metabolized or eliminated from his body. The Judge of the Mental Health Court found that ‘intoxication’ included the secondary effect of amphetamine consumption, described as a ‘cerebral disturbance’, from which Clough was suffering at the time of the killing. Her Honour was satisfied that Clough had intentionally caused himself to be intoxicated with methylamphetamine and could therefore not rely on the mental impairment provisions of the Queensland Criminal Code to absolve himself of criminal responsibility for the killing. On appeal, counsel for Clough argued that the primary judge should have found that the mental impairment provisions did apply because the appellant was not intoxicated at the relevant times. The Court of Appeal rejected the argument. In a decision reminiscent of the South Australian approach in *Police v Hellyer*, the Court held that the ordinary meaning of ‘intoxication’ was wide enough to encompass more than a comparatively short-term elation or stimulation and that intoxication under the legislation included the secondary effect of amphetamine consumption from which the appellant was suffering at relevant times.

**Four Options for Reform**

2.133 The Council is considering four possible reforms to South Australian law on the criminal responsibility of individuals who suffer from mental impairment and the effects or after effects of drug or alcohol intoxication at the time of their criminal

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153 Ibid, 310.
154 See the discussion by Millsteed J, in 'Mental Competence', a paper presented to the law Society of South Australia, 21 March 2012, (SA Attorney General's Dept).
156 *Re Clough* [2007] QMHC 002.
conduct. Each reform option involves a redefinition of the meaning of 'mental impairment'. The first option would extend the defence of mental incompetence. The second and third would restrict the application of the defence when mental impairment is a consequence of the effects or after effects of intoxication. Each option is described in turn and discussed before concluding with a question asking for an expression of your views. There is a fourth option, which will be covered briefly and offered for consideration at the end of this discussion of the problem of co-morbidity. Perhaps reform is unnecessary. You may conclude that the existing CLCA provisions are adequate, even in cases when mental illness or incapacity is precipitated by intoxication or the consequential effects of habitual or intensive use of drugs or alcohol.

**Option 1: A definition of mental impairment that extends beyond impairments resulting from mental illness, intellectual disability or senility.**

2.134 The first of the options for reform was proposed by the Victorian Law Reform Commission (VLRC), which reviewed the law on drug-induced psychosis as part of its review of defences to homicide in 2004.157

2.135 The common law forms the backdrop to the VLRC discussion of co-morbidity. Victoria adopts both the common law on intoxication and the common law insanity defence. At common law, individuals who are so intoxicated that they cannot form an intention to do the criminal act, so that their conduct is involuntary, cannot be held criminally responsible. Cases in which courts are prepared to accept that the defendant's conduct was involuntary are very rare however. In the more usual case of cognitive impairment as a consequence of extreme intoxication, the person acts intentionally but may be unable to tell right from wrong or unable to appreciate the nature of their conduct. In these circumstances common law does not recognise their state of intoxication as a bar to conviction. Moreover evidence of a state of intoxication alone, no matter how severe the mental impairment resulting from that state, cannot provide a basis for an insanity defence. As a consequence, individuals who are severely intoxicated or affected by drugs to the extent that they experience a psychotic episode in which they are either unable to appreciate what they are doing or understand that it is wrong, may be held criminally responsible for their conduct.158

2.136 The VLRC expressed the view that, based on the underlying purpose of the mental impairment defence, it should not matter what the cause of the impairment was, so long as the excusing condition stems from a failure of cognitive capacity. If the person is unable to understand what they are doing or understand that it is wrong the Commission concluded that a mental impairment defence should be available.159 Such an extension of the definition of mental impairment would include not only the


159 Victorian Law Reform Commission, *Defences to Homicide* 2004 [5.44].
effects of intoxication but also states of mental dissociation or disintegration resulting from events that subject the individual to extreme stress.160

2.137 The VLRC recommended that a provision should be added to the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) which would specify that the term ‘mental impairment’ includes but is not limited to the common law notion of a ‘disease of the mind’.161

2.138 The VLRC proposal for an extended statutory definition of 'mental impairment' was not adopted by the Victorian Government in its response to the Commission's report.

2.139 It has been objected that a broad definition of mental impairment would open the floodgates to acquittal based on evidence of intoxication.162 The VLRC anticipated the floodgates argument. In Victoria the mental impairment defence results in the imposition of supervision of the person acquitted for an indefinite period, perhaps in custody. When the offence committed was serious, supervision may extend beyond the maximum period of imprisonment for the offence. The VLRC remarked that the potential severity of the consequences of an acquittal on the ground of mental impairment in Victorian law would make it unlikely that criminal defendants would choose to rely on the defence in cases where the criminal conduct occurred as a consequence of an isolated and adverse reaction to an intoxicant.

Question 8.

**Should the CLCA be amended so that a person charged with an offence would be able to rely on a defence of mental incompetence when, from whatever cause, he or she was unable to understand the nature and quality of their conduct or understand that it was wrong?**

**Option 2: A definition of mental impairment that would exclude mental illness in combination with a state of voluntary intoxication at the time of the criminal conduct**

2.140 South Australia, unlike Victoria, has legislated to abrogate the common law on intoxication and criminal responsibility. Part 8 of the CLCA, which deals with intoxication, denies a defence of automatism or involuntary conduct to a defendant whose lack of capacity for self control was a consequence of their choice to engage in recreational use of drugs or alcohol.163 Evidence of the defendant's state of self

160 Apart from its effect on the law of criminal responsibility and intoxication, the VLRC extended definition of mental impairment proposed by the Victorian Law Reform Commission would also impose a significant restriction on the availability of the defence of automatism, which results in outright acquittal. See: Bernadette McSherry, 'It's a Man's World: Claims of Provocation and Automatism in Intimate Homicides' (2005) Melbourne University Law Review 905, 927-28. But see R v Radford (1985) 42 SASR 266 which suggests that statutory amendment is unnecessary to reach that result in a jurisdiction that adheres to the common law meaning of 'mental illness'.

161 Victorian Law Reform Commission, Defences to Homicide 2004 (Recommendation 38).


163 'Recreational use' of drugs or alcohol, which is characterised as a 'drug', is explained in a set of cross linked definitions in CLCA Part 8, s267A - Definitions. Intoxication resulting from recreational use is 'self induced'
induced intoxication may be relevant to guilt however, when the offence is one that requires proof of an intention to cause a criminal harm, foresight that harm might result or knowledge of incriminating circumstances. Depending on the facts of the case, evidence that the defendant was intoxicated at the time of the criminal conduct may assist either the defence or the prosecution when intention, foresight or knowledge are in issue. To that extent, South Australia preserves the common law. In other offences such as common assault, which do not require proof of intention to cause harm or foresight of consequences, evidence of the defendant's recreational use of drugs or alcohol and resulting state of intoxication cannot defeat a finding of guilt. In offences of negligence, such as manslaughter and negligent injury to person or property, evidence of intoxication will almost always add weight to the prosecution case for conviction.

2.141 Evidence of mental impairment from whatever cause, whether resulting from intoxication, mental illness or their combined effects, is admissible after conviction, when sentence is determined, to mitigate the penalty for the offence.

2.142 It was remarked earlier that the differences between the effects of intoxication and mental illness on criminal responsibility are a consequence of distinctive legal and social attitudes towards individuals whose mental impairment was a consequence of voluntary or self-induced intoxication. In the CLCA, Part 8 Intoxication and Part 8A mental incompetence reflect generally accepted moral distinctions between the effects of mental impairment caused by a mental illness and impairments of consciousness resulting from intoxication. The division between Part 8 and Part 8A is marked by the statutory definition of 'mental impairment' in Part 8A, which 'does not include intoxication'. No provision has been made, however, for the not uncommon case in which an individual with an existing mental illness engages in recreational drug use and commits an offence while intoxicated. In the current state of the law it is uncertain whether such a person is permitted to rely on evidence of their mental illness to support a plea of mental incompetence, leading to an acquittal.

2.143 An alternative to the Victorian proposal to allow defendants unrestricted access to the mental incompetence defence in such cases would be to adapt a co-morbidity rule from CLCA Part 8 Intoxication, which applies when criminal conduct occurs as the consequence of recreational alcohol or drug use in combination with therapeutic use of a prescribed drug for an illness or disability. In such cases of combined drug use, the state of intoxication is regarded as self induced, even though in part attributable

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intoxication. Consumption of a drug is regarded as recreational unless the drug is administered against the will of the person; taken by mistake or accident or taken for a therapeutic purpose in accordance with directions for medical use.

164 See R v B, MA [2007] SASC 384 (%th November 2007), Supreme Court of South Australia, Court of Criminal Appeal, for an extended discussion of the modifications of common law effected by CLCA Part 8 Intoxication.

to therapeutic consumption. In such cases, the standard provisions of Part 8 on intoxication and criminal responsibility apply. The effect is that individuals who must use drugs for lawful therapeutic purposes are required to take particular care, when consuming recreational drugs or alcohol, to avoid impairments of self control or consciousness that might result in criminal conduct.

2.144 By analogy, individuals who suffer from a mental illness might be barred from reliance on a defence of mental incompetence when criminal conduct occurs during a period of self induced intoxication by drugs or alcohol. Defendants who seek to rely on the defence would be required to prove, on the balance of probabilities, that their ignorance of the nature of their conduct, inability to appreciate that it was wrong or inability to control their conduct was not a consequence of the combined effect of their mental illness and state of self induced intoxication.

2.145 A defendant who failed to establish that their impairment was not a consequence of self induced intoxication combined with mental illness would be dealt with in accordance with the provisions of Part 8 Intoxication. Reliance on a plea of automatism would be barred and evidence of their impairment would not be admissible in assault and similar offences. Their impaired mental state would be relevant, however, to consideration of their liability for offences, such as murder and reckless or intentional infliction of harm that require proof of intention to cause harm or knowledge of incriminating consequences or circumstances.

Question 9.

Should the CLCA be amended so that a person charged with an offence would be barred from reliance on a defence of mental incompetence if their inability to understand the nature and quality of their conduct or inability to understand that it was wrong or incapacity for self control was a consequence of the combined effects of mental illness and a state of self induced intoxication?

Option 3: A definition of mental impairment that would exclude a mental impairment of short duration which results from intensive or habitual use of intoxicants.

2.146 Common law recognised the possibility that intensive or habitual use of intoxicants might result in a continuing mental illness or one that manifested itself from time to time, though no traces of the drug remained in the body. The classic instance is delirium tremens, which is a serious illness that can result as a consequence of cessation of habitual use of alcohol or other depressant drugs. Common law permitted reliance on the insanity defence when criminal conduct occurred during an

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166 CLCA, s267A(3)
167 The offence of rape is the subject of a special exception to this principle: see CLCA ss269(2), (3)(b). When criminal liability for rape is in issue, the prosecution must prove both that the victim did not consent and that the offender was aware of the possibility that the victim did not consent. In cases of self induced intoxication, however, the prosecution is not required to prove that the defendant was aware of that possibility.
episode of delirium tremens. In the United States the Model Penal Code, which has been adopted in many jurisdictions, allows a defence of mental disease or defect to be based on evidence of a 'fixed and settled' mental disease resulting from alcohol or drug use. Modern US instances of reliance on a mental impairment defence in these cases go beyond the classic case of delirium tremens and allow the possibility of an acquittal to be based on evidence of a supervening mental illness after cessation of habitual or intensive use of hallucinogenic drugs. In some jurisdictions the defence is available though the mental illness is temporary. Others adopt a more restrictive approach and do not permit reliance on the defence unless the mental illness is fixed or settled and, in addition, permanent.

2.147 The frequently cited decision of the Californian Supreme Court in People v Kelly provides a vivid illustration of the more liberal approach. Valerie Kelly began using cannabis when she was 15 and moved on to intensive use of mescaline and LSD when she was 18, taking one or other of these drugs 50-100 times over a two month period before making a sustained attack on her mother with a knife. Fortunately the attack was not fatal. Valerie was charged with attempted murder. Seven psychiatrists testified at her trial and most agreed that Valerie had ceased using hallucinogens some weeks before she stabbed her mother. Her prior intensive use had, however, resulted in a temporary psychosis that left her unable to distinguish right from wrong at the time of the attack. Her psychosis was said to be a consequence of the effects of intensive use of mescaline and LSD by a young woman with underlying personality problems who suffered from latent schizophrenia or schizoid personality. Her mental illness was, however, temporary and no longer manifest at the time of her trial. Valerie was convicted at first instance.

2.148 The trial judge ruled that she could not rely on the insanity defence when her mental illness was a temporary psychosis resulting from her earlier intensive use of hallucinogens. On appeal, the California Supreme Court reversed the conviction, holding that the trial judge had been wrong to rule that a temporary psychosis could not provide a basis for the insanity defence. It was sufficient in the Court's opinion, that Valerie Kelly suffered from a 'temporary psychosis' of a 'settled nature' over a period of some months which was not limited to periods when she was intoxicated and that her temporary psychosis had the consequence that she was unable to distinguish right from wrong when she attacked her mother.

2.149 There is no consensus on the issue of temporary, drug induced insanity in American criminal law. Other courts in other jurisdictions have refused to follow People v Kelly, taking the view that a merely temporary mental disorder induced by drugs cannot provide the basis for a mental incompetence defence.

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170 People v. Kelly 10 Cal. 3d 565 (1973) http://scocal.stanford.edu/opinion/people-v-kelly-22952
171 The defence of insanity in California in 1973 was governed by a version of the common law McNaghten test.
172 See, for example, the recent majority decision of the Supreme Court of Vermont in State v Sexton (2003-331); 180 Vt. 25; 904 A.2d 1133 http://libraries.vermont.gov/sites/libraries/files/supct/180/op2003-331.txt which held, on facts indistinguishable in essentials from those in People v Kelly, that the defence of insanity was not open to the defendant whose state of drug induced psychosis was not permanent. The vigorous dissent in that case provides an informative account of the absence of consensus on the issue in American criminal jurisprudence.
2.150 In South Australia, the existing definition of mental impairment is consistent with the common law. It would permit reliance on a defence of mental incompetence when a mental illness caused by drugs or alcohol manifests itself after cessation of use though the illness is temporary rather than permanent. In their present form the CLCA provisions could potentially allow a defence of mental incompetence in a case like *People v Kelly*, where hallucinogen use had ceased at the time of the offence and the psychosis from which the defendant suffered at the time of the attack had subsided by the time of her trial, if not earlier.

2.151 The argument for denial of a mental incompetence defence when it is based on evidence of a mental impairment resulting from recreational use of alcohol is based, in part at last, on the contention that these defendants, who were afflicted by a 'self-made madness', are not morally entitled to a complete defence that would excuse their conduct. Even if that is accepted, however, individuals with significant and continuing impairment resulting from their recreational drug use may have a better moral entitlement to the defence than offenders whose impairment was temporary and unlikely to return unless induced by resumption of habitual or intensive use. A distinction between 'permanent' and 'temporary' mental impairments resulting from recreational use of drugs or alcohol would permit reliance on the mental incompetence defence when drug use has resulted in organic damage to the brain. In terms of predisposition to criminal conduct, the effects of long term alcoholism, habitual solvent abuse or petrol sniffing may be similar to the effects of physical trauma causing brain injury in terms of impaired capacity for self control or understanding of the nature of the criminal conduct and whether it was right or wrong. It is also possible that intensive or habitual recreational use of drugs may precipitate an extended or permanent psychosis with similar impairment of the capacity for the exercise of rational self control. When damage is permanent, the origin of the disability is likely to be too remote in time to have any relevant bearing on a person's current blameworthiness.

**Question 10.**

Should the CLCA be amended so that a person charged with an offence would be barred from reliance on a defence of mental incompetence based on evidence of a mental illness resulting from the use of intoxicants unless the illness is permanent/prolonged/persistent/protracted/enduring?

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173 *CLCA, s269A - Interpretation: 'intoxication' 'mental illness', 'mental impairment'.
175 There is a further dimension to the distinction between permanent and temporary forms of 'self made madness' in terms of the individual's capacity for a rational and morally appropriate response to a finding of guilt which is present when the disability is temporary and probably absent when the disability is permanent. That consideration is related to the concept of 'reactive fault', first proposed by B Fisse in relation to corporate criminal liability. For discussion, see J Braithwaite, *Restorative Justice and Responsive Regulation* (OUP, 2001) 118-20; P Cane, Responsibility in Law and Morality (Hart, 2002) 36-9.
Option 4: Reform of the CLCA provisions that define the relationship between mental impairment and intoxication is unnecessary.

2.152 South Australian statutory provisions and common law which governs the relationship between mental impairments resulting from recreational drug use, mental impairments from other causes and their effects on criminal responsibility is complex. Cases involving questions of co-morbidity are likely to show considerable variation in practice. It is possible that this is an area of contention about criminal responsibility in which attempts to guide courts, lawyers and expert witnesses by further attempts at statutory refinement are likely either to be without effect or, in the alternative, likely to result in unpredictable and unwanted consequences. It may be preferable to allow courts to exercise their interpretive discretion within the existing framework of rules.

Question 11.

Should the existing provisions on intoxication and mental impairments in the CLCA be retained without change?

The law and practice on mental impairment in the criminal law in other Australian jurisdictions

2.153 Each Australian jurisdiction has an insanity defence based on the M’Naghten Rules. The law has developed differently in different jurisdictions, however. Each Australian jurisdiction provides different definitions of what it means to be ‘insane’, with some jurisdictions taking a broader approach to others.

In relation to the insanity defence, the Australian jurisdictions can be usefully divided into two categories:

- Code States (Western Australia, Queensland and Tasmania), together with the jurisdictions that have adopted variations on the Model Criminal Code formulation (South Australia, the Australian Capital Territory, the Northern Territory and the Commonwealth): These jurisdictions have widened the scope of the defence by adding a third, volitional arm to the traditional M’Naghten Rules. This means that the defence is open to an accused who is unable to control his or her conduct.

- Common law states (NSW, Victoria): NSW has, to date, retained the common law and thus the M’Naghten Rules, while Victoria has adopted a statutory version of the M’Naghten Rules.

Australian Capital Territory

2.154 The ACT’s criminal laws are loosely based on the Commonwealth Model Criminal Code.
2.155 The ACT’s insanity defence is known as the defence of ‘mental impairment’. It is broad in its definition of mental impairment, including senility, intellectual disability, mental illness, brain damage, and notably, severe personality disorders, as potential components of an accused’s mental state.

2.156 In the ACT, mental impairment can be established by way of the traditional M’Naghten Rules. However, the ACT, like a number of other jurisdictions, has further qualified the second limb of the M’Naghten test, of knowing that the conduct was ‘wrong’, by codifying the well-known direction of Dixon J in Porter. In addition, the ACT Code has broadened the defence of mental impairment by adding the volitional test of whether or not an individual had an inability to ‘control the conduct’.

Commonwealth


2.158 The defence of insanity at a federal level is practically identical to the ACT code discussed above. The insanity defence under the Commonwealth Criminal code is also known as the defence of ‘mental impairment’ and it defines the potential components of an accused’s mental state as including senility, intellectual disability, mental illness, brain damage, and severe personality disorder. In addition, volitional incapacity is a third additional test under the Commonwealth Code for the defence of ‘mental impairment’, and the section 7.3(1)(b) of the Code has qualified the second test in M’Naghten with the words of Dixon J in Porter.

New South Wales

2.159 The defence of insanity in NSW is known as the defence of ‘mental illness’. Section 38(1) of the Mental Health (Forensic Provisions) Act 1990 (NSW) provides that, if the person tried ‘did the act or made the omission charged, but was mentally ill at the time’, the jury should return a ‘special verdict’ – ‘that the accused person is not guilty by reason of mental illness’ (‘NGMI’). In NSW, the scope of the defence continues to be governed by the common law and thus by the M’Naghten Rules. Thus, the accused’s mental state is defined as a defect of reason caused by a disease of the mind and there is no third additional volitional test.

176 Criminal Code (ACT) s28
177 Criminal Code (ACT) s 27(1).
178 The King v Porter (1933) 55 CLR 182. See Part 1 for a discussion of Porter and Justice Dixon’s explanation that knowledge of whether the conduct was wrong means that an accused can ‘reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong’.
179 Criminal Code (ACT) s 28(1)(c).
180 Criminal Code (Cth) s7.3(1).
181 Criminal Code (Cth) s7.3(8).
182 Criminal Code (Cth) 7.3(1)(c).
183 The King v Porter (1933) 55 CLR 182.
2.160 The defence of mental illness is currently under review in NSW. In its Consultation Paper, the NSW Law Reform Commission considered either expanding and clarifying the *M’Naghten Rules*, or replacing the *Rules* with a new approach.

**Northern Territory**

2.161 The Northern Territory’s criminal laws are governed by a criminal code based on the *Model Criminal Code*.

2.162 The Northern Territory code includes ‘involuntary intoxication’ as a component of the mental state of the accused in determining ‘mental impairment’ in addition to senility, intellectual disability, mental illness, and brain damage.

2.163 Like other code jurisdictions, the Northern Territory code contains a volitional test for the defence of ‘mental impairment’. The test requires that the accused was ‘not able to control his or her actions’. The *M’Naghten Rules* have also been codified in a way that is practically identical to the ACT and Commonwealth codes.

2.164 As discussed in Part 3 of the Discussion Paper, the Northern Territory retains the traditional common law disposal option for successful insanity acquitees - indeterminate detention.

**Queensland**

2.165 Queensland is a code state and its criminal laws are governed by the Criminal Code (Qld).

2.166 The definition of what constitutes ‘insanity’ is defined under the Queensland Code as a ‘mental disease or natural mental infirmity’.

2.167 Like most jurisdictions, Queensland’s Criminal Code includes a volitional test for ‘mental impairment’, which asks whether the individual had the ‘capacity’ to control their actions.

2.168 As previously pointed out the *M’Naghten Rules* are also codified, but along with Tasmania and Western Australia, Queensland has amended the first *M’Naghten* rule, requiring that the accused not ‘understand’ what he or she was doing, rather than not ‘know’ it. It is suggested that the use of the word ‘understand’ in these jurisdictions reflects the need for a deeper appreciation of the effect of the conduct upon other people.

