GOVERNMENT RESPONSE TO

LAW COMMISSION REPORT

ON

MENTAL IMPAIRMENT DECISION-MAKING AND THE INSANITY DEFENCE

Presented to the House of Representatives

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Introduction

1. The Government has considered the Law Commission's report *Mental Impairment Decision-making and the Insanity Defence* (NZLC R121) tabled in Parliament on 22 December 2010, and responds to the report in accordance with Cabinet Office Circular CO (09) 1.

2. The Government is in the process of reviewing the Criminal Procedure (Mentally Impaired Persons) Act 2003 (the CP(MIP) Act) and its interface with associated legislation. The Government's review has a wider focus than the Commission's report and it will examine issues with the practical application of the legislative regime highlighted by Government agencies, legal counsel, mental health workers, and from judgments given in the High Court and Court of Appeal.

3. The Government agrees with the Commission's recommendation not to change the insanity defence in section 23 of the Crimes Act 1961. The Commission's other recommendations propose reform of the CP(MIP) Act and other related Acts. The Government will consider these amendments in mid 2012, in the context of any changes to the CP(MIP) Act resulting from its own review of the Act and associated legislation.

Law Commission Report and Government Response

BACKGROUND

4. In New Zealand, the insanity defence is used in only a tiny proportion of criminal cases. It is run between 30 and 40 times each year and is successful about 10 times.[1] However the consequences for people acquitted on account of insanity are serious. They are likely to be detained for some years in a mental health facility, for periods that have some correlation with the time they would have served if found guilty of the offence.[2] Therefore it is important that the defence is appropriate and workable.

5. In October 2004, the then Government asked the Commission to review the defence of insanity (section 23 of the Crimes Act 1961) and in particular to consider:

   - whether the defence is appropriate in its nature and scope;
   - if not, whether it should be abolished or modified;
   - the way in which the defence should be put to and considered by the court; and
   - issues relating to the burden and standard of proof.[3]

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[1] Dr Rees Tapsell, *Forensic Psychiatry and the Law A Judicial Update*, Wellington (7 November 2005).
[2] Skipworth et al, *Insanity Acquitee Outcomes in New Zealand*, (2006) 40 Australian and New Zealand Journal of Psychiatry 1003-1009.
[3] Terms of Reference for the Law Commission's project on Criminal Defences (Insanity & Partial Defences) (1 October 2004).

6. The Law Commission's report, *Mental Impairment Decision-making and the Insanity Defence*, addresses the above terms of reference. The report also covers Ministerial decision-making under the CP(MIP) Act. For example, once a defendant is acquitted as "not guilty by reason of insanity", the person is then subject to Ministerial decision-making about their continued detention or release. The Commission notes its serious concern with Ministerial decision-making in this context.

Recommendations 1 and 2

The insanity defence: section 23 of the Crimes Act 1961

7. Section 23 of the Crimes Act 1961, which defines the insanity defence, provides:

> (1) Every one shall be presumed to be sane at the time of doing or omitting any act until the contrary is proved.
>
> (2) No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility or disease of the mind to such an extent as to render him incapable—
>
> (a) Of understanding the nature and quality of the act or omission; or
> (b) Of knowing that the act or omission was morally wrong, having regard to the commonly accepted standards of right and wrong.

8. The Law Commission report examines issues with the insanity defence, including:

- the mixed purpose of the defence. Section 23(2)(b) partly protects certain defendants, by shielding them from a criminal conviction. Section 23(2)(a) protects the community, by ensuring that a defendant who would otherwise be entitled (under normal principles of criminal liability) to an acquittal can be detained;
- the archaic and inappropriate terminology (eg "imbecility");
- the gulf between language and case law on the one hand, and on the other, psychiatric concepts and practices; and
- the anomalous results produced in some cases, for example, classification of hyperglycaemia as a disease of the mind, and hypoglycaemia as not.

9. The Law Commission considered the following options for reforming the insanity defence:

- abolition;
- update the language of the qualifying mental conditions; and
- revise the cognitive impairment part of the defence.

