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Should infanticide be retained in one form or another or should it be abolished altogether?

Should the offence/defence of infanticide be amended?

SELECT BIBLIOGRAPHY

TERMS OF REFERENCE

On 17 March 1993, the Attorney General, the Hon John P Hannaford, MLC, gave the New South Wales Law Reform Commission the following terms of reference:

> to review the partial defences of infanticide, provocation and diminished responsibility under s 22A, 23 and 23A of the *Crimes Act* 1900 (NSW) respectively;
>
> to develop proposals for reform and clarification of the substantive elements of the defences.

PARTICIPANTS

The Law Reform Commission is constituted by the *Law Reform Commission Act* 1967. For the purpose of this reference, the Chairman, in accordance with the Act, created a Division comprising the following members of the Commission:

> The Hon R M Hope QC (until 2 April 1993)
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> The Hon G J Samuels QC (from 3 April 1993)
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SUBMISSIONS

The Commission invites submissions on the issues raised in this Discussion Paper. Submissions and comments should reach the Commission by **29 October 1993**. Suggestions for further issues which should be considered are welcome.

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Who can make a submission?

Anyone may make a submission or comment. If you have an opinion on the matters under review or personal experience of the issues involved the Commission would like to hear from you. You do not need legal qualifications to make a submission although the Commission welcomes input from the legal community.

Use of submissions and confidentiality

Submissions may be used by the Commission in two ways:

1. Because the law reform process is a public one, copies of submissions are normally made available by the Commission on request to other persons or organisations. If you would like your submission to be treated as confidential, please indicate this in your written submission or oral comments. Any request for a copy of a submission marked “confidential” will be determined in accordance with the *Freedom of Information Act* 1989 (NSW).

2. In preparing its Report the Commission will make reference to submissions made in response to this Discussion Paper. However a request for confidentiality will be respected by the Commission in relation to the publication of submissions.

Thus, if you would like your submission to be treated as confidential, please indicate this on your written submission or when making oral comments.

1. Introduction

BACKGROUND TO THE REFERENCE

1.1 Over the years there have been numerous criticisms of the so-called "partial defences" by judges, academics, practitioners and law reformers. In the recent case of *R v Chayna,*[1] his Honour Justice Murray Gleeson, the Chief Justice of New South Wales, called for reform of the defence of diminished responsibility. In that case the differing expert opinions of seven psychiatrists highlighted the difficulties for the jury in the application of the defence. Accordingly, the Attorney General, on 17 March 1993, referred the matter to the Commission along with terms of reference covering the other partial defences for which statutory provision is made in the *Crimes Act* 1900 (NSW).[2]

WHAT ARE THE PARTIAL DEFENCES?

1.2 The existing partial defences - infanticide, provocation and diminished responsibility - operate to reduce a person's liability for an unlawful homicide from murder to manslaughter. The defences are "partial" in the sense that they do not operate to deliver an outright acquittal (that is, to exculpate fully), as is the case with the other "complete" defences, such as duress and self-defence. In addition to operating as a partial defence, infanticide also constitutes a substantive offence that may be charged from the outset.

1.3 It is critical to be aware of the historical context in which the partial defences emerged. When these defences were judicially developed (provocation) or were enacted (diminished responsibility and infanticide) the penalty for murder was either death or a mandatory life sentence. The partial defences operated to reduce the charge from murder to manslaughter, thus offering the sentencing judge some flexibility to fashion an appropriate punishment based on the circumstances of the particular case. This situation no longer pertains in New South Wales. The death penalty was abolished in this State in 1955[3] and the mandatory life sentence for murder in 1982.[4] Since 1989 there is no longer even a *presumption* that a life sentence will be imposed for murder.[5] It is important to consider the partial defences in this context because it may be that, with their original rationale gone, they are no longer necessary.

THE PARTIAL DEFENCES AND THE SOCIAL REALITY OF HOMICIDE

1.4 Chapters 3, 4 and 5 present the "black letter law" view of the partial defences. This is, however, only a small part of the overall picture. Recent investigations into the law of homicide have stressed the necessity of viewing that crime in a contextual way. Thus:

> the social reality of homicide encompasses an analysis of four essential elements: the perpetrator, the victim, the act of violence itself, and the social context in which it occurs.[6]

It is beyond the scope of this Paper to conduct a detailed empirical investigation into the nature, incidence and classification of homicide. That task has been undertaken by others.[7] Because they are the most recent, it may be worth noting a few of the Victorian findings in order to provide a context for consideration of the partial defences. Note, however, that the defence of diminished responsibility is not available in Victoria and that the mandatory life sentence for murder was only abolished in that State in 1986. The study found that:[8]

> 27.9% of victims were related to the killer and 33.9% were in "special relationships" (which include family, sexual intimates and so on);
>
> 31.3% of all homicides occurred in a "domestic context" (probably understated because the study does not include murder-suicides) and 30.7% occur in an "argument context";
>
> 70% of female offenders killed in a "domestic context" compared with 24.6% of men;
>
> 65% of female victims were killed in a "domestic context" compared with 17.5% of male victims;

in 55% of "domestic context" killings there was a background of domestic violence (this figure is also probably understated);

women homicide offenders killed a member of their family in 68% of cases and male offenders in 21% of cases;

in 86% of cases the offender was male: 72.3% of their victims were men, 27.7% were women;

women killed far less frequently than men and 72.3% of their victims were men;

12.3% of offenders were found to have some mental disorder but this probably understates the incidence of such disorders;

75% of homicide offenders were charged with and committed for murder but only 65% were presented for murder; a presentment for murder was less likely in the "domestic context" cases;

only 27.7% of homicide offenders were convicted of murder; 67.4% were convicted of manslaughter and 17.2% of all presented cases resulted in acquittals; and

all those convicted of murder in the "domestic context" cases were men.[9]

1.5 In a study of homicide between adult sexual intimates in Victoria and New South Wales, Easteal discovered the following facts about verdicts and sentences:[10]

In NSW, 57% of cases were dealt with by way of a plea of guilty to manslaughter (compared with only 16.7% in Victoria); 30% of guilty verdicts were for murder in NSW (compared with 63% in Victoria).

In both jurisdictions, 41% of males were convicted of murder, compared with 5% of women. By contrast 65% of women were convicted of manslaughter compared with 43% of men.

Sentences for both murder and manslaughter were generally low. Thus 50% of offenders received a minimum sentence of less then ten years. Female offenders generally received lighter sentences, probably because they are rarely convicted of murder. For example, over 50% of women received a sentence of 0-5 years compared with 20% of men. Aboriginal offenders also received lighter sentences, again because they are rarely convicted of murder and because of the preponderance of women in the sample (which was very small).

Case studies detailing the events, the charges, the verdicts and the sentences reveal no particular pattern. That is, instead of there being a constant set of factors informing the exercise of the prosecutorial and sentencing discretions, Easteal found a "rather random and highly discretionary series of choices by the Crown, the juries and judges".[11] For example, there appears to be no essential difference between cases in which pleas to manslaughter were accepted and cases in which a murder trial was held. However, it did emerge that plea bargaining did not affect the sentence, that the length of sentence was similar whether the defendant pleaded guilty to manslaughter or was convicted by the jury and, of course, that murder verdicts resulted in higher sentences then manslaughter verdicts. Both gender and Aboriginality influenced the charge and sentence. Apparently this was because these killings tended more often to be unpremeditated and involved a degree of victim precipitation.

Finally, it was found that "the most recurrent theme in the killings by both men and women was the antecedents of physical and emotional violence towards the woman".[12]

1.6 These studies raise some very interesting issues and provide something of a demographic portrait of the nature of homicide and its treatment by the criminal process.[13] Unfortunately, the collected data cannot really capture the concrete human stories on which they are based. These are stories which a legal investigation finds difficult to tell. But in considering the moral dilemmas, the policy questions and the often tragic human situations involved where issues of provocation, diminished responsibility and infanticide are raised, some understanding of the type of cases involved is necessary. To provide this context consider the following stories. They are drawn in

the most part from the facts of decided cases, both here and in other jurisdictions, but some are an amalgam of a number of cases. They are, of course, only partial - much has been omitted and the specificity of every case cannot be reduced to a set of common indicia. Nevertheless they do convey something that will fill out the legal picture in the following chapters and we hope that the reader will bear them in mind as he or she reads the rest of this Paper.

Story 1

Adam and June had been married for 27 years. During these years Adam had brutalised both June and their three children. He had long subjected his daughters to incest and had made death threats to them to prevent them from leaving home. Sometimes he raped his daughters at knife point and sometimes he inflicted injuries on them with a knife. June was scared of her husband and her daily life was permeated by this fear. She never knew when she might next be beaten. She also did not know that Adam had been raping the children. One day her daughter told her of what had happened. June's fear and desperation at her and her daughters' situation grew. The next day, as they went to bed, Adam hugged June and told her how much he loved her. He said that their daughters would not be leaving home as they had threatened but that they could live together as one big happy family forever. Shortly after, while he slept, June killed her husband with a kitchen knife. At her murder trial, June raised the defence of provocation.

Story 2

Jeremy had bashed his de-facto wife Sari for many years. He didn't do it regularly but when he was drunk it was particularly bad although he said he was contrite afterwards. Once Jeremy beat Sari so badly that she had to be hospitalised and Jeremy was arrested and charged by the police, convicted and put on probation. After this, Sari took their daughter Em and left. Although Jeremy begged, Sari refused to return to him. Finally when he had come round to her new home in breach of a court order, she told him that she hated him, that she wasn't scared of him any more, that she had a new lover and that Em was not his child. On hearing this, Jeremy shot his wife with a gun he had brought to the house with him. On trial for murder, Jeremy argued that he had been provoked to kill Sari.

Story 3

Abel's daughter had left home in circumstances which were profoundly at odds with the cultural and religious practices of her parents. She had been involved sexually with a man of a different ethnic background and they were not married. This caused both Abel and his wife a great deal of grief. They felt that they had lost their daughter and that she had lost her heritage and religion. One day Abel visited his daughter at her new home hoping to convince her to come back home with him. To his horror, he found her in bed with her boyfriend. He grabbed a heavy statue from the mantelpiece and hit his daughter on the head. She died from the blow and at his trial on the charge of murder Abel raised the defence of provocation.

Story 4

David had always had behavioural problems, when he was a child he was violent and unruly and his adoptive family found him very difficult to deal with. He had a number of convictions for unprovoked violence. He had spent a much of his life after the age of 12 in mental institutions, juvenile correction institutions and prisons. On trial for the murder of a sexual partner, it was found that he suffered from brain damage causing him to act in an uncontrolled or aggressive way if provoked or if he had been drinking. He pleaded not guilty to murder on the basis of diminished responsibility.

Story 5

Hilda had lived in an abusive relationship for over twenty years. Her husband was physically abusive and tormented her with tales of his extra-marital sexual exploits. Hilda felt she had nowhere to go, she felt trapped, scared and unable to control the situation. She had, over the

years, sought treatment for stress, anxiety and depression and was sometimes on medication. At the trial for the murder of her husband, Hilda raised the defence of diminished responsibility.

Story 6

Ronald has a mild intellectual disability. He lacks the social skills to live independently and is anxious, paranoid and impulsive. He also has an antisocial personality disorder. When he and some friends killed a homeless man in a public park he pleaded guilty to manslaughter on the grounds of diminished responsibility.

Story 7

Rachel lived in a very conservative family. Sex was never spoken about, especially not to Rachel who was only sixteen. When she knew she was pregnant it was impossible for her to tell her family. It was also impossible to tell anyone else. So for the next months, Rachel pretended that she wasn't pregnant at all. She even began to believe it herself. She found that by wearing loose clothes people seemed not to notice and in any case she didn't get very big. And one day, months later, Rachel gave birth to a child, in an outside toilet at home, entirely on her own. When she picked up the baby from where it had fallen onto the floor, she wrapped it up in her jumper and put it in the wardrobe. She then had dinner with the rest of the family. The child died and Rachel pleaded guilty to a charge of infanticide.

Story 8

Andrea gave birth to Pip who was her first child and immediately felt depressed, unhappy and completely unable to cope. Money was difficult, her partner wasn't working and was away from home most of the time. Andrea began to feel more and more distressed and trapped by the situation. She went to her local doctor and told her that she thought she might be having a nervous breakdown. She was hospitalised for a short period and was put on medication. When she came out for a home visit and spent some time with Pip she smothered him with a pillow and the child died. Andrea pleaded guilty to infanticide.

OUTLINE OF THIS DISCUSSION PAPER

1.7 This Paper provides an overview of the partial defences falling within the terms of reference. In Chapters 3, 4 and 5 of this Discussion Paper, the Commission sets out the law of the partial defences and discusses the various problems with each defence. Options for reform are proposed and discussed. In essence these options are proposed from within the context of the prevailing law of homicide in New South Wales. This means that they take for granted the murder/manslaughter distinction and the discretionary sentence for murder. This is not a reference to review the law of homicide, but it would be simplistic, unrealistic and wrong to take the partial defences out of context. Thus any proposals for reform must also include the option of reviewing the law of homicide in this State. In particular, the traditional murder/manslaughter distinction may require reconsideration. Because of this, Chapter 2 provides an overview of the law of homicide in New South Wales and raises the question of whether the current distinction between murder and manslaughter should simply be abolished and replaced with a single category of unlawful homicide.

1.8 Chapter 3 deals with the defence of provocation, Chapter 4 with diminished responsibility and Chapter 5 with infanticide. The format of Chapters 3, 4 and 5 is the same. First, the origins of the defence are outlined as a means of putting the current law in its historical perspective. Then an analysis of the current elements of the defence in New South Wales is set out, highlighting problematic areas. For a comparative perspective the law in other jurisdictions is examined. Finally, some suggestions for reform are listed along with arguments for each option. These suggestions are highly tentative and not exhaustive. The Commission welcomes comments both on the suggestions presented as well as on any alternative proposals.

PURPOSE OF THIS DISCUSSION PAPER

1.9 The purpose of this Discussion Paper is to promote debate, provide a framework for community consultation and present a number of preliminary suggestions for reform. **It does not seek to present the views**

of the Commission, nor does it make any final recommendations. In preparing this Paper, the Commission has held some preliminary consultations with interested individuals and organisations and it is hoped that this Discussion Paper and the reform suggestions presented in it will encourage further comments, submissions and suggestions from interested groups and persons. Such submissions will greatly assist the Commission in formulating its final recommendations to the Attorney General.

SUMMARY OF OPTIONS FOR REFORM

In summary, the Commission proposes the following options for reform:

Threshold Option: Abolish the murder/manslaughter distinction along with the partial defences.

If the Threshold Option is not favoured the following options are proposed with respect to *each* partial defence:

Option One: Retention of the defence.

Option Two: Abolition of the defence within the present law of homicide.

Option Three: Reformulation of the defence in accordance with the suggestions presented.

If the Threshold Option is not favoured it will also be necessary to consider the relationship between the defences. They can each be seen separately or the fate of one can be linked to the fate of the others. For example, it might be thought that with a discretionary sentence for murder there is no justification for *any* of the partial defences. On the other hand it might be thought that while diminished responsibility is complex and problematic and should be abolished, provocation functions well in practice and should be retained. The relationship between diminished responsibility and infanticide also requires consideration.

Footnotes

1. (Unreported) Supreme Court, NSW, Court of Criminal Appeal, 15 February 1993.

2. Consideration of the common law partial defence of excessive self defence, abolished by the High Court in *Zecevic v DPP* (1987) 162 CLR 645, is not within these terms of reference.

3. *Crimes (Amendment) Act* 1955 (NSW).

4. *Crimes (Homicide) Amendment Act* 1982 (NSW).

5. *Crimes (Life Sentences) Amendment Act* 1989 (NSW). See Chapter 2 at paras 2.12 - 2.16.

6. A Wallace *Homicide: The Social Reality* (NSW Bureau of Crime Statistics and Research, 1986) at 4.

7. A recent study has been conducted by the Victorian Law Reform Commission *Homicide Prosecutions Study* (Report 40, Appendix 6, 1991) which covered the years 1981-1987 and involved 302 defendants and 259 victims. See also Wallace as updated by R Bonney *Homicide II* (NSW Bureau of Crime Statistics and Research, 1987) and M Huong and P Salmelainen *Family, Acquaintance and Stranger Homicide in New South Wales* (NSW Bureau of Crime Statistics and Research, 1992).