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185 2010: CP 6, para 3.64-3.88.
186 Criminal Code (NT) s 43A.
187 Criminal Code (NT) s 43(1)(c).
188 Criminal Code (Qld) s 27(1).
189 Criminal Code (Qld) s 27(1).
Further, Queensland’s (as well as Tasmania’s and Western Australia’s) legislation avoids the actual use of the words ‘nature and conduct’ to describe this first test from *M’Naghten*, instead asking if the accused had the capacity to understand what the person was doing.

Similar to the Northern Territory, the Queensland Code includes ‘involuntary intoxication’ as a component of the mental state of the accused in determining ‘mental impairment’.

Queensland also adds a third volition-based test to the insanity defence, which queries whether the accused had the capacity to control his or her actions.\(^{191}\)

**Tasmania**

Tasmania is another code state, and its criminal laws are governed by the Criminal Code (Tas).

In Tasmania, the defence is known as ‘insanity’ and is defined uniquely as ‘mental disease’ including ‘natural imbecility’. Like Queensland and Western Australia, Tasmania changes the requirement of the first test from *M’Naghten* that the accused must be incapable of ‘understanding’ the physical character of the act or omission, rather than ‘knowing’ it (see 2.167 for more discussion on this point). Again, as previously pointed out, Tasmanian legislation also avoids the use of the phrase ‘nature and quality’ in its codification of the first *M’Naghten* test and reflects the formulation of the English Court of Appeal in *R v Codere*\(^ {192}\) with the wording ‘the physical character of the act’.\(^ {193}\)

Tasmania includes a volition-based test to the insanity defence, although it is worded uniquely: ‘the act or omission was done or made under an impulse which he or she was in substance deprived of any power to resist’.\(^ {194}\) This particular wording implies a notion of involuntary impulse. However, the need for this unusual wording is perhaps questionable, as the involuntary impulse notion captured in the Tasmanian legislation is picked up in the limited case law in other jurisdictions regardless.\(^ {195}\)

**Victoria**

The ‘mental impairment’ defence in Victoria is covered by the *Crimes (Mental Impairment and Fitness to be Tried) Act 1997* (s20) and it is closely based on the *M’Naghten Rules*.\(^ {196}\) There is no additional test with a volitional element in Victoria.

The mental impairment defence is currently under review in Victoria. The Victorian Law Reform Commission has been asked to review the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*. In its terms of reference, the Commission is

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\(^{191}\) Criminal Code (Qld) s 27(1).


\(^{193}\) See Criminal Code (Tas) s 16(1)(a)(i).

\(^{194}\) Criminal Code (Tas) s 16(1)(b).

\(^{195}\) See *e.g.* *R v Cox* [2006] SASC 188 at [25] (White J).

\(^{196}\) See *Crimes (Mental Impairment and Fitness to be Tried) Act 1997* s 20(1)(a)-(b).
considering the definition of ‘mental impairment’ the process of deciding fitness to stand trial, the application of the Act in the Magistrates’ Court, appropriate jury directions and the provisions governing supervision and review.\textsuperscript{197}

2.177 The term ‘mental impairment’ is not defined in the Act, although the Victorian Supreme Court has ruled that the defence is unavailable if there is no disease of the mind.\textsuperscript{198} Notably, previously, this has been criticised as too narrow by the Victorian Law Reform Commission,\textsuperscript{199} but has been nonetheless affirmed by subsequent case law.\textsuperscript{200}

\textit{Western Australia}

2.178 Western Australia is a code state, and its criminal laws are governed by the Criminal Code (WA).

2.179 In Western Australia, the ‘insanity’ defence is defined as unsoundness of mind or a state of mental impairment, meaning intellectual disability, mental illness, brain damage or senility.\textsuperscript{201}

2.180 As in Tasmania and Queensland the first test from \textit{M’Naghten} is defined as a capacity to ‘understand’ what he or she is doing, rather than ‘know’ the nature and quality of the act itself. The issue of ‘knowledge’ is discussed above in this Part of the Discussion Paper.

2.181 As in the Northern Territory and Queensland the Western Australian Code includes ‘involuntary intoxication’ as a component of the mental state of the accused in determining ‘mental impairment’.

2.182 WA also adds a third volition-based test to the insanity defence, which permits individuals to argue insanity on the basis that they did not have the capacity to control their actions at the time of the alleged offence.\textsuperscript{202}


\textsuperscript{198} \textit{R v Sebalj} [2003] VSC 181. See Bronitt and McSherry, above n 3, p 242.


\textsuperscript{200} See, e.g. \textit{R v Martin (No 1)} (2005) 159 A Crim R 314.

\textsuperscript{201} Criminal Code (WA) ss 27, 1.

\textsuperscript{202} Criminal Code (WA) s 27.
3. The Fixing of Limiting Terms
Introduction

3.1 This Part of the Discussion Paper examines part of the process that follows a successful defence of mental incompetence. This process is generally known as disposal. It is to be contrasted with punishment, which follows conviction resulting from a normal trial. A flowchart setting out the manner in which a matter is disposed of in the courts once a mental impairment defence is raised is set out at Appendix A.

3.2 Specifically, this Part deals with the practice of fixing limiting terms. Together with Part 4, it provides the procedural framework for the defence of mental incompetence.

3.3 As mentioned in Part 1 of the Discussion Paper, the practice of fixing limiting terms is connected to, but not the same as, the sentencing process. The making of supervision orders and the fixing of limiting terms are matters related to the sentencing process. As stated in the Foreword to the Discussion Paper, although such orders are not imposed as punishment, they involve a deprivation of freedom and, when the Court fixes a limiting term, it must do so by reference to the period of imprisonment that would have been ordered if the defendant had been convicted of the relevant offence.

The remarks of Justice Bleby in *R v Tzeegankoff* made in relation to the regime which formerly applied under s293 of the CLCA assist in explaining this:

It follows that there has never been and cannot be any suggestion of punishment being due to the applicant, or any suggestion that he must remain in secure custody for that reason. The only justification for a person being detained after a finding of not guilty on the ground of insanity is for the protection of himself and of the community – to ensure that the disease of the mind from which he suffers cannot adversely affect others. It must also be clearly understood that a person who has been subject to a detention order under the Criminal Law Act is entitled to ... enjoy a regime that is the least restrictive of his freedom and personal autonomy as is consistent with the safety of the community. That relaxation is not dependent upon his having served an appropriate period of “punishment”. That is just not a relevant consideration.203

3.4 When an individual successfully raises the mental incompetence defence (or if a defendant is found unfit to stand trial), and the judge decides to make a supervision order, he or she sets a limiting term by reference to the length of imprisonment to which that individual would have been sentenced had the trial resulted in a conviction.

3.5 It is widely acknowledged that the insanity defence reflects the social protection function of the criminal law. In *Porter*, Justice Dixon stated that the insanity defence addressed the ‘difficult task’ of attempting to define ‘the classes of people who should not be punished although they have done actual things which in others would amount to a crime’.204 As this comment suggests, this defence is marked by an underlying concern with those individuals who have caused harm but who cannot be dealt with via the normal processes of the criminal law.

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204 *The King v Porter* (1933) 55 CLR 182, 187.
3.6 For all but the recent decades in the life of a formal insanity defence in the common law, there has only been one option following a successful insanity defence: indefinite detention. This reflects the long-standing nature of concerns with dangerousness that marked the development of the insanity defence itself.\textsuperscript{205}

3.7 Recently, improvements in treatment options, greater social and expert understanding of the diversity of mental illness, and the influence of human rights discourse on the criminal justice system and the mental health system have resulted in a more nuanced approach to disposal. Under this approach, disposal options are intended to be closely targeted to particular individuals and their circumstances.

3.8 This Part of the Discussion Paper provides:

- An overview of the historical development of law and practice;
- Recent developments;
- An explanation as to how matters proceed when a defendant is sentenced in the 'normal' way;
- The procedural context in which the limiting term is fixed;
- Disposal options;
- Fixing the limiting term;
- Law and practice in other Australian jurisdictions.

3.9 The Council had an opportunity to hear directly from senior psychiatrists and the judiciary to gain a greater understanding of the procedural elements associated with Part 8A of the CLCA.

3.10 The data generated by the Case File Review also aided the Council to identify features of the way in which cases proceeded through the court system.

3.11 The Case File Review indicated that just over 50% of offences with which individuals found not guilty by reason of mental incompetence were charged were categorised as ‘offences against the person’. These included serious assault, creating risk of harm, endangering life and wounding with intent.\textsuperscript{206}

These results highlight the need for the government to ensure that resourcing the mental health sector continues to be a priority so that services are available for people before critical incidents occur.

Overview of the historical development of law and practice

3.12 The origins of the modern law relating to the disposal of individuals found ‘not guilty by reason of insanity’ may be traced back to another famous insanity trial, that of

\textsuperscript{205} See for discussion, R D Mackay, \textit{Mental Condition Defences in the Criminal Law} (OUP, 1995) and Arlie Loughnan, \textit{Manifest Madness: Mental Incapacity in Criminal Law} (OUP, 2012).

\textsuperscript{206} A study in the United Kingdom found a similar outcome whereby in high percentage of cases reviewed where a mental impairment defence was raised ‘a major constituent was purposeful violence against the person’: see R D Mackay et al., ‘Yet more facts about the Insanity Defence’ [2006] \textit{Criminal Law Review} 399-411.
James Hadfield for high treason in 1800. As with the trial of Daniel McNaughtan, the significance of this case is such that it warrants discussion in some detail.

3.13 Hadfield had attempted to shoot King George III, believing that this act would ensure that he himself would be killed but the world would be saved. As special privileges accompanied treason trials, Hadfield was entitled to assistance from counsel in the preparation of evidence and the examination and cross-examination of witnesses. His counsel, Thomas Erskine, argued that, rather than ‘total deprivation of memory and understanding’, ‘delusion was the inseparable companion of real insanity’. The Justices interrupted Erskine’s defence and the Attorney-General confirmed that he did not want to challenge the evidence. Hadfield was acquitted and, in accordance with the practice from the previous era, the jury gave both their verdict and its factual basis: ‘[w]e find the prisoner Not Guilty; he being under the influence of insanity at the time the act was committed’.

3.14 Hadfield’s Case triggered an important step in the formalisation of the disposal of individuals acquitted on the basis of insanity. Uncertainty about the power to detain Hadfield led the English Parliament to pass the Criminal Lunatics Act 1800 which provided:

That in all cases … of any person charged with treason, murder, or felony, that such person was insane at the time of the commission of such offence, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence… if they shall find that such person was insane at the time of the committing such offence…. the court shall order such person to be kept in strict custody until his Majesty’s pleasure shall be known.

3.15 The provision in the 1800 Act that a defendant found ‘not guilty on account of insanity’ would be detained ‘in strict custody…until His Majesty’s pleasure be known’ came to be known as indefinite detention.

3.16 The Criminal Lunatics Act 1800 marked the beginning of the formalisation of exculpatory insanity (and ‘insanity on arraignment’ or unfitness to plead). Although the Act did not define insanity for legal purposes, it fundamentally altered the procedural context in which claims to exculpation on the basis of insanity were made.

3.17 As a result of the 1800 Act, juries were required to return a special verdict in insanity trials and thus it was no longer possible for the insane defendant simply to be acquitted. The Act also brought the detention of insane defendants into the

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207 R v Hadfield (1800) 27 St. Tr. 1281.
212 This Act was subtitled ‘An Act for the Safe Custody of Insane Persons Charged with Offences’ (39 & 40 Geo. III c. 94).
criminal law, by enabling the accused to be acquitted but at the same time providing the court with power to keep the insane defendant in custody.\textsuperscript{215} The effect of the passage of the 1800 Act was that a defendant did not have to be convicted of a crime in order to be confined under the criminal law.\textsuperscript{216} Although it had been possible to detain insane defendants before 1800, the Act introduced a ‘more systematic means of containing them within a voluntarist legal system’.\textsuperscript{217} While in theory, defendants such as Hadfield could be released if they were no longer a danger to themselves or others, in practice, the period of confinement was life.\textsuperscript{218}

3.18 The combined effect of the statutory provisions was to connect a successful insanity defence with a particular verdict (the special verdict) and indefinite detention. This link proved to be an enduring feature of the insanity defence. As discussed below, even after indefinite detention fell away, and other disposal options were made available to courts, the link between a successful mental illness plea and the special verdict has remained, conjoining the issue of no criminal responsibility and disposal in a way that is unique in criminal law.

3.19 The practice of indefinitely detaining individuals found ‘not guilty by reason of insanity’ carried over from England and Wales to the Australian states and territories. This meant that an individual who successfully raised the insanity defence would be detained until such a time as the state or territory granted an application for release.\textsuperscript{219} Consequently, most individuals were detained for long periods of time (in some cases, longer than had they been convicted and sentenced to a term of imprisonment). As a result, in general, only those charged with the most serious crimes (such as murder) raised the insanity defence, even after the abolition of capital punishment.\textsuperscript{220}

**Recent developments**

3.20 In the last few decades, jurisdictions within Australia came to recognise that indeterminate detention for individuals found not guilty on the basis of insanity was no longer consistent with developments in expert medical knowledge of mental illness and the human rights of those individuals in the criminal justice system. As a result, laws in some jurisdictions were amended to provide alternatives to indefinite detention.

3.21 In South Australia, a bill to amend the CLCA was introduced into the South Australian Parliament by the then Attorney-General in August 1994 (the *Criminal Law Consolidation (Mental Impairment) Amendment Bill*). Part 8A of the Act came into operation in March 1996 when the *Criminal Law Consolidation (Mental

\textsuperscript{215} Smith 1998: 97.
\textsuperscript{217} Wiener Reconstructing the Criminal 85.
\textsuperscript{219} Prior to the amendments introduced in 1995, s292(2) of the Criminal Law Consolidation Act (SA) provided that ‘the Court shall order any person found not guilty on the ground of insanity, to be kept in strict custody in such place and in such manner as it thinks fit, until the Governor’s pleasure be known.’
\textsuperscript{220} See NSW Law Reform Commission: CP 6 [3.6].


*Impairment*) Amendment Act 1995 was passed by parliament. Pursuant to that legislation, new provisions were introduced to provide alternatives to indeterminate detention.

3.22 There is some evidence from overseas jurisdictions that changes to disposal regimes have increased the levels of use of the insanity defence.221

**Matter proceeds and defendant sentenced in 'normal' way**

3.23 In setting out the process of setting limiting terms, a good starting point is the traditional or standard way in which a criminal matter proceeds and an individual is sentenced.

3.24 The factors to be taken into account in sentencing are set out in section 10 of the *Criminal Law (Sentencing Act)* 1988 (SA).

The legislation provides that a court should have regard to each of the following matters:222

- the circumstances of the offence;
- other offences (if any) that are to be taken into account;
- if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character;
- the personal circumstances of any victim of the offence;
- any injury, loss or damage resulting from the offence;
- the degree to which the defendant has shown contrition for the offence such as by taking action to make reparation for any injury, loss or damage resulting from the offence;
- if the defendant has pleaded guilty to the charge of the offence;
- the degree to which the defendant has co-operated in the investigation of the offence;
- the deterrent effect any sentence under consideration may have on the defendant or other persons;
- the need to ensure that the defendant is adequately punished for the offence;
- the character, antecedents, age, means and physical or mental condition of the defendant;
- the rehabilitation of the defendant;
- the probable effect any sentence under consideration would have on dependants of the defendant; and
- any other relevant matter.

3.25 If a person is not found to be mentally incompetent and thereby transitions through the criminal justice system in the normal way, any mental illness that he or she had at the time of the offence (or continues to have) may still be taken into account. This is because the proper exercise of the sentencing discretion frequently calls for a

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222 *Criminal Law (Sentencing Act)* 1988 (SA) s10
consideration of the offender’s mental state at the time of the offending or at the time of sentence or both.

3.26 In *R v Tsiaras*, the Court of Appeal identified several ways in which serious psychiatric illness not amounting to insanity is relevant to sentence.

According to the *R v Tsiaras* principles, serious psychiatric illness not amounting to insanity is relevant to sentencing in at least the following five ways:

1. It may reduce the moral culpability of the offence, as distinct from the prisoner's legal responsibility. Where that is so, it affects the punishment that is just in all the circumstances and denunciation of the type of conduct in which the offender engaged is less likely to be a relevant sentencing objective.
2. The prisoner's illness may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.
3. A prisoner suffering from serious psychiatric illness is not an appropriate vehicle for general deterrence, whether or not the illness played a part in the commission of the offence. The illness may have supervened since that time.
4. Specific deterrence may be more difficult to achieve and is often not worth pursuing as such.
5. Psychiatric illness may mean that a given sentence will weigh more heavily on the prisoner than it would on a person in normal health.

3.27 If an individual is found not guilty on the basis of mental incompetence, he or she will not be sentenced in the ‘normal’ way but will be subject to a disposal order.

**The procedural context in which the limiting term is fixed**

3.28 Before a limiting term is fixed, the court must find the defendant not guilty by reason of mental incompetence and then order and assess psychiatric and psychological reports on the defendant’s condition. These steps are described below and are set out in a flow chart (Diagrams A, B and C).

**Steps preceding a finding of not guilty by reason of mental incompetence**

3.29 An investigation into a defendant’s mental competence (which must be separated from the remainder of the trial: s269E(1)) is to be conducted before a jury unless the defendant has elected to have the matter dealt with by a judge sitting alone (S269B(1)).

In most cases a defendant will elect to proceed to have the issue considered by judge alone (S269B(1)). Judge-alone proceedings are discussed in Part 2 of the Discussion Paper.

3.30 The trial judge has a discretion to proceed first with the trial of the objective elements of the offence, or first with the trial of the mental competence of the defendant (s269E(2)).

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3.31 If the trial judge decides to proceed first with the trial of the objective elements, the process is as follows:

The court must first hear evidence and representations put to the court by the prosecution and the defence relevant to the question whether the court should find that the objective elements of the offence are established against the defendant (S269GA(1)).

If the court is satisfied that the objective elements of the offence are established beyond reasonable doubt, the court must record a finding that the objective elements of the offence are established; but otherwise the court must find the defendant not guilty of the offence and discharge the defendant (S269GA(2)).

3.32 If the trial judge decides to try the defendant’s mental competence to commit the offences first, the process is as follows:

The court must hear relevant evidence and representations put to the court by the prosecution and defence on the question of the defendant’s mental competence to commit the offence. It may then require the defendant to undergo an examination by a psychiatrist or other appropriate expert and require the results of the examination to be reported to the court (s269FA(1)(a),(b)).

At the conclusion of the trial of the defendant’s mental competence, the court must decide whether it has been established, on the balance of probabilities, that at the time of the alleged offence the defendant was mentally incompetent to commit the offence. If so, the court must record a finding to that effect. If not, the court must record a finding to the effect that the presumption of mental competence has not been displaced and proceed with the trial in the normal way (s269FA(3)(a),(b)).

The court may, if the prosecution and defence agree, dispense with, or terminate, an investigation into a defendant’s mental competence to commit an offence and record a finding that the defendant was mentally incompetent to commit the offence (s269FA(5)(a),(b)). This is discussed in Part 2 of the Discussion Paper.

If the court records a finding that the defendant was mentally incompetent to commit the offence, the court must hear evidence by the prosecution and defence relevant to the question whether the court should find that the objective elements of the offence are established (s269FB(1)).

3.33 If the court is satisfied that the objective elements of the offence are established beyond reasonable doubt, the court must record a finding that the objective elements of the offence are established (s269FB(2)) and must find the defendant not guilty of the offence but declare the defendant to be liable to supervision or order an unconditional release where the penalty, if the person had been found guilty, would likely only have received a fine or a minor penalty. The court must then determine the ‘limiting term’ or the period of time for which the defendant will be liable to such supervision. The way in which the court determines the period of the limiting term is set out in the next section of this Part of the Discussion Paper.
Or, otherwise, if the court finds that the objective elements of the offence have not been established the court shall find the defendant not guilty of the offence and discharge them (s269FB(3)).

These steps are summarised for easy reference in the flow charts (Diagrams B and C) set out below and have been taken from *Question of Law Reserved (No 1 of 1997)*:225

**Diagram B: Trial of Objective Elements First**

Diagram B: Trial of Objective Elements First
The court hears evidence and representations on the issue of the objective elements (s269GA(1))

- If objective elements not established the accused is found not guilty and discharged (s 269GA(2))

  - If satisfied of mental incompetence the accused is found not guilty but declared to be liable to supervision. (s 269GB(3))

  - If not satisfied of mental incompetence court determines whether subjective elements of offence are established. (s 269GB(4))

- If objective elements are established court hears evidence and representations on the issue of mental competence. (s 269GB(1))

  - If satisfied that subjective elements are established the accused is found guilty of the offence. (s 269GB(4))

  - If not satisfied that subjective elements are established the accused is not found guilty of the offence. (s 269GB(4))

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225 *Question of Law Reserved (No 1 of 1997)* 70 SASR 251
Diagram C: Trial of Mental Competence First

**Trial of Mental Competence First**

The court hears evidence and representations on the issue of mental competence (s 269FA(1))

- If not satisfied of mental incompetence the trial of the offence proceeds in the normal way. (s269FA(3))
- If satisfied of mental incompetence court determines whether objective events of offence are established. (s269FB(1))

- If satisfied that objective elements are established the accused is found not guilty of the offence but declared to be liable to supervision. (s269FB(3))
- If not satisfied that objective elements are established the accused is found not guilty of the offence and discharged. (s269FB(3))

**Psychiatric and psychological reports ordered**

3.34 Expert psychiatric and psychological reports provide important evidence for the court in making a disposal order under Part 8A of the CLCA.

3.35 The legislation provides that reports may be sought in the following circumstances:

1. The Court has the power to order a report during the trial, upon request from the defendant, the prosecution or at the initiative of the judge (ss269FA(1)(b), 269FA(2), 269GB(1)(b), 269GB(2)). This is for the purpose of determining whether, on the balance of probabilities, the defendant was mentally incompetent at the time of the alleged criminal conduct.