10. Overall, the Law Commission did not consider any of the alternative approaches to be good ones. In terms of stakeholder consultation, the overwhelming response the Commission received was that, "broadly speaking, the defence is workable, in spite of its flaws".[4] Therefore, although problems with the insanity defence are not insignificant, the Law Commission has not recommended its reform.

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[4] Law Commission, *Mental Impairment Decision-Making and the Insanity Defence*, Report 120 (2010) p 7.

Procedural Issues

11. The Commission also considered three procedural issues, none of which are provided for in section 23 of the Crimes Act 1961 itself, but which have a bearing on the operation of the insanity defence:

    - the burden and standard of proof;
    - the nature of the verdict; and
    - whether the Crown should be permitted to put the insanity defence in issue, in cases where there is evidence of mental impairment, but the defence has not done so.

12. As a result of its consideration of these issues, the Law Commission recommends a new statutory provision in the CP(MIP) Act for the Crown, by leave of the judge, to adduce evidence of insanity, in cases where the defence has put his or her mental capacity for criminal intent in issue, without raising the insanity defence.

Response

13. The Government accepts that the defence of insanity contains flaws and supports the recommendation of the Law Commission not to reform the defence.

14. In order to reform the insanity defence, it would be important to have viable alternatives to the defence as its stands. The research contained in the report regarding other jurisdictions and their use (or not) of the alternatives available for reform, shows that there would be little change to outcomes if the defence was reformed. The Government agrees the options available to reform the defence will not provide a satisfactory alternative to the current law and would be unlikely to provide any greater certainty.

15. The Government considers that an amendment to the CP(MIP) Act allowing the Crown to adduce evidence of insanity by leave of the judge has merit and should be considered in the context of the Government's wider review of the Act.

Recommendations 3, 4, 5, 14 – 25, 27, 32 – 38, 41 and 42

The Commission proposes a new tribunal to take over ministerial responsibility for mental health and intellectual disability decision-making

16. Under section 24 of the CP(MIP) Act, a person found not guilty by reason of insanity must be detained in a hospital as a special patient or special care recipient, if the court is satisfied that the making of such an order is necessary in the interests of the public or any affected person. That person is then subject to Ministerial decision-making about their continued detention. The Law Commission states Ministerial decision-making is widely regarded as much more problematic than the insanity defence itself. The same issue also affects two other groups: the unfit to stand trial, and restricted patients.

17. At present, the Minister of Health and/or the Attorney-General have responsibility for decisions about the detention of persons acquitted on account of insanity or persons unfit to stand trial. For example, an acquitted person must be detained until the Minister of Health orders that he or she:

- can be held as a patient or care recipient rather than a special patient or special care recipient (reclassified);
- can be discharged from compulsory status; or
- can be given long leave from detention.

18. The Commission's report lists several problems with Ministerial decision-making:

- the risk of politicised decisions, resulting in Ministers being more risk averse at times (such as election year or in dealing with a particularly high profile case);
- increased stress on patients from delays, media coverage and public backlash that can exacerbate unwellness;
- unnecessarily prolonged detention periods ("The pattern of detention observed was not thought by the authors to be justified by the patients' clinical risk");[5]
- procedural limitations in that decisions are made on the papers, in contrast to an open tribunal so victims must be told what has been decided, and may feel that they have had no opportunity for meaningful input;
- the Minister of Health is not obliged to give reasons for his or her decisions and there is no right of appeal against Executive decisions except judicial review; and
- delays between responsible clinicians' reports and a Ministerial decision on how to respond. The Commission notes there were differing views about the existence and size of this issue.

19. In the view of the Commission and other stakeholders these problems are such that Ministerial decision-making "requires prompt and significant reform".[6] The Commission therefore recommends removing Ministers from the process, and establishing a new tribunal (a "Special Patients' Review Tribunal"), to take over the Ministerial functions.

Response

20. The Government agrees with the Commission that there is an issue with Ministerial decision-making and the proposal for an independent tribunal has merit. It is appropriate therefore to consider the need for a tribunal in the context of the Government's wider review of the CP(MIP) Act.

21. If the decision is made to go ahead with a new tribunal, the Commission has made detailed and useful recommendations to consider regarding its scope and operation.

[5] *Ibid* p 72.
[6] *Ibid* p 9.