8. Specific findings on provocation and infanticide are discussed in the relevant chapters.

9. There have been some well-known cases involving women convicted of murder in the domestic context, but these cases are far less prevalent than those involving men and apparently were not caught by this sample.

10. This is a small part of this recent study of all aspects of domestic homicide, P Easteal *Killing the Beloved: Homicide Between Adult Sexual Intimates* (Australian Institute of Criminology, 1993).

11. Easteal at 173.

12. Easteal at 179.

13. The Commission would like to thank the Judicial Commission of New South Wales for allowing access to their Sentencing Information System which has provided further information.

2. Recasting the Law of Homicide in New South Wales

THE LAW OF HOMICIDE IN NEW SOUTH WALES

Brief history

2.1 Current New South Wales law draws a statutory distinction between murder and manslaughter.[1] Although the exact division is slightly different, it reflects the traditional common law distinction which began to emerge sometime in the fifteenth century.

2.2 The earliest law of unlawful homicide covered all killings other than those caused in the enforcement of justice. This meant that even accidental killings or those committed in self-defence were unlawful, although a Royal Pardon was available in such cases. Sir Owen Dixon has described the state of the law of homicide in the fourteenth century in this way:

> The distinction between murder and manslaughter has not yet emerged. All homicide is criminal unless it is justifiable as something akin to the execution of justice. Every killing is a felony involving loss of life or member, unless it is excusable as done *per infortunium* [by accident] or *se defendendo* [in self-defence]. These must be specially found, and when specially found do not entitle the prisoner to acquittal, but only to a pardon.[2]

2.3 The root of the murder/manslaughter distinction lay in the distinction between offences which attracted the benefit of clergy and those which did not. This benefit, which allowed the Church a right to try and sentence its own clergy, became available to anyone who could feign literacy by reciting a particular psalm. The Church would not pass a "judgment of blood" and thus the significance of claiming the benefit of clergy was that it shielded the claimant from capital punishment. The usual sentence imposed for a "clergyable" felony was a branding on the hand and imprisonment for a term not exceeding one year.[3] This led to the situation that:

> he who was convicted of felonious homicide might suffer death, or he might escape with branding and a short term of imprisonment. Whether the penalty in a particular case was one or the other depended, not on the circumstances of the killing, but solely upon the qualifications of the slayer.[4]

2.4 From the end of the fifteenth century to the middle of the sixteenth, a series of statutes were passed which denied the benefit of clergy to certain felonies. One such category comprised homicides committed with "malice aforethought". The effect of these statutes was to impose a capital punishment on homicides committed with a particular type of mental state[5] - these offences were called "murder". Thus the legal significance of the mental state of "malice aforethought" was one that was reflected in terms of sentence - it meant that the felony could be punished by death. Homicide without the requisite malice - designated "manslaughter" - remained a "clergyable" offence. It has been said, therefore, that:

> it was the general expansion of benefit of clergy, together with statutes that withdrew certain specific offences from its protecting influence, that drew the line between murder and manslaughter.[6]

2.5 Thus, from the beginning of the sixteenth century, the main concern of the law of homicide has been with attempting to draw this distinction and consequently with the nature of "malice aforethought". It has been stressed that:

> the difference between murder and manslaughter was not the difference between two distinct felonies, but the difference between two descriptions of the one felony. They were differentiated only because the *consequences* of a conviction had, by statute, ceased to be the same.[7]

The nature of murder and manslaughter as merely degrees of the one offence of homicide continues to be reflected in the fact that, despite the general common law rule that prevents conviction for one felony on the charge of another, the defendant can be convicted of manslaughter if he or she was indicted for murder.[8]

Categories of homicide: murder and manslaughter

2.6 In New South Wales, as at common law, unlawful homicide is divided into two categories: murder and manslaughter.[9] The differences in law between murder and manslaughter are quite intricate and technical. They reflect the:

> very gradual evolution ... from an almost exclusive concern with the external act which occasioned death to a primary concern with the mind of the man who did the act.[10]

Murder

2.7 In order for a charge of murder to be made out in New South Wales, the prosecution must prove that the defendant has caused the death of a human being and that, at the time the conduct occurred, the defendant acted with the requisite mental state. Under s 18(1)(a) of the *Crimes Act*, this mental state involves either:

the intention to kill; or

the intention to inflict grievous bodily harm. The relevant type of harm here is bodily harm of a "really serious kind"[11]; or

reckless indifference to human life. This has been held to mean having foresight of the *probability* of death resulting.[12] In New South Wales, foresight of the probability of grievous bodily harm or the possibility of death resulting is not sufficient to constitute murder.

2.8 In addition, a killing done in an attempt to commit or during or immediately after the commission of a crime punishable by imprisonment for life or 25 years will also constitute murder.[13] This is a form of constructive murder known as "felony murder". The range of relevant offences is now very small and includes offences such as wounding with intent to resist arrest and wounding during robbery.

Manslaughter

2.9 The crime of manslaughter is largely an accumulation of residual categories of homicide - that is, unlawful killings which fall short of the requirements for murder although the *actus reus* is, of course, the same. Manslaughter falls into two categories which reflect the ways in which it may be differentiated from murder. The first category is where the mental element is the same as that for murder, but the conviction is reduced to manslaughter by reason of certain mitigating factors involved in the commission of the offence which are thought to reduce the actor's moral culpability. These factors are provocation, diminished responsibility and infanticide. This category of murder, known as "voluntary manslaughter", deals with the partial defences and is discussed in detail in Chapters 3, 4 and 5.

2.10 The second category of manslaughter is comprised of unlawful killings where the mental element of the offence is insufficient to constitute murder. This category is known as "involuntary manslaughter" and involves two main sub-categories. The following have been held sufficient to constitute involuntary manslaughter:

A killing resulting from an unlawful and dangerous act. In *Wilson,*[14] the High Court held (by majority) that the act must, as well as being unlawful, be dangerous in the sense of involving an appreciable risk of serious injury. In the same case, the Court held that the category of "battery manslaughter" or manslaughter by the intentional infliction of *some* harm is not a category of involuntary manslaughter at common law.

A killing resulting from criminal negligence. The essence of this type of manslaughter is a great falling short of the standard of care required of an ordinary person. The conduct must involve "such high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment".[15] The types of conduct which may amount to criminal negligence have been said to be "infinitely variable"[16] and it is not yet entirely clear what degree of risk is required.

Other unlawful killings

2.11 Finally, there are a number of situations in which an unlawful killing has occurred which does not amount to either murder or manslaughter. For example, s 52A of the *Crimes Act* 1900 (NSW) provides for a statutory offence of culpable driving where the death or grievous bodily harm of a person is caused by a car driven by an intoxicated person or driven at a speed or in a manner dangerous to the public. The offence was created because of the perception that juries were reluctant to convict of the more serious offence of manslaughter.[17] The penalty for culpable driving causing death is five years imprisonment.

Sentencing for homicide

2.12 Until 1955 there was a mandatory death penalty for murder in New South Wales.[18] This meant that following a conviction for murder, the trial judge had no choice but to impose the death penalty although it could be commuted by Executive Pardon. Between 1955 and 1982 the penalty for murder in this State was a mandatory life sentence. The consequence of this was that where a verdict of murder was returned by the jury, the judge was bound to impose a life sentence for murder. No distinction could be drawn between, for example, a revenge killing and a "mercy killing" and no mitigating factors such as age or mental condition could be taken into account. In practice, however, people sentenced to "life" did not actually remain in gaol for the term of their natural life and were released on parole after an average of about fourteen years.[19]

2.13 By way of contrast, the penalty for manslaughter was (and, historically, has always been) discretionary and the sentencing judge could impose any sentence up to life imprisonment which fitted the crime, taking into account any mitigating factors. In New South Wales, the maximum penalty for manslaughter is now 25 years.[20] In many ways this difference is the rationale for the partial defences to murder. In some circumstances - where the defendant lost self-control or where he or she suffered from some abnormality of mind - there was considered to be a reduced level of culpability which should be reflected in the punishment imposed. The partial defences operated to reduce the conviction from murder to manslaughter, thus allowing the sentencing judge a discretion to impose an appropriate sentence.

2.14 The *Crimes (Homicide) Amendment Act* 1982 (NSW) abolished the mandatory life sentence for murder and conferred a qualified discretion on the sentencing judge. It enabled the judge to impose a lesser sentence than life if it appeared that the defendant's culpability was "significantly diminished by mitigating circumstances".[21] Although indeterminate "life" sentences were often imposed, prisoners could be released on parole after serving some portion of their sentence. This situation changed in 1989 when the *Sentencing Act* 1989 (NSW) came into effect. The core of that legislation requires the sentencer to impose a minimum period of imprisonment to which a one-third addition is normally (in the absence of "special circumstances") added by way of a parole period.[22] Under the new regime, remissions for good behaviour are abolished.

2.15 Also in 1989, s 19A of the *Crimes Act* replaced the former s 19.[23] The new section provided that a person sentenced to life for murder is to remain in gaol for the term of his or her natural life. It also gave judges a wider sentencing discretion for murder, removing the need to find that the defendant's culpability was affected by mitigating circumstances before a sentence of life could be displaced. It also should be noted that it is now possible for prisoners sentenced to an indeterminate life sentence before 1989 to apply to the Supreme Court to be resentenced for a determinate period.[24] The purpose of this procedure is to attempt to approximate the situation of prisoners sentenced under the former law to those sentenced under s 19A.

2.16 The effect of these reforms is that there is now a discretionary sentence for murder, with the maximum penalty being life imprisonment. A sentence of life imprisonment means that the prisoner will spend the rest of his or her natural life in gaol. In practice, such sentences are extremely rare and are reserved for the "worst cases" of murder. There is also, as there has always been, a discretionary sentence for manslaughter. As mentioned above, the maximum penalty for that offence is now 25 years.

REFORMING THE LAW OF HOMICIDE IN NEW SOUTH WALES

Introduction

2.17 It is sometimes suggested that, because there is a discretionary penalty for murder in New South Wales, the partial defences have become redundant. This is because the original principal rationale - to allow flexibility in sentencing - has disappeared. The major argument in favour of retention of the partial defences is that the word

"murder" carries powerfully condemnatory connotations and that the effect of "labelling" as a murderer a person who kills under circumstances of diminished responsibility or provocation or who commits infanticide cannot be discounted. It is said that the community does recognise differing levels of culpability for unlawful killings and is acutely aware of the difference between a murderer and a manslaughterer. It is therefore inadequate to reflect this difference purely in terms of sentence.[25]

2.18 There are three ways to deal with this question of "labelling". The first is a suggestion that the argument itself is less than compelling:

> It may been noted, for example, that an intentional killing, albeit one committed under provocation or in circumstances where the defence of diminished responsibility is applicable, is indeed "murder".
>
> The issue of labelling may well be a sidetrack with few practical consequences. It can be argued that the distinction is not well understood by the public and is not regarded by the community as being important.
>
> It is also probably true that the public will attach their own labels, regardless of the legal classification. Thus it has been noted that while the offence of "rape" has been replaced with a number of graded offences of sexual assault, the community still refers to those convicted of sexual assault as "rapists".
>
> The argument that there is something "special" about homicide because it has uniquely irreversible consequences and that it is therefore imperative that the moral condemnation associated with the word "murder" be retained, is not compelling. While our society does place a very high value on human life, if the condemnation attaches because of the fact of death, then it attaches to the word "killer" or "homicide offender" as much as it does to the word "murderer".
>
> Finally it may be argued that the time and expense involved in running complicated defences simply to avoid the stigma of a murder conviction is unwarranted.

2.19 The second way to deal with the "labelling" argument is by the introduction of a verdict of "murder with extenuating circumstances" to deal with cases which would now reduce murder to manslaughter. Thus a defendant who now would be convicted of manslaughter because he or she killed under provocation would be convicted of "murder with extenuating circumstances" and sentenced under s 19A of the *Crimes Act* 1900 (NSW).

One category of homicide?

2.20 The final alternative is the introduction of a new overall category of "culpable homicide" or "unlawful homicide". It would then be possible to differentiate between different types of killing and different levels of culpability in terms of sentence without the stigma of a "murder" conviction. The issue was raised by Lord Kilbrandon in *Hyam v DPP* in this oft-quoted passage:

> It is not so easy to feel satisfaction at the doubts and difficulties which seem to surround the crime of murder and the distinguishing from it of the crime of manslaughter. There is something wrong when crimes of such gravity, and I will say of such familiarity, call for the display of so formidable a degree of forensic and judicial learning ... I believe this is to show that a more radical look at the problem is called for ... There does not appear to be any good reason why the crimes of murder and manslaughter should not both be abolished, and the single crime of unlawful homicide substituted; one case will differ from another in gravity, and that can be taken care of by variation of sentences downwards from life imprisonment.[26]

2.21 In 1976, the New Zealand Criminal Law Reform Committee[27] recommended that there be a single offence of unlawful homicide to cover what is now murder and manslaughter by reason of provocation[28] and that provocation be only relevant with respect to sentence. It also recommended that "constructive manslaughter" (or involuntary manslaughter, including unlawful and dangerous act manslaughter and criminal negligence) be abolished and replaced with general offences proscribing conduct intended to cause grievous bodily harm or some lesser injury or conduct likely to cause such harm or done with a reckless disregard for the safety of the

public. These offences would be committed regardless of whether death (or, indeed, any harm) resulted from the conduct. Only the potential harm of the defendant's conduct would be relevant.

2.22 In 1989 these recommendations were incorporated into the draft *Crimes Bill*. The Bill was subjected to a great deal of criticism and was eventually sent for further consultation. In 1991 the Crimes Consultative Committee published its report.[29] It recommended that the traditional murder terminology be retained instead of the phrase "culpable homicide" but thought that the abolition of provocation as a partial defence was the correct approach. However, the Committee felt that the endangerment provisions were not appropriately applied to conduct causing death and recommended a revised manslaughter provision under the rubric of "culpable homicide". In addition, an offence of negligently causing death was recommended. These recommendations in effect reinstate the murder/manslaughter distinction, with conduct that was formerly provocation now amounting to murder. It was also recommended that the mandatory life sentence for murder be abolished.

Implementation of one category of homicide

2.23 Although the abolition of the murder/manslaughter distinction has often been suggested, there is a dearth of material exploring how this might actually work in practice. While it is expected that a greater number of people would plead guilty to "unlawful homicide" and proceed directly to sentence, homicide trials would still be run, for example, in the following circumstances:

Where the defendant alleges that one of the elements of the *actus reus* of the offence is not present. Thus, for example, the defendant might argue that he or she did not do the act or omission leading to the death at all (in the case of alibi) or that the act or omission did not cause the death.

Where the defendant alleges that he or she did the act or omission leading to the death accidentally or that his or her act was not voluntary.

Where the killing was alleged to be justifiable; that is, where the defences of self-defence or duress are applicable.

Where the defendant pleads not guilty (that is, he or she should be excused from criminal liability) on the basis of mental illness.

2.24 One problem is to work out what the relevant mental element for "unlawful homicide" would be; that is, what the jury would have to find in order to convict a defendant of this offence. Detailed consideration of the precise drafting of such an offence is unnecessary at this stage, but a number of preliminary suggestions may be made:

The *mens rea* for the new offence of "unlawful homicide" could be defined to include all of the current mental elements for both murder and involuntary manslaughter. Given the fact that one of the problems with the retention of the current distinction is the highly technical nature of these elements and the unclear lines between them, this is not a compelling option. If the jury had to be instructed to consider whether the mental state of the defendant came within one of the many existing categories, little would have been saved in terms of time and cost and trials would not be significantly simplified.

"Unlawful homicide" could be defined negatively. For example, it could be said that any killing of a human being caused by the voluntary act of the defendant and committed with some state of mind above a threshold level of, for example, criminal negligence, would be unlawful homicide. (Exculpatory defences such as self-defence would still be available.)

"Unlawful homicide" could be defined positively after a reconsideration of the current elements of murder and manslaughter. This is similar to suggestion 1 above, except that it provides the opportunity to rethink the boundaries of the offence of "unlawful homicide" without regard to the existing categories which developed in the common law of murder and manslaughter. For example, thought might be given to whether culpable negligence should be included within this offence, or should constitute a separate offence, or perhaps be aggregated with other existing offences (such as culpable driving).

The approach suggested by the New Zealand Criminal Law Reform Committee could be adopted. This would involve abolishing the partial defences and incorporating what is now murder and the category of voluntary manslaughter into one category of "unlawful homicide". The category of involuntary manslaughter would be abolished and replaced with general endangerment provisions in which the actual harm caused would be irrelevant to liability.