2. The Court may also order a report before the trial is commenced, if it believes the trial will be expedited by doing so (s269WA(1)). This is also for the purpose of determining whether the defendant was mentally incompetent at the time of the alleged criminal conduct.

3. If the Court finds the defendant was mentally incompetent at the time of the criminal conduct, and that the objective elements of the case are made out, then the defendant is not guilty, but a supervision order must be made. Within 30 days of this order, the Minister must submit a psychiatrist report (s269Q(1)). A report submitted to the court by the Minister pursuant to s269Q
must contain a diagnosis and prognosis of the defendant’s condition and suggested treatment plan.\textsuperscript{228}

4. If the Court is considering releasing a defendant, or significantly reducing the level of supervision, they must first consider reports by three different psychiatrists (or other appropriate experts), or one or two if the offence was a summary offence, who have personally examined the defendant on his or her mental condition and the possible effects of the proposed action on the behaviour of the defendant (ss269T(2), 269T(2a)).

3.36 In addition, the ODPP must provide a report setting out the attitudes of the victim (if any) and the victim’s next of kin (s269R). Furthermore, the court must be satisfied that the defendant’s next of kin and the victim or the victim’s next of kin have been given reasonable notice of the proceedings. These issues are discussed in Part 4 of the Discussion Paper in relation to victims and interested parties.

3.37 Where the offence charge is major or minor indictable there must be three psychiatric reports ordered pursuant to s269T. However, where it is a summary offence only, the court has a discretion to proceed with fewer than three reports.

3.38 The Council has been informed, however, that both the number and range of expert reports required by the courts in relation to the defence of mental incompetence is a matter of concern because of resources and potential delays.

The number of reports is thought to be excessive and repetitious in some instances, particularly in uncontested matters.

For instance, where the defendant has had a psychotic episode during a prescribed period of time it is not uncommon for the defendant to face multiple charges in different jurisdictions. If this is the case, perhaps one report would suffice as the offences arise out of same period of time/psychotic episode.

In addition, the Council's preliminary enquiries in the Magistrates Court indicate that a number of defendants are raising the defence of mental incompetence for minor offences in that jurisdiction.\textsuperscript{227}

3.39 Other jurisdictions do not appear to have the same requirements as to the production of psychiatric reports and it is generally up to the Court to inform itself as it see fit (see discussion of the practice in other jurisdictions in the final section of this Part of the Discussion Paper).

3.40 Pursuant to the previous s293 CLCA legislation a finding of not guilty due to mental incompetence resulted in a detention order for life with the possibility of release on licence either at the Governor’s pleasure or from 1992 onwards, by order of the court if the Governor or the court was satisfied, on expert evidence, that an order for release was now appropriate. It is likely that at the time three opinions were thought necessary as one report was thought to be inadequate for the gravity of the offence.

\textsuperscript{228} Under s269Q(2), the Minister must also arrange for a yearly report to be made to the court regarding the treatment and condition of the defendant, though this report is not required to be made by a psychiatrist.

\textsuperscript{227} See for example Schwark v Police [2011] SASC 212.
(which would only have ever been murder) but with only two reports you could have a situation where two expert reports offered opposing opinions and therefore the third report would assist in resolving such situations.

3.41 There has been a significant increase in the number of defendants raising the defence of mental incompetence because the court now has a range of options for disposition and because s269 applies to all offences, including minor indictable and summary offences. Hence the statutory process for obtaining psychiatric reports, holding multiple hearings and ordering unconditional releases, detention or release on licence applies equally, regardless of the jurisdiction or the seriousness of the offence. The result has been a significant increase in cost to the court and taxpayer by the requirement to order at least three psychiatric reports where the offence is major indictable or minor indictable and thereby resulting in extended time delays in obtaining those reports due to the relatively small pool of experts available to provide those reports.

3.42 The Council invites comment on the issue of the number and nature of expert reports required under Part 8A of the CLCA.

**Question 12.**

Should there be a reduction in the number of psychiatric reports required under Part 8A?

**Question 13.**

Should Magistrates and Judges have a discretion regarding the type and/or number of reports to be ordered? If so, what factors should guide the exercise of that discretion?

**Disposal options**

3.43 Division 4, Part 8A of the CLCA provides for disposition of persons declared liable to supervision by reason of having been found mentally incompetent to commit an offence.

3.44 As discussed above, disposals for defendants found to be mentally incompetent are not intended to be punitive. Rather, they are oriented to the treatment and care of a mentally impaired accused and his or her needs must be balanced against the safety and protection of the wider community.

There are three disposal options under Part 8A. Section 269O of the CLCA provides that:
(1) The court by which a defendant is declared to be liable to supervision under this Part may—
(a) release the defendant unconditionally; or
(b) make an order (a supervision order)—
(i) committing the defendant to detention under this Part; or
(ii) releasing the defendant on licence on the following conditions:
   (A) the conditions imposed by subsection (1a);
   (B) any other conditions decided by the court and specified in the licence.

Each of these is considered in turn.

1. Defendant released unconditionally

3.45 Under Part 8A, a court can decide to unconditionally release an individual who has been found not guilty of an offence on the basis of mental incompetence.

3.46 This means in certain cases, where a fine or any other non-custodial sentence would have been imposed and the court is satisfied that the defendant does not pose an ongoing risk to himself or the community the court should consider an unconditional release the most appropriate option.

2. Defendant released on licence with conditions

3.47 Section 269O provides that the court may release a defendant on licence on conditions decided by the court and as specified in the licence.

3.48 The limiting term should be equal to (i.e not exceed) the length of the sentence that would have been imposed had the person been found guilty but the person can be released on licence at any time during the limiting term provided the court is satisfied it is appropriate that it occur.

3.49 Pursuant to s269T(1) the court, in determining the appropriate disposition of persons declared liable to supervision must have regard to the following matters:
   - the nature of the defendant’s mental impairment;
   - whether the defendant is, or would if released, be likely to endanger another person, or other persons generally;
   - whether there are adequate resources available for the treatment and support of the defendant in the community; and
   - whether the defendant is likely to comply with the conditions of the licence; and other matters the court thinks relevant.

3.50 When setting conditions of licence, the Court must apply the principle that restrictions on the defendant’s freedom and personal autonomy should be kept to the minimum consistent with the safety of the community.

3.51 When the limiting term expires, the person is no longer subject to the order and the conditions specified in it.
3.52 Pursuant to s269(V), supervision by the Parole Board (normally carried out via DCS) and supervision by the Minister for Health (normally carried out through FMHS) are statutory requirements and must be in all orders for release on licence. Other conditions that may be imposed such as orders as to housing, a prohibition against consuming drugs or non-prescribed medication and an order that the individual receive the psychiatric treatment recommended are a matter for the court’s discretion. Licence conditions are considered in Part 4 of the Discussion Paper.

3.53 Where a defendant has been released on licence subject to conditions, supervisory responsibilities are divided between the Minister for Health (treatment of monitoring of the mental condition) and the Parole Board (all other supervision). The issue of supervision of licensees is discussed in Part 4 of the Discussion Paper.

3. Defendant ordered to be detained

3.54 Custodial orders place the defendant in the custody of the Minister for Mental Health who may give directions as to the appropriate custody, supervision and care of the defendant. In most cases individuals in South Australia will be detained at the forensic mental health facility, James Nash House. In determining whether to commit a defendant to detention or to release a defendant on licence, the court making a supervision order must apply the principle that the restrictions on the defendant’s freedom of personal autonomy should be kept to the minimum (s269S).

Disposal Options in Other Jurisdictions

3.55 The Council is aware that other disposal options are available to courts in other jurisdictions. These are outlined in the final section of this Part of the Discussion Paper, below. Some pertinent examples of other disposal options are canvassed here.

3.56 For example, in Tasmania, the court has the option to issue a community based order without the requirement for supervision or, conversely, an intensive supervision order that would include more stringent licence conditions than would usually be imposed.  

3.57 One option available under the Commonwealth legislation provides the court with powers at the end of the period in which the defendant must be detained in safe custody in prison or in a hospital (the equivalent of the period of the limiting term).

At this point, the court may order the person's release from custody either absolutely or subject to conditions to apply for such period as the court specifies in the order, although not exceeding 3 years. Such conditions include:

- that the person remain in the care of a responsible person nominated in the order;
- that the person attend upon a person nominated, or at a place specified, in the order for assessment of the person's mental illness, mental condition or intellectual disability and, where appropriate, for treatment.

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228 Criminal Justice (Mental Impairment) Act 1999 (Tas) s21.
229 Crimes Act 1914 (Cth) s20BC, s20BJ.
3.58 An alternative option that might apply at summary court level is available in New South Wales.

Under the *Mental Health (Forensic Provisions) Act* 1990 (NSW), if a Magistrate discharges a defendant subject to a condition, and the defendant fails to comply with the condition within 6 months of the discharge, the Magistrate may deal with the charge as if the defendant had not been discharged.\(^{230}\)

3.59 The Council seeks comment on alternative or additional options for disposing of matters that would provide the court with a range of options and greater flexibility in being able to offer treatment tailored to the needs of the individual.

**Question 14.**

*Should the court be provided with additional disposal options to apply to persons found not guilty by reason of mental incompetence? If so, what options should be available to the court?*

**The requirement to fix a limiting term**

3.60 In the event that the court makes a supervision order, either committing the defendant to detention or releasing the defendant on licence, the court is required to fix a limiting term. The limiting term is the period during which the supervision order remains in operation.

3.61 It follows that a “limiting term” is the best approximation of the sentence the Court would have considered appropriate if the accused had been found fit for trial and had been sentenced in a normal trial having been found guilty of the offence.

3.62 It is important to recognise that when a court fixes a limiting term it is not imposing a penalty. The general purpose of the supervision order is not to penalise, but to both protect the public and to secure the defendant such supervision and treatment as is available and appropriate.\(^{231}\)

3.63 The sentencing factors set out in Section 10 of the *Criminal Law (Sentencing Act) 1988* (extracted above) are to be taken into account in fixing the limiting term. In determining the length of a limiting term the court is prohibited from taking into account a person’s mental impairment the time of the offending. However, it should be pointed out that the sentencing principles which govern the sentencing of offenders with a mental illness have not application when a limiting term is set.\(^{232}\)

\(^{230}\) *Mental Health (Forensic Provisions) Act* 1990 (NSW) s32.

\(^{231}\) *Question of Law Reserved (No 1 of 1997)* 70 SASR 251 at 266; *R v Draoui* (2008) 101 SASR 267, 281.

\(^{232}\) *R v Draoui* (2008) 101 SASR 267. In the *Criminal Law (Sentencing) Act* 1988 (SA) mental impairment is defined as impaired intellectual or mental function resulting from a mental illness, an intellectual disability, a personality disorder, or a brain injury or neurological disorder (including dementia): see *Criminal Law (Sentencing) Act* 1988 (SA), s19C.
Similarly, in *R v Behari* Justice Kourakis commented on the way in which a limiting term is fixed without reference to the mental state of an accused (as would usually occur when sentencing in the usual way):

It is a consequence of the conditions for making supervision orders and limiting terms that they will commonly, although not necessarily, be made with respect to persons who, by reason of their mental state, are either unlikely to have formed a guilty intention or, if an intention were formed, are likely to have acted in a state which the common law may have accepted as one of diminished responsibility for the purpose of sentencing. In those circumstances it would be problematic to take into account the mental state which accompanied the objective elements as part of the required hypothetical sentencing exercise. The very mental impairment which renders the accused unfit to stand trial would make a determination of the mental state very difficult. Indeed, it may be self-contradictory to do so, because the mental state may not be a culpable one. They are prophylactic and remedial in nature.

The tension which arises when sentencing persons with mental impairments under the criminal law between the mitigating effect of their diminished responsibility on the one hand and the increased need for community protection on the other is ameliorated by fixing a limiting term because the Act allows for release into the community on licence and ultimately discharge when there is no longer any risk to the community. Those options are not available under criminal sentencing regimes.

It follows, in my view, that in fixing a limiting term the court must proceed as if it is sentencing for an offence constituted by the objective elements it has found but where it has been left in ignorance of the mental state of the accused. It can neither reduce the limiting term by reason of diminished responsibility nor increase it by reason of callous premeditation or disregard for the suffering of the victims. In that way, fixing a limiting term will not be plagued by the difficulty of ascertaining the relevant guilty mental state to which I have referred nor will the period during which the psychiatric care is provided be reduced on account of diminished responsibility arising out of the very mental condition which requires treatment.

In *R v T, JA*, Judge Tilmouth referred to the decision in *Veen v The Queen (No 2)* and stated that:

Principle dictates that a sentence (including a limiting term) should not be increased beyond what is proportional to the crime merely in order to extend the period of protection for the community.

The process of fixing a limiting term was also discussed by Vanstone J in *R v Draoui* in a judgement in which the other four members of the court concurred. In that case the court was required to decide whether a concession by the defence that the objective facts of the offence were admitted was a matter which warranted a reduction in the limiting term. The defence had argued that a reduction was

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233 *Behari* (2011) 110 SASR 147.
234 *R v Behari* (2011) 110 SASR 147, [14].
235 2013 [SADC] 12
238 [2008] SASC 188
appropriate by way of analogy with the reduction in sentence which may be made in the case of an early plea of guilty to the offence. Her Honour said:

The reference in s 269O(2) to “the period of imprisonment ... that would ... have been appropriate if the defendant had been convicted of the offence ...” must be taken to attract the factors enumerated in s10 Criminal Law (Sentencing) Act 1988, so far as they “are relevant and known to the court”: s 10(1) Sentencing Act. For the reasons which follow I consider that the factor found in s 10(1)(g) – the fact of a plea of guilty – cannot be relevant to the task contemplated by s 269O(2) CLCA.

In my opinion the words “... a term ... equivalent to the period of imprisonment ... that would ... have been appropriate if the defendant had been convicted ...” in s 269O(2) cannot accommodate the reduction in sentence which would have been given to a defendant who had pleaded guilty. What the section requires is an exercise or calculation which is hypothetical. It is hypothetical first, because in determining what sentence would otherwise have been imposed no account is to be taken of the defendant’s mental impairment and second, because it is based on the premise that the defendant had been found guilty of the offence. He has not been. Under the legislative framework he has either been found mentally incompetent and therefore not guilty, or mentally unfit to stand trial.

It would be contrary to the thrust of the legislation to assume those two false premises as required, but then have regard to the way the trial of the objective elements was conducted and use that conduct to reduce the figure otherwise reached. I say that because to do so would be to go behind one of the false premises which the judge is required to act upon and to build into it an antecedent step.

3.66 Alternatives to this method of fixing a limiting term include are set out below.239

Law and practice in other Australian jurisdictions

3.68 As discussed above, a “limiting term” is the best approximation of the sentence the Court would have considered appropriate if the accused had been found fit for trial and had been sentenced in a normal trial of criminal proceedings having been found guilty of that offence.

3.69 Jurisdictions in Australia are divided on their use of limiting terms. South Australia, NSW, the Commonwealth, and the ACT all incorporate the device of a limiting term. The Northern Territory, Victoria, Queensland, Western Australia and Tasmania do not utilise the device and some of these jurisdictions simply impose indefinite detention that can only be lifted by the relevant body (either the executive or an independent body) when it is deemed safe for the individual to return to the community.

Australian Capital Territory

3.70 In the ACT, where a person has been acquitted of either a serious or non-serious offence because of mental illness, the Supreme Court may order that the person be detained in safe custody in prison or in a hospital for a specified period. The limiting period must not exceed the maximum period of imprisonment that could have been

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239 These options have been canvassed in NSW: see NSW Law Reform Commission, People with with cognitive and mental health impairments in the criminal justice system, 2010 [7.89-7.102].
imposed if the person had been convicted of the offence.\textsuperscript{240} However, the Supreme Court cannot make any order without the ACT Civil and Administrative Tribunal’s (ACAT) recommendation as to how deal best with that individual.

3.71 The \textit{Mental Health (Treatment & Care) Act 1994} (ACT) requires that when the ACAT is reviewing an ‘order for detention’ it must take into account:

\begin{itemize}
    \item dangerousness/public safety;
    \item the nature and extent of the person's mental dysfunction or mental illness, including the effect it is likely to have on the person's behaviour in the future;
    \item the best estimate of the sentence of imprisonment nominated by the relevant court under the \textit{Crimes Act}, as the sentence it would have imposed had the person been found guilty of the relevant offence.\textsuperscript{241}
\end{itemize}

3.72 Persons cannot be detained beyond this limiting period,\textsuperscript{242} although persons released conditionally during that period who breach the conditions of their release can have their release revoked.\textsuperscript{243} Nonetheless, nothing permits the ACAT to require a person to remain in custody for an aggregate period that is longer than the limiting period.\textsuperscript{244}

\textit{The Commonwealth}

3.73 Where a person has been acquitted because of mental illness or has been found not likely to be fit to stand trial for 12 months, the court must order that the person be detained in safe custody in prison or in a hospital for a specified period. As in the ACT, the period must not exceed the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence.\textsuperscript{245}

3.74 In addition, the Attorney-General must as soon as possible review the individual’s case and decide if the person should be released from detention. This review must be repeated every six months. In making such assessments, the Attorney-General is to consider reports from a psychiatrist or psychologist and one other medical practitioner, as well as any other reports the Attorney-General deems necessary, and any representations made by the individual in detention.\textsuperscript{246}

3.75 The court may also order the person's release from custody either absolutely or subject to conditions to apply for such period as the court specifies in the order, although not exceeding 3 years. Such conditions include:

\begin{itemize}
    \item that the person remain in the care of a responsible person nominated in the order;
    \item that the person attends upon a person nominated, or at a place specified, in the order for assessment of the person's mental illness, mental condition or intellectual disability and, where appropriate, for treatment.\textsuperscript{247}
\end{itemize}

\textsuperscript{240} \textit{Crimes Act} 1900 (ACT) s302.
\textsuperscript{241} \textit{Mental Health (Treatment & Care) Act} 1994 (ACT) s72, \textit{Crimes Act} 1900 (ACT) Part 13.
\textsuperscript{242} \textit{Mental Health (Treatment & Care) Act} 1994 (ACT) s75.
\textsuperscript{243} \textit{Mental Health (Treatment & Care) Act} 1994 (ACT) s74.
\textsuperscript{244} \textit{Mental Health (Treatment & Care) Act} 1994 (ACT) s75.
\textsuperscript{245} \textit{Crimes Act} 1914 (Cth) s20BC, s20BJ.
\textsuperscript{246} \textit{Crimes Act} 1914 (Cth) s20BD, s20BK.
\textsuperscript{247} \textit{Crimes Act} 1914 (Cth) s20BC, s20BJ.
If the Court is one of summary jurisdiction and the individual is found to be suffering from mental illness or intellectual disability, the court must either dismiss the charge and discharge the person conditionally or unconditionally, or: adjourn the proceedings; remand the person on bail; and/or make any other order that the court considers appropriate.

New South Wales

The law and practice governing individuals with cognitive and mental health impairments in the criminal justice system is currently under review in NSW.\(^{248}\)

If an individual is found fit for trial but, at trial, is found ‘not guilty by reason of mental illness’ (‘NGBI’), the Court may order that the person be detained in such place and in such manner as the Court thinks fit until released by due process of law, including an order releasing the person from custody, either unconditionally or subject to conditions, as the Court considers appropriate.

The Court may not make an order for the release of a person from custody unless it is satisfied, on the balance of probabilities, that the safety of the person or any member of the public will not be seriously endangered by the person’s release.\(^{249}\)

For individuals found NGBI, no limiting term exists (although the device is employed in relation to defendants who are unfit, discussed below). The constraints imposed by the court apply indefinitely to NGMI individuals.

In reviewing the current law, the NSW Law Reform Commission noted that a point in favour of a time-limited order is that an indeterminate order may deter individuals from raising the defence. The Commission also noted that, if there was concern that an individual continued to be dangerous on the expiry of his or her order, legislation could provide that he or she be transferred to the civil mental health system.\(^{250}\)

Under the *Mental Health (Forensic Provisions) Act 1990* (NSW), if an individual is found unfit to stand trial, a “special hearing” may be conducted by the Court to determine if the individual is ‘guilty on the limited evidence available’ of the offence or an alternative offence.

If the judge or jury finds the accused “guilty” of the offence, and the sentencing judge determines that a sentence would have been appropriate, a “limiting term” is imposed on the accused. That limiting term is not subject to parole and non-parole periods, and must take into account time already spent in any form of incarceration.

After the court determines the limiting term, the Mental Health Review Tribunal takes responsibility for the individual, who will be classified as a “forensic patient”.

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250 See NSW Law Reform Commission, *People with with cognitive and mental health impairments in the criminal justice system*, 2010 [7.89-7.102].
The Mental Health Review Tribunal is a specialist quasi-judicial body constituted under the *Mental Health Act 2007* (NSW). It has a wide range of powers that enable it to conduct mental health inquiries, make and review orders, and to hear some appeals, relating to the treatment and care of people with a mental illness.

It is worth noting that an individual can be assessed by the Tribunal at any point throughout the period of the limiting term and reclassified as an involuntary patient, thus permitting the Tribunal to detain an individual in a mental health facility for longer than the length of the limiting term if their condition requires.

3.82 In the Magistrates Court, there are less formal provisions, enabling a Magistrate to make orders in relation to a person who appears to be mentally ill within the terms of the *Mental Health (Forensic Provisions) Act 1990* (NSW) or, if not, where it would be more appropriate to deal with him or her otherwise than in accordance with law. This includes dismissing the charges, granting bail, and releasing such individuals conditionally or unconditionally. If a Magistrate discharges a defendant subject to a condition, and the defendant fails to comply with the condition within 6 months of the discharge, the Magistrate may deal with the charge as if the defendant had not been discharged.\(^{251}\)

*Northern Territory*

3.83 In the Northern Territory, if the jury concludes that a person is not guilty by reason of mental impairment, the court must declare the person liable to supervision under the *Criminal Code Act* (NT) or, they must order that the person be released unconditionally.