Recommendations 6 – 13, 26, 28 – 31, 39, 40

The Commission recommends other amendments to the CP(MIP) Act

22. The Commission considers the Attorney-General's involvement in section 31(2) cases, when the person is found to be no longer unfit to stand trial, seems appropriate[7]. If or when an alleged offender becomes fit to stand trial, the Commission finds it is right for the Attorney-General to be involved, on behalf of the state, in determining whether the person should be brought before a court, or absolved from criminal responsibility. However, the Commission recommends that the Attorney-General's involvement under section 31(3) be revised.

23. The Commission recommends decisions under section 31(3) regarding the rare case of a patient still unfit to stand trial but clinically eligible for a change of status should be based upon a solely clinical assessment by a new (non-Ministerial) decision-maker, without the involvement of the Attorney-General.[8] Consequently:

    - section 32 should be amended so that it would remain open to the Crown to reactivate criminal charges if a patient whose "special" status has been altered under section 31(3) subsequently becomes fit to stand trial;[9] and

    - for persons whose status has changed under section 31(3), and who may then be subsequently released into the community at some future time, statutory mechanisms for reviewing their fitness to stand trial will be necessary.[10]

24. In section 31(4) cases, in which the maximum period for detention has expired, change of status is mandatory; there is no element of discretion. The Commission therefore recommends that the function of the Attorney-General should be replaced by senior officials at the Ministry of Health.[11]

25. For those who have been released from compulsory status prior to the expiry of what would otherwise have been the maximum detention period, the Commission recommends that there should be a statutory requirement that they submit themselves periodically for assessment of their fitness to stand trial.[12]

26. While there are very few restricted patients, the Commission recommends that decision-making processes for restricted patients, currently provided for in section 78 of the Mental Health (Compulsory Assessment and Treatment) Act 1992, should be aligned with their other proposals discussed above.[13]

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[7] Recommendation 6.
[8] Recommendation 7.
[9] Recommendation 8.
[10] Recommendation 10.
[11] Recommendation 9.
[12] Recommendation 11.
[13] Recommendations 12 and 13

27. Section 31 of the CP(MIP) Act presently provides only for reclassification of a special patient to a patient or a special care recipient to a care recipient. The Commission recommends an amendment to permit immediate discharge of special patients and special care recipients because "they do not always meet civil committal criteria for mental disorder as defined in the Mental Health (Compulsory Assessment and Treatment) Act 1992". The result is that a person would be inevitably discharged via a convoluted process. "It would make much more sense simply to empower the Tribunal to reach that result directly."[14]

28. Recommendations 28 – 31 propose changes to the grounds for a change of person's status so that they are consistent, regardless of whether a case is governed by sections 31(3) or 33 of the CP(MIP) Act or section 78 of the Mental Health (Compulsory Assessment and Treatment) Act 1992. The Commission recommends that redrafted decision-making grounds should also provide that the safety of the public or any person or class of person is the paramount consideration, and that interference with the patient's freedom and personal autonomy should be kept to the minimum that is consistent with this objective.

29. While recommending no change to the current administration of short term leave by the Ministry of Health,[15] the Law Commission recommends abolishing the distinction between persons unfit to stand trial, who are currently not permitted long leave, and persons acquitted on account of insanity.[16]

Response

30. The Government considers these recommended amendments would improve the workings and consistency of decision-making processes under the relevant sections of CP(MIP) Act. These recommendations will be considered in the context of any changes that may result from the Government's review of the CP(MIP) Act and its associated legislation.

Conclusion

31. The Government accepts that the defence of insanity contains flaws and supports the recommendation of the Law Commission not to reform the defence.

32. The Government agrees with the Commission's assessment there are issues with Ministerial decision-making under the CP(MIP) Act. If the decision is made to go ahead with an independent tribunal, the Law Commission has made detailed and useful recommendations to consider regarding its scope and operation.

33. The Commission's recommendations for reform of the CP(MIP) Act and related legislation have merit and will be considered within the context of the Government's own review of that Act, in mid 2012.

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[14] Recommendation 26.
[15] Recommendation 39.
[16] Recommendations 40.