OPTION FOR REFORM

Threshold Option: Abolish the murder/manslaughter distinction in favour of one overall category of unlawful homicide.

This option is theoretically a "threshold" one: if it is favoured there is no actual need to consider the substantive elements of the partial defences. *It must, however, be stressed again that even if the Threshold Option is preferred, the Commission remains interested in hearing views on provocation, diminished responsibility and infanticide in order to formulate recommendations regarding these partial defences in the event that the Threshold Option is not recommended.*

Some arguments for one category of homicide[30]

2.25 *Historical argument.* There is no logical reason why the historical line between murder and manslaughter should continue to be drawn. The current distinction arose in the context of the specific "device" of the benefit of clergy and was clearly concerned with the need to make a differentiation in terms of *penalty*. In a jurisdiction with a discretionary sentence for both murder and manslaughter this distinction is no longer necessary as different levels of culpability are already given effect to in terms of sentence.

2.26 The criminal law should make distinctions on the basis of logic, reason and fairness: the existence of an entrenched, historical distinction is not sufficient. The sentencing process can make finer and more appropriate distinctions.

2.27 *Difficulty of making murder/manslaughter distinction.* The line between murder and manslaughter is often extremely difficult to draw. For example, a person who causes death and foresees that his or her act will *probably* cause death will be guilty of murder while a person who foresees that his or her act will *possibly* cause death will be guilty of manslaughter. This is a highly technical distinction since the line between possibility and probability may be very fine and the distinction may well not be reflected in differences in the actual culpability of the two acts.

2.28 The existing categories of murder and manslaughter represent a clumsy way to assign moral culpability and involve significant overlaps and anomalies. For example, euthanasia or "mercy killing" may amount to murder at law, while killing in a jealous rage may well amount to manslaughter at law, yet these results probably would not accord with generally accepted social understandings about moral responsibility.

2.29 The argument that it is important to retain the moral condemnation of the word "murder" (see below) would have force if it were a straightforward matter to decide to whom the condemnatory label of "murderer" was to be applied. This has, however, proved exceedingly difficult to do - there is no bright moral or legal line between a murderer and a manslaughterer. To make the distinction, a complex, time consuming and expensive jury trial is required. In this context it might be worth dropping the term "murder" from our legal vocabulary.

2.30 *Time and cost savings.* There will be more guilty pleas (in those cases in which the defendant would have contested murder but pleaded guilty to manslaughter) and this will save considerable time and expense as matters now being decided in the trial context would be decided at the sentencing stage.

Some arguments against one category of homicide[31]

2.31 *Retention of label of "murderer".* It is important to retain the moral condemnation that is associated with the label "murderer". In 1982 when the New South Wales Government rejected the amalgamation of the categories it was stated in Parliament that:

> The unlawful homicide approach was rejected precisely because it would have removed from the statute books an ancient and powerful word, widely understood by the public, carrying the strongest possible overtones of moral condemnation. In our culture, to described someone as a murderer is to employ the most bitterly and effectively stigmatizing epithet available in our language. To remove that term from the law would be to risk possible public misapprehension, and to invite criticism - rightly or wrongly - that the moral force of the law was being lessened.[32]

2.32 *Historical argument.* There is a well established historical distinction, stemming from at least the fifteenth century for a difference between murder and manslaughter. The distinction is now firmly entrenched in the common law. Whatever the original rationale for the distinction, the terms "murder" and "manslaughter" have not only become part of the law of this State but form part of the community's understanding of the crime of homicide. To abolish the distinction would result in a gap between the law and the community's perception of it. This is unacceptable in relation to a crime as fundamental as homicide.

2.33 *The role of the jury.* The present law involves the jury in making decisions relating to levels of culpability and a move towards a single category of homicide would shift this role to the sentencer, that is, the trial judge. This is an incursion upon the jury's traditional function. The question that the community must answer is whether we want the jury, as our representatives, to draw the distinction between murder and manslaughter or whether we are content to pass the task on to the sentencing judge.

2.34 *The inadequacy of the sentencing process.* The shift away from the jury places a great deal of faith in the complex, difficult and highly discretionary sentencing process.[33] The fact finding mission that a sentencing judge undertakes is less rigorous than one in the context of a trial and, in particular, does not incorporate those protections that are given to the accused at trial. A trial is a far more open process and one in which community values are able to be reflected. This may be particularly important in domestic homicides where it is crucial that the killing is adequately placed in context. It might be added that a move towards sentencing also places a great deal of faith in the ability of the judiciary to make value judgments on questions of degree, credibility and reasonableness, especially where issues of race and gender are involved. As the Victorian Law Reform Commission has recently pointed out:

> It may be that judges are as, or more, susceptible to gender and ethnicity bias as juries. At least the sexes are more evenly represented in juries than they are on the Supreme Court.[34]

2.35 Because appellate courts are usually reluctant to interfere with the findings of fact of a sentencing judge, issues which are now relevant to the partial defences would be less open to appellate scrutiny if they became relevant only in the sentencing arena.

2.36 The "unlawful homicide" approach could lead to higher sentences. This is because there would be no "tariff" for murder and manslaughter and thus no "peg" on which to justify a lower sentence.[35]

Footnotes

1. Section 18(1)(a) of the *Crimes Act* 1900 (NSW) sets out the requirements for murder and s 18(1)(b) provides that every punishable homicide other than murder is manslaughter.

2. Sir Owen Dixon "The Development of the Law of Homicide" (1935) 9 *Australian Law Journal Supplement* 64 at 65.

3. R Perkins "A Re-Examination of Malice Aforethought" (1934) *Yale Law Journal* 537 at 541.

4. Perkins at 541-2.

5. Dixon at 66.

6. Perkins at 542.

7. Dixon at 66. Emphasis added.

8. B Fisse *Howard's Criminal Law* (5th ed, Law Book Company, 1990) at 79ff.

9. In some jurisdictions, notably some States of the United States, these categories are further subdivided into degrees of seriousness.

10. Dixon at 64.

11. *Pemble* (1971) 124 CLR 107. Section 4 of the *Crimes Act* 1900 (NSW) defines the term to include "any permanent or serious disfiguring of the person".

12. *Crabbe* (1985) 156 CLR 464.

13. *Crimes Act* 1900 (NSW) s 18(1)(a).

14. (1992) 174 CLR 313.

15. *Nydam* [1977] VR 430.

16. Fisse at 114.

17. See *Buttsworth* [1983] 1 NSWLR 658, per O'Brien CJ of Cr D for a discussion of the history and nature of the offence. See also *Andrews v DPP* [1937] AC 576.

18. Section 19 of the *Crimes Act* 1900 (NSW) was amended by the *Crimes (Amendment) Act* 1955 (NSW) to remove the mandatory death penalty for murder.

19. A Freiberg and D Biles *The Meaning of Life: A Study of Life Sentences in Australia* (Australian Institute of Criminology, 1975) at 53.

20. *Crimes Act* 1900 (NSW) s 24. The maximum penalty was reduced from life imprisonment by the *Crimes (Life Sentences) Amendment Act* 1989 (NSW).

21. *Crimes Act* 1900 (NSW) s 19. See D Brown, D Farrier, D Neal and D Weisbrot *Criminal Laws* (The Federation Press, 1990) at 658 regarding the judicial construction of this provision and subsequent developments.

22. *Sentencing Act* 1989 (NSW) s 5.

23. *Crimes (Life Sentences) Amendment Act* 1989 (NSW).

24. *Sentencing Act* 1989 (NSW) s 13A.

25. This view has been put to the Commission a number of times in preliminary consultations: Legal Aid Commission *Oral Submission* (8 July 1993); Dr W Barclay *Oral Submission* (8 July 1993); Professor S Yeo *Oral Submission* (16 June 1993); M Sides QC, Acting Senior Public Defender *Submission* (18 May 1993).

26. [1974] 2 WLR 607 at 640.

27. New Zealand Criminal Law Reform Committee *Report on Culpable Homicide* (1976). For a discussion of the Committee's recommendations, see G Orchard "Culpable Homicide - Parts I and II" [1977] *The New Zealand Law Journal* 411, 447.

28. New Zealand does not have a defence of diminished responsibility.

29. Crimes Consultative Committee *Crimes Bill 1989: Report of the Crimes Consultative Committee* (1991).

30. See New Zealand Criminal Law Reform Committee *Report on Culpable Homicide* (1976); K Milte, A Bartholomew and F Galbally "Abolition of the Crime of Murder and of Mental Condition Defences" (1975) 49 *Australian Law Journal 160.*

31. Note that the following reports have rejected the unlawful homicide approach: Victoria. Law Reform Commission. *Homicide* (Report 40, 1991); House of Lords Select Committee on Murder and Life Imprisonment *Report* (1989).

32. Then Attorney General Frank Walker, Parliamentary Debates (Hansard) 11 March 1982 at 2483. Note, however, that the crime of "rape" has been abolished in favour of categories of "sexual assault", see D Weisbrot "Homicide Law Reform in New South Wales" (1982) 6 *Criminal Law Journal* 248 at 250.

33. Victoria. Law Reform Commission. *Homicide* (Discussion Paper 13, 1988) at para 108. See also S Norrish QC *Oral Submission* (30 June 1993); Professor S Yeo *Oral Submission* (16 June 1993).

34. VLRC Report 40 at para 170.

35. Legal Aid Commission *Oral Submission* (8 July 1993).

3. Provocation

INTRODUCTION

3.1 Under common law and statute law in New South Wales, a person who would otherwise be guilty of murder may have his or her criminal liability reduced to manslaughter if the killing occurred in circumstances of provocation.

3.2 Briefly, at law, provocation in New South Wales involves circumstances which caused the accused actually to lose self-control and commit the fatal act, *and* which would have been sufficient (in the view of the finder of fact - usually the jury) to cause an "ordinary person" in the position of the accused also to lose self-control to this degree. When fairly raised by the evidence, provocation becomes a matter which the prosecution is required to "negative" or disprove, as part of the its general obligation to prove its case beyond a reasonable doubt.

3.3 Although provocation also is available in some Australian jurisdictions as a complete defence to all crimes involving an element of assault, in New South Wales the scope of the defence is limited to reducing murder to manslaughter. As a practical matter, however, provocation can be - and often is - raised as a mitigating factor to be taken into account in sentencing *after* a conviction for an offence involving an element of assault. In this Paper, the Commission deals only with provocation as a "partial defence" to murder.

3.4 The theoretical underpinning for the defence is unclear. Some defences are based on the idea that the act in question was "justified" in the circumstances. Such defences of justification - which go to the propriety of the act - would include self-defence (broadly, incorporating defence of another and defence of property) and acting under lawful authority; for example, using reasonable force to prevent the commission of a crime or to effect a lawful arrest. In such cases we say that, on balance, it was proper for the actor to "take the law into his or her hands" because the harm caused is outweighed by the actual or potential harm prevented.

3.5 Another class of defences excuse the actor - rather than the act - having regard to some attribute or disability which wholly or partially diminishes the person's moral responsibility. Examples of such excuse-based defences include the defence of mental illness (formerly, the "insanity defence"), diminished responsibility, infanticide, and incapacity (immaturity). In such cases we say that the act was wrong, but it would nevertheless be inappropriate to exact the full punishment because of the personal circumstances of the accused.

3.6 The categorisation of provocation is somewhat problematic, however.[1] It is often said in the cases and commentary that the defence of provocation is "a concession to human frailty".[2] This implies that the accused person's conduct is partially *excused* because of the highly provocative circumstances in which the killing occurred, rather than the killing itself being *justified* in the circumstances. This would explain a case in which, for example, a baby's continued crying was held to be capable of amounting to provocation at law.[3] However, other aspects of the judicial and statutory development of the law of provocation - such as the imposition of an objective ("ordinary person") test, the relevance of the "proportionality" of the response to the provocation, and the need for the provocation to emanate from the victim - resonate much more with the "balancing" concerns traditionally associated with *justifications*.

3.7 No doubt the difficulty involved in properly locating the theoretical basis of provocation is echoed in the contemporary social ambivalence towards the continued viability of the defence - or, at least, its application in particular cases. While the community places a very high value on human life, the law in this area "concedes" that otherwise decent people may be provoked beyond human endurance and that this should partially excuse even the use of lethal force in response. On the other hand, there is a growing realisation that in practice the defence may operate to partially condone violence in precisely those circumstances in which the society has been seeking to reduce the use of violence and to treat its use much more seriously.

3.8 Empirical studies (see below at 3.89 - 3.101) show that provocation is often an issue in cases in which men kill men during arguments and in which men kill women out of jealousy and in domestic situations. Given this, we must assess to what extent we as a community are prepared to recognise a reduced level of culpability for what many consider to be male patterns of aggression. We need also to look at how these peculiarly male

patterns may operate to deny female victims of domestic violence an adequate legal defence. In this context it has been suggested that society cannot be heard to stress the importance of the preservation of human life where it places people in very high risk situations and provides no adequate legal recourse.[4] Such an approach is not inconsistent with the historical bases of the law of provocation which, far from focusing on individual frailties, proceeded by reference to categories of people in situations which the prevailing social practices deemed highly provocative.[5] These issues are important when considering the need to reform the law of provocation and will form the basis of the discussion in this Chapter.

BRIEF HISTORY

3.9 The origins of the current defence of provocation can be traced to Anglo-Saxon and Norman times when a distinction began to be drawn between deliberate premeditated killings, which were capital offences, and those killings which occurred in the heat of passion.[6] This distinction became clearer in the sixteenth century when killings "upon a sudden affray" were prevalent. This was because drunken brawls and duels were extremely common and because the wearing of weapons ensured that these encounters often had fatal results.[7] Their very prevalence, along with societal acceptance of the bearing of arms, led such killings to be perceived as a less morally reprehensible form of homicide than cold-blooded premeditated slayings.[8]

3.10 Thus Coke wrote in 1628 that:

> Homicide is called chance medley ... for that it is done by chance (without premeditation) upon a sudden brawle, shuffling or contention.[9]

These killings by "chance medley" were viewed as "excusable homicide" and, along with causing death by misadventure, were punished by forfeiture of property and the exaction of the deodand. The modern defence of provocation[10] (and, to some extent, self-defence) developed out of this early approach.

3.11 However, by the early seventeenth century, another trend was evident in the law of homicide. Malice aforethought was considered to be an essential element of murder and killings were presumed to have been committed with malice. This presumption could, however, be rebutted by evidence of provocation.[11] Coke wrote that malice would be implied where "one killeth another without any provocation on the part of him that is slain".[12] In cases where malice was not implied, the act was not murder but was, as Brown has commented, "hooked on the accommodating peg of the common law felony of manslaughter ... which for purposes of reprehensibility and punishment was set roughly between 'excusable' homicide and murder".[13]

3.12 Chance medley fell into disuse in the eighteenth century, its decline beginning a century earlier with the *Statute of Stabbing* (1604).[14] But along with this decline came more and more frequent recourse to direct notions of provocation, a process Brown describes as the "child swallowing up the parent".[15] Judicial statements mapping out the scope of provocation occurred throughout the seventeenth century.[16]

3.13 Hale provided a number of illustrations in answer to the question "what is such a provocation as will take off the presumption of malice in him that kills another"[17] and in *Mawgridge* (1707)[18] Holt CJ summarised those categories of act which would constitute sufficient rebuttal of the presumption of malice to reduce an offence from murder. These were: (1) angry words followed by a physical assault, even if it were nose pulling or a "filliping upon the forehead"; (2) false imprisonment; (3) the aiding of someone being unlawfully deprived of liberty; and (4) finding one's wife engaged in adultery.