3.84 A person liable to supervision can be subject to a custodial or non-custodial ‘supervision order’, which is set for an indefinite term.\(^{252}\) The Court must then nominate a term that is appropriate for the offence, usually equivalent to what the court would have set as the non-parole period for the offence if the person had been found guilty of the offence.\(^{253}\) At least 3 months before the expiry of that nominated term, the Court must conduct a major review of the supervision order.\(^{254}\) The supervision order must then be varied to a non-custodial supervision order unless the Court is satisfied on the evidence available that the safety of the supervised person or the public will be seriously at risk if the person is released on a non-custodial supervision order.\(^{255}\)

3.85 The court is required to consider an appropriate medical report and treatment plan,\(^{256}\) and to receive and consider any report from the victim and from members of the accused person’s family about the impact of the person’s conduct upon them before revoking any non-custodial supervision order.\(^{257}\)

\(^{251}\) *Mental Health (Forensic Provisions) Act 1990* (NSW) s32.

\(^{252}\) *Criminal Code Act* (NT) s 43ZC.

\(^{253}\) *Criminal Code Act* (NT) s 43ZG.

\(^{254}\) *Criminal Code Act* (NT) s 43ZG.

\(^{255}\) *Criminal Code Act* (NT) s 43ZG.

\(^{256}\) *Criminal Code Act* (NT) s 43ZH, 43ZK.

\(^{257}\) *Criminal Code Act* (NT) s 43ZL.
Queensland

3.86 Queensland’s Mental Health Court was established under the *Mental Health Act* 2000 and is constituted by a Supreme Court judge, who may seek advice from two assisting psychiatrists. It determines whether, when an offence was allegedly committed, a person was of unsound mind; of diminished responsibility (where the charge is murder); and if the person was not of unsound mind, whether he or she is fit for trial.

3.87 If the Mental Health Court decides the person was of unsound mind, or is unfit for trial, it may make a “forensic order”. Under this order a person may be detained in an authorised mental health service, or a high security unit, for treatment or care. The Court also has the power to order limited community treatment, which enables the person to reside in the community with active monitoring by a mental health service.

3.88 Queensland does not use the ‘limiting term’ device. A forensic order made by the Mental Health Court in respect of a forensic patient remains in force indefinitely until it is revoked by a review of the Mental Health Review Tribunal. The Mental Health Review Tribunal conducts such reviews every 6 months, or on application. On review, the Tribunal has the power to discharge the patient, approve limited community treatment and order the patient’s transfer to another hospital or removal from Queensland. The Tribunal is required to take into account factors such as the patient’s treatment and security needs and the safety of the community when conducting such a review.

Western Australia

3.89 If it is deemed by a Western Australian Court that an accused is unfit to stand trial, then the court must choose between two dispositions:

- to make an order releasing the person (‘unconditional release’); or
- to make a custody order.

3.90 In cases of an individual found not guilty by reason of unsound mind, the Lower Courts have three options:

- release the person unconditionally;
- impose a non-custodial disposition with conditions (akin to a Conditional Release Order, a Community Based Order or an Intensive Supervision Order under the *Sentencing Act* 1995); or
- make a custody order.

3.91 In the higher courts, the same choices exist unless the offence falls in Schedule One of

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258 *Mental Health Act* 2000 (Qld) s203
259 *Mental Health Act* 2000 (Qld) s200
260 *Mental Health Act* 2000 (Qld) s203
261 *Criminal Law (Mentally Impaired Accused) Act* 1996 (WA) ss16(5)(a), 19(5)(a).
263 *Criminal Law (Mentally Impaired Accused) Act* 1996 (WA) s22.
the Criminal Law (Mentally Impaired Accused) Act.\textsuperscript{264} If the alleged offence falls within Schedule One, the court must make a custody order. Schedule One contains a list of offences including homicide; grievous bodily harm and wounding; assaults occasioning bodily harm; criminal damage; and dangerously driving a stolen motor vehicle.

3.92 Notably, there are no limiting terms in Western Australia. Orders are indefinite, with release at the “Governor’s Pleasure” on advice of the Attorney General. However, after a court has imposed a custody order, the Mentally Impaired Defendants Review Board must review the order at regular intervals and provide regular reports to the Attorney General and the Governor which include the accused’s progress, place of custody, and any recommendations relating to the lifting or altering of the custody order.

Tasmania

3.93 Tasmania’s law in regard to limiting terms is governed by the Mental Health Act 1996 (Tas). It provides that if a person is found unfit for trial and not likely to become fit in 12 months, the court is to hold a special hearing. If the person is found not guilty, or is found not guilty on the grounds of insanity, then the court may:

- release the defendant unconditionally; or
- make a supervision order releasing the defendant on such conditions as the court thinks fit; or
- make a community treatment order, within the meaning of the Mental Health Act; or
- make a continuing care order, within the meaning of the Mental Health Act.\textsuperscript{265}

3.94 If the case is in the Supreme Court, the Judge can also make a restriction order, under which the individual is to be admitted to and detained in a special facility.\textsuperscript{266} Judges and magistrates in lower courts can refer a matter to the Supreme Court if they feel that a restriction order is necessary.\textsuperscript{267}

3.95 There is no device of a “limiting term” in Tasmania. Restriction orders are made indefinitely, and can only be lifted by the Supreme Court. A court is to apply, where appropriate, the principle that restrictions on the defendant's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community and must have regard to:

- the nature of the defendant's mental impairment or other condition or disability; and
- whether the defendant is, or would if released be, likely to endanger another person or other persons generally; and
- whether there are adequate resources available for the treatment and support of the defendant in the community; and
- whether the defendant is likely to comply with the conditions of a supervision

\textsuperscript{264} Criminal Law (Mentally Impaired Accused) Act 1996 (WA) s21.
\textsuperscript{265} Criminal Justice (Mental Impairment) Act 1999 (Tas) s21.
\textsuperscript{266} Criminal Justice (Mental Impairment) Act 1999 (Tas) ss21, 24.
\textsuperscript{267} Criminal Justice (Mental Impairment) Act 1999 (Tas) s25.
order; and
  • other matters that the court thinks relevant.

3.96 The court must also consider any report on the attitudes of victims, if any, and next of kin.

3.97 Patients are reviewed every 12 months by the Tasmanian Forensic Tribunal, which can issue a certificate if it determines that a restriction order is no longer necessary. The individual can then apply with that certificate to the Supreme Court to discharge or revoke the restriction order. However, an individual, the Secretary of Health, or the Chief Forensic Psychiatrist can also make an application to the Supreme Court to have an order revoked without first having a decision that a certificate should issue from the Forensic Tribunal.

Victoria

3.98 As in NSW, where an accused is found unfit to stand trial a court may adjourn the matter or hold a "special hearing" to determine whether the person would be found not guilty of the offence; not guilty by reason of mental impairment; or to have committed the offence. Notably, the latter is a qualified finding of guilt only. If a person is found not guilty by reason of mental impairment or guilty in the qualified sense of the word, then the Court may make an order for unconditional release of the individual or make a supervision order.

3.99 In the Magistrates Court, if a person is found not guilty because of mental impairment, he or she must be discharged. As such, the Department of Public Prosecutions will occasionally try to get the matter heard in a higher court in order to subject the individual to a supervision order of some kind.

3.100 Supervision orders may be custodial or non-custodial. These supervision orders are for an indefinite term (s27), although the court may specify that the matter be brought back to the court for review at the end of a specified period.

3.67 The supervision order may commit the person to custody or release the person on conditions fixed by the court (s26). However, the court must also fix a nominal term. Three months before the end of the nominal term the court that made a supervision order must undertake a major review of the order and thereafter at intervals not exceeding five years for the duration of the order. The purpose of a major review order is to determine whether the person subject to the order is able to be released from it.

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268 Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) ss12-18.
269 Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s18.
270 Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s18, s23.
271 Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s5.
272 Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s26.
273 Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s27.
The nominal term is fixed in accordance with the following table:

<table>
<thead>
<tr>
<th>Person found not guilty of offence because of mental impairment or found at special hearing to have committed</th>
<th>Nominal term</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) murder or treason</td>
<td>25 years</td>
</tr>
<tr>
<td>(b) a serious offence (within the meaning of the <em>Sentencing Act 1991</em>) other than:</td>
<td>a period equivalent to the maximum term of imprisonment available for the offence</td>
</tr>
<tr>
<td>(i) murder</td>
<td></td>
</tr>
<tr>
<td>(ii) an offence against section 20 of the <em>Crimes Act 1958</em> (threats to kill)</td>
<td></td>
</tr>
<tr>
<td>(c) any other offence for which there is a statutory maximum term of imprisonment</td>
<td>a period equivalent to half the maximum term of imprisonment available for the offence</td>
</tr>
<tr>
<td>(d) any other offence punishable by imprisonment but for which there is no statutory maximum term</td>
<td>a period specified by the court</td>
</tr>
</tbody>
</table>

As set out above there are a range of options for fixing a limiting term (or the equivalent) in the various jurisdictions: :
- no limiting term (Qld, WA, Tas, NSW); or
- no limiting term - but the court or legislature sets a ‘nominal term’ at which time the supervision order will be subject to review (Victoria, NT); or
- a limiting term set by the court or legislature (ACT, SA, Commonwealth, NZ).

Options for consideration include:
- Fixing two different limiting terms, for offences punishable by life imprisonment, and for all other offences: This is the approach taken in New Zealand, where a time limit of 10 years from the time of making the order, if the offence is punishable by life imprisonment, or, otherwise, half the maximum term of imprisonment provided for the offence.274
- A fixed percentage of the maximum penalty for the offence: On this approach, a limiting term could be fixed at two-thirds of the maximum term of imprisonment, or 10 years, whichever is less.
- Fixing limiting terms according to the non-parole period which would otherwise have been imposed for an offence.
- Fixing limiting terms according to the average or mid-range sentence for the offence, where this is determined by reference to sentencing statistics.275

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274 See *Criminal Procedure (Mentally Impaired Persons) Act 2003* (NZ) c30(1)-(2).
275 This proposal was made in The Hon Greg James QC, *Review of the New South Wales Forensic Health*
3.71 The Council invites comment on alternatives to the way that a limiting term is currently fixed.

**Question 15.**

The following options are suggested for consideration:

(a) Should any of the procedures in the interstate models discussed above be adopted in South Australia?

(b) If the court is to retain the power of fixing a limiting term should it be fixed in a way other than by reference ‘to the term of imprisonment that would have been imposed’ had the accused been convicted of an offence and sentenced in the usual way?

(c) If the court is to retain the power of fixing a limiting term should the court be allowed to take into account a concession by the defence that the objective facts are admitted?

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4. Supervision of Individuals released on Licence
4.1 This Part of the Discussion Paper continues the discussion of the practices that follow a successful mental incompetency defence. Together with Part 3, this Part provides the procedural context for the defence of mental incompetence.

4.2 As mentioned in Part 3, the supervision of individuals who have successfully raised the mental incompetence defence is distinct from punishment. In brief, while detention for the purposes of punishment is punitive, the purpose of supervision following a finding of mental incompetence is to protect the individual and the community.

4.3 As also discussed in Part 3, an individual found not guilty by reason of mental incompetence may be released into the community on licence with conditions (s269O).

4.4 The purpose of this Part is to discuss the supervision of individuals released on licence. This Part of the Discussion Paper covers:

- An overview of the legal regime relating to supervision and release of defendants on licence;
- Victims and Interested parties;
- Supervision of individuals released on licence;
- Supervision of individuals with intellectual disability released on licence;
- Licence conditions and breaches of licence conditions;
- Options for a Mental Health Review Tribunal or Board in South Australia;
- Forensic mental health facilities; and
- The situation in other Australian jurisdictions.

Overview of the legal regime relating to supervision and release of defendants on licence

4.5 The legal regime relating to supervision of individuals released on licence following a successful defence of mental incompetence is set out in Division 4 of Part 8A of the CLCA.

The provisions contained in Division 4 provide the courts with specific powers with respect to individuals found mentally incompetent, and those who have been found unfit to stand trial. Collectively, these powers are known as disposal powers.

4.6 Division 4, Part 8A of the CLCA sets out the rationale or principles on which the court acts in making supervision orders and releasing individuals on licence.

Section 269S provides that, in deciding whether to release a defendant under this Division, or the conditions of a licence, the court must apply the principle that restrictions on the defendant's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community.
4.7 The principle contained in s269S has been described as the ‘cornerstone to the operation of the statutory scheme’. In *R v Ridings* Justice White stated that the section intends that:

the court should have regard, as a fundamental matter, to the safety of the community but otherwise should ensure that restrictions on the defendant’s freedom and personal autonomy are kept to the minimum consistent with that safety. Continuing a person in custody for the purposes of retribution or punishment is not an appropriate consideration when determining an application for the variation of a supervision order.276

4.8 Where an individual has been found mentally incompetent the legislation provides that a court may release the defendant unconditionally, or make an order committing the defendant to detention under this Part, or releasing the defendant on licence on the following conditions (a "supervision order") (s269O).

4.9 If a defendant is committed to detention under this Part, the individual is in the custody of the Minister for Health who may give directions for the custody, supervision and care of the individual that are considered appropriate.

The Minister may place the defendant under the custody, supervision and care of another; and, if there is no practicable alternative, direct that a defendant be kept in custody in a prison (s269V).

4.10 On application to the court, and under s269P, a supervision order may be varied so that, for instance, an order for detention may be amended to allow for the release of an individual on licence.

4.11 Alternatively, an order for release on conditional licence can be revoked at any time during the limiting term and an order for detention substituted in its place. The prosecution, the defendant, Parole Board, the Public Advocate or another person with a proper interest in the matter may apply to the court (s269P).277

4.12 As outlined in Part 3 of the Discussion Paper, Section 269T(1) outlines the matters to which the court is to have regard in releasing individuals unconditionally, making detention orders and releasing individuals on licence. Section 269T(2) provides that a court cannot release an individual, or significantly reduce the degree of supervision to which he or she is subject unless the court has considered at least three reports (or at least one report if the offence is summary) and has considered the report on the attitudes of victims and next of kin.

4.13 Section 269U of the CLCA provides:

(1) If a person who has been released on licence under this Division contravenes or is likely to contravene a condition of the licence, the court by which the supervision order was made may, on application by the ODPP (which may be made, in a case of urgency, by telephone), review the supervision order.

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277 See decision in *R v Steele (no 2)* [2012] SASC 162 where Gray J granted the victim to be represented by Counsel on the basis it was an ‘interested party’.
(2) After allowing the ODPP and the person subject to the order a reasonable opportunity to be heard on the application for review, the court may—
   (a) confirm the present terms of the supervision order; or
   (b) amend the order so that it ceases to provide for release on licence and provides instead for detention; or
   (c) amend the order by varying the conditions of the licence, and make any further order or direction that may be appropriate in the circumstances.

(3) When an application for review of a supervision order is made, the court may issue a warrant to have the person subject to the order arrested and brought before the court and may, if appropriate, make orders for detention of that person until the application is determined.

4.14 Where a court has made an order detaining the person under Part 8A of the CLCA, including following a breach of their licence conditions, the Minister for Mental Health and Substance Abuse has the power to direct that the person be kept in custody in prison if there is no practicable alternative (s269V(2)(b)).

The issue of breach of licence conditions is discussed below.

4.15 The Council is aware that given the shortage of hospital beds either in acute mental health wards or James Nash House the court often makes orders pursuant to s269X that the individual be detained in prison on the basis there is ‘no practical alternative’.

4.16 There are a number of difficulties with this. The first is that the individual is unlikely to be given adequate mental health treatment whilst in prison. Secondly, once declared liable to supervision they have already been found not guilty. On that basis and from a jurisprudence perspective, prison is an inappropriate place for such an individual to be detained.

Victims and Interested Parties

4.17 For the purposes of the disposition of individuals under Division 4 of Part 8A of the CLCA, the court must consider the views of next of kin of defendant and of victim.

4.18 Attitudes of the next of kin of the victim and of the defendant are an important consideration for the court in making disposal orders regarding mentally incompetent individuals. The court is also required to take into account that the overriding consideration for the court is the minimum restriction to be placed on the applicant’s freedom and personal autonomy which is consistent with the safety of the community (s269S).

4.19 Section 269R provides that the ODPP must provide the court with a report setting out, so far as reasonably ascertainable, the views of (a) the next of kin of the defendant; and (b) the victim (if any) of the defendant's conduct; and (c) if a victim was killed as a result of the defendant's conduct—the next of kin of the victim.

4.20 The involvement in Part 8A proceedings can be stressful for victims particularly when information about victim/next of kin attitudes is required each time changes to a defendant’s supervision order are requested.
The Council invites comment on whether judges and magistrates should have a discretion in requiring Victim/Next of Kin reports.

**Question 16.**

Should Judges and Magistrates have a discretion in requiring Victim/Next of Kin reports at all stages of the Part 8A proceedings? If so, what factors should guide the exercise of that discretion?

**Supervision of individuals released on licence**

4.22 The Case File Review indicated that, upon a finding of not guilty by reason of mental incompetence, and an order as to supervision, 64% of individuals were released on licence, 32% were detained, and 2% were released unconditionally.278

4.23 Under current law, licensees in South Australia are subject to the dual supervision of the Minister for Health and the Parole Board (s269V).

The Minister for Health has supervision responsibilities that relate to treating or monitoring the mental condition of a person. This is carried out through the FMHS. In all other respects the Parole Board has supervisory responsibility which is carried out by the DCS.

4.24 The Minister for Health and the Parole Board may not agree on an approach to the supervision of a licensee, and, where this is the case, it can create issues for both the ODPP and the court.

4.25 The *Operational Review* recommended that a case management approach should be used in the supervision of persons on conditions of licence, with the lead case management agency nominated by the courts at the time conditions of licence are set.279

This was supported by the *Joint Stakeholder Survey Report*, which also made a number of further recommendations in relation to the development of cross agency protocols and training to improve collaboration between agencies.

4.26 The Council invites comment on whether instead of the court nominating the lead agency, the supervisory agencies between themselves should nominate a lead agency to be primarily responsible for individual licensees, and to be empowered to obtain a consensus on their position prior to a court appearance.

4.27 If supervisory agencies or the court nominate a lead agency to be primarily responsible for supervision of an individual licensee, it would also be possible for that

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278 See Appendix B, Case File Review.
lead agency to instruct the ODPP to determine whether breach proceedings should be instituted.

The ODPP has standing to make an application to the court to review a licence if there is a reported breach of a supervision order (s269U). In exercising this responsibility, the ODPP receives instructions both from DCS and treating clinicians from the FMHS.

4.28 A difficulty arises when these instructions diverge or conflict.

For example, if a licensee has used illicit drugs contrary to the conditions of the licence, DCS may approach the ODPP asking that an application for review of the licence be made as a result of this breach. This raises the possibility of the licensee being returned to detention. However, upon consulting with FMHS, the ODPP may find that the treating clinicians consider the person’s mental condition to be stable and do not consider that there would be any benefit in admission to James Nash House.

These diverging instructions can cause difficulty for the ODPP, who has to put the conflicting views forward, thus compromising their ability to provide assistance to the court.

**Question 17.**

Should the court or supervisory agencies nominate a lead agency to be primarily responsible for supervision of an individual licensee?

**Question 18.**

If a lead agency is nominated to be primarily responsible should it instruct the ODPP to determine whether breach proceedings should be instituted?

**Supervision of Individuals with Intellectual Disability Released on Licence**

4.29 The defence of mental incompetence in South Australia is broad enough to capture individuals with permanent intellectual disabilities as well as those with temporary, treatable mental illnesses.

4.30 Channelling people with an intellectual disability into the mental health system after they have successfully raised the mental incompetence defence in the criminal justice system may not reflect or adequately address the needs of such individuals in terms of
supervision and treatment. For instance, while mental illnesses may be temporary and treatable, intellectual disability is likely to be permanent. 280

4.31 Some of these individuals fall outside the scope of the domain of the Minister for Health. SA Health has expressed a view that the Minister for Disabilities should have a supervisory role for those detainees and licensees whose primary diagnosis is a cognitive disability rather than mental illness. 281

4.32 As a result, the Council requests comment on whether the shared supervisory role of the Minister for Health and the Parole Board should be extended to include the Minister for Disabilities.

4.33 Further, consideration may be given to the long-term possibility of separating those forensic patients with a primary cognitive disability into a dedicated secure facility, where individuals could be accommodated and treated specially under the supervisory responsibility of the Minister for Disabilities.

Clinically, the rehabilitation model for individuals with cognitive impairments is different from a general mental health model and their needs are not necessarily adequately met in the general forensic setting. It is arguable that a high security environment that supports rehabilitation, training and intensive behaviour intervention while individuals are subject to a custodial order is appropriate for individuals with cognitive disability. 282

4.34 It has long been recognised that defendants with cognitive disabilities are falling through ‘service gaps’ and that facilities and services designed primarily for people with mental illness are not appropriate for this group. This has been recognised in various reports, including:

- The Operational Review Report identified a need for appropriate high security accommodation arrangements to be made for persons with a non-psychiatric mental impairment. 283

- The Mental Impairment Joint Stakeholder Survey Report made recommendations for legislative clarity that included reviewing the sufficiency of the definition of ‘Minister’ in relation to the provision of facilities, services and supervision for mentally impaired defendants with an intellectual incapacity of brain injury under Part 8A. 284

- Similarly, the Paving the Way (Review of Mental Health Legislation in South Australia) Report recommended that ministerial arrangements for carrying out

280 For discussion, see NSW LRC, Mental with mental impairment and cognitive disability in the criminal justice system, 2010.
281 SA Health information provided to AGD.
282 SA Health information provided to AGD.
284 Joint Stakeholder Survey carried out by Ms Margaret Bonesmo on behalf of the Departments of Health, Justice and the Attorney-General, August to December 2004. The aim of the survey was to gauge current understanding and awareness of the principles and operation of the legislative regime for dealing with offenders who have a mental impairment.
functions under Part 8A CLCA be put in place for both health and disability services.285

4.35 Detailed information about the situation of individuals with intellectual disability is provided by the Gaps in Secure Services Project Report.286 The Gaps in Secure Services Project examined the service needs of adults and young people with cognitive disability who are either under a custodial supervision order and detained in a Forensic Mental Health Facility (James Nash House) or a Youth Justice Centre, or under a non-custodial supervision order and monitored by the FMHS. A 12-month project was established in December 2011 to derive an understanding of the specific needs of this forensic population.

4.36 As at July 2012, there were ten to twelve forensic consumers with a cognitive disability. This number included Disability Services’ eligible consumers who have been in James Nash House for a lengthy period, have recently been breached and returned to a custodial environment, or are in prison due to lack of vacancies in James Nash House. It also includes an individual in a Youth Justice Centre.287

4.37 The Gaps in Secure Care Project identified that 30% of people under a forensic order between 1 January 2011 and 1 January 2012 were found to have a primary diagnosis of cognitive disability. Findings suggest that rehabilitation and support services are struggling to cater for the intensive cognitive and behavioural needs of this cohort, with some individuals defaulting into the criminal justice system.

4.38 The data on the 74 people reviewed in the Gaps in Secure Services Project highlighted that at least 41 people were subject to a limiting term of three years or less. While it was evident that these people were on relatively short limiting terms, the data also established that people were subject to multiple limiting terms. There were examples of people subject to four to six limiting terms over the course of two to five years. On further investigation, it was also established that these limiting terms were for petty, repeated offences that were indicative of inappropriate behaviour and substance abuse.

4.39 The Gaps in Secure Services Project Steering Committee has agreed to develop a Memorandum of Understanding (MoU) between DCS, the Department of Communities and Social Inclusion (DCSI) and the SA Department for Health and Ageing (SADHA) that improves the coordinated delivery of services to forensic disability consumers.

4.40 It is evident that psychiatric intensive-care beds are also utilised by people with an intellectual disability or acquired brain injury. Dr Ken O’Brien, Director of James Nash House has anecdotally advised that 30% of the patients at James Nash House are

285 Paving the way: review of mental health legislation in South Australia Report, prepared by Ian Bidmeade on behalf of the Review Committee on Mental Health Legislation for the Mental Health Unit, Department of Health, 2005.

286 The Gaps in Secure Services Project was led by the South Australian Department for Health and Ageing (SADHA) (Mental Health and Substance Abuse) in conjunction with a Steering Committee comprising SADHA, Department for Communities and Social Inclusion (DCSI) and Department for Correctional Services (DCS).

287 SA Health information provided to AGD.
those with an intellectual disability or acquired brain injury as opposed to those who have been diagnosed with an acute mental illness. Further, the costs of keeping someone at a mental health forensic facility is something in the order of $821.00 per day or $300,000 per year and as a result diverts resources from the mentally ill patients who require it.

4.41 For example, there is currently one individual detained in James Nash House who has a brain injury and as a result has difficulty complying with the licence conditions. As a result of breaching his licence on two occasions it was revoked in September 2010 and he was detained. In June 2011 he sought a variation of his licence to enable him to be released into the community on strict conditions but this has not occurred because he requires extensive supervision in the community and at considerable expense.

4.42 There is no suitable purpose-built facility for s269 licensees with acquired brain injuries; and current accommodation at Grove Closed (a secure annexe of Glenside Hospital) is inappropriate as staff supervising him do not have the skills necessary to do more than keep him detained.

4.43 The circumstances surrounding this individual suggest a wider issue and that is the management of individuals with an intellectual disability or acquired brain injury who are found not guilty of an offence and become subject to a limiting term but as a result of their condition are considered unsuitable for release into the community where supervision alone and licence conditions are not enough to guarantee the safety of the individual or the community.

4.44 On the face of it, it would appear that a mental health forensic centre with individuals who are detained on the grounds of mental illness is not appropriate for those with an intellectual disability or acquired brain injury and that alternative facilities are required which are tailored towards the needs of these individuals.

4.45 It is also important to remember that it would equally be unsatisfactory to cause such individuals to be placed in public housing leaving them isolated and with little support. Ideally, there should be provision for supported accommodation for such people where independent living skills can be encouraged and programmes can be delivered (such as those dealing with substance abuse).

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<td>Should the shared supervisory role of the Minister for Health and the Parole Board be extended to include the Minister for Disabilities?</td>
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Question 20.

In the absence of a purpose built facility for individuals found not guilty of an offence due to mental incompetence (or being found unfit to stand trial) on the basis of an intellectual disability or brain injury, what options are available for housing and supporting these individuals whilst on a licence pursuant to s269?

Licence Conditions and Breaches of licence conditions

4.46 The Case File Review revealed the range of conditions that are imposed on individuals released on licence.

Examples of conditions commonly imposed are:
- That the licensee is under the care of a psychiatrist and must comply with the treatment recommended by that psychiatrist;
- That the licensee is under the care of a mental health team;
- That the licensee must take the medication he or she has been prescribed;
- That the licensee must not take other drugs;
- That the licensee must ensure that his or her blood alcohol does not exceed 0.08%;
- That the licensee must undergo drug and alcohol testing;
- That the licensee will be supervised by a community corrections officer;
- That the licensee will be assessed for fitness to hold a driver’s licence.

4.47 Data generated by the Case File Review indicated that half of the individuals released on licence have breached the conditions of that licence; in 86% of cases where there was evidence of a breach there was also evidence of multiple breaches associated with the consumption of drugs and/or alcohol.

4.48 If a person breaches, or appears likely to breach, their conditions of licence, there can be an application to the court to review the supervision order. The court can vary the conditions or revoke the licence. If the licence is revoked, the person can be detained. The application can be made by telephone if necessary. Only the Crown can make this type of application. The licensee can be arrested and detained while the application is dealt with (section 269U).

4.49 If the licence breach is also a criminal offence, for example, using an illegal drug, or drink-driving, the person can be charged with an offence in the ordinary way and can be arrested if necessary. This applies whether or not the person is mentally ill at the time, although if they have committed the offence while mentally impaired, this can activate Part 8A for a second time.

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289 Aside from minor adjustments the drafting from paragraphs 4.45 - 4.54 has been taken directly from the Scoping Paper which had previously been released by the AGD addressing this issue.
Apart for Part 8A, if the person is mentally ill and needs medical treatment to avert danger to themselves or others, the *Mental Health Act 2009* provides a process. The person can be examined by a doctor or authorised mental health professional who certifies that the person is mentally ill and needs to be detained (section 21). This authorises the police to take the person to an approved treatment centre where they can be held and treated, subject to rights of appeal. If a police officer suspects that a person may be in need of detention in this way, the officer can apprehend the person and take them for medical examination (section 57).

Otherwise, if a person is not, at the time, mentally ill, and the breach of licence condition is not an offence in itself (for instance, the person has failed to keep a medical appointment), only Part 8A can be used to deal with the breach.

It is important that breaches of a condition are not ignored. This is not only because the conditions have been imposed by a court and have the force of law, but also because breaches can lead to a deterioration in the person’s mental health (for example, if they stop taking their medication) and can increase the risk that the person becomes dangerous to others (for example, if they use illegal drugs or drink to excess) or are at risk of committing an offence. Conditions should therefore be readily enforceable both in the public interest and in the interests of the person concerned.

**Options for dealing with a breach of a licence condition**

One possibility is that, where the person appears to the court to be in need of inpatient medical treatment, the court should be able to order that the person be detained as if under the *Mental Health Act 2009*. That would result in the person’s admission to an approved treatment centre, where they could be assessed and treated as necessary. By operation of the *Mental Health Act 2009*, the person would be released once medically assessed to be recovered. This might be a preferable option to revoking the licence and returning the person to secure detention at James Nash House, which would result in a longer stay while the necessary psychiatric reports were obtained, even if the person had meanwhile recovered.

Another possibility, where the court judges that the person does not require inpatient mental health treatment at the time, would be to detain the person at home for a period. The basis for this would be that the breach suggests that the person is either unable or unwilling to comply with the conditions of licence, justifying a higher level of restraint on their liberty, but the person does not require inpatient medical treatment. The order would attach a consequence to the breach and would protect the public against any danger posed by the person at the time. On the other hand, this option will not be useful if a person is homeless or drifting from one short-stay accommodation to another.

Another question is whether a breach of licence condition should be an offence. A breach of a bail condition or a condition of a bond is an offence, as is a breach of a restraining order. Any of these may have conditions similar to conditions of licence. If detected, a breach can result in arrest and prosecution. Given that a limiting term may be of some duration, it may be that the person, at the time the breach occurs, is not suffering from a mental impairment and in that case ordinary criminal sanctions might be more appropriate than mental-health related sanctions. In some cases, the
person might be able to establish that they were mentally impaired at the time of the alleged breach, however. It would be necessary to provide that this could be dealt with by a review of the conditions of the existing licence.

Question 21:

Should breaches of licence particularly, persistent breaches, be dealt with by way of:

(a) an amendment to the *Mental Health Act 2009* to enable a licensee to be assessed and treated as an alternative to revocation of the licence and returning the person to secure detention at James Nash House; and/or

(b) amending the CLCA (and any other ancillary legislation) to provide for home detention where a licensee is either unable or unwilling to comply with the conditions of licence, justifying a higher level of restraint on their liberty, but not requiring inpatient medical treatment; and/or

(c) where there is evidence that a breach or persistent breach of licence conditions is not as a result of a mental impairment at the time of the breach, should a breach of licence conditions constitute a criminal offence and attract a criminal sanction?

Supervision

4.56 The Case File Review indicates that, where a breach of licence was evident, the ODPP brought an application to review the licence before the court in 30% of cases.\(^{290}\)

4.57 The current situation presents some difficulties. If the ODPP seeks reviews of licences for non-compliance in line with recommendations from the Parole Board, James Nash House will quickly fill up with persons stable in terms of their mental health but having breached their licence conditions. If the ODPP does not seek licence reviews, a person may ignore their licence conditions by, for instance, taking prohibited drugs, and he or she may become dangerous. Licence conditions that include the threat of a short prison term for non-compliance with Parole Board directions might enhance compliance by licensees.

4.58 The Council is concerned that licensees may currently be aware that the ODPP is unlikely to seek an application to review licences for persistent breaches unless there is an indication of a decline in mental health. Therefore, it is feared, licensees do not comply with licence conditions or, at least, have no external incentive to comply.

4.59 The Council is aware of other options in place in other Australian jurisdictions:

*The Queensland Model:* Limited community treatment is a form of leave from custody that enables a person on a forensic order in Queensland to access community treatment and rehabilitation outside custody. It is the only such mechanism in the state. Limited community treatment may only be ordered or approved by the Mental

\(^{290}\) See Appendix B, Case File Review.
Health Court when making a forensic order or by the Mental Health Review Tribunal when reviewing the order.

All forensic patients on limited community treatment must have a “Limited Community Treatment Plan”. This plan must be in accordance with the conditions ordered or approved by the Mental Health Court or Mental Health Review Tribunal. Once limited community treatment has been generally approved by the Mental Health Court or the Tribunal as part of the Plan, an authorised doctor may authorise limited community treatment for the patient.

Under this scheme, non-compliance with limited community treatment conditions is assessed differently each time depending on the situation and the individual. The outcome however ultimately depends on whether or not the patient requires inpatient assessment and treatment. If he or she does, his or her limited community treatment is suspended and the individual is returned to custody. If he or she does not, the limited community treatment plan conditions are reviewed, and may be altered by changing the levels of monitoring, review and support for the individual.

4.60 The Council invites comment on whether additional means of empowering particular agencies (such as the Parole Board) are required to deal with non-compliance by licensees.

**Question 22.**

Are additional means of empowering particular agencies (such as the Parole Board) required to deal with non-compliance by licensees?

**Administrative detention**

4.61 One potential response to the problem of breaches of licence conditions arises from the prior practice of the Director of James Nash House. This practice instituted a form of administrative detention.

4.62 Prior to the case of *R v Draoui* in 2008, the Director of FMHS would insert the following licence condition: that a licensee could be detained at James Nash House, without Court interference, for up to 14 days, if it was felt that the licensee was contravening, or about to contravene, a licence condition and was a danger to themselves, or another.

4.63 The Council understands that the Director’s practice was based on the belief that, during the short period of detention, a licensee’s mental condition might generally stabilise and there was no need for the matter to return to the court. If this was not the case, and it was clear that the period of detention of longer than 14 days would be required, a formal application for a review of licence was made and the matter would be listed for hearing before the court.

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291 *Mental Health Act 2000* (Qld) s289.
292 *Mental Health Act 2000* (Qld) s129.
293 *R v Draoui* [2008] SASC 188.
4.64 *R v Draoui* concerned an appeal by a defendant charged in the Magistrates Court with two counts of obtaining by false pretences. At trial, it was alleged that Draoui caused the National Australia Bank to endorse cheques by fraudulently pretending that assets and income on an application for credit were true and correct. The appellant misinformed the bank about his asset position and his income. The total amount the subject of the two offences was about $200,000.

Draoui was found unfit to stand trial. In September 2007, in accordance with s269O(2), the trial Judge fixed a limiting term of 10 years. Pursuant to s269O(1)(b)(ii), the trial Judge made a supervision order releasing the appellant on licence upon various conditions. Draoui appealed seeking a revocation of the order releasing him on licence subject to conditions.

The Court of Criminal Appeal held that the provisions of the Act did not allow for administrative detention and that only the court could revoke a licence, even for a short period.

As a consequence the Director of James Nash House can now only detain a licensee under the *Mental Health Act* 2009 or after a court order has been made revoking a licence under s269P of the CLCA.

4.65 The practical difficulty with this situation is that unless a licensee is acutely unwell at the time and the ODPP has serious concerns about the licensee, detention under the *Mental Health Act* 2009 (SA) is not an option. By the time an application is made under ss269P or 269U and the relevant order obtained, the licensee may have become dangerous to himself or herself, or others.

It is possible to seek an urgent review of a supervision order by application to the court for a warrant to issue. This may be done by telephone. Currently, the court, SA Police and the ODPP have agreed to an interim process whereby a warrant sought urgently after hours may be processed. This process is necessary if there is any doubt about the danger the licensee may represent to himself or herself, victims or members of the community.

4.66 The Council understands that both the ODPP and Legal Services Commission are in favour of administrative detention, namely, the ability for the Director of FMHS to detain licensees for a short period to stabilise them without going through the formality of court intervention.

While it is obviously a serious matter to interfere with the liberty of a person, the Council understands that it was the experience of the ODPP that such decisions were made infrequently and usually assisted in stabilising the licensee quickly. A formal court process was avoided with consequent savings on court time and cost. The period of detention was never longer than 14 days without review by the court and there was the ability to act quickly where the need arose.

4.67 If an amendment to the Act provided the Director of FHMS with the ability to detain a licensee for up to 14 days before a review of the licensee’s supervision order by the court was necessary, there would also need to be further amendments to provide
police with statutory power to apprehend a licensee if necessary, as in the past on occasion the police have been reluctant to do so without a warrant issued by a court.

4.68 An alternative option is that it could also be made a standard condition of release on licence that, if the licensee at any time appears, to the Director of FMHS, to be mentally unwell such that the person requires medical treatment, but the person is not willing to receive the necessary treatment voluntarily, the licensee could be admitted on the Director’s order, to James Nash House or another appropriate treatment facility and detained there for no more than 14 days to receive the necessary treatment. Another appropriate treatment facility could include a step down facility e.g. a halfway house. Details of step-down facilities and half-way houses are provided below.

4.69 The Council is aware that these options raise issues about the rights of the individual to the minimum restrictions on his or her freedom and personal autonomy as is consistent with the safety of the community (s269S).

4.70 The Council invites comment on the desirability of an administrative detention option, or, alternatively, options other than administrative detention.

Question 23.

Should the CLCA be amended to allow for administrative detention in the circumstances discussed in R v Draoui? Are there any alternatives to administrative detention in these circumstances?

Cross-border issues

(a) licensees who abscond interstate

4.71 It can happen that persons under supervision leave the jurisdiction where the licence was granted, contrary to their conditions of licence. Currently, although the Mental Health Act 2009 provides for return to detention of mental-health detainees who are at large, including those from interstate, there is no corresponding provision for the return of licensees. If grounds for a warrant exist, then a warrant may be able to be enforced by authorities in the other state under the Commonwealth Service and Execution of Process Act to bring the person before the court of the jurisdiction where the licence was granted. It may be possible to legislate for a simpler solution however.

4.72 One option would be to build on the model provide by the Mental Health Act 2009 so that if an authorised officer or police officer reasonably believes that a person in South Australia is a forensic patient from interstate who has not been lawfully transferred here, the officer is authorised to exercise powers necessary to return the patient to an authorised officer of that state. Conversely, officers could be authorised,

294 Aside from minor adjustments the drafting from paragraphs 4.74 - 4.84 has been taken directly from the Scoping Paper which had previously been released by the AGD addressing this issue
to the extent permitted by a corresponding law, to take care and control of a South Australian forensic patient who has been apprehended by authorities interstate.

4.73 Another option would be to provide for a warrant to be issued in South Australia for apprehension of a forensic patient who has absconded to South Australia from interstate. Victoria has enacted provisions in its Crimes (Mental Impairment and Unfitness to be Tried) Act 1997, Part 7B, allowing the Secretary of the Health Department to apply for a warrant to apprehend a person who has arrived in Victoria in breach of supervision or detention conditions applying in another state. The execution of that warrant enables the person to be returned to that state. This is useful if no warrant has been issued in the other state or if a warrant issued in the other state can for some reason not be executed. Such a provision would assist other jurisdictions if an interstate licensee entered South Australia contrary to licence conditions.

4.74 Queensland likewise provides in its Mental Health Act (section 184) that a warrant issued in another jurisdiction authorises a person’s arrest in Queensland. The ACT also has comparable provisions in its Mental Health (Treatment and Care) Act 1994. A person who is liable to be detained in a mental health facility under a corresponding law can be detained in the ACT under section 48I. However, this Act, takes a similar approach to the Queensland Act in that it recognises an interstate warrant as effective in the ACT as authorising apprehension by police there (sections 48P and 48Q).

4.75 There may be a danger in providing for a warrant of one state to be treated as applying in another state. This is because of the risk of inconsistency with the Commonwealth Service and Execution of Process Act, which covers the field as to the execution of a warrant from one state in another state. Whether this is problematic for the above approach has not been tested.

**Question 24.**

(a) Should there be statutory provision for police officers or authorised officers in South Australia to take care and control of interstate forensic patients who are found in South Australia and to return them to the jurisdiction that made the orders?

(b) Further, should provisions similar to those in Part 7B of the Victorian Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 be enacted in South Australia?

(b) licensees who wish to move interstate to live

4.76 It can also happen that a person under supervision or a person who is detained may wish to move interstate for proper reasons, for example, to be with family. The Mental Health Act 2009 makes provision for persons under detention and treatment orders to be transferred interstate where there is an arrangement permitting this and it would be in their best interests to do so (section 70). Likewise, in the case of a person detained interstate, the director of a South Australian treatment centre may approve their admission that the centre, whereupon the patient is treated as if under South Australian order.
4.77 One possibility is to make similar provision for forensic patients. The law could provide, in the case of an interstate forensic patient being transferred to South Australia, that the interstate detention or supervision order and licence conditions apply as if they were orders of a South Australian court and that they can be reviewed by a South Australian court in the same way. The law could also provide for arrangements to be made under a Ministerial agreement for the transfer of South Australian forensic patients to reside interstate.

4.78 Again, Victoria has enacted provisions that enable the Victorian courts to set conditions of supervision if a person who has been under supervision in another state moves to Victoria. The Minister must be satisfied that the transfer is for the person’s benefit and that there are facilities available in Victoria for their custody, treatment or care. The transfer must also be necessary for the maintenance or re-establishment of family relationships or of relationships with support persons (Crimes (Mental Impairment and Unfitness to be Tried) Act 1997, Part 7A). Conversely, this Part also deals with the conditions under which the Minister may consent to the transfer of a Victorian forensic patient to another state. Broadly, the Minister must be satisfied that the person has given informed consent, that the transfer is in their best interests and that the law of the receiving state permits the transfer.

4.79 In the ACT, under the Mental Health (Treatment and Care) Act 1994, interstate custodial patients may be transferred to mental health facilities in the ACT (section 48K), although the facility can only accept them if they could reasonably have been detained under the ACT Act.

4.80 As part of the Fourth National Mental Health Action Plan, Mental Health Ministers nationally have agreed that provisions should be enacted around Australia by 2014 to enable co-operative transfers in the interest of persons under supervision.

**Question 25.**

Are the provisions of Part 7A of the Victorian Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 a suitable model for amendments to the South Australian law to enable transfer of persons under supervision to and from South Australia?

**Forensic Mental Health Facilities in South Australia**

4.81 Patients utilising the FMHS in South Australia are primarily comprised in one of two groups:

- people found by the courts under the CLCA mentally incompetent to commit an offence or unfit to stand trial;
- prisoners who require acute mental health care as inpatients before returning to correctional services where their ongoing mental health care is managed by Forensic Prison In-Reach Services at the prison in conjunction with Prison Health Services.
4.82 In South Australia, the FMHS is currently undergoing a period of development. Given this dynamic situation, a description of what exists currently and what is planned for the future is provided below.

4.83 The South Australian FMHS consists of the following component parts:

- **Inpatient Services (high security):** inpatient services available to prisoners and individuals on remand who are in need of acute mental health care, and the provision of secure care to those people found not guilty by reason of mental impairment (forensic patients) and deemed by the court to require care within a secure facility. There are currently 30 beds in James Nash House and 10 beds at Glenside campus.

- **Forensic Community Mental Health Service:** this service consists of a multidisciplinary team located at Oakden, mandated to provide supervision of all forensic patients on licence in the community.

- **Correctional Mental Health Service:** this service includes prison in-reach, which is provided by forensic consultant psychiatrists and registrars to all prisons in South Australia. Prison in-reach (limited) is also provided by the Forensic Community Mental Health Service to assist the Department for Correctional Services in the management of offenders with mental disorder.

- **Court Assessment Service:** this service provides coordination and provision of expert reports required by the courts to investigate mental competence to commit offences and mental unfitness to stand trial, applications to vary supervision orders and release on licence conditions as well as commenting on mental health considerations at the point of sentencing.