3.14 Thus, by the eighteenth century, those features which came to mark the modern law of provocation were beginning to be formed. A distinction between "mere words" and physical assaults was made.[19] The lawfulness of the actions of the provoker were relevant.[20] Where premeditation was evident, the defence was not available and consequently there was a requirement of "suddenness".[21] In Foster's words this requirement arose in that provocation was a killing "owing to a sudden Transport of Passion, which through the Benignity of the Law, is imputed to Human Infirmity".[22]

3.15 The nineteenth century saw the rise of a more objective view of provocation and a requirement of "proportionality" began to be developed. According to East, for example, retaliation that is "outrageous in its

nature ... and beyond all proportion to the offence ... is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty".[23]

3.16 As the *Mawgridge* position (whereby *any* physical assault was sufficient) was gradually abandoned, an objective standard was introduced to enable the jury to gauge whether or not the conduct was sufficiently provocative.[24] Thus in *Welsh,* Keating J told the jury that:

> What I am bound to tell you is, that in law it is necessary that there should have been a serious provocation in order to reduce the crime to manslaughter, as, for instance a blow and a severe blow - something which might naturally cause an ordinary and reasonable minded person to lose his self-control and commit such an act.[25]

3.17 The first half of this century saw the English courts adopting a very rigorous test of provocation. The objective test was confirmed in *Alexander*[26] and *Lesbini.*[27] In *Mancini* a stringent objective test, along with a requirement of suddenness and proportionality was applied.[28] In *Holmes,*[29] despite the historical requirement of a sudden intention to murder, the House of Lords found that the doctrine rested on negativing any sort of intention to murder. Finally, in *Bedder,*[30] the objective test was interpreted so restrictively that none of the personal characteristics of the accused were attributed to the reasonable person at all.

3.18 Coss has described this period as "the erosion of compassion".[31] Indeed, so strenuous had the test become that, prior to the enactment of the *Homicide Act* in 1957, doubts were expressed as to the continued existence of the defence.[32] Legislative intervention came with the enactment of the *Homicide Act* 1957 (UK). Section 3 provided that:

> Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

3.19 Despite the legislation, the doctrine of provocation had become, in Coss's words, "a self-spun web of complexity".[33] It was the 1978 decision of *Camplin*[34] which effected substantial change, primarily in respect of the ordinary person test.

3.20 The move towards a broader doctrine of provocation had started somewhat earlier in Australia. The New South Wales legislature had recognised as early as 1883 that "mere words" could be provocation when the *Criminal Law Amendment Act* abolished the common law rule that insulting words alone were not sufficient to constitute provocation. In *Parker,*[35] the requirement of "suddenness" was considerably broadened. With respect to the interpretation of the objective test, in the Northern Territory, Kriewaldt J instructed juries in a number of cases involving tribal Aboriginal defendants that the ordinary person was a reasonable tribal Aborigine.[36] In *Enright* the fact of being "illegitimate" was permitted to be attributed to the ordinary person,[37] and in *Moffa* the High Court allowed that the ethnic derivation of a person could be relevant in some circumstances.[38]

CURRENT LAW IN NEW SOUTH WALES

3.21 While New South Wales has a statutory provision dealing with provocation, prior to 1982 s 23 of the *Crimes Act* 1900 (NSW) was interpreted by the courts as essentially reflecting the common law defence.[39] In the early 1980s a number of highly publicised cases of domestic killings highlighted the inadequacies of the prevailing law of homicide, in particular the defence of provocation and the mandatory penalty for murder.[40] In 1981 the government of New South Wales established a Task Force on Domestic Violence which recommended (among other things) the abolition of the mandatory life sentence for murder and the reformulation of the defence of provocation. The *Crimes (Homicide) Amendment Act* 1982 (NSW) was introduced to implement these

recommendations. Section 19 of the *Crimes Act* was amended to change the punishment for murder and a new s 23 dealing with the defence of provocation was substituted. Section 23 now provides that:

> (1) Where, on the trial of a person for murder, it appears that the act or omission causing death was an act done or omitted under provocation and, but for this subsection and the provocation, the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.
>
> (2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where:
>
> > (a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused; and
> >
> > (b) that conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased,
>
> whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.
>
> (3) For the purpose of determining whether an act or omission causing death was an act done or omitted under provocation as provided by subsection (2), there is no rule of law that provocation is negatived if:
>
> > (a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission;
> >
> > (b) the act or omission causing death was not an act done or omitted suddenly; or
> >
> > (c) the act or omission causing death was an act done or omitted with any intent to take life or inflict grievous bodily harm.
>
> (4) Where, on the trial of a person for murder, there is any evidence that the act causing death was an act done or omitted under provocation as provided by subsection (2), the onus is on the prosecution to prove beyond a reasonable doubt that the act or omission causing death was not an act done or omitted under provocation.
>
> (5) This section does not exclude or limit any defence to a charge of murder.

The elements of the defence - the act of provocation

The nature of the provocation - mere words

3.22 It is clear from s 23(2)(a) of the *Crimes Act* that words - if "grossly insulting" - can be sufficiently provocative conduct for the purposes of the defence. This has been the case in New South Wales since s 370 of the *Criminal Law Amendment Act* 1883 abolished the common law rule that insulting words alone were not sufficient to constitute provocation. Indeed recent cases show that even at common law the "mere words" rule is now loosely applied, if not entirely obsolete.[41]

The nature of the provocation - adultery

3.23 The history of the defence reveals that finding one's spouse in an act of adultery always has been regarded as sufficient to constitute provocation.[42] While the common law no longer conceives of the provocation in terms of categories, it is probably still true that adultery is usually enough to satisfy the defence.[43] This aspect of the law requires careful consideration in light of the values of contemporary society. The basis of this element -

the view expressed in *Mawgridge* that "jealousy is the rage of a man and adultery is the highest invasion of property"[44] - is entirely inappropriate for a society that views women as full members of society with equal rights to men and not as objects of property. It is important to consider, therefore, the degree to which we as a community are prepared to countenance the use of the defence of provocation by jealous and thwarted individuals who resent losing what they regard as "belonging" to them.

Must the provocative conduct be unlawful?

3.24 Section 23 is silent on whether the provocative conduct must have been unlawful and it appears that the common law is unclear on this issue. In *The Queen v R* two judges of the South Australian Full Court were of the opinion that the provocative conduct need not be unlawful.[45] However Zelling J thought that unlawfulness was still a requirement. Gillies considers that the courts have implicitly recognised that unlawfulness is not an element of the defence by its omission from standard formulations of the doctrine.[46]

3.25 It may be the case that the provocative conduct will, in fact, often be unlawful - either by constituting criminal assault or because the insult is so gross as to tend to induce a breach of the peace.[47] O'Connor and Fairall argue convincingly that if the defence is based on loss of control, there is no justification for a requirement of unlawfulness.[48] In practical terms, such a requirement would lead to contrived and unnecessary arguments about whether the words of the victim could have amounted to a breach of the peace or to some other offence, such as "unseemly words".[49]

3.26 Finally, although s 23 is silent on the question, it appears that the common law rule[50] that a lawful arrest does not amount to provocative conduct forms part of the law in this State.

The provocation must take place in the presence of the accused

3.27 The common law rule that provocation must take place in the presence of the accused was confirmed in Victoria in *Arden.*[51] Although s 23 does not specifically contain a requirement of presence, it has been construed to reflect the common law in this respect by the New South Wales Court of Criminal Appeal.[52] This rule is justified on the basis that if the provocation is merely hearsay, then there is introduced:

> an element of belief and there is nothing tangible upon which the accused can be said to have acted.[53]

3.28 It has been said that the requirement of presence is not without value in that it removes weak and unmeritorious claims from the jury.[54] However, there have been a number of criticisms of the rule. First, it has been argued that the justification based on belief may not be apt where the accused has every reason to believe the informant.[55] In terms of the effect on the defendant, a belief may be every bit as powerful as direct provocation. In the context of self-defence, for example, a reasonable belief based on hearsay is sufficient.[56] Secondly, Lanham points out possible problems with the formulation of the requirement in terms of *visual* perception of the incident.[57] Thirdly, its retention in New South Wales runs counter to the legislative intent behind the 1982 amendments which the second reading speech reveals to be to change the common law position with respect to hearsay provocation.[58] It has been suggested that the requirement of presence be interpreted such that provocation will be available if:

> the defendant believes on reasonable grounds both that the provocative conduct has occurred and that the victim perpetrated the provocative act.[59]

3.29 It should be noted that recent cases have gone a long way towards weakening this requirement. In particular, those cases which deal with a long series of provocative incidents, most often in the context of domestic violence, allow a prior series of events to be taken into account. For example in *The Queen v R* words and conduct which occurred not in the presence of the accused were taken into account "as part of the background against which what is said or done by the deceased to the killer is to be assessed".[60]

To whom must the provocation be directed?

3.30 At common law it was arguable that provocation directed at someone other than the accused could constitute provocation.[61] This is more clearly the case under s 23, since the words "towards or affecting" the accused are sufficiently broad to include provocation directed at a third party. In *Quartly*[62] the New South Wales Court of Criminal Appeal has confirmed that provocation under s 23 need not be directly aimed at the defendant. This approach is sensible if the focus of provocation law is loss of self-control and any tenuous or spurious connections between the defendant and the person to whom the actions are directed can be dealt with under the ordinary person test.[63]

From whom must the provocation emanate?

3.31 The general rule at common law is that provocation must emanate from the deceased. Thus, if the defendant kills the victim under provocation from a third party, the defence may not be available. Section 23 refers specifically to the "conduct of the deceased". There are exceptions to this rule; for example, if the retaliation accidentally kills the victim the deceased may be able to argue provocation on the basis of the doctrine of transferred malice.[64] Again, it appears that if the defendant held an honest, reasonable but mistaken belief that he or she was being provoked, then he or she may still rely on the defence of provocation despite the fact that there is no actual provocation emanating from the victim.[65] In the recent Victorian case of *Voukelatos*[66] two judges thought that wholly delusionary or imagined conduct could form the legal basis for a plea of provocation. Finally, courts have been more willing to attribute the conduct of another to the deceased if there is a close association between the provoker and the deceased.[67]

3.32 It has been suggested that, despite the exceptions, the requirement that the provocative conduct must stem from the victim is inconsistent with the excusatory nature of the defence and its purported concession to human frailty.[68]

Self-induced provocation

3.33 The old s 23(2)(a) provided that the provocation could not be caused by any act of the defendant but the new New South Wales legislation is silent on this issue. However, the current section does require the defendant to have been "induced" to lose control by the conduct of the victim. This may mean that "self-induced provocation" is no defence in New South Wales although the issue does not seem to have arisen for decision.

3.34 At common law, the Privy Council in *Edwards* held that while a wrongdoer (here a blackmailer) could not rely on the predictable result of his or her actions in order to found a defence of provocation, a reaction that went to extreme lengths could be viewed by the jury as provocation.[69]

A final act of provocation. Must there be a trigger?

3.35 The law of provocation requires an identifiable act of provocation. In other words an accumulation of provocative incidents, however abusive or violent, will not suffice in the absence of a provocative "trigger". Although recent cases such as *Hill*[70] and *The Queen v R*[71] take into account the whole relationship and history in terms of assessing the gravity of the final provocative conduct, they still require there to be this final act. As O' Brien CJ opined in *Croft:*

> the whole doctrine of provocation fundamentally depends upon [the existence of some provocative incident] ... it is never sufficient that there simply be a history of violence and abusive conduct on the part of the deceased.[72]

3.36 It is questionable whether this is, in fact, a legal requirement. For one thing, it is not clear that there is anything in *Parker*[73] which suggests that this is so. Even more to the point, there is nothing in the terms of s 23 which requires it - the section refers only to "any conduct of the deceased".

3.37 Whether or not this "requirement" is consistent with the legislation and with High Court authority, it seems to have been accepted as a necessary one and it has limited the use of the defence for women who kill their abusers after long term domestic violence, although recent cases have watered it down significantly. In the case of *R* the actual provocative trigger was a relatively minor incident when viewed against the full horror of the

background of the case. Again, in *Morabito*, the jury returned a verdict of manslaughter in circumstances in which "there was no immediate trigger from the deceased to cause panic or sudden emotional reaction"[74] and where the "risk of imminent return of the deceased [from gaol] was a final straw which led to loss of self-control".[75] With such broad interpretations of what may constitute the final "trigger", it seems illogical that the Courts should have to search for such incidents in order to fulfil the technicalities of the defence,[76] particularly when the legal necessity for doing so is not clear. The better approach may be to drop the need for a specific triggering incident and subsume the issue as a factor within the requirement that the accused *actually* lost self-control because of the provocation offered.

The elements of the defence - the act of retaliation

Loss of self-control - the subjective test

3.38 The core of the defence of provocation is that the defendant *actually* lost control and killed while in this state. While some factors such as proportionality and suddenness may no longer be legal requirements, they may well go towards showing the defendant's actual state of mind. Indeed O'Connor and Fairall point out that, with respect to the subjective element, *all* circumstances, including ethnicity, intoxication, temperament, unusual physical characteristics, age and so on will be relevant.[77]

3.39 Loss of self-control can be proved expressly by the testimony of the defendant, or can be inferred from his or her actions at the time.[78]

Loss of self-control - causation

3.40 It is clear that the provocative conduct must actually cause the loss of self-control. Thus, for example, if the defendant was intoxicated:

> it is a question of fact for the jury whether the loss of self-control was caused by the deceased's words or conduct or solely by the inflammatory effects of drink or drugs.[79]

The requirement of suddenness

3.41 Before the 1982 amendments, the common law required that the retaliatory act be "sudden" or done "in the heat of passion".[80] Cases such as *Parker*[81] had interpreted this requirement broadly, allowing the time span between the provocative and retaliatory acts to be conceived in terms of a mounting of tension. However the requirement still presented a barrier in cases in which a long history of violence and abuse in a domestic context was not seen by the law as sufficient provocation if the last "provocative act" was not sufficiently temporally proximate to the killing.

3.42 The new s 23(3)(b) expressly removed the requirement of "suddenness".[82] In this respect the legislation marked an important advance for victims of domestic violence. Prior to the amendment the law had essentially refused to take cognisance of the true extent of the "cumulative provocation" these women (as is usually the case in the domestic context) suffered. Despite this change, it is still the case that some "trigger" is required.[83]

The role of intention

3.43 Section 23(3)(c) of the *Crimes Act* makes it clear that an intent to murder arising out of the provocative act will not negative the defence and this is also the case in Australia at common law.[84] It is only a premeditated intention to kill or inflict grievous bodily harm that will amount to murder.[85] It is, in fact, the very essence of the defence of provocation that the defendant did have the relevant intention but that this intention was formed spontaneously and by reason of the provocation.

Must the loss of control stem from anger?

3.44 Although anger is primarily associated with the defence of provocation and fear with self-defence, the High Court in *Van Den Hoek* found that this is not necessarily the case. The defence of provocation can be made

out where loss of control stems from fear, anger or a combination of both.[86] This would appear to be sound in both psychology and policy. In particular, victims of domestic violence who kill their abusers and who may be motivated by fear and despair as well as anger may be more able to avail themselves of the defence.[87]

Loss of self-control - the objective test

3.45 No area of the law of provocation has been as contentious as the so-called "objective test". When the law in New South Wales was substantially reformed in 1982 the objective test remained. This move has been described by one commentator as a "trade off" for the other reforms - a guarantee that the liberalisation of the provocation defence in other respects would not open the gates to spurious pleas.[88] Thus the 1982 amendments to the *Crimes Act* leave the common law objective test intact.

3.46 Essentially, the test requires that the provocation must actually have deprived the defendant of his or her power of self-control and that it also must have been sufficient to have deprived an ordinary person of this power, such that the ordinary person could have moved to kill.

3.47 There has been a great deal of judicial and academic comment on the need for and the nature of the objective test, in particular the extent to which it may be "subjectivised" by incorporating characteristics of the particular defendant. The harshness of the House of Lords decision in *Bedder,*[89] which refused to allow *any* characteristics of the defendant to be attributed to the ordinary person, was mitigated by a number of later decisions.

3.48 The ordinary person began to look more and more like the person actually on trial: he or she could be of an ethnic background, disabled, Aboriginal, impotent, a church-goer, divorced, pregnant, imprisoned, an alcoholic, deaf, a parent, a dwarf, or young.[90] These characteristics were, for the most part, only relevant to an understanding of how the alleged provocative conduct would have affected someone like the accused - that is, whether the conduct had a certain "sting" in the circumstances. For example, the use of certain derogatory terms may be particularly inflammatory when directed at some members of the community but of less moment in respect of others.[91] On the other hand, these factors were not (with the exception of age and sex) relevant to the degree of self-control to which the person on trial could be expected to be held.[92]

3.49 In *Stingel v The Queen*[93] the High Court confirmed this two-pronged test. In the first place, in relation to the gravity of the provocation, the Court stressed that:

> the content and extent of the provocative conduct must be assessed from the viewpoint of the particular accused ... in that regard, none of the attributes or characteristics of a particular accused will be necessarily irrelevant to an assessment of the content and extent of the provocation involved in the relevant conduct. For example, any one or more of the accused's age, sex, race, physical features, personal attributes, personal relationships and past history may be relevant to an objective assessment of the gravity of a particular wrongful act or insult.[94]

3.50 However, in relation to the power of self-control of the hypothetical "ordinary person",[95] the Court was of the opinion that:

> subject to a qualification in relation to age ... the extent of the power of self-control of that hypothetical ordinary person is unaffected by the personal characteristics or attributes of the particular accused.[96]

3.51 In their Honours' opinion, the function of the test is to "provide an objective and uniform standard of the minimum powers of self-control which must be observed".[97] The "governing principles" of equality and individual responsibility require that all people are held to the same standard.[98] The Court considered it necessary for the trial judge to instruct the jury on the relevance of characteristics when applying the test.