- **Court Liaison Service:** this service is attached to courts to provide mental health advice to the judiciary and courts more broadly. It also provides a Mental Health assessment for individuals referred by the Courts who appear to have a mental illness and are awaiting sentencing, and a referral and liaison service to assist in ensuring that the person is linked into appropriate services.

- **Owenia House:** Sex offender treatment for adult offenders who have committed sexual offences against children.

4.84 The Council is aware that there have been positive developments with the following service developments which have been funded (by the State and Commonwealth) and which are currently in the planning, design and build stage:

- **Inpatient Services (high security):** bed numbers will increase from 30 to 40 beds at James Nash House in 2014.

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295 With regard to the current 40 bed forensic inpatient capacity (30 beds at James Nash House and 10 beds at the Glenside Grove Closed Ward), there are currently 38 patients who are forensic patients and two who are from the prison system that have been admitted to James Nash House or Glenside Grove Closed Ward.
- **Forensic Step Down Rehabilitation Unit:** 10 beds to be built on the Oakden site (outside the secure perimeter) to provide rehabilitation services to forensic patients assessed as suitable and who require intensive rehabilitation prior to a planned return to the community.

4.85 During the 2010-11 financial year, there were 58 discharges from the 40 forensic beds. These patients, depending on their treatment needs, had average lengths of stay of between 40 and 1200 days. Patient turnover is low due to the nature of the patient’s illness or conditions imposed by the courts.\(^{296}\)

4.86 There are current, well-publicised pressures on forensic inpatient services and the subsequent impacts on the wider mental health inpatient services due to a shortage of forensic beds.

Some of the forensic patients being held in metropolitan hospital acute wards are those that have breached licence conditions and courts have directed that they be detained in a secure mental health facility. A number of these do not require intensive psychiatric care and their detention in mental health facilities can result in beds not being available for adult patients who need acute or intensive psychiatric care.

This also impacts on emergency department wait times as patients may be held for a long time in the emergency department while awaiting an inpatient bed.

4.87 With limited access to forensic inpatient beds, there is also increased pressure on SA Police resources. The police are required to transport forensic clients to hospital when a breach of licence has occurred and, notably, they have to remain with the patient until a secure bed becomes available.

4.88 The lack of capacity in forensic inpatient mental health services has drawn criticism from a number of areas. These include comments in the Public Advocate’s Annual Report. The Public Advocate has called for an increase in capacity to 60 beds.\(^{297}\)

4.89 Given the immediate need for additional forensic beds, a review of the existing approved 10 bed James Nash House Redevelopment project was undertaken with the view to maximising the number of additional beds possible within the proposed redevelopment. It was identified that an additional 10 new beds could be provided at marginal cost with a small increase to the other amenities currently being provided within the existing project for a 10 bed facility.

**James Nash House**

4.90 James Nash House was the first institution of its type in Australia to provide forensic mental health treatment in a dedicated facility. It has been operating since the mid 1980’s and currently has 30 beds.

\(^{296}\) SA Health information provided to AGD.

James Nash House provides varying levels of security and independence so that mentally disordered offenders and forensic patients are subjected to the level of security they require so they can gradually be prepared for less restrictive living. Over 50% of James Nash House patients have been there between 1 and 10 years. Of the significance of James Nash House in the mental health and prison system in South Australia, the James Nash House Redevelopment project has been approved by the Government.

This currently approved project provides a new 10-bed forensic mental health facility adjacent to the existing 30 bed James Nash House and will replace the 10 beds resulting from the pending closure of the Grove Closed ward at Glenside by mid-2013. This maintains the current status quo of 40 available forensic mental health beds for South Australia.

It is now proposed to incorporate an additional 10 new forensic mental health beds into the approved James Nash House redevelopment to provide a total of 20 forensic mental health beds at this new facility. The 10 additional new beds will add to the forensic acute care capacity and make James Nash House a 50-bed site.

Further to this redevelopment, it should be noted that a new 10 bed forensic subacute step-down unit will be built at Oakden (near James Nash House) by mid-2013. When all works are completed, South Australia will have 60 forensic mental health beds.

On average there are 25 individuals on the waiting list for admission to James Nash House. The number can fluctuate and recently there were 35 individuals on the waiting list. Of the average 25 individuals on the forensic waiting list, an average of 16 (65%) are in the prison system and nine (35%) are held in adult mental health acute wards across the metropolitan hospital system.

Of the 40 patients being held in either James Nash House or at Grove Closed Ward at Glenside, seven of these are patients with an intellectual disability or an acquired brain injury. As mentioned above, these individuals may have different treatment and care needs from individuals with mental impairments. Ideally, these patients would be treated in a different environment to James Nash House; however, an alternate location is not available at present.

298 SA Health information provided to AGD.
300 SA Health information provided to AGD.
301 SA Health information provided to AGD.
Step-up and step-down facilities

While James Nash House provides an important service in forensic mental health in South Australia, there is a recognised need for an intermediate step between James Nash House and being released – either conditionally or unconditionally – into the community.

Step-up and step-down facilities are residential mental health facilities that operate to assist consumers recovering from serious mental health episodes. Step-up facilities allow consumers to “step-up” from the community into the facility when they begin to suffer some form of relapse, preventing a worsening of the individual’s condition. Step-down facilities enable a more gradual return to the community after a consumer leaves a hospital setting, often providing outreach and drop-in services as well as a residential program to offer further support to individuals integrating back into the community.

Some facilities, such as the one currently running in the ACT, act as both “step-up” and “step-down” facilities in one. This is a residential mental health program known as The Adult Step Up Step Down Program. The aim of the program is to prevent relapse and to assist individuals recovering from acute episodes of mental illness.

The Step Up component is available to individuals in the community who are displaying signs of a deterioration in their mental health. It is hoped that the highly supportive environment will prevent them from further deterioration. The Step Down component of the program provides a graduated return to the community for those exiting a hospital setting. As those individuals graduate into the community, the program continues to provide outreach services.

Currently, there is a step-down facility proposed as part of further development of James Nash House.

There are two aspects to the James Nash House step-down facility proposals:

The first aspect is the use of a new unit attached to James Nash House (likely to be called Ashton House) as part of a “transition to the community program”. The program will work as follows: when patients first apply for release on licence, they are initially housed in either James Nash House or Ashton House, with the ability for the Clinical Director to move the licensee between both buildings depending on clinical need. Ashton House would have reduced security when compared with James Nash House but forensic staff would monitor patients on a daily basis and be able to quickly alert the Clinical Director if a licensee’s mental health was beginning to deteriorate.

The second aspect is a proposal for a transitional team to move the licensee from James Nash House/Ashton House arrangement as described above, into a non-forensic facility or community housing. In Dr Brereton’s words:

303 SA Health information provided to AGD.
'If we were able to set up a transition team from James Nash House, the purpose would be to provide community based rehabilitation for our inpatients and facilitate accurate assessment of their progress and risk. Ideally the team would be multidisciplinary and consist of 4 staff, including Occupational Therapy, Social Work, and Nursing. These staff members would work under the existing discipline departments but would be identified as specifically available for transition. They would work with patients on the ward prior to transition, draw up leave programs and rehab goals and help provide detailed information to the courts when considering licence applications. They would be available to provide escorts for leaves, liaise with police, and link patients in with Drug and Alcohol counselling, TAFE courses etc. They would also provide detailed information regarding a patient's progress on leaves and risk assessments. With this in place we could have a number of patients on leave at the same time and facilitate a number of different types of leave - from patients who only require a few weeks to settle into a new placement, to patients who require leave for years before we could reassure the court we were comfortable they were ready to be discharged.'

4.103 There are programs in different jurisdictions around the world that could be used as models for step-down facilities in South Australia to be appropriately adapted or tailored to the requirements in this State. These models are being investigated by the Director of James Nash House.

4.104 The implementation of such a program may require legislative amendments to achieve the required flexibility of movement from one facility to another.

**Question 26.**

Are there comments with respect to the Step-Up and Step-Down proposal outlined and being investigated by the Director of James Nash House?

**Supervision by a Mental Health Review Board or Tribunal in South Australia**

4.105 In most Australian jurisdictions, courts share responsibility for individuals released on licence (who are part of a broader category of forensic patients) with a Mental Health Board, Tribunal or equivalent. These arrangements have been outlined in the final section of this Part of the Discussion Paper.

4.106 If a Mental Health Review Board, Tribunal or equivalent were to be introduced in South Australia to assist in the supervision of individuals released on licence the following matters would require consideration:

- Should it be an existing body or a new body established for the purpose of supervision?
- In either case, should it have a membership, which includes Parole Board/Corrections or other representation and expertise?

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304 SA Health information provided to AGD.
305 See further ‘Managing Mentally Ill Offenders in the Community: Milwaukee’s community Support Program’ by Douglas C. McDonald, Ph.D., and Michele Teitelbaum, Ph.D.
• Should it monitor conduct, grant leave, be able to vary security or terminate orders?
• Should it be able to do all these things or make recommendations to the Minister on some?
• Would the Minister retain his/her supervisory roles if such a body or Tribunal exists?
• Should there be provision for reference back to the courts after responsibility has passed to the Tribunal, for example, an annual report?

4.107 One of the questions to be considered in relation to the supervision of individuals released on licence is what part, if any, the court should play once a person has been committed to detention or released on licence.

For example, should the court’s function cease once orders have been made under s269O with the person thereafter being subject to supervision and management by experts in the mental health sector?

If a Board or Tribunal or equivalent were to be introduced would the court ceased to have a role in supervising individuals released on licence? The counter-argument is that, as a person’s liberty is at stake, it is appropriate that the court have an ongoing supervisory role.

4.108 Careful consideration would need to be given if a Board, Tribunal or equivalent were to be vested with the power and responsibility to revoke a non-custodial order.

4.109 A Mental Health Review Board or Tribunal would need to fit into the existing structures and frameworks, particularly in the Magistrates Court, that are designed to assist offenders who have a mental illness and/or co-morbid issues.

4.110 As announced by the Premier in June 2013 a new South Australian Civil and Administrative Tribunal (SACAT) will be created. The SACAT would be an independent statutory body, charged with the review of a number of administrative decisions, made by the government that are currently reviewed by a variety of different bodies.

4.111 SACAT may provide a suitable framework within which to institute a Mental Health Review Board or Tribunal. However, the drawback of a tribunal system in South Australia could be the relatively small pool of experts with the relevant expertise to sit on such a Tribunal.

The situation in other Australian jurisdictions

4.112 In relation to the supervision of individuals released on licence, it should be noted that in most Australian jurisdictions the courts share responsibilities for forensic patients with a Mental Health Board or Tribunal. In one combination or another, these bodies supervise or arrange the supervision of an individual released on licence.

4.113 The material contained in this section of Part 4 covers the fixing of limiting terms, and the supervision of individuals released on licence. Where appropriate, the practices at
lower court level (summary jurisdiction) are distinguished from those applying at higher court level (trial on indictment).

**Australian Capital Territory (ACT)**

4.108 The ACT Civil and Administrative Tribunal (ACAT) has responsibility for individuals released on licence from the forensic mental health system in the ACT.

4.109 The ACAT may make orders for release subject to any conditions that the ACAT thinks is appropriate. This may include a requirement to comply with specified mental health orders. At any time, the ACAT may vary or revoke any of these conditions. If the individual on release breaches any condition of his or her release, the ACAT may order the person to be detained in custody “until the ACAT orders otherwise”.

**The Commonwealth**

4.110 The Attorney-General can order a person’s release from custody subject to conditions. However, this release order can be revoked by the Attorney-General if the individual fails to comply, or it is suspected that they have failed to comply, with the conditions of the order. Having been arrested, the person must appear before a magistrate or judge, and may be sent back to custody to finish their period of detention. Once back in detention, the Attorney-General must, as soon as practicable, review the person’s detention.

**New South Wales**

4.111 The Forensic Division of the Mental Health Review Tribunal has supervision of individuals released from custody in New South Wales, whether they are released by order of the Court or the Forensic Division itself. Section 74 of the Mental Health (Forensic Provisions) Act 1990 (NSW) provides a non-exhaustive list of conditions that the Mental Health Review Tribunal may impose on an individual. These can include appointing a case manager or health professional to conduct home visits. Notably, the Tribunal may amend or impose conditions on release or leave orders on application of victims.

4.112 If it appears that an individual has breached conditions of their release or leave, or “has suffered a deterioration of mental condition and is at risk of causing serious harm to himself or herself or to any member of the public”, then the President of the Tribunal can make an order for the apprehension of the individual. When the accused has been apprehended, the Tribunal must review his or her case. Upon review, the Tribunal may either confirm the person’s release or leave (with or
without conditions), or may make an order for the person’s detention, care or treatment in a mental health facility, correctional centre or other place.\textsuperscript{314}

\textit{Northern Territory}

4.113 Only the Court can vary supervision orders, although a number of individuals have standing to apply for such orders to be varied.

4.114 The Office of the Director of Public Prosecutions may make an urgent application to the court for an order to vary the supervision order if it appears that a supervised person is not complying with or is not likely to comply with the supervision order.\textsuperscript{315} A normal variation or revocation of the suspension order can be applied for by the Office of the Director of Public Prosecutions, the supervised person, or a person having the custody, care, control or supervision of the supervised person (as per the terms of the order itself).\textsuperscript{316} This application for variation or revocation can be made for any reason, but is often used by the person in charge of the supervised person to increase or decrease the conditions on his or her non-custodial order in case of breach or improved condition.

4.115 In addition, if any member of the Police Force reasonably suspects that a supervised person is failing to comply with the supervision order, or is compromising his or her own safety or the safety of the public, then that member may arrest the supervised person. An application to vary the non-custodial supervision order (as described above) must be made immediately.\textsuperscript{317}

\textit{Queensland}

4.116 The management of a forensic patient is the collaborative responsibility of the treating psychiatrist, a multi-disciplinary team, District Forensic Liaison Officer and Community Forensic Mental Health Services.

4.117 Limited community treatment is a form of leave from custody that enables a person on a forensic order in Queensland to access community treatment and rehabilitation outside custody. It is the only such mechanism in the state. Limited community treatment may only be ordered or approved by the Mental Health Court when making a forensic order\textsuperscript{315} or by the Mental Health Review Tribunal when reviewing the order.

4.118 All forensic patients on limited community treatment must have a “Limited Community Treatment Plan”. This plan must be in accordance with the conditions ordered or approved by the Mental Health Court or Mental Health Review Tribunal. Once limited community treatment has been generally approved by the Mental Health Court or the Tribunal as part of the Plan, an authorised doctor may authorise limited community treatment for the patient.\textsuperscript{319}

\textsuperscript{314} Mental Health (Forensic Provisions) Act 1990 (NSW) s68(2).
\textsuperscript{315} Criminal Code Act (NT) s 43ZE.
\textsuperscript{316} Criminal Code Act (NT) s 43ZD.
\textsuperscript{317} Criminal Code Act (NT) s 43ZF.
\textsuperscript{318} Mental Health Act 2000 (Qld) s289.
\textsuperscript{319} Mental Health Act 2000 (Qld) s129.
4.119 If limited community treatment is approved, the mental health team provide close monitoring, support and may require that the person be brought back to a mental health facility if the person is not adhering to limited community treatment conditions.

4.120 Non-compliance with limited community treatment conditions is assessed differently each time depending on the situation and the individual. The outcome however ultimately depends on whether or not the patient requires inpatient assessment and treatment. If he or she does, his or her limited community treatment is suspended and the individual is returned to custody. If he or she does not, the limited community treatment plan conditions are reviewed, and may be altered by changing the levels of monitoring, review and support for the individual.

4.121 The complete revocation of a forensic order requires an authorised psychiatrist to recommend their removal, taking into account the patient’s mental state and longitudinal history of stability of mental state; treatment needs; index offence; and victim rights and interests. The Tribunal can only revoke the forensic order if it is satisfied the patient does not pose an unacceptable risk to their own safety or the safety of others.320

Tasmania

4.122 A Supervision Order in Tasmania permits an individual to reside in the community subject to the supervision of the Chief Forensic Psychiatrist on conditions as to treatment, residence, directions relating to alcohol or illicit drug consumption or other directions made by the Chief Forensic Psychiatrist.321

4.123 If there are reasonable grounds to hold that:
   • a person has contravened or is likely to contravene a supervision order; or
   • there has been or is likely to be a serious deterioration in that person’s mental health; and
   • that because of either or those situations, there is a risk that the person will harm themselves or another, then that person can be apprehended.322

The apprehended individual is to be taken to a secure mental health unit as soon as possible, where they can be detained for up to 24 hours, plus an additional 72 hours if authorised by the Chief Forensic Psychiatrist. The Forensic Tribunal can authorise an additional determined period of detention as well.

4.124 At any time during the supervision order, including while the individual has been apprehended for breach of the order, the following individuals may apply to the Supreme Court for variation or revocation of the supervision order:
   • The Secretary of the responsible Department;
   • The Chief Forensic Psychiatrist;
   • The person under the order; and

320 Mental Health Act 2000 (Qld) s204.
321 Criminal Justice (Mental Impairment) Act 1999 (Tas) s29A.
322 Criminal Justice (Mental Impairment) Act 1999 (Tas) s31.
• Any person with the care/ control of the person subject to the order.323

4.125 The Court can ask for a range of materials to use as evidence in making a determination as to the outcome of the review.

Victoria

4.126 A person subject to a supervision order is classified under the Mental Health Act 1986 (Vic) as a “forensic patient” or under the Disability Act 2006 (Vic) as a “forensic resident”.

4.127 The Forensic Leave Panel was established under the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 which governs the detention, management and release of persons found unfit to be tried or not guilty on the grounds of mental impairment. The Forensic Leave Panel, which includes judicial and psychiatric members, is an independent statutory body with jurisdiction to consider applications for certain types of leave for forensic patients and forensic residents. Leave of absence includes on-ground leave, limited off-ground leave and special leave. Special leave cannot exceed 7 days for medical treatment, or 24 hours in other cases. Extended leave is for leave not exceeding 12 months. Extended leave applications must go back to court and can be granted as part of an individual’s gradual return to the community.

4.128 This power of leave is crucial, as neither a forensic patient nor forensic resident may have their custodial order varied into a non-custodial order unless they have completed an extended period of leave granted by the court, and complied with the conditions of that extended leave.324 Additionally, if the court varies a custodial order to a non-custodial order, the nominal term will continue to run.325

4.129 If an individual is subject to a non-custodial supervision order, the individual in charge of the person under the non-custodial supervision order (the supervisor), the Secretary to the Department of Human Services or the Secretary to the Department of Health may apply to the court that made the order for a variation of the order if it appears that the person subject to the order has failed to comply with it.326 The Court can order the individuals arrest if they do not appear for the review of the non-custodial order.

4.130 At a review of a supervision order, the Court can vary the order, by making the order custodial, by varying conditions attached to the order, or by revoking the order.

Western Australia

4.131 The Mentally Impaired Accused Review Board is established under section 41 of the Criminal Law (Mentally Impaired Accused) Act 1996 (WA) and is governed by the provisions contained within the Act. The Board reports and makes recommendations to the Attorney General on matters relating to people who are either unfit to stand trial or acquitted on account of unsoundness of mind and detained under custody orders.

323 Criminal Justice (Mental Impairment) Act 1999 (Tas) s30.
324 Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s32.
325 Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s32.
326 Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s29.
issued under the Act.

4.132 As a matter of practice, the Mentally Impaired Accused Review Board’s general philosophy is that an accused’s release to the community must be carefully ‘staged’. General practice is that there will be a gradual extension of the person’s freedom through increasing periods of leave of absence, including home leave, prior to making a conditional release order.

4.133 Conditional release orders are granted by the Governor on advice from the Attorney General, who usually relies on reports of the Mentally Impaired Accused Review Board. If the person progresses well on a conditional release order, the Board will consider whether they should be released unconditionally.

4.134 If a person is released on a conditional release order, and breaches those conditions, then the Board can cancel the order. The custody order then ‘revives’. A similar process occurs if an accused is never subject to a custody order but rather a non-custodial disposition with conditions attached. A breach of those conditions can cause the sentencing court to cancel the non-custodial disposition. In those circumstances, the court is obliged to issue a custody order for the individual. A warrant for the person’s apprehension can be applied for in any of the above circumstances to help return the accused to custody.

4.135 Conditional release orders are, in practice, for an indefinite duration, although they can be for a set time period. The Board must nevertheless review all cases of conditional release orders and report annually to the Attorney General. Other non-custodial dispositions are generally under the supervision of Community Corrections.

4.136 Council invites comment on the desirability of introducing a Mental Health Review Tribunal or Board or equivalent to assist in the supervision of individuals released on licence.

Question 27.

Should South Australia consider introducing a Mental Health Review Tribunal, Board or equivalent to assist in the supervision of individuals released on licence? If so, what functions and powers would such a Tribunal, Board or equivalent perform?

327 The Governor can empower the Board to do this: see Criminal Law (Mentally Impaired Accused) Act 1996 (WA) s27. If this power is granted, then the Board can, at any time, grant a leave of absence from a custody order.

328 Criminal Law (Mentally Impaired Accused) Act 1996 (WA) s35.

329 The Board must report on the factors outlined in Criminal Law (Mentally Impaired Accused) Act 1996 (WA) s33.


331 Criminal Law (Mentally Impaired Accused) Act 1996 (WA) s22.

332 Criminal Law (Mentally Impaired Accused) Act 1996 (WA) s37.
SUMMARY OF QUESTIONS

The Defence of Mental Incompetence

1. Should the CLCA be amended to replace reference to ‘knowledge’ with the word ‘understanding’? Should the CLCA be amended to define ‘nature and quality of the conduct’? If so, should the definition include ‘understanding the physical nature of the conduct and its physical consequences’?

2. Should the CLCA provide for a definition of ‘wrongness’ based on whether the defendant was able to ‘reason with a moderate degree of sense and composure’?

3. Alternatively, should the CLCA be amended so as to provide that a consideration of whether there was an ability to reason with a moderate degree of sense and composure be confined to cases of ‘frenzy, uncontrolled emotion or suspended reason’?

4. Should the CLCA be amended to remove the ‘unable to control conduct’ component of the defence?

5. Should the definition of mental illness in s269A of the CLCA be amended to specifically include hypoglycaemia or exclude hyperglycaemia? Should the definition of mental illness in s269A of the CLCA be amended to specifically include or exclude any other problematic medical conditions?

6. Should the definition of mental illness in s269A of the CLCA be amended to expressly declare that the objective test formulated by Mason CJ, Brennan and McHugh JJ in Falconer, must be applied for the purpose of distinguishing between sane and insane automatism in cases involving dissociation?

7. Should the definition of mental impairment under the CLCA be amended to specifically exclude personality disorder including psychopathy?

8. Should the CLCA be amended so that a person charged with an offence would be able to rely on a defence of mental incompetence when, from whatever cause, he or she was unable to understand the nature and quality of their conduct or understand that it was wrong?

9. Should the CLCA be amended so that a person charged with an offence would be barred from reliance on a defence of mental incompetence if their inability to understand the nature and quality of their conduct or inability to understand that it was wrong or incapacity for self control was a consequence of the combined effects of mental illness and a state of self induced intoxication?

10. Should the CLCA be amended so that a person charged with an offence would be barred from reliance on a defence of mental incompetence based on evidence of a mental illness resulting from the use of intoxicants unless the illness is permanent/prolonged/persistent/protracted/enduring?

11. Should the existing provisions on intoxication and mental impairment in the CLCA be retained without change?
The Fixing of Limiting Terms

12. Should there be a reduction in the number of psychiatric reports required under Part 8A?

13. Should Magistrates and Judges have a discretion regarding the type and/or number of reports to be ordered? If so, what factors should guide the exercise of that discretion?

14. Should the court be provided with additional disposal options to apply to persons found not guilty by reason of mental incompetence? If so, what options should be available to the court?

15. The following options are suggested for consideration:
   (a) Should any of the procedures in the interstate models discussed above be adopted in South Australia?
   (b) If the court is to retain the power of fixing a limiting term should it be fixed in a way other than by reference ‘to the term of imprisonment that would have been imposed had the accused been convicted of the offence and sentenced in the usual way’?
   (c) If the court is to retain the power of fixing a limiting term should the court be allowed to take into account a concession by the defence that the objective facts are admitted?

Supervision of Individuals Released on Licence

16. Should Judges and Magistrates have a discretion in requiring a Victim/Next of Kin reports at all stages of the Part 8A proceedings? If so, what factors should guide the exercise of that discretion?

17. Should the court or supervisory agencies nominate a lead agency to be primarily responsible for supervision of an individual licensee?

18. If a lead agency is nominated to be primarily responsible should it instruct the ODPP to determine whether breach proceedings should be instituted?

19. Should the shared supervisory role of the Minister for Health and the Parole Board be extended to include the Minister for Disabilities?

20. In the absence of a purpose built facility for individuals found not guilty of an offence due to mental incompetence (or being found unfit to stand trial) on the basis of an intellectual disability or brain injury, what options are available for housing and supporting these individuals whilst on a licence pursuant to s269.

21. Should breaches of licence particularly, persistent breaches, be dealt with by way of:
   (a) an amendment to the Mental Health Act 2009 to enable a licensee to be assessed and treated as an alternative to revocation of the licence and returning the person to secure detention at James Nash House; and/or
   (b) amending the CLCA (and any other ancillary legislation) to provide for home detention where a licensee is either unable or unwilling to comply with the
conditions of licence, justifying a higher level of restraint on their liberty, but not requiring inpatient medical treatment; and/or

(c) where there is evidence that a breach or persistent breach of licence conditions is not as a result of a mental impairment at the time of the breach, should a breach of licence conditions constitute a criminal offence and attract a criminal sanction?

22. Are additional means of empowering particular agencies (such as the Parole Board) required to deal with non-compliance by licensees?

23. Should the CLCA be amended to allow for administrative detention in the circumstances discussed in \textit{R v Draoui}? Are there any alternatives to administrative detention in these circumstances?

24. (a) Should there be a statutory provision for police officers or authorised officers in South Australia to take care and control of interstate forensic patients who are found in South Australia and to return them to the jurisdiction that made the orders?

(b) Further, should provisions similar to those in Part 7B of the \textit{Victorian Crimes (Mental Impairment and Unfitness to be Tried) Act 1997} be enacted in South Australia?

25. Are the provisions of Part 7A of the \textit{Victorian Crimes (Mental Impairment and Unfitness to be Tried) Act 1997} a suitable model for amendments to the South Australian law to enable transfer of persons under supervision to and from South Australia?

26. Are there comments with respect to the Step-Up and Step-Down proposal outlined and being investigated by the Director of James Nash House?

27. Should South Australia consider introducing a Mental Health Review Tribunal, Board or equivalent to assist in the supervision of individuals released on licence? If so, what functions and powers would such a Tribunal, Board or equivalent perform?
Cases

**Bratty v Attorney-General for Northern Ireland** [1963] AC 386
**Cooper v McKenna; Ex parte McKenna** [1960] Qd R 407.
**Edward Arnold** (1724) 16 St. Tr. 695
**M’Naghten** (1843) 10 Cl & Fin 200
**McDermott v Director of Mental Health; Ex parte A-G (Qld)** (2007) 175 A Crim R 461
**Police v Hellyer** [2002] SASC 61
**Question of Law Reserved (No. 1 of 1997)** 70 SASR 251 No. S6444
**Quick** [1973] 3 All ER 347
**R v Ayoub** [1984] 2 NSWLR 511
**R v B, MA** [2007] SASC 384
**R v Behari** (2011) 110 SASR 147
**R v Bini** [2003] SADC 35
**R v Carter** [1959] VR 105
**R v Clifford** [2010] SASFC 10
**Re Clough** [2007] QMHC 002.
**R v Clough (No 2)** [2010] QCA 120
**R v Cox** [2006] SASC 188
**R v Derbin** [2000] NSWCCA 361
**R v Draoui** [2008] SASC 188
**R v Eitzen** [2011] SASC 98
**R v EY (No 2)** [2012] SASC 116
**R v Falconer** (1990) 171 CLR 30
**R v Hadfield** (1800) 27 St. Tr. 1281
**R v Hennessy** [1989] 2 All ER 9.
**R v Jones** [1996] NSWSC 124
**R v Kakavand** [2010] SASC 350
**R v Kemp** [1957] 1 QB 399
**R v Martin (No 1)** (2005) 159 A Crim R 314
**R v McMillan** [1966] NZLR 616 (CA)
**R v Meddings** [1966] VR 306
**R v Milka** [2010] SASC 250
**R v Porter** [1933] HCA 1; (1933) 55 CLR 182
**R v Radford** (1985) 42 SASR 266
**R v Ridings** [2008] SASC 366
**R v Rivett** (1950) 34 Cr Apps 887 (CA)
**R v Sebalj** [2003] VSC 181
**R v Sebalj** [2006] VSCA 106
**R v Stapleton** (1952) 86 CLR 358
**R v Steele (No 2)** [2012] SASC 162
**R v Sullivan** [1984] AC 156
**R v T, JA** [2013] SADC 12
**R v Telford** [2004] SASC 248
**R v Tsiaras** [1996] 1 VR 398
**R v Tzeegankoff** [1998] SASC 6639
**R v Zilic** [2010] SASC 70
**Samuels v Flavel** (1970) SASR 256


Schwark v Police [2011] SASC 212
Sodeman v. The King (1936) 55 CLR 192
Veen v The Queen (No 2) (1987-1988) 164 CLR 46
Willgoss v R [1960] HCA 5; (1960) 105 CLR 295
Youssef (1990) 50 A Crim R 1 (CCA NSW).

Legislation

Child Sex Offender Registration Act 2006 (SA)
Crimes (Homicide) Act 2005 (Vic)
Crimes (Mental Impairment and Fitness to be Tried) Act 1997 (Vic)
Crimes Act 1914 (Cth)
Crimes Act 1958 (Vic)
Criminal Code Act (ACT)
Criminal Code Act (Cth)
Criminal Code Act (NT)
Criminal Code Act (Tas)
Criminal Code Act (WA)
Criminal Code Act 1899 (Qld)
Criminal Justice (Mental Impairment) Act 1999 (Tas)
Criminal Law (Mentally Impaired Accused) Act 1996 (WA)
Criminal Law (Sentencing) Act 1988 (SA)
Criminal Law Consolidation (Mental Impairment) Amendment Act 2000 (SA)
Criminal Law Consolidation Act 1935 (SA)
Mental Health (Forensic Provisions) Act 1990 (NSW)
Mental Health (Treatment & Care) Act 1994 (ACT)
Mental Health Act 2000 (Qld)
Mental Health Act 2009 (SA)
Prisoners’ Counsel Act 1836
The Criminal Lunatics Act 1800 (39 & 40 Geo. III c. 94)
APPENDIX A

Mental Impairment Flow Chart

Flowchart provided by Witness Assistance Services, DPP, SA Attorney-General’s Department
APPENDIX B
APPENDIX B

Analysis of the Case File Review

In March 2012, the Attorney-General requested that the South Australian Sentencing Advisory Council consider the following term of reference:

‘To consider the operation of Part 8A of the Criminal Law Consolidation Act 1935 with particular reference to the test of mental incompetence in section 269(C), the fixing of limiting terms and the supervision of defendants released on licence pursuant to s269(O) of the Act’.

In order to gain a clearer picture as to how s269(C) of the Criminal Law Consolidation Act 1935 was currently operating in South Australia the Attorney-General’s Department undertook a file review on behalf of the Sentencing Advisory Council. The file review included an analysis of a high proportion of cases where there had been a finding of not guilty on the basis of mental incompetence in the South Australian District and Supreme Courts between 2006 - 2012. The percentage of cases reviewed was approximately 90% of the total number of cases where a finding of mental incompetence was made by the courts during the relevant period. In total, 55 individual cases were reviewed.

A number of factors were considered including the percentage of males and females found not guilty, whether there were any prior offences, whether there had been a prior diagnosis of mental illness, which limb of s269(C) applied, whether the judge gave the basis for the finding of mental incompetence, the number of individuals that had consumed drugs or alcohol in the weeks or days preceding the offending act(s), the classes of offences committed by the individuals, whether the individual had been released unconditionally, detained or released on licence (upon a finding of not guilty and an order as to supervision), the limiting terms imposed, the number of individuals subject to a review of their licence before the court on the basis of a breach of licence and the number of individuals that committed subsequent offences whilst on licence.

The outcomes of the review have been shown in graph form below.

A snapshot of the outcomes of the file review indicates the following:

- 78% of the individuals were male as compared to 22% female;
- 40% of the individuals committed offences against the person including serious assault, creating risk of harm, endangering life and wounding with intent;
- 69% had prior offences and of those with a prior offence a high proportion had been dealt with in the traditional manner in the courts (82%) and not by way of the s269 legislation (8%);
- 85% had been diagnosed with a mental illness prior to the commission of the offence and of those diagnosed 64% had been prescribed medication;
- the primary psychiatric diagnosis was schizophrenia (47%) followed by drug-induced psychosis (15%) and bipolar disorder (10%) (keeping in mind that many individuals had co-morbid conditions which is the existence of two or more psychiatric conditions);
- limb (b) of s269(c) (did not know that the conduct was wrong) was the basis for the finding of mental incompetence in 87% of all matters;
• 65% of judges did not give the basis of their finding that an individual was not guilty by reason of mental incompetence;
• 80% of all individuals indicated that drugs and/or alcohol had been a problem for them in the past;
• 73% of all individuals had indicated they had ingested drugs and/or alcohol in the weeks or days leading up to the commission of the offence;
• only 20% of individuals were tested for drugs and/or alcohol upon being arrested by police;
• upon a finding of not guilty and an order as to supervision, 64% of individuals were released on licence, 32% were detained, and 2% were released unconditionally;
• of those who have been detained half have since been released;
• there is evidence that half of the individuals released on licence have breached the conditions of that licence;
• in 86% of cases where there was evidence of a breach there was also evidence of multiple breaches associated with the consumption of drugs and/or alcohol; and
• where a breach of licence was evident the DPP brought an application to review the licence before the court in 30% of cases.

Further, whilst every effort was made to ensure the accuracy of the data, the results have not been independently verified and on that basis their accuracy cannot be guaranteed.
OUTCOMES OF THE REVIEW IN GRAPH FORMAT

1. Breakdown of individuals (male/female)

2. Individuals with prior offences
3. For those individuals who had committed prior offences, the manner in which they were dealt with in the courts.

4. The number of individuals diagnosed with a mental illness prior to committing the offence.
5. Of the individuals diagnosed with a mental illness, the percentage which had been prescribed medication.

6. The limb of s269(C) which was used as the basis for the finding of mental incompetence.
7. Whether the judge presiding over the matter gave the basis for the finding of mental incompetence (i.e. the nature of the mental impairment and the limb that applied)

![Bar chart showing percentages for Yes, No, and Not Yet Determined](chart1)

- Yes: 65%
- No: 33%
- Not Yet Determined: 2%

8. The percentage of individuals where drugs and/or alcohol had presented a problem for the individual in the past.

![Bar chart showing percentages for Yes and No](chart2)

- Yes: 80%
- No: 20%
9. The percentage of individuals who reported as having consumed (or tested positive for) drugs and/or alcohol in the weeks or days leading up to the commission of the offence.

10. The number of matters where testing for drugs and/or alcohol was carried out by police or medical staff following the arrest of an individual.
11. The limiting terms imposed.

12. Where a finding of not guilty was made and an order as to supervision - the level of supervision imposed (ROL = release on licence)
13. If detained, the number of individuals that have since been released.

14. If released on licence, the number of individuals where a breach of licence conditions was evident.
15. Where a breach had been indicated was there evidence of multiple breaches?

16. Where there was evidence of multiple breaches to what extent did the breaches relate to the consumption of drugs and/or alcohol.
17. What percentage of matters, where a breach or breaches were indicated, did the DPP bring an application before the court for a review of the licence?

![Bar chart showing 70% No and 30% Yes]

18. Upon release on licence how many individuals have committed a subsequent offence?

![Bar chart showing 84% No and 16% Yes]
19. The categories of offences committed by the individuals.
(Please see details of the breakdown of offences at the end of Appendix B)
20. The categories of formal psychiatric diagnoses

(Please see the breakdown of the diagnosis of Schizophrenia at the end of Appendix B)
1. Offences Creating Risk, Threatening or Causing Physical Harm/ Assault Offences
   - Cause harm
   - Aggravated causing harm with intent to cause harm
   - Aggravated causing serious harm with intent to cause serious harm
   - Aggravated unlawfully causing serious harm with intent to cause serous harm
   - Wounding with intent
   - Creating Risk of Harm
   - Aggravated creating risk of harm
   - Aggravated threatening to cause harm
   - Create risk of serious harm
   - Creating risk of grievous bodily harm
   - Aggravated endangering life
   - Attempt to endanger life
   - Endangering life
   - Aggravated threatening life
   - Threatening life
   - Assault
   - Aggravated assault
   - Aggravated assault causing harm
   - Assault a police officer
   - Assault causing harm
   - Assault occasioning actual bodily harm
   - Indecent assault

2. Property Related Offences
   - Arson
   - Damaging property
   - Property damage
   - Attempt using motor vehicle without consent
   - Possessing firearm without a licence
   - Throwing objects at a vehicle

3. Criminal Trespass
   - Aggravated criminal trespass in a place of residence
   - Aggravated serious criminal trespass
   - Aggravated serious criminal trespass in a place of residence
   - Attempted aggravated serious criminal trespass in a place of residence
   - Serious criminal trespass in a place of residence

4. Offences of Dishonesty
   - Theft
   - Robbery
   - Aggravated robbery
   - Blackmail

5. False imprisonment

6. Police Related Offences
   - Resisting police
   - Escape custody
   - False report to police
   - Aggravated escaping police pursuit by dangerous driving
   - Drive dangerously to escape police

Diagnosis Groups:
1. Schizophrenia
   - Schizoaffective disorder
   - Paranoid schizophrenia
   - Chronic schizophrenia
   - Treatment resistant schizophrenia
APPENDIX C
Part 8A—Mental impairment

Division 1—Preliminary

269A—Interpretation

(1) In this Part—

authorised person means a person authorised by the Minister to exercise the powers of an authorised person under this Part;

defence—a defence exists if, even though the objective elements of an offence are found to exist, the defendant is entitled to the benefit of an exclusion, limitation or reduction of criminal liability at common law or by statute;

defensible—a defendant's conduct is to be regarded as defensible in proceedings under this Part if, on the trial of the offence to which the proceedings relate, a defence might be found to exist;

intoxication means a temporary disorder, abnormality or impairment of the mind that results from the consumption or administration of intoxicants and will pass on metabolism or elimination of intoxicants from the body;

judge includes magistrate;

mental illness means a pathological infirmity of the mind (including a temporary one of short duration);¹

mental impairment includes—

(a) a mental illness; or

(b) an intellectual disability; or

(c) a disability or impairment of the mind resulting from senility,

but does not include intoxication;

Minister means the Minister responsible for the administration of the Mental Health Act 1993;

next of kin of a person means a person's spouse, domestic partner, parents and children;

objective element of an offence means an element of an offence that is not a subjective element;

psychiatrist means a person registered under the Health Practitioner Regulation National Law as a specialist in psychiatry;

subjective element of an offence means voluntariness, intention, knowledge or some other mental state that is an element of the offence;

supervision order — see section 269O;

victim, in relation to an offence or conduct that would, but for the perpetrator's mental impairment, have constituted an offence, means a person who suffered significant mental or physical injury as a direct consequence of the offence or the conduct.
(2) For the purposes of this Part—

(a) the question whether a person was mentally competent to commit an offence is a question of fact;

(b) the question whether a person is mentally unfit to stand trial on a charge of an offence is a question of fact.

Note—

1 A condition that results from the reaction of a healthy mind to extraordinary external stimuli is not a mental illness, although such a condition may be evidence of mental illness if it involves some abnormality and is prone to recur (see R v Falconer (1990) 171 CLR 30).

269B—Distribution of judicial functions between judge and jury

(1) An investigation under this Part by the Supreme Court or the District Court into—

(a) a defendant's mental competence to commit an offence or a defendant's mental fitness to stand trial; or

(b) whether elements of the offence have been established,

is to be conducted before a jury unless the defendant has elected to have the matter dealt with by a judge sitting alone.

(2) The same jury may deal with issues arising under this Part about a defendant's mental competence to commit an offence, or fitness to stand trial, and the issues on which the defendant is to be tried, unless the trial judge thinks there are special reasons to have separate juries.

(3) Any other powers or functions conferred on a court by this Part are to be exercised by the court constituted of a judge sitting alone.

(4) The defendant's right to elect to have an investigation under this Part conducted by a judge sitting alone is not subject to any statutory qualification.¹

Note—

1 The intention is to ensure that the right to elect for trial by judge alone is unfettered by the statutory qualifications on that right imposed by the Juries Act 1927 (thus preserving the principle enunciated in R v T' [1999] SASC 429 on this point).

269BA—Charges on which alternative verdicts are possible

(1) A person charged with an offence is taken, for the purposes of this Part, to be charged in the alternative with any lesser offence for which a conviction is possible on that charge.

(2) It follows that a trial of a charge on which an alternative verdict for a lesser offence is possible is taken to be a trial of a charge of each of the offences for which a conviction is possible.
Division 2—Mental competence to commit offences

269C—Mental competence

A person is mentally incompetent to commit an offence if, at the time of the conduct alleged to give rise to the offence, the person is suffering from a mental impairment and, in consequence of the mental impairment—

(a) does not know the nature and quality of the conduct; or
(b) does not know that the conduct is wrong; or
(c) is unable to control the conduct.

269D—Presumption of mental competence

A person's mental competence to commit an offence is to be presumed unless the person is found, on an investigation under this Division, to have been mentally incompetent to commit the offence.

269E—Reservation of question of mental competence

(1) If, on the trial of a person for an offence—

(a) the defendant raises a defence of mental incompetence; or
(b) the court decides, on application by the prosecution or on its own initiative, that the defendant's mental competence to commit the offence should be investigated in the interests of the proper administration of justice,

the question of the defendant's mental competence to commit the offence must be separated from the remainder of the trial.

(2) The trial judge has a discretion to proceed first with the trial of the objective elements of the offence or with the trial of the mental competence of the defendant.

(3) If, at the preliminary examination of a charge of an indictable offence, the question of the defendant's mental competence to commit the offence arises, the question must be reserved for consideration by the court of trial.

269F—What happens if trial judge decides to proceed first with trial of defendant's mental competence to commit offence

If the trial judge decides that the defendant's mental competence to commit the offence is to be tried first, the court proceeds as follows.

A—Trial of defendant's mental competence

(1) The court—

(a) must hear relevant evidence and representations put to the court by the prosecution and the defence on the question of the defendant's mental competence to commit the offence; and
(b) may require the defendant to undergo an examination by a psychiatrist or other appropriate expert and require the results of the examination to be reported to the court.
(2) The power to require an examination and report under subsection (1)(b) may be exercised—
   (a) on the application of the prosecution or the defence; or
   (b) if the judge considers the examination and report necessary to prevent a possible miscarriage of justice—on the judge's own initiative.

(3) At the conclusion of the trial of the defendant's mental competence, the court must decide whether it has been established, on the balance of probabilities, that the defendant was at the time of the alleged offence mentally incompetent to commit the offence and—
   (a) if so—must record a finding to that effect;
   (b) if not—must record a finding that the presumption of mental competence has not been displaced and proceed with the trial in the normal way.

(5) The court may, if the prosecution and the defence agree—
   (a) dispense with, or terminate, an investigation into a defendant's mental competence to commit an offence; and
   (b) record a finding that the defendant was mentally incompetent to commit the offence.

B—Trial of objective elements of offence

(1) If the court records a finding that the defendant was mentally incompetent to commit the offence, the court must hear evidence and representations put to the court by the prosecution and the defence relevant to the question whether the court should find that the objective elements of the offence are established.

(2) If the court is satisfied that the objective elements of the offence are established beyond reasonable doubt, the court must record a finding that the objective elements of the offence are established.