3.52 It should be noted that, while *Stingel* itself was concerned with s 160 of the Tasmanian *Criminal Code*, the objective test was said to be the same as at common law. The New South Wales Court of Appeal has applied the *Stingel* test in *Tumanako*[99] and in *Baraghith.*[100] By way of contrast, the Court of Criminal Appeal of the

Northern Territory in *Mungatopi* cast the objective test in terms of the "ordinary Aboriginal person" and endorsed an earlier Northern Territory case[101] giving this person "the powers of self-control as everyone is entitled to expect an ordinary person of that culture and environment to have".[102]

3.53 *Stingel* at least clarifies the state of the objective test. In particular it seems that the limitation suggested in earlier cases[103] whereby only permanent characteristics could be attributed to the ordinary person are no longer relevant. *Stingel* refers to a very wide range of characteristics as relevant to the gravity of the provocation. On the other hand, both exceptional pugnacity and intoxication remain irrelevant insofar as they go to the issue of self-control.[104] Thus a taunt "you exceptionally pugnacious person" or "you drunkard" may be taken into account in assessing how grave the provocation is but pugnacity or intoxication will not be relevant in assessing the level of self-control of the defendant.

Critique of the objective test

3.54 The objective test as most recently propounded in *Stingel* has been subjected to a great deal of criticism in the past two decades.

3.55 The first issue is the complexity of the *Stingel* test and other formulations which require a jury to both regard and disregard characteristics. In fact it was acknowledged in *Camplin* itself that the distinction may be too subtle for the jury to grasp.[105] In *Voukelatos* Murphy J reiterated this point, suggesting that the test is so complex that the jury would:

> if not consciously, at least subconsciously dismiss such refinements and decide as they thought to be fair and just in the circumstances.[106]

3.56 Secondly, the test has been criticised as being completely unrealistic. Yeo argues cogently that no rational distinction can be drawn between those factors going to gravity and those factors relevant to self-control. This is because, in behavioural terms, it is highly artificial to dissect the personality of the defendant into how he or she would view the provocation and how he or she would react emotionally to it.[107] For instance (to adapt an example of Yeo's[108]), if a person taunts another by reference to some visible scarring or other physical disability, the fact that the person is scarred is relevant to show that the taunt was gravely provocative to him or her. However the fact that defendant may be highly sensitive and perhaps have a lower level of self-control by reason of having grown up dealing with the disability and the insensitivity of others cannot be considered. However, despite this artificiality, the distinction appears to be a necessary one if the objective test is to be retained. If the individual's capacity for self-control can be taken into account this effectively demolishes the test - the investigation becomes completely subjective.[109] Because the gravity/self-control distinction is flawed and because it is central to maintaining the objective test, it has been argued that this is a good reason to abandon the objective test altogether.

3.57 The objective test in general has also been criticised as behaviourally inapt. Brett argues that scientific studies have shown that:

> the degree of response to a stress situation varies considerably from one individual to another ... it would be perverse of the law to ignore these teachings of science ... but if we pay attention to them, it at once becomes clear that the reasonable man of provocation law is a figment of the imagination.[110]

3.58 Related to this is the fact that the objective test contravenes a basic principle of our criminal law that culpability is to be assessed by reference to the subjective mental state of the defendant. Measuring the behaviour of the defendant relative to some hypothetical reasonable person is irrelevant to whether he or she actually lost control.

3.59 The fourth factor that has been commented on is the inappropriateness of a test that presupposes a homogenous society acting in accordance with well recognised, standard behavioural norms. A rule which tests people's reactions according to values which are culturally alien to them may work grave injustices. Murphy J in *Moffa* thought that the test was "not suitable even for a superficially homogenous society, and the more

heterogeneous our society becomes, the more inappropriate the test is."[111] His Honour thought an entirely subjective test would be more appropriate. Yeo, while criticising the *Stingel* distinction, makes a strong case for the inclusion of ethnicity as a factor going to self-control should the distinction be retained.[112] Thus he contends that:

> a migrant ... would, in most cases, have already been deeply conditioned by the customs and traditions of his native land. These customs and traditions would have moulded his emotions and personality to such a degree that altering them in any significant manner would be extremely difficult. If the law of provocation recognises the emotional instability of youth, it is hard to understand why it should not likewise recognise ethnic derivation when determining an accused's power of self-control.[113]

3.60 According to Yeo, the demands of equality in a heterogeneous multicultural society demand ethnicity be taken into account, rather than ignored. True equality is achievable only when "each group recognise the others' right to be different and when the majority does not penalise the minority groups for being different".[114] In this respect it is relevant to note that in a number of other jurisdictions such as Papua New Guinea, Western Samoa, the Northern Territory and New Zealand, the objective test has been interpreted so as to allow ethnicity to be taken into account in respect of powers of self-control.[115]

3.61 In this context it is important to be careful that claims for "equality" do not mean only "equality for diverse categories of men". It is crucial to ensure that the recognition of diverse cultural practices do not operate to reinforce the assertion of male power over women.[116]

3.62 On a more theoretical level, Yeo[117] argues that the underlying rationale for the defence of provocation (concession to human frailty, contributory fault by the victim) is at odds with the rationale for the objective test (the need of society to maintain objective standards of behaviour). This suggests that the test can be abolished.

3.63 The "classic" argument for the objective test is seriously flawed. That argument contends that the test is necessary because otherwise the good-tempered killer would be convicted while the bad-tempered killer would have the benefit of the defence. This argument needs only to be stated to be rejected. If the good-tempered person does not lose self-control then he or she will not kill and there will be no occasion for a murder trial at all. If she or he does kill but still does not lose self-control then provocation is not applicable because the killing was done in cold blood. Finally if she or he kills and does lose self-control then there is no reason that provocation cannot be raised, the defendant will pass both the subjective (although it may be a little more difficult to prove) and the objective tests.

3.64 The final problem with the objective test, particularly where issues of ethnicity arise, is evidentiary. It will be discussed in the section on evidence below.

3.65 Many commentators argue that for these reasons the objective test should be abolished. It has also been pointed out that another strong argument for the adoption of a purely subjective test is that provocation is only a partial defence - the defendant will still be found guilty of manslaughter.[118] However it is worth reiterating what is often said to be the fundamental rationale for the test - that it functions to set a minimum standard of behaviour to which all members of society can expect to be held.

The requirement of proportionality

3.66 Section 23(3)(a) now provides that "there is no rule of law" that provocation is negatived if there was not a reasonable proportion between the act causing death and the conduct of the victim. Despite earlier authority to the contrary,[119] this is also now the case at common law in Australia where proportionality is no longer a separate requirement but is only one factor to be taken into account in deciding whether the objective test has been satisfied.[120]

3.67 In *Stingel* the High Court approved the proposition that:

> the question is not whether there was some loss of self control, but whether the loss of self control was of such extent and degree as to provide an explanation for or to constitute, in some measure, an excuse for the acts causing death.[121]

Two things are evident from this. First, the conduct must have been "capable" of provoking the response.[122] It is, therefore, not necessary to find that the provocation "would" have caused the response, only that it was "capable" of so doing. Secondly, the conduct must have been capable of provoking an ordinary person not simply to some form of retaliation but to retaliation to the degree, method and continuance of violence that actually caused the death. In effect this is a recognition that the law still requires some degree of proportionality between the provocative act and the response. This has been criticised as counter to human reality by applying a measure of reasonableness to actions carried out when the defendant had already lost his or her self-control.[123]

Onus of proof and the role of the judge and jury

3.68 Under s 23(4), the onus of proof rests on the prosecution to prove beyond a reasonable doubt that the act causing death was not done under provocation.

3.69 At common law the issue of provocation must go to the jury if the defendant has discharged the evidential onus and provided sufficient evidence to justify the jury considering the matter. If any of the essential elements of provocation are not present then the jury will not be invited to consider the defence.[124] There is no precise formula to determine how much evidence is needed before the matter can go to the jury. One formulation is that provocation can be considered by the jury "if there is evidence which, if believed, might reasonably have led the jury to return a verdict of manslaughter on the grounds of provocation".[125] Another is that "the view might fairly be taken" that the defendant was provoked.[126]

3.70 It is, however, clear that the trial judge must direct the jury on provocation regardless of whether the point was raised by the defence and regardless of whether the defence wishes the matter to be raised.[127] In some cases the defence may be unwilling to raise provocation because it may run counter to its claims for self-defence.[128]

Provocation and offences other than murder

3.71 Unlike the position under the Australian and Papua New Guinea Codes,[129] at common law provocation is only available as a defence to murder.[130] However there is some doubt as to its applicability on charges of attempted murder and with respect to serious assaults.

Attempted murder

3.72 It is unclear whether provocation can be raised as a defence to a charge of attempted murder: there is English and Victorian[131] authority to say it cannot and New Zealand[132] authority to say it can. In the South Australian Full Court case of *Duvivier*, Mitchell J thought it could but Zelling J, on the basis of the doctrine of legal impossibility, thought it could not.[133] If provocation can be raised and functions to reduce the charge to attempted manslaughter, there is concern that the archaic rule that a conviction for a misdemeanour (attempted manslaughter) cannot be returned on an indictment for a felony (attempted murder) would pose difficulties for the prosecution.

Serious assaults

3.73 Provocation at common law does not extend to assault, even serious assaults such as wounding with intent to inflict grievous bodily harm. However the elements of some assaults include the intention to murder. There is some authority for[134] permitting provocation to be pleaded in relation to such assaults and some against.[135]

3.74 Provocation is a special defence developed by the common law in relation to murder.[136] While logic and symmetry may demand the extension of the defence to attempted murder, the question is essentially one of policy and the solution is unlikely to be found in technical arguments.

Evidence

3.75 The law of provocation and, in particular, the objective test present a number of evidentiary problems. While the introduction of subjective characteristics into the objective test is to be welcomed, the defence is faced with the impermissibility of adducing evidence of why conduct would be particularly provocative to the defendant. Australian courts are bound by common law evidentiary rules which prohibit the calling of evidence on matters of common knowledge and on questions going to the ultimate issue which the jury is required to find.[137] This problem is particularly acute in the following specific areas.

Ethnicity and Aboriginality

3.76 The problem is evident in relation to the inability to adduce evidence of the cultural practices of a particular ethnic group or of Aboriginal people to understand how an "ordinary person" of this background would act or re-act in the circumstances. Thus in *Dincer,* when the jury was faced with the question of how to assess the gravity of the provocation to a conservative Turkish Muslim who had believed his unmarried daughter was involved with a young man, the only help Lush J could offer to the jury was:

> there is no answer to that question ... The law does not allow the calling of evidence to assist the judgment of the jury on a question like that. It is your problem.[138]

3.77 This state of affairs essentially asks the jury to resort to stereotype, and prompted Murphy J in *Voukelatos* to express the view that:

> many, if not most, jurors would say and, perhaps, with more than a little justification, that the law is an ass.[139]

3.78 This is particularly problematic with respect to Aboriginal defendants, usually faced with an all white jury with no knowledge of how seriously an Aboriginal person, given his or her customs, beliefs and background, may view a particular type of conduct. Eames notes that the courts have tried to get around this problem by using a number of devices which fall short of actually calling evidence.[140] For example in *Jabarula* the examination and cross examination of Aboriginal people given during the course of the trial, although not directly on point, was said to be able to throw some light on the question for the jury.[141] If evidence of this nature does come to be accepted by the courts the issue of who may testify must be carefully considered. Will it be necessary to call anthropologists or sociologists? Will any community member do?

Battered Woman Syndrome

3.79 The second area in which evidentiary problems are found is where the defendant has killed following a long period of domestic violence and abuse. With respect to both the objective and subjective tests it is clear that without adequate information a jury may well have recourse to popular but false notions of domestic violence. Thus, to quote the rhetorical questions of a hypothetical jury posed by Wilson J in a recent decision of the Canadian Supreme Court:

> Why would a woman put up with this kind of treatment: Why should she continue to live with such a man? How could she love a partner who beats her to the point of requiring hospitalisation? We would expect the woman to pack her bags and go. Where is her self respect? Why does she not cut loose and make a new life for herself?[142]

3.80 These stereotypical and false assumptions are of great concern to women.[143] The so-called "Battered Woman Syndrome" (BWS) is an attempt to alleviate these evidentiary difficulties.

3.81 Crucial to an understanding of these issues is an appreciation of just how widespread domestic violence is and how frequently the results are fatal. A 1986 study of homicide in New South Wales[144] revealed that 42.5% of homicides were perpetrated against family members and nearly one quarter of homicides were perpetrated by the spouse of the victim. Of those offenders who killed their spouses, nearly three quarters were men. Women are more at risk of death at the hands of their spouse, de-facto or former partner than from any other person, indeed 47% of female homicide victims were killed by their spouse. What is important is that there was a

recorded history of marital violence in 48%[145] of these cases, cases in which the State proved unable to protect women from abusive relationships of which it was fully aware. It is also particularly sobering to note that in almost half the cases in which women were killed, they were in the process of separation from their partner or had already left the relationship.

3.82 The deficiencies of a plea of self-defence in this context are well documented and it is generally considered that changes to the law in this area are crucial in providing effective defences to battered women who kill.[146] For a number of reasons, not the least because it provides a complete defence, an adequate defence of self-defence would be more advantageous to women than a defence of provocation.[147] Nevertheless provocation can be useful, particularly as it has been interpreted in the last decade and particularly where the jury is provided with adequate information about the woman's situation.

3.83 The Battered Woman Syndrome is not a defence as such, but is introduced to support or establish other defences, such as duress, self-defence or provocation. BWS has been considered by Australian courts on three occasions, in cases in which the defences of duress and self-defence were at issue.[148] The syndrome is primarily associated with the work of Lenore Walker, an American psychologist, and has been used in courts in the United States for the past decade.[149] Essentially the theory is that a woman subjected to long term and repeated domestic abuse becomes immobilised, passive and unable to escape her situation. This is a psychological response to the material conditions of her life. While the syndrome has been the subject of some criticism, both in terms of Walker's psychological research and in terms of its utility to help women[150] and while it is still in its infancy in Australia, it does have direct relevance to the law of provocation. Although all of the Australian cases so far have dealt with self-defence and duress, both King CJ and Bollen J in *Runjanjic and Kontinnen* thought that there was no difference in principle between admitting evidence of BWS in such cases and admitting it in provocation cases.[151]

3.84 Evidence of this nature is relevant in assisting the jury in two respects: firstly in assessing the defendant's subjective response and secondly in measuring her actions against the objective test. With respect to the former, if the experiences of the defendant are so far beyond what the jury is able to comprehend, her evidence as to her subjective state of mind may not be regarded as credible by the jury.[152] With respect to the objective test it will be difficult, in the absence of evidence, for the jury to ascertain whether the defendant acted as an ordinary battered woman (whatever that may be) would in the circumstances.

Diminished responsibility and provocation

3.85 Provocation and diminished responsibility are sometimes pleaded together although it is not clear how common this is in New South Wales. Case studies conducted in England have shown that juries often return manslaughter verdicts simultaneously based on both defences. Such a course is clearly advantageous to the defence in a provocation case because this will enable psychiatric evidence to be called. It is impermissible to adduce evidence of the defendant's propensity to lose self-control for the purposes of provocation but it may be relevant to aspects of diminished responsibility. Once the evidence has been admitted:

> it may become virtually impossible to disentangle the issues of loss of self-control, abnormality of mind and substantial impairment of mental responsibility ... once expert evidence of this nature is introduced, it is submitted, the jury cannot help be influenced by it in their assessment of both diminished responsibility and provocation.[153]

3.86 Conversely, pleading provocation and diminished responsibility together also aids the diminished responsibility defence. Indeed the "two defences reinforce each other".[154] Thus the defence of provocation operates to show what the victim did and diminished responsibility can present evidence of what the defendant felt.