(3) If the court finds that the objective elements of the offence are established, the court must find the defendant not guilty of the offence but declare the defendant to be liable to supervision under this Part; but otherwise the court must find the defendant not guilty of the offence and discharge the defendant.

(4) On the trial of the objective elements of an offence, the court is to exclude from consideration any question of whether the defendant's conduct is defensible.

269G—What happens if trial judge decides to proceed first with trial of objective elements of offence

If the trial judge decides to proceed first with the trial of the objective elements of the offence, the court proceeds as follows.
A—Trial of objective elements of offence

(1) The court must first hear evidence and representations put to the court by the prosecution and the defence relevant to the question whether the court should find that the objective elements of the offence are established against the defendant.

(2) If the court is satisfied that the objective elements of the offence are established beyond reasonable doubt, the court must record a finding that the objective elements of the offence are established; but otherwise the court must find the defendant not guilty of the offence and discharge the defendant.

(3) On the trial of the objective elements of an offence, the court is to exclude from consideration any question of whether the defendant's conduct is defensible.

B—Trial of defendant's mental competence

(1) If the court records a finding that the objective elements of the offence are established, the court—

(a) must hear relevant evidence and representations put to the court by the prosecution and the defence on the question of the defendant's mental competence to commit the offence; and

(b) may require the defendant to undergo an examination by a psychiatrist or other appropriate expert and require the results of the examination to be reported to the court.

(2) The power to require an examination and report under subsection (1)(b) may be exercised—

(a) on the application of the prosecution or the defence; or

(b) if the judge considers the examination and report necessary to prevent a possible miscarriage of justice—on the judge's own initiative.

(3) At the conclusion of the trial of the defendant's mental competence, the court must decide whether it has been established, on the balance of probabilities, that the defendant was at the time of the alleged offence mentally incompetent to commit the offence and—

(a) if so—must declare that the defendant was mentally incompetent to commit the offence, find the defendant not guilty of the offence and declare the defendant to be liable to supervision under this Part;

(b) if not—must record a finding that the presumption of mental competence has not been displaced and proceed with the trial in the normal way.

(4) If the trial is to proceed under subsection B(3)(b), the objective elements of the offence are to be accepted as established.
(5) The court may, if the prosecution and the defence agree—
   (a) dispense with, or terminate, an investigation into a defendant's mental competence to commit an offence; and
   (b) declare that the defendant was mentally incompetent to commit the offence, find the defendant not guilty of the offence, and declare the defendant to be liable to supervision under this Part.

Division 3—Mental unfitness to stand trial

269H—Mental unfitness to stand trial

A person is mentally unfit to stand trial on a charge of an offence if the person's mental processes are so disordered or impaired that the person is—
   (a) unable to understand, or to respond rationally to, the charge or the allegations on which the charge is based; or
   (b) unable to exercise (or to give rational instructions about the exercise of) procedural rights (such as, for example, the right to challenge jurors); or
   (c) unable to understand the nature of the proceedings, or to follow the evidence or the course of the proceedings.

269I—Presumption of mental fitness to stand trial

A person's mental fitness to stand trial is to be presumed unless it is established, on an investigation under this Division, that the person is mentally unfit to stand trial.

269J—Order for investigation of mental fitness to stand trial

(1) If there are reasonable grounds to suppose that a person is mentally unfit to stand trial, the court before which the person is to be tried may order an investigation under this Division of the defendant's mental fitness to stand trial.

(2) The court's power to order an investigation into the defendant's mental fitness to stand trial may be exercised—
   (a) on the application of the prosecution or the defence; or
   (b) if the judge considers the investigation necessary to prevent a possible miscarriage of justice—on the judge's own initiative.

(3) If a court orders an investigation into the defendant's mental fitness to stand trial after the trial begins, the court may adjourn or discontinue the trial to allow for the investigation.

(4) If a court before which a preliminary examination of an indictable offence is conducted is of the opinion that the defendant may be mentally unfit to stand trial, the preliminary examination may continue, but the court must raise for consideration by the court of trial the question whether there should be an investigation under this Division of the defendant's mental fitness to stand trial.
269K—Preliminary prognosis of defendant's condition

(1) Before formally embarking on an investigation under this Division of a defendant's mental fitness to stand trial, a court may require production of psychiatric or other expert reports that may exist on the defendant's mental condition and may, if it thinks fit, itself have a report prepared on the defendant's mental condition.

(2) If it appears from a report that the defendant is mentally unfit to stand trial but there is a reasonable prospect that the defendant will regain the necessary mental capacity over the next 12 months, the court may adjourn the defendant's trial for not more than 12 months.

(3) If after the adjournment the court is of the opinion that the grounds on which the investigation was thought to be necessary no longer exist, the court may revoke the order for the investigation and the trial will then proceed in the normal way.

269L—Trial judge's discretion about course of trial

If the court orders an investigation into a defendant's mental fitness to stand trial, the question of the defendant's mental fitness to stand trial may, at the discretion of the trial judge, be separately tried before any other issue that is to be tried or after a trial of the objective elements of the alleged offence.

269M—What happens if trial judge decides to proceed first with trial of defendant's mental fitness to stand trial

If the trial judge decides that the defendant's mental fitness to stand trial is to be tried first, the court proceeds as follows.

A—Trial of defendant's mental fitness to stand trial

(1) The court—

(a) must hear relevant evidence and representations put to the court by the prosecution and the defence on the question of the defendant's mental fitness to stand trial; and

(b) may require the defendant to undergo an examination by a psychiatrist or other appropriate expert and require the results of the examination to be reported to the court.

(2) The power to require an examination and report under subsection (1)(b) may be exercised—

(a) on the application of the prosecution or the defence; or

(b) if the judge considers the examination and report necessary to prevent a possible miscarriage of justice—on the judge's own initiative.

(3) At the conclusion of the trial of the defendant's mental fitness to stand trial, the court must decide whether it has been established, on the balance of probabilities, that the defendant is mentally unfit to stand trial and—

(a) if so—must record a finding to that effect;

(b) if not—must proceed with the trial in the normal way.
(5) The court may, if the prosecution and the defence agree—
   (a) dispense with, or terminate, an investigation into a defendant's fitness to stand trial; and
   (b) record a finding that the defendant is mentally unfit to stand trial.

**B—Trial of objective elements of offence**

(1) If the court records a finding that the defendant is mentally unfit to stand trial, the court must hear evidence and representations put to the court by the prosecution and the defence relevant to the question whether a finding should be recorded under this section that the objective elements of the offence are established.

(2) If the court is satisfied beyond reasonable doubt that the objective elements of the offence are established, the court must record a finding to that effect and declare the defendant to be liable to supervision under this Part; but otherwise the court must find the defendant not guilty of the offence and discharge the defendant.

(3) On the trial of the objective elements of an offence under this section, the court is to exclude from consideration any question of whether the defendant's conduct is defensible.

**269N—What happens if trial judge decides to proceed first with trial of objective elements of offence**

If the trial judge decides to proceed first with the trial of the objective elements of the offence, the court proceeds as follows.

**A—Trial of objective elements of offence**

(1) The court must first hear evidence and representations put to the court by the prosecution and the defence relevant to the question whether the court should find that the objective elements of the offence are established.

(2) If the court is satisfied beyond reasonable doubt that the objective elements of the offence are established, the court must record a finding to that effect; but otherwise the court must find the defendant not guilty of the offence and discharge the defendant.

(3) On the trial of the objective elements of an offence under this section, the court is to exclude from consideration any question of whether the defendant's conduct is defensible.

**B—Trial of defendant's mental fitness to stand trial**

(1) If the court records a finding that the objective elements of the offence are established, the court—
   (a) must hear relevant evidence and representations put to the court by the prosecution and the defence on the question of the defendant's mental fitness to stand trial; and
(b) may require the defendant to undergo an examination by a psychiatrist or other appropriate expert and require the results of the examination to be reported to the court.

(2) The power to require an examination and report under subsection (1)(b) may be exercised—

(a) on the application of the prosecution or the defence; or

(b) if the judge considers the examination and report necessary to prevent a possible miscarriage of justice—on the judge's own initiative.

(3) If the court is satisfied on the balance of probabilities that the defendant is mentally unfit to stand trial, the court must record a finding to that effect and declare the defendant to be liable to supervision under this Part.

(4) If the court is not satisfied on the balance of probabilities that the defendant is mentally unfit to stand trial, the court must proceed with the trial of the remaining issues (or may, at its discretion, re-start the trial).

(5) The court may, if the prosecution and the defence agree—

(a) dispense with, or terminate, an investigation into a defendant's mental fitness to stand trial; and

(b) declare that the defendant is mentally unfit to stand trial, and declare the defendant to be liable to supervision under this Part.

Division 4—Disposition of persons declared to be liable to supervision under this Part

269O—Supervision

(1) The court by which a defendant is declared to be liable to supervision under this Part may—

(a) release the defendant unconditionally; or

(b) make an order (a supervision order)—

(i) committing the defendant to detention under this Part; or

(ii) releasing the defendant on licence on the following conditions:

(A) the conditions imposed by subsection (1a);

(B) any other conditions decided by the court and specified in the licence.

(1a) Subject to this Act, every licence under subsection (1)(b)(ii) is subject to the following conditions:

(a) a condition prohibiting the defendant from possessing a firearm or ammunition (both within the meaning of the Firearms Act 1977) or any part of a firearm;
(b) a condition requiring the defendant to submit to such tests (including testing without notice) for gunshot residue as may be reasonably required by a person or body specified by the court.

(1b) A court may only vary or revoke the conditions imposed by subsection (1a) if the defendant satisfies the court, by evidence given on oath, that—

(a) there are cogent reasons to do so; and

(b) the possession of a firearm, ammunition or part of a firearm by the defendant does not represent an undue risk to the safety of the public.

(2) If a court makes a supervision order, the court must fix a term (a \textit{limiting term}) equivalent to the period of imprisonment or supervision (or the aggregate period of imprisonment and supervision) that would, in the court's opinion, have been appropriate if the defendant had been convicted of the offence of which the objective elements have been established\(^1\).

(3) At the end of the limiting term, a supervision order in force against the defendant under this Division lapses.

\textbf{Note—}

\(^1\) The court should fix a limiting term by reference to the sentence that would have been imposed if the defendant had been found guilty of the relevant offence and without taking account of the defendant's mental impairment.

\textbf{269OA—Court may direct defendant to surrender firearm etc}

(1) The court by which a defendant is declared to be liable to supervision under this Part may, in relation to a supervision order that is subject to the condition imposed by section 269O(1a)(a), direct the defendant to surrender forthwith at a police station specified by the court any firearm, ammunition or part of a firearm owned or possessed by the defendant.

(2) No criminal liability attaches to a person to the extent that he or she is complying with a direction under this section.

(3) The Commissioner of Police must deal with any surrendered firearm, ammunition or part of a firearm in accordance with the scheme set out in the regulations.

(4) No compensation is payable by the Crown or any other person in respect of the exercise of a function or power under this section.

(5) The regulations may provide for the payment, recovery or waiver of fees in respect of this section.

\textbf{269P—Variation or revocation of supervision order}

(1) At any time during the limiting term, the court may, on the application of the Crown, the defendant, Parole Board, the Public Advocate or another person with a proper interest in the matter, vary or revoke a supervision order and, if the order is revoked, make, in substitution for the order, any other order that the court might have made under this Division in the first instance.

(2) If the court refuses an application by or on behalf of a defendant for variation or revocation of a supervision order, a later application for variation or revocation of the order cannot be made by or on behalf of the defendant for six months or such greater or lesser period as the court may direct on refusing the application.
269Q—Report on mental condition of the defendant

(1) If a defendant is declared to be liable to supervision under this Part, the Minister must, within 30 days after the date of the declaration, prepare and submit to the court by which the declaration was made a report, prepared by a psychiatrist or other appropriate expert, on the mental condition of the defendant containing—

(a) a diagnosis and prognosis of the condition; and

(b) a suggested treatment plan for managing the defendant's condition.

(2) If a supervision order is made against the defendant, the Minister must arrange to have prepared and submitted to the court, at intervals of not more than 12 months during the limiting term, a report containing—

(a) a statement of any treatment that the defendant has undergone since the last report; and

(b) any changes to the prognosis of the defendant's condition and the treatment plan for managing the condition.

269R—Reports and statements to be provided to court

(1) For the purpose of assisting the court to determine proceedings under this Division, the Crown must provide the court with a report setting out, so far as reasonably ascertainable, the views of—

(a) the next of kin of the defendant; and

(b) the victim (if any) of the defendant's conduct; and

(c) if a victim was killed as a result of the defendant's conduct—the next of kin of the victim.

(2) A report is not, however, required under subsection (1) if the purpose of the proceeding is—

(a) to determine whether a defendant who has been released on licence should be detained or subjected to a more rigorous form of supervision; or

(b) to vary, in minor respects, the conditions on which a defendant is released on licence.

(3) If a court is fixing a limiting term in proceedings under this Division relating to an alleged indictable offence or prescribed summary offence, a person who has suffered injury, loss or damage resulting from the defendant's conduct may furnish the court with a statement of a kind referred to in section 7A of the Criminal Law (Sentencing) Act 1988 (a victim impact statement), as if the defendant had been convicted of the offence and the court was determining sentence (and the court must deal with the statement in all respects as if it were a statement furnished under that section).

(4) However, the court need not comply with section 7A(3b) and (3c) of the Criminal Law (Sentencing) Act 1988 if the court is satisfied that—

(a) the defendant is incapable of understanding the victim impact statement; or

(b) having regard to the nature of the defendant's mental impairment, it would be inappropriate for the defendant to be present.
(5) If a court is fixing a limiting term in proceedings under this Division, the Crown or the Commissioner for Victim's Rights may furnish the court with a statement of a kind referred to in section 7B of the Criminal Law (Sentencing) Act 1988 (a *neighbourhood impact statement* or a *social impact statement*) as if the court were determining sentence for an offence (and the court must deal with the statement in all respects as if it were a statement furnished under that section).

(6) In this section—

*a prescribed summary offence* has the same meaning as in section 7A of the Criminal Law (Sentencing) Act 1988.

**269S—Principle on which court is to act**

In deciding whether to release a defendant under this Division, or the conditions of a licence, the court must apply the principle that restrictions on the defendant's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community.

**269T—Matters to which court is to have regard**

(1) In deciding proceedings under this Division, the court should have regard to—

(a) the nature of the defendant's mental impairment; and

(b) whether the defendant is, or would if released be, likely to endanger another person, or other persons generally; and

(c) whether there are adequate resources available for the treatment and support of the defendant in the community; and

(d) whether the defendant is likely to comply with the conditions of a licence; and

(e) other matters that the court thinks relevant.

(2) The court cannot release a defendant under this Division, or significantly reduce the degree of supervision to which a defendant is subject unless the court—

(a) has considered at least three reports (*expert reports*) each prepared by a different psychiatrist or other appropriate expert who has personally examined the defendant, on—

( i) the mental condition of the defendant; and

(ii) the possible effects of the proposed action on the behaviour of the defendant; and

(b) has considered the report most recently submitted to the court by the Minister under this Division; and

(c) has considered the report on the attitudes of victims and next of kin prepared under this Division; and

(d) is satisfied that—

(i) the defendant's next of kin; and

(ii) the victim (if any) of the defendant's conduct; and
(iii) if a victim was killed as a result of the defendant's conduct—the next of kin of the victim,

have been given reasonable notice of the proceedings.

(2a) However, the court may act on the basis of one or two expert reports if—

(a) the supervision order arose from proceedings based on a charge of a summary (rather than an indictable) offence; and

(b) satisfied that, in the circumstances of the case, the report or reports adequately cover the matters on which the court needs expert advice.

(3) Notice need not be given under subsection (2)(d) to a person whose whereabouts have not, after reasonable inquiry, been ascertained.

269U—Revision of supervision order

(1) If a person who has been released on licence under this Division contravenes or is likely to contravene a condition of the licence, the court by which the supervision order was made may, on application by the Crown (which may be made, in a case of urgency, by telephone), review the supervision order.

(2) After allowing the Crown and the person subject to the order a reasonable opportunity to be heard on the application for review, the court may—

(a) confirm the present terms of the supervision order; or

(b) amend the order so that it ceases to provide for release on licence and provides instead for detention; or

(c) amend the order by varying the conditions of the licence,

and make any further order or direction that may be appropriate in the circumstances.

(3) When an application for review of a supervision order is made, the court may issue a warrant to have the person subject to the order arrested and brought before the court and may, if appropriate, make orders for detention of that person until the application is determined.

269V—Custody, supervision and care

(1) If a defendant is committed to detention under this Part, the defendant is in the custody of the Minister and the Minister may give directions for the custody, supervision and care of the defendant the Minister considers appropriate.

(2) The Minister may—

(a) place the defendant under the custody, supervision and care of another; and

(b) if there is no practicable alternative—direct that a defendant be kept in custody in a prison.

(3) Supervisory responsibilities arising from conditions on which a person is released on licence are to be divided between the Parole Board and the Minister in the following way:

(a) the supervisory responsibilities are to be exercised by the Minister insofar as they relate to treating or monitoring the mental condition of the person; and
(b) the supervisory responsibilities are in all other respects to be exercised by the Parole Board.

(4) The Minister or the Parole Board (as the case may be) may delegate a power or function under this section—

(a) to a person for the time being performing particular duties or holding or acting in a particular position; or

(b) to any other person or body that, in the delegator's opinion, is competent to perform or exercise the relevant functions or powers.

(5) A delegation under subsection (4)—

(a) must be by instrument in writing; and

(b) may be absolute or conditional; and

(c) does not derogate from the ability of the delegator to act in any matter; and

(d) is revocable at will by the delegator.

269VA—Effect of supervening imprisonment

(1) If a person who has been released on licence under this Division commits an offence while subject to the licence and is sentenced to imprisonment for the offence, the supervision order is suspended for the period the person is in prison serving the term of imprisonment.

(2) In determining when the term of a supervision order comes to an end, the period of a suspension under subsection (1) is not to be taken into account.

Division 5—Miscellaneous

269W—Counsel to have independent discretion

(1) If the defendant is unable to instruct counsel on questions relevant to an investigation under this Part, the counsel may act, in the exercise of an independent discretion, in what he or she genuinely believes to be the defendant's best interests.

(2) If the counsel for the defendant in criminal proceedings (apart from proceedings under this Part) has reason to believe that the defendant is unable, because of mental impairment, to give rational instructions on questions relevant to the proceedings (including whether to be tried by judge alone), the counsel may act, in the exercise of an independent discretion, in what the counsel genuinely believes to be the defendant's best interests.

269WA—Power to order examination etc in pre-trial proceedings

(1) If in pre-trial proceedings it appears to the court that it might expedite the trial to order the examination of the defendant under this section in anticipation of trial, the court may, by order—

(a) require the defendant to undergo an examination by a psychiatrist or other appropriate expert; and

(b) require that the results of the examination be reported to the court.

(2) The prosecution and the defence are entitled to access to the report.
269X—Power of court to deal with defendant before proceedings completed

(1) If there is to be an investigation into a defendant's mental competence to commit an offence, or mental fitness to stand trial, or a court conducting a preliminary examination reserves the question whether there should be such an investigation for consideration by the court of trial, the court by which the investigation is to be conducted, or the court reserving the question for consideration, may—

(a) release the defendant on bail to appear later for the purposes of the investigation; or

(b) commit the defendant to an appropriate form of custody (but not a prison unless the court is satisfied that there is, in the circumstances, no practicable alternative) until the conclusion of the investigation.

(2) If a court declares a defendant to be liable to supervision under this Part, but unresolved questions remain about how the court is to deal with the defendant, the court may—

(a) release the defendant on bail to appear subsequently to be dealt with by the court; or

(b) commit the defendant to some appropriate form of custody (but not a prison unless the court is satisfied that there is, in the circumstances of the case, no practicable alternative) until some subsequent date when the defendant is to be brought again before the court.

269Y—Appeals

(1) An appeal lies to the appropriate appellate court against a declaration that a defendant is liable to supervision under this Part in the same way as an appeal against a conviction.

(2) An appeal lies to the appropriate appellate court against a supervision order in the same way as an appeal against sentence.

(3) An appeal lies with the permission of the court of trial or the appropriate appellate court against a key decision by the court of trial.

(4) A key decision is—

(a) a decision that the defendant was, or was not, mentally competent to commit the offence charged against the defendant; or

(b) a decision that the defendant is, or is not, mentally unfit to stand trial; or

(c) a decision that the objective elements of an offence are established against the defendant.

(5) On an appeal, the appellate court may exercise one or more of the following powers:

(a) confirm, set aside, vary or reverse a decision of the court of trial;

(b) direct a retrial of the case or an issue arising in the case;

(c) make any finding or exercise any power that could have been made or exercised by the court of trial;

(d) make ancillary orders and directions.
269Z—Counselling of next of kin and victims

(1) If an application is made under Division 4 that might result in a defendant being released from detention, the Minister must ensure that counselling services in respect of the application are made available to—

(a) the defendant's next of kin; and
(b) the victim (if any) of the defendant's conduct; and
(c) if a victim was killed as a result of the defendant's conduct—the next of kin of the victim.

(2) A person does not, in disclosing information about the defendant during the course of providing counselling under this section, breach any code or rule of professional ethics.

269ZA—Exclusion of evidence

A finding made on an investigation into a defendant's fitness to stand trial does not establish an issue estoppel against the defendant in any later (civil or criminal) proceedings, and evidence of such a finding is not admissible against the defendant in criminal proceedings against the defendant.

269ZB—Arrest of person who escapes from detention etc

(1) If a person who is committed to detention under this Part—

(a) escapes from the detention; or
(b) is absent, without proper authority, from the place of detention,

the person may be arrested without warrant, and returned to the place of detention, by a member of the police force or an authorised person.

(2) A Judge or other proper officer of a court by which a person is released on licence under this Part may, if satisfied that there are proper grounds to suspect that the person may have contravened or failed to comply with a condition of the licence, issue a warrant to have the person arrested and brought before the court.