THE DEFENCE OF PROVOCATION IN PRACTICE

The prosecution process

3.87 In *Kolalich*, the High Court stated that provocation was an issue which could be considered by the prosecution and that:

> they may decide that, on that account, manslaughter should be charged rather than murder ... they may also decide that, on that account, a plea of guilty to manslaughter should be accepted in satisfaction of an indictment for murder.[155]

3.88 However the Court also found that these powers were exceptional and that in most cases the issue is:

> best left to the determination of a jury entrusted with deciding whether, absent such a defence of provocation, the accused is guilty of murder.[156]

3.89 Thus it is possible to be indicted directly for manslaughter on the grounds of provocation or to plead guilty to it. The most recent indications of how this works in practice come from the Victorian *Homicide Prosecutions Study*, which considered the period 1981-1987.[157] That study found that provocation was an issue in 23.5% of homicide cases (75 cases). Of these, 15 cases were ultimately presented for manslaughter.[158] In only one case was provocation the *only* issue: self-defence and unlawful and dangerous act manslaughter were also relevant in all other cases. Only four of these cases arose in a domestic context, the others were all "argument" cases. Ultimately 11 of these defendants were convicted for manslaughter while 4 were acquitted.

3.90 In the context of "sexual intimate homicide", Easteal has compared murder cases with those in which the defendant was permitted to plead guilty to manslaughter. She found that:

> No variable seems to be the obvious difference. Premeditation? No, some of the manslaughters were acknowledged as premeditated. Means of killing? Again, no; some murders were less violent than the manslaughters and some of the latter showed less loss of self-control than some of the murders.[159]

3.91 Thus the difference between a murder and a manslaughter trial seems to be ultimately a matter of discretion often reliant on factors such as the attitude of the individual prosecutor and the degree of involvement of the victim's family.[160] It does, however, appear to be the case that female defendants are more frequently offered pleas to manslaughter in cases in which provocation may be an issue than are men.

Provocation at trial

3.92 Provocation was raised in 60 murder trials in the Victorian study. Sixty percent of defendants raising the issue were convicted of manslaughter, with only 22% convicted of murder. However, as the Victorian Law Reform Commission point out, this cannot necessarily be seen as a "success rate" for provocation because of the presence of other defences in the same trial.[161] The ostensibly high success rate for provocation also may be explained on the basis that juries often favour compromise verdicts. Thus, if the defence runs both provocation and self-defence and the jury's options are acquittal, murder or manslaughter, they will often choose to steer the middle course.[162]

3.93 The Victorian study found that more male than female defendants use the provocation defence: in absolute terms and as a proportion of all accused charged with murder, men use the provocation defence much more frequently than women. However, where female defendants do raise the defence it is more likely to be successful.[163] No female defendant who argued provocation was convicted of murder, although 25% of male defendants who raised the defence were.[164]

3.94 In the context of domestic homicides, of the 64 cases where male defendants were presented for murder or manslaughter, provocation was an issue in 30 cases. Of these, 23% were convicted of murder and 67% of manslaughter. It was also found that male defendants are less likely to receive a manslaughter conviction where their victim is female.

3.95 Provocation was raised in 8 of the 26 cases of female defendants presented for murder or manslaughter. There were no murder convictions and four were convicted of manslaughter.

3.96 The Victorian Law Reform Commission suggests that these figures may indicate that the lack of murder convictions for female defendants reflect the fact that other defences are also argued or that women tend not to be prosecuted for murder if provocation is a viable option.

3.97 The Victorian Law Reform Commission found that its data:

> does not support the conclusion that the provocation defence generally operates in a gender biased way. It refutes the claim made by some commentators that juries routinely accept provocation defences by males who have killed females.[165]

3.98 It may be that more empirical work needs to be done on this issue but it is also important to be aware of what lies behind these figures. The general pattern that emerges from the cases is that men use the provocation defence when they kill their partners or ex-partners in a jealous rage and that women use it - as they are now, under the 1982 amendments, more able to do - where they have been the victims of long term domestic abuse. The data treats these situations as commensurate - something which itself should be examined for gender bias.[166]

Sentencing

3.99 Where provocation was an issue and a manslaughter verdict returned, the Victorian study found that 33% of women received non-custodial sentences (compared with 10% of men) and that the most common sentence for men was 6-8 years and for women 3-5 years.[167] The Victorian Commission found that "assessment of the fact summaries ... indicates that heavier sentences for the males were generally appropriate".[168]

3.100 Easteal[169] found that the sentences given to battered women were all relatively lenient; 30% received non-custodial sentences and the top was an eight year minimum. It is interesting that those manslaughter convictions on the grounds of provocation and diminished responsibility (as opposed to involuntary manslaughter) received heavier sentences. Thus it seems that the intent to murder is viewed as a factor in sentencing. It also appears that the extent and nature of the domestic violence preceding the killing was not directly relevant to sentence. Thus in Easteal's study the violence in a provocation case was "possibly the worst of the sample yet that factor did not appear to weigh in [the defendant's] favour".[170] She concludes that "there seems to be a failure in the judiciary's understanding of the dynamics of battering and in their acceptance of domestic violence as criminal assault" and that Battered Women Syndrome evidence is important so that "jurors (and judges) are [not] left with their own preconceived notions of reasonable behaviour for a battered woman".[171]

3.101 It is also interesting to consider Easteal's findings concerning the sentencing of men convicted for the murder or manslaughter of their female partners. Although sentences varied widely, she found that "overall the nature of the victim did mitigate the sentence", particularly when the woman "had been less than the cultural ideal of female virtue".[172] Thus:

> Leaving one's husband, having an affair, not taking care of the child(ren), nagging one's husband, lack of appreciation for the husband's work on behalf of the family were all *not* manifested by the ideal woman. Thus, one of the few consistencies in sentencing and/or determining whether to allow the defendant to plead down to manslaughter was the nature of the victim and her degree of compatibility with societal norms.[173]

THE POSITION IN OTHER JURISDICTIONS

3.102 The position in other Australian jurisdictions and in the United Kingdom is not substantially different from the prevailing position in New South Wales. To some extent the changes introduced in this State in 1982 put on a statutory footing what the courts in this and other jurisdictions already were beginning to do. The common law position has been briefly referred to above in the description of the law in the New South Wales and the law in the common law and Code jurisdictions will be considered below only insofar as it differs substantially from the law in New South Wales. The New Zealand position will be considered in slightly more detail.

Other Australian jurisdictions - the Code States

3.103 In Queensland, Western Australia, Tasmania and the Northern Territory the respective Codes govern the law of provocation.

3.104 Section 304 of the Queensland *Criminal Code* provides:

> Where a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only.

3.105 Section 281 of the Western Australian Code is in substantially the same terms. Under the Queensland Code the meaning of provocation falls to be determined by reference to the common law[174] while in Western Australia, provocation is interpreted by reference to the definition in s 245 of that Code.[175] The Queensland Criminal Code Review Committee has recommended that the Code definition of provocation be applicable.[176]

3.106 Section 160 of the Tasmanian *Criminal Code* provides:

> (1) Culpable homicide which would otherwise be murder may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.
>
> (2) Any wrongful act or insult of such nature as to be sufficient to deprive an ordinary person of the power of self-control, and which, in fact, deprives the offender of the power of self control, is provocation, if the offender acts upon it on the sudden and before there has been time for his passion to cool.

3.107 The Code also expressly provides for the situations of unlawful arrest (s 160(5)), provocation by lawful acts and self-induced provocation (s 160(4)). The ordinary person test, formulated by the High Court in *Stingel*, is essentially the same as at common law and is discussed above. Proportionality is merely a factor to be taken into account in deciding whether the retaliation flowed from the conduct of the deceased.[177] The term "any wrongful act or insult" is interpreted broadly and not restricted by reference to old common law categories.[178] Although s 160 is silent on the matter, the onus of proof lies on the prosecution and the trial judge must leave the matter to the jury (even if the defence is not argued) if there is material capable in law of constituting provocation.[179]

3.108 In the Northern Territory, s 34(2) of the *Criminal Code* provides:

> When a person who has unlawfully killed another under circumstances that, but for this subsection, would have constituted murder, did the act that caused death because of provocation and to the person that gave him that provocation, he is excused from criminal responsibility for murder and is guilty of manslaughter only provided
>
> (a) he had not incited the provocation;
>
> (b) he was deprived by the provocation of the power of self control;
>
> (c) he acted on the sudden and before there was time for his passion to cool;
>
> (d) an ordinary person similarly circumstanced would have acted in the same or a similar way.

3.109 It should also be noted that under s 34(1) provocation is available to exclude criminal responsibility in respect of offences other than murder. As noted above, the Court of Criminal Appeal of the Northern Territory in *Mungatopi* has cast the objective test in terms of the "ordinary Aboriginal person" and endorsed an earlier Northern Territory case[180] giving this person "the powers of self control as everyone is entitled to expect an ordinary person of that culture and environment to have".[181] This differs from the test as propounded in *Stingel*.

3.110 It is also important to note that, in the Code jurisdictions, provocation is a complete defence to offences of which assault is an essential element.[182] In *PLAR No 1 of 1980,*[183] the Supreme Court of Papua New Guinea held that provocation could be a complete defence to a charge of involuntary manslaughter based on an unlawful and dangerous act.

Other Australian jurisdictions - the common law States

3.111 Section 13 of *Crimes Act* 1900 (NSW) in force in the Australian Capital Territory is substantially the same as s 23. In Victoria and South Australia the defence is entirely one of the common law.

England

3.112 In England the common law still prevails but is modified by the *Homicide Act* 1957 s 3. Perhaps the major difference between New South Wales and English provocation law is the recent reiteration by the English Court of Appeal of the requirement of a "sudden and temporary loss of self-control".[184] The difference has been explained in the following way:

> The English law views the element of "suddenness" restrictively so as to recognise only the provoking event occurring immediately before the killing. Furthermore, the element is construed as disallowing an effluxion of time between the provoking event and the killing. In contrast, the Australian law has given an liberal interpretation to "suddenness" by recognising the notion of cumulative provocation[185] and by permitting a time interval between the final provoking event[186] and the killing.[187]

3.113 Another difference lies in the precise formulation of the objective test. *Stingel* modifies *Camplin* with respect to sex as a characteristic relevant to self-control. It is also clear from that case that the test is to be formulated in terms of the "ordinary" and not the "reasonable" person.

Ireland

3.114 In Ireland, the Irish Court of Appeal abandoned the objective test in *The People v MacEion,*[188] adopting the reasoning of Murphy J (in dissent) in *Moffa.*

New Zealand

3.115 Following the decision in *Bedder,* the New Zealand *Crimes Act* (1961) was amended to introduce s 169(2):

> Anything done or said may be provocation if -
>
> (a) in the circumstances of the case it was sufficient to deprive a person having the power of self control of an ordinary person but otherwise having the characteristics of the offender, of the power of self control; and
>
> (b) it did in fact deprive the offender of the power of self control and thereby induced him to commit the act of homicide.

3.116 The New Zealand Court of Appeal considered this concept of the "hybrid ordinary person" in *McGregor.*[189] In that case it sought to limit the relevant "characteristics" to those which set the offender apart from the ordinary person and to those which had some degree of permanence. Thus exceptional pugnacity or excitability and intoxication were excluded as were mental conditions without the requisite degree of permanence. *McGregor* stressed the necessity for the provocation to be directed at the particular characteristic. However in *Tai*[190] the Court of Appeal appeared no longer to insist on this nexus. This decision, in effect, allowed ethnicity to be taken into account in respect of powers of self-control of the defendant. Further, the caution expressed in *McGregor* concerning mental conditions has not necessarily been heeded in subsequent case law.[191] Thus, for example, post-traumatic stress disorders and obsessive compulsive personality disorders have both been said to be capable of being a "characteristic" under s 169(2).

3.117 Apart from s 169(2), the law of provocation in New Zealand is governed by the common law. While there are a number of differences - for example the New Zealand courts do not seem to have found the question of indirect provocation a problem - the New Zealand position is quite similar to that prevailing in New South Wales.[192]

3.118 It is ironic that, when the House of Lords in *Camplin* essentially adopted the "hybrid" ordinary person test, Lord Simon remarked that New Zealand juries had not experienced difficulties working with it.[193] In fact, in 1976 the Criminal Law Reform Committee had recommended the abolition of the defence of provocation, in large part because of the complexities of the test.[194] The Committee recommended that there be a single offence of unlawful homicide to cover what is now murder and manslaughter by reason of provocation and that provocation be only relevant with respect to sentence.[195]

3.119 Following this report, cl 128 of the Draft *Crimes Bill* 1989 provided that:

> The fact that a person kills any other person under provocation shall not be a defence to a charge of culpable homicide but may be taken into account on the question of penalty.

The Bill has been subjected to a great deal of criticism.[196] It was argued that the reforms would lead to the diminution of the role of the jury and to the role of defence counsel. It was said to leave too much to the sentencing judge. The most trenchant criticism, however, was made with respect to the dismantling of the traditional terminology and symbolism of the law of murder. It was said that:

> Without excellent reason, legislatures molest such symbols to the peril of the law's meaning and people's understanding of it ...
>
> If [the term murder] deters a few killings and if it helps prop up the flaking masonry of public confidence in the criminal law then no harm and some small good will result from keeping it.[197]

3.120 Eventually the Bill was sent for further consultation and in 1991 the Crimes Consultative Committee published its report.[198] It recommended that the traditional murder terminology be retained instead of the phrase "culpable homicide" but thought that "abolition" of provocation as a partial defence was the correct approach.

Canada

3.121 Section 232 of the *Criminal Code* is essentially the same as s 160 of the Tasmanian Code.[199] The interpretation of that section[200] is substantially similar to the law in Australia, although there are a number of interesting minor differences. For one thing, the decision in *Hill*[201] on the objective test does not draw the gravity/control distinction quite as clearly as the decision in *Stingel*. Again, Canadian law does not require the provocation to be sufficient to make the ordinary person act as the accused did - it is sufficient that the loss of self-control be *caused* by the provocation.[202] Another point worth noting is the absence of a requirement of proportionality.[203]

The United States

3.122 The position in the United States varies quite considerably between the States. About eleven States have enacted provisions based upon the Model Penal Code of the American Law Institute. Under s 210.3 of that Code, any intentional killing is manslaughter if:

> committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse [such reason to be] determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

3.123 This broadens the common law in two main ways. First, it does not limit what may be seen as provocation. Secondly, it introduces an almost subjective test. While still requiring the jury to consider whether there was a "reasonable" explanation for the mental or emotional disturbance of the defendant, it requires this consideration to be made by reference to the viewpoint of the defendant.

India

3.124 The defence of provocation is found in Exception 1 to s 300 of the Indian *Penal Code:*[204]

> Culpable homicide is not murder if the offender while deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation or caused the death of another person by mistake or accident.

3.125 The interpretation given to this provision by the Indian courts is interesting because it goes a lot further in subjectivising the ordinary person test than courts in Australia and other common law jurisdictions. The courts have held that characteristics, particularly ethnicity, may be taken into account both in respect of the gravity of the provocation and in assessing the powers of self-control of the defendant. This does not collapse into pure subjectivity because the level of self-control required is that of the ordinary member of a particular class of people. Further, the Indian courts admit evidence of experts such as anthropologists in order to aid the jury's understanding of the cultural factors involved. By contrast with the Australian position in *Stingel*, Indian law only requires the ordinary person to have lost his or her self-control simpliciter. It is not necessary that he or she be provoked to retaliation to the degree, method and continuance of violence that actually caused the death.

European jurisdictions

3.126 The House of Lords Select Committee on Murder and Life Imprisonment conducted a survey of the Member States of the Council of Europe with respect to their law of provocation.[205] It is difficult to appreciate the actual significance of the presence or absence of an analogous defence without considering the entire law of homicide in the relevant jurisdiction and, in particular, the murder/manslaughter distinction and the penalty for murder. However it is noted that the following jurisdictions provide for a reduction of murder to some lesser offence on the grounds of provocation: Cyprus, Luxembourg, Malta and Switzerland. Denmark, Turkey and Italy provide a similar defence in relation to all offences or consider provocation in relation to punishment.

OPTIONS FOR REFORM

Option One: retain the defence without amendment

Implementation

The current law of provocation could be retained in its existing state.

Other recommendations to this effect

The Queensland Criminal Code Review Committee has recommended the retention of the provocation defence in the Queensland Criminal Code[206] but this is a different provision to s 23. There is no standing recommendation to reform the current provocation defence in this State. As noted above, the defence was recently reformed by Parliament and the Commission's current reference is the first comprehensive review of the 1982 amendments.

Option Two: abolish defence.

Implementation

For example it could be provided that:

> The fact that a person kills any other person under provocation shall not be a defence to a charge of murder but may be taken into account on the question of penalty.[207]

It is also necessary to consider the option of abolishing the law of provocation in the context of the removal of the murder/manslaughter distinction. This option is fully canvassed in Chapter 2.

Other recommendations to this effect

The Gibbs Report considered that provocation should be irrelevant in determining guilt and should only be taken into account in respect of sentence.[208] As noted above this is also the course proposed in New

Zealand. The Canadian Law Reform Commission's proposed new criminal code does not provide for a defence of provocation at all.[209]

Option Three: reformulate defence

Implementation and other similar recommendations

The major issue to be considered here is the need to reform the objective test. The criticisms of that test have been discussed above at paras 3.54 - 3.65. There are also a number of other issues to be considered. Similar recommendations are referred to in footnotes to the text of this section.

Some or all of the following suggestions for reformulation of the defence could be adopted:

Reform the objective test

This could be done by either:

(a) Abolishing the objective test altogether in favour of the purely subjective test of whether the defendant in fact lost self-control.[210]

OR

(b) Introducing what is essentially a subjective test restrained by an element of community standards.

For example, provocation could be a defence if, on the facts as they appeared to the defendant, it can reasonably be regarded as a sufficient ground for the loss of self-control leading the defendant to react against the victim with murderous intent.[211] This avoids reference to notional "reasonable man", instead directing the attention of the jury to what they themselves consider reasonable - which has always been the real question. The Victorian Law Reform Commission made the following suggestion for reformulation:

Where a person suffers a loss of self control as a result of provocation (whether by things done or words said and whether by the deceased or by someone else) and intentionally kills or is a party to the killing of another, he or she is not guilty of murder but guilty of manslaughter if, in all the circumstances, there is a sufficient reason to reduce the offence from murder to manslaughter.[212]

OR

(c) Introducing a clearer statutory formulation of the objective test clarifying that factors such as ethnicity, gender and disabilities may go to establishing the level of control of the ordinary person.

Reform of other legal requirements of the defence

Clarify whether provocation can be a defence to a charge of attempted murder[213] or to charges for offences involving intention to murder.

Clarify that the defendant need not be present at the time of the provocation[214] and that the provocation need not stem from the victim.[215]

Clarify that it is unnecessary for the provocative conduct to be unlawful.

Evidentiary reforms

If the objective test was to remain intact, evidence could be allowed to be introduced on matters relevant to it. Thus, for example, the Australian Law Reform Commission has recommended that the

abolition of the common knowledge and ultimate issue rules, along with the liberalisation of the definition of expertise will facilitate the calling of evidence of the cultural practices of the defendant.[216]

Provision could be made for evidence of Battered Woman Syndrome to be called in provocation cases.

DISCUSSION OF THE OPTIONS

Should there be a provocation defence in one form or another or should it be abolished?

3.127 Before the precise form of the provocation defence is considered, it is necessary to discuss whether or not a partial defence of provocation, operating to reduce liability for murder to manslaughter is required at all. The following issues are relevant to this consideration.

3.128 *Is the defence necessary in a jurisdiction with a discretionary penalty for murder?* The most frequent argument for the abolition of the provocation defence is that, as a historical device to avoid the death penalty or a mandatory life sentence, it is unnecessary in a jurisdiction with a discretionary murder penalty and that factors now going to establish the defence can adequately be taken into account in respect of sentence. It is argued that to take the sentence-only approach to provocation would eliminate or shorten many trials and reduce expense. It is true that there is nothing strange about giving judges broad sentencing discretions, they already possess this for all offences - including murder - in New South Wales.

There are a number of arguments against this position.

3.129 *Historical argument*. The first argument contends that the historical basis for this claim is not correct. There is a long standing historical distinction between unprovoked and provoked killings and it is by no means certain that provocation was merely a device to avoid the death penalty. In 17th century England, the culpability of a person who killed under provocation was lower than for manslaughter. The defence was an attempt to recognise a *higher* level of culpability for such killings.

3.130 *"Labelling" argument.* The second argument is based on the question of "labelling". A successful defence prevents labelling as "murderers" people who kill under circumstances of extreme provocation. It has been pointed out to the Commission that many defendants who rely on the partial defences are otherwise people of good character, people for whom the stigma of a murder conviction may be significant.[217]

3.131 This last point is not unimportant. As a community we perceive a moral distinction between provoked and unprovoked or hot-blooded and cold-blooded killings. People recognise that there is a point at which they themselves could lose self-control, although this rarely may be to the extent of killing another person. Thus we can, to some extent, empathise with the accused. The law should continue to reflect this perception.

3.132 Finally in the context of "labelling", it has been argued that in certain circumstances the jury may be reluctant to convict of "murder" and, without the defence, may *acquit* in sympathy contrary to the facts and the judge's direction. The defence gives the jury the choice of an appropriate intermediate verdict.

3.133 *The role of the jury.* The third argument against the abolition of provocation on the ground that it is unnecessary where there is a discretionary murder penalty concerns the role of the jury. The jury has traditionally been and remains the appropriate arbiter of community values. To remove fundamental issues of culpability from the jury and to pass them on to the sentencing judge undermines its role. In addition, a jury finding of manslaughter enables the public to understand why a seemingly lenient sentence has been proposed. It therefore aids community understanding of the law of homicide.

3.134 *The inadequacy of the sentencing process.* Concerns also arise that, if provocation becomes relevant merely to sentence, the sentencing process essentially would not be up to the task. In the first place, the judge has no assistance from the jury as to their view of the offence and thus there is little community input into the sentencing process although the issues now involved at trial will still have to be resolved. It is noted that the

sentencing process is not subject to the traditional protections afforded to the accused in a criminal trial and there is concern in passing greater power over to trial judges.

3.135 It is also noted that there is a clear sentencing difference between murder and manslaughter (that is, a different "tariff") despite the discretionary sentence. The maximum sentence for murder is life and the maximum sentence for manslaughter is 25 years. At present average sentences for manslaughter are much lower than murder sentences.[218] It is therefore advantageous to be sentenced for manslaughter. The concern is that, if provocation were abolished and defendants became liable to a maximum life sentence, actual sentences might rise.

3.136 *Lack of empirical evidence to support claims of cost saving.* While it is often argued that abolishing provocation would substantially reduce the number and length of trials and thus reduce court costs, there is no empirical evidence to suggest this is the case. It is not known how frequently provocation is run in conjunction with diminished responsibility or with some other complete defence such as self-defence or automatism. If it is often run together with other defences, then time and cost savings may be minimal. Further research in this area would be useful.

3.137 *Are there other problems with provocation, however formulated?* A number of general arguments have been proposed to suggest that provocation should be abolished.

3.138 *Excessive self-defence has been abolished.* First it is argued that the rationale for retention of the defence is weakened by the abolition of the partial defence of excessive self-defence by the High Court in *Zecevic.*[219] That defence was abolished because although a distinction in moral culpability was perceived, the majority found it impossible to draw the distinction in law. (That decision leaves provocation as the only existing common law partial defence.) In this context it is worth noting that the decision in *Zecevic* has been subjected to considerable criticism. In particular it has been noted that the minority in that case was capable of drawing a sensible and just legal line to reflect the perceived moral distinction.[220]

3.139 *Provocation has no satisfactory doctrinal base.* Secondly, it is said that provocation has no satisfactory doctrinal base. The "concession to human frailty" rationale cannot explain the cases, nor can the partial fault of the victim. On either rationale, but especially if provocation is seen as a "concession to human frailty", it is argued that a concession of this nature should be irrelevant in determining guilt but could be taken into account in respect of sentence. Because such a killing is intentional, loss of self-control is not a sufficiently good reason to reduce the actual level of culpability. By way of contrast, the law generally does not accept desire (another human frailty) or even necessity (hunger) as defences to property crimes.

3.140 On the other hand it is argued that if there was no defence of provocation there would be the possibility of more acquittals based on "defences" going to lack of *mens rea* or to voluntariness. As a matter of policy it is often preferable in these cases that a manslaughter conviction result. It also should be noted that the absence of a coherent doctrinal framework has not usually proved to be an impediment to retention of other areas of the criminal law.

3.141 *Provocation is gender biased.* Despite the findings of some studies that the provocation defence is not gender biased in practice, there is also evidence that the defence operates primarily as an excuse for men who kill women. In particular it is contended that the equation of killing an ex-lover in a jealous rage (a context in which men are likely to use provocation) and killing an abuser after long term domestic violence (a context in which women are likely to use the defence) are neither comparable in terms of moral culpability nor for the purposes of evaluating whether the operation of the defence reveals gender bias.

3.142 Considerations of possible gender bias in the use of the defence of provocation by men must be carefully weighed up with the following issue. Before the 1982 amendments, it was clearly the case that the rules with respect to suddenness reflected male responses to trauma. Indeed the whole law of provocation was based on a paradigm of men as natural aggressors and operated to reinforce this paradigm. The amendments brought necessary and commendable changes to the law of provocation although some areas remain of concern in attempting to make the defence available to women who kill their abusers. But it is surely the case that, given the defence is now more applicable to the response patterns of women (particularly those who may have been involved in long-term domestic abuse), to abolish provocation now may remove a necessary and appropriate

defence from such women. It may be, however, that provocation, however formulated, is not the appropriate defence for women who kill their partners after a period of domestic violence. One reason is that provocation relies on the notion that the killer lost her self-control which may not in fact be the case in these circumstances. Thus advances in the law of self-defence or a new defence specifically applicable to victims of domestic violence who kill has been suggested.[221]

Should the provocation defence be retained in its current form?

3.143 The law of provocation was substantially reformed in New South Wales in 1982 and significant problems with the old defence were addressed. The law also has been refined through a series of judicial decisions. It is arguable that, on this basis, the defence does not require further reformulation. It is indeed the case that the 1982 amendments introduced some much-needed and far-reaching reforms into the law of provocation in New South Wales. It may be, therefore, that the law of provocation does not need any further "tinkering" - that it is a defence that works well in practice and, essentially, should be left alone.

3.144 Despite these arguments, there is no reason why the legislature should not attempt to clarify aspects of the law of provocation that were not covered by the 1982 amendments and which have not yet received definitive judicial consideration. The law of provocation remains quite complex. Reformulation will clarify issues with respect to self-induced provocation, misdirected retaliation and the availability of the defence on charges of attempted murder and other serious assaults.

3.145 Finally, the objective test requires reconsideration. Although the reform of this test was rejected in 1982, the problems associated with it have not disappeared and the issue of whether it should be retained, reformulated or abolished arises quite squarely for reconsideration a decade on. The objective test has been discussed extensively above at paras 3.45 - 3.65 and the problems with it pointed out. The Commission is particularly interested in receiving submissions on this aspect of the law of provocation.

Footnotes

1. See D Brown, D Farrier, D Neal and D Weisbrot *Criminal Laws* (The Federation Press, 1990) at 667-669. This issue also is considered in J Dressler "Partial Justification or Partial Excuse?" (1988) 51 *Modern Law Review* 467; J Dressler "Rethinking Heat of Passion: A Defense in Search of a Rationale" (1982) 73 *Journal of Criminal Law and Criminology* 421; S Uniacke "What are Partial Excuses to Murder" and F McAuley "Provocation: Partial Justification, Not Partial Excuse" both in S Yeo (ed) *Partial Excuses to Murder* (The Federation Press, 1991).

2. See, for example, *Curtis* (1756) Fost 137; 168 ER 67 at 68.

3. For example *Doughty* (1986) 83 Cr App R 319 discussed in Horder "The Problem of Provocative Children" [1987] *Criminal Law Review* 655.

4. J Greene "A Provocation Defence for Battered Women Who Kill? (1989) 12 *Adelaide Law Review* 145 at 146.

5. Greene at 147-8. See discussion below at paras 3.9 - 3.13.

6. G Coss "'God is a righteous judge, strong and patient: and God is provoked every day': A Brief History of the Doctrine of Provocation in England" (1991) 13 *Sydney Law Review* 570 at 571.

7. B Brown "The Demise of Chance Medley and the Recognition of Provocation as a Defence to Murder in English Law" (1963) 7 *American Journal of Legal History* 310 at 312.

8. Brown at 311.

9. *Third Part of the Institutes of the Laws of England* at 57.

10. Brown at 310.

11. A Ashworth "The Doctrine of Provocation" (1976) 35 *Cambridge Law Journal* 292.

12. *Third Part of the Institutes of the Laws of England* at 51.

13. Brown at 313.

14. 1 Jac 1 c 8.

15. Brown at 310.

16. See Coss at 574ff for a survey of seventeenth century cases.

17. Hale (1736) vol 1 *A History of the Pleas of the Crown* 455.

18. (1707) Kel 119; 84 ER 1107.

19. *Mawgridge.*

20. *Mawgridge.* Ashworth points out that in the seventeenth century adultery was a crime of immorality punished by the ecclesiastical courts and was regarded as a serious offence, at 294.

21. *Maddy* (1671) 1 Vent 159; 86 ER 108.

22. (1762) *Crown Law, Discourse II Of Homicide* at 255.

23. East 1 *Pleas of the Crown* 234; *Thomas* (1837) 7 Car & P 817; 173 ER 356.

24. Ashworth at 298.

25. (1869) 11 Cox CC 336 at 339. And see Coss at 582-3 for subsequent cases.

26. (1913) 9 Cr App R 139.

27. [1914] 3 KB 1116.

28. [1942] AC 1.

29. [1946] AC 588.

30. [1954] 2 All ER 801.

31. Coss at 583.

32. Turner *Russell on Crime* (11th ed, 1958) at 613, quoted in Brown at 317.

33. Coss at 591.

34. [1978] AC 705.

35. (1963) 111 CLR 610.

36. See, for example, *MacDonald* [1953] NTJ 186 at 189; *Muddarubba* [1956] NTJ 317. These cases are discussed in *Jabarula v Poore* (1989) 42 A Crim R 479 at 486-8 (NT SC).

37. [1961] VR 663.

38. (1977) 138 CLR 601 at 606 per Barwick CJ.

39. See *Parker* (1963) 111 CLR 610 at 660.

40. Notably the Hill and Roberts cases in NSW (*Hill v R* (1981) 3 A Crim R 397), the *Queen v R* case in South Australia ((1981) 4 A Crim R 127) and the Krope case in Victoria. See D Weisbrot "Homicide Law Reform in New South Wales" (1982) 6 *Criminal Law Journal* 248 at 265; R Landsdowne "Homicide Law Reform: New South Wales" (1982) 7 *Legal Service Bulletin* 80.

41. See *Moffa* (1977) 138 CLR 601, per Mason J at 620-621; *Dutton* (1979) 21 SASR 356 (taunts about sexual prowess); *R* (1981) 4 A Crim R 127 (false words of affection against background of horrifying domestic abuse).

42. See *Maddy* (1671) 1 Vent 159; 86 ER 108; *Mawgridge* (1707) Kel 119; 84 ER 1107.

43. See, for example, *Moffa* (1977) 138 CLR 601; *Gardner* (1989) 42 A Crim R 279 (Vict CCA).

44. *Mawgridge* (1707) Kel 119 at 137; 84 ER 1107 at 1115.

45. King CJ and Jacobs J.

46. P Gillies *Criminal Law* (2nd ed, Law Book Company, 1990) at 349. In England it was held in *Doughty* (1986) 83 Cr App R 319 that the crying of a baby - clearly not an unlawful act - could constitute provocation.

47. B Fisse *Howard's Criminal Law* (5th ed, Law Book Company, 1990) at 98.

48. D O'Connor and P Fairall *Criminal Defences* (2nd ed, Butterworths, 1988) at 187-8.

49. See the *Summary Offences Act* 1988 (NSW) s 4.

50. *Scriva (No 2)* [1951] VLR 298.

51. [1975] VR 449.

52. *Quartly* (1986) 22 A Crim R 252 at 256ff (NSW CCA). Note that the correctness of this decision was left open in *Peisley* (1990) 54 A Crim R 42 (NSW CCA).

53. *Arden* [1975] VR 449 at 452.

54. D Lanham "Provocation and the Requirement of Presence" (1989) 13 *Criminal Law Journal* 133 at 147.

55. O'Connor and Fairall at 185.

56. *Masters* [1987] 2 Qd R 272.

57. Lanham at 147.

58. NSW Parliamentary Debates (Hansard) (1982) at 2485-6.

59. Lanham at 149. See *R v White* [1988] 1 NZLR 122 which imposed a requirement of reasonable belief.

60. (1981) 4 A Crim R 127 at 131 (SA SC). See also the New South Wales case of *Hill* (1981) 3 A Crim R 397.

61. See O'Connor and Fairall at 185; *Terry* [1964] VR 248 at 250-1; *Earley* (unreported) South Australia, Court of Criminal Appeal, 24 August 1990.

62. (1986) 22 A Crim R 252 at 258-9.

63. See R O'Regan "Indirect Provocation and Misdirected Retaliation" [1968] *Criminal Law Review* 319 at 321.

64. O'Connor and Fairall at 184, see especially *Kenney* [1983] 2 VR 470 at 472.

65. *Croft* [1981] 1 NSWLR 126 at 149-50.

66. [1990] VR 1.

67. See *Tumanako* (unreported) Supreme Court, NSW, Court of Criminal Appeal, 7 October 1992; *Gardner* (1989) 42 A Crim R 279 (Vict CCA). But compare *Peisley* (1990) 54 A Crim R 42 (NSW CCA).

68. See, for example, F McAuley "Provocation: Partial Justification, Not Partial Excuse" in Yeo (ed).

69. [1973] AC 648 (on appeal from Hong Kong). Note, however, the decision of the English Court of Appeal in *Johnson* [1989] 2 All ER 839 leaving the issue to the jury where there is evidence that conduct may have provoked the defendant to lose his self control. See discussion in P Alldridge "Self-Induced Provocation in the Court of Appeal" (1991) 55 *Journal of Criminal Law* 94.

70. (1981) 3 A Crim R 397 (NSW CCA).

71. (1981) 4 A Crim R 127 (SA SC).

72. [1981] 1 NSWLR 126 at 161.

73. (1963) 111 CLR 610.

74. (1992) 62 A Crim R 82 at 86 (NSW CCA in the context of a sentencing appeal).

75. (1992) 62 A Crim R 82 at 85.

76. See Greene at 156; S Tarrant "Something is pushing them to the side of their own lives; A feminist critique of law and laws" (1990) 20 *Western Australian Law Review* 573 at 592.

77. O'Connor and Fairall at 191-2.

78. *Peisley* (1990) 54 A Crim R 42 at 48 (NSW CCA). Note that in cases where provocation and self-defence are run together it may be tactically inappropriate for the defendant to testify that she or he has lost control.

79. *Cooke* (1985) 39 SASR 225.

80. Section 23(2)(c).

81. (1964) 111 CLR 610.

82. This followed the recommendations of the New South Wales Task Force on Domestic Violence, see Weisbrot at 263.

83. Compare the recent Tasmanian decision of *Attorney-General's Reference No 1 of 1992 Re R v Roetz* (unreported) Supreme Court, Tasmania, Court of Criminal Appeal, 11 June 1993 which held that there is a legal requirement in s 160 of the Tasmanian *Criminal Code* that the loss of self control follow suddenly upon the wrongful act or insult. This means that there must be some temporal connection between the act of provocation and the loss of self control as well as between the loss of self control and the act of retaliation.

84. See *Johnson v The Queen* (1976) 136 CLR 619; *Van Den Hoek* (1986) 161 CLR 158 at 167-8.

85. O'Connor and Fairall at 193.

86. (1986) 161 CLR 158 at 167 per Mason J.

87. Tarrant at 596.

88. Landsdowne at 81.

89. [1954] 2 All ER 801.

90. See the list of factors and the cases in which they were discussed cited in M Goode "The Abolition of Provocation" in Yeo (ed) at 44.

91. See Weisbrot at 256-259.

92. A distinction first drawn in *Camplin* [1978] AC 705, perhaps influenced by the work of Ashworth.

93. (1990) 171 CLR 312.

94. *Stingel* at 326.

95. Note that this expression is preferred to that of the "reasonable man" from the law of torts: *Stingel* at 328; *Enright* [1961] VR 663 at 669.

96. *Stingel* at 327.

97. *Stingel* at 327.

98. *Stingel* at 324. Age is excluded because it is an "aspect of ordinariness".

99. (Unreported) Supreme Court, NSW, Court of Criminal Appeal, 7 October 1992, noted at (1993) 17 *Criminal Law Journal* 111.

100. (1991) 54 A Crim R 240. The High Court refused special leave to appeal on the ground that the Court of Criminal Appeal correctly interpreted the phrase "in the position of the accused" in accordance with *Stingel*, see (1991) 66 ALJR 212.

101. *Jabarula v Poore* (1989) 42 A Crim R 479 (NT SC).

102. (1991) 57 A Crim R 341 at 346-7 (NT CCA).

103. See, for example, *Croft* [1981] 1 NSWLR 126.

104. As do psychological conditions such as dependent personality disorders, see *Tumanako.*

105. [1978] AC 705 at 718; see also *Romano* (1984) 36 SASR 283 at 291.

106. *Voukelatos* [1990] VR 1 at 12.

107. S Yeo "Ethnicity and the Objective Test in Provocation" (1987) 16 *Melbourne University Law Review* 67.

108. S Yeo "Power of Self-Control in Provocation and Automatism" (1992) 14 *Sydney Law Review* 3 at 6-7.

109. S Yeo "Recent Australian Pronouncements on the Ordinary Person Test in Provocation and Automatism" (1991) 33 *Criminal Law Quarterly* 280 at 288.

110. P Brett "The Physiology of Provocation" [1970] *Crim Law Review* 634 at 637.

111. (1977) 138 CLR 601 at 626.

112. Yeo (1992) at 11-13. Note the cases cited in Yeo (1987) which, prior to *Stingel*, allowed ethnicity to be taken into account in respect of loss of self control. Yeo argues that Australian courts were developing a test which was more appropriate than *Camplin* in taking ethnicity into account in a more general way. However, in light of *Stingel,* these developments are now largely irrelevant.

113. Yeo (1987) at 72.

114. Yeo (1992) at 12.

115. Yeo (1987) at 74.

116. G Jauncey, Aboriginal Legal Service, *Oral Submission* (29 June 1993).

117. Yeo (1992).

118. See, for example, Weisbrot at 266-7

119. *Duffy* [1949] 1 All ER 932 at 933.

120. *Johnson v The Queen* (1976) 136 CLR 619 at 636.

121. (1990) 171 CLR 312 at 325 approving *Parker* (1976) 136 CLR 619 at 637-8.

122. *Stingel* at 325.

123. S Yeo "Lessons on Provocation from the Indian Penal Code" (1992) 14 *International and Comparative Law Quarterly* 615 at 624.

124. O'Connor and Fairall at 198.

125. *Van Den Hoek* (1986) 161 CLR 158 at 162.

126. *Moffa* (1977) 138 CLR 601 at 613.

127. *Van Den Hoek* (1986) 161 CLR 158 at 162, 169.

128. See, for example, *Johnson* [1989] 2 All ER 839.

129. Under the Codes, provocation is available to any crime in which assault is an element. See, for example, Queensland *Criminal Code* s 268-269.

130. Brown et al at 751 note 2.

131. *Cunningham* [1959] 1 QB 288 at 290; *Farrar* (1991) 53 A Crim R 387 (Vict SC).

132. *Smith* [1964] NZLR 834.

133. (1982) 29 SASR 217.

134. See, for example, *Newman* [1948] VLR 61 at 65 and *Spartels* [1953] VLR 194 where the charge was reduced to unlawful wounding and *Helmhout* (1980) 1 A Crim R (Vict SC) 103 at 106ff where the result was outright acquittal of that charge.

135. See, for example, *Falla* [1964] VR 78 at 80.

136. See Hempel J in *Farrar* (1992) 53 A Crim R 387 at 390; P English "Provocation and Attempted Murder" [1973] *Criminal Law Review* 727 at 735.

137. There have been a number of law reform proposals to abolish these rules: New South Wales Law Reform Commission *Evidence* (Report 56, 1988), cl 69 of Draft Evidence Bill; Australian Law Reform Commission *Evidence* (Report 38, 1987), cl 69 of Draft Evidence Bill.

138. *Dincer* [1983] 1 VR 460 at 468.

139. *Voukelatos* [1990] VR 1 at 12.

140. G Eames "Aboriginal Homicide: Customary Law Defences or Customary Lawyers' Defences?" in H Strang and S Gerull (eds) *Homicide: Patterns, Prevention and Control* (Australian Institute of Criminology Conference Proceedings No 17, 1993) at 157-159.

141. See *Jabarula v Poore* (1989) 42 A Crim R 479 (NT SC), noted in (1989) 13 *Criminal Law Journal* 343.

142. *Lavallee* [1990] 1 SCR 852 at 871.

143. Those who think that this is not a feminist issue might like to consider that in *Hill* (1981) 3 A Crim R 397 (NSW CCA) (the domestic violence case which triggered the 1982 New South Wales reforms) the prosecution used all its peremptory challenges to exclude women from the jury which was ultimately composed of 11 men and 1 woman, see Brown et al at 748.

144. A Wallace *Homicide the Social Reality* (New South Wales Bureau of Crime Statistics and Research, 1986). See also the Western Australian, New South Wales and Victorian studies discussed in Tarrant which made essentially the same findings, see also the recent Victorian Law Reform Commission *Homicide Prosecutions Study* (Report 40, Appendix 6, 1991) .

145. As domestic violence is significantly under-reported this figure is likely to be low, see C Devery *Domestic Violence in NSW: A Regional Analysis* (New South Wales Bureau of Crime Statistics and Research, 1992) at 9.

146. See, for example, E Sheehy, J Stubbs and J Tolmie "Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations" (1992) 16 *Criminal Law Journal* 369.

147. See Sheehy et al; J Tolmie "Provocation or Self Defence for Battered Women Who Kill" in Yeo (ed).

148. *Runjanjic and Kontinnen* (1991) 53 A Crim R 362 (SA CCA) (duress); *Kontinnen* (unreported) Supreme Court, SA, 26 March 1992, noted in (1992) 16 *Criminal Law Journal* 360; *Hickey* (unreported) Supreme Court, NSW, 14 April 1992, noted in (1992) 16 *Criminal Law Journal* 271 (both self-defence). Note that in England BWS has been taken to be an abnormality of mind sufficient to bring the defence of diminished responsibility into play: *Ahluwalia* [1992] 4 All ER 889. Note, also, that in *Roetz* (unreported) Supreme Court, Tasmania, Court of Criminal Appeal, 11 June 1993 evidence of "sexual child abuse accommodation syndrome" was admitted to explain the length of time between the provocative acts and the loss of self control of the defendant. In that case Zeeman J took special note of "present day psychiatric knowledge".

149. Beginning with *State of New Jersey v Kelly* (1984) 478 A2d 364. See Brown et al at 780-786 for discussion of the decision.

150. Tarrant; Sheehy et al; J Stubbs and J Tolmie "No Legal Refuge" (1992) 139 *Australian Left Review* 8; J Stubbs "Battered Woman Syndrome: An advance for women or further evidence of the legal system's inability to comprehend women's experience" (1992) 3 *Current Issues in Criminal Justice* 267. For a defence of BWS see P Easteal "Battered Woman Syndrome: Misunderstood?" (1992) 3 *Current Issues in Criminal Justice* 356.

151. (1991) 53 A Crim R 362 at 370 (per King CJ) and 372 (per Bollen J) (SA CCA).

152. Greene at 156. See, with respect to the credibility of women's testimony, J Scutt "The Incredible Woman: A Recurring Character in Criminal Law" in P Easteal and S McKillop (eds) *Women and the Law* (Australian Institute of Criminology Conference Proceedings No 16, 1993).

153. R Mackay "Pleading Provocation and Diminished Responsibility Together" [1988] *Criminal Law Review* 411 at 419.

154. J Hunter and J Bargen "Diminished Responsibility: 'Abnormal' Minds, Abnormal Murderers and What the Doctor Said" in Yeo (ed) at 135.

155. (1991) 173 CLR 222 at 225, per Mason CJ, Deane, Gaudron and McHugh JJ.

156. (1991) 173 CLR 222 at 227-8, see also per Brennan J at 230.

157. Victorian Law Reform Commission *Homicide Prosecutions Study* (Report 40, Appendix 6, 1991).

158. Eight were committed for murder, 2 were charged with murder and 5 were initially charged with manslaughter. The other 60 cases went to trial for murder.

159. P Easteal *Killing the Beloved: Homicide Between Adult Sexual Intimates* (Australian Institute of Criminology, 1993) at 173. Note that Easteal's sample was not large.

160. Legal Aid Commission *Oral Submission* (8 July 1993).

161. *Homicide Prosecutions Study* at para 153.

162. M Tedeschi QC, Crown Prosecutor *Oral Submission* (21 June 1993).

163. *Homicide Prosecutions Study* at para 154.

164. *Homicide Prosecutions Study* at para 155.

165. Victorian Law Reform Commission *Homicide* (Report 40, 1991) at para 167.

166. See the critique of the *Homicide Prosecutions Study* in A Howe "Provoking Comment: The Question of Gender Bias in the Provocation Defence - A Victorian Case Study" (unpublished paper).

167. It should be noted that the maximum sentence for manslaughter in Victoria is 15 years.

168. VLRC Report 40 at para 161.

169. Easteal (1993).

170. Easteal (1993) at 134.

171. Easteal (1993) at 145.

172. Easteal (1993) at 173.

173. Easteal (1993) at 173.

174. This is the effect of *Kaporanovski* (1973) 133 CLR 209.

175. See, for example, *Hodge* (1984) 13 A Crim R 458 (WA SC). This is also the case in Papua New Guinea, now confirmed by legislation. For a discussion of this issue see R O'Regan "The Definition of Provocation as a Qualified Defence Under the Griffith Code" (1989) 13 *Criminal Law Journal* 165.

176. Queensland Criminal Code Review Committee *Final Report* (1992) at 195.

177. *Jeffrey* [1982] Tas R 199 at 214.

178. *Stingel* at 322. Note, the High Court held that this interpretation is specific to the Tasmanian Code and not necessarily applicable to the differently worded provisions of Queensland or Western Australia at 323.

179. *Stingel* at 333.

180. *Jabarula v Poore* (1989) 47 A Crim R 479 (NT SC).

181. (1991) 57 A Crim R 341 at 346-7 (NT CCA).

182. See Queensland *Criminal Code* s 268, 269; Western Australian *Criminal Code* s 245, 246; Papua New Guinea *Criminal Code* s 272 .

183. [1980] PNGLR 326, discussed in D Chalmers, D Weisbrot and W Andrew *Criminal Law and Practice of Papua New Guinea* (2nd ed, Law Book Company, 1985) at 425-429; see also K Wilson "Provocation in Papua New Guinea" (1981) 5 *Criminal Law Journal* 128. Compare the decision of the High Court of Australia in *Kaporonovski* (1973) 133 CLR 209.

184. See *Thornton* [1992] 1 All ER 306; *Ahluwahlia* [1992] 4 All ER 889. Following the decision in *Thornton,* the *Crimes (Homicide) Amendment Bill* was introduced to eliminate the requirement of suddenness. The Bill lapsed, see Horder "Provocation and the Loss of Self Control" (1992) 108 *Law Quarterly Review* 191.

185. See, for example, *Hill* (1980) 3 A Crim R 397 (NSW CCA); *R* (1981) 4 A Crim R 127 (SA SC).

186. See, for example, *Parker* (1964) 111 CLR 665. Both footnotes added.

187. S Yeo "Provocation Down Under" (1991) 141 *New Law Journal* 1200 at 1200.

188. (1978) 112 ILTR 53.

189. [1962] NZLR 1069.

190. [1976] 1 NZLR 102.

191. See discussion in W Brookbanks "Provocation - Defining the Limits of Characteristics" (1986) 10 *Criminal Law Journal* 411.

192. For a general discussion, see B Brown "Provocation in New Zealand: A Characteristic Solution" in Yeo (ed).

193. [1978] AC 705 at 727.

194. New Zealand Criminal Law Reform Committee *Report on Culpable Homicide* (1976).

195. It should be noted that the Culpable Homicide Report and the subsequent Bill dealt not only with provocation but surveyed the entire law of homicide. The Bill contains new general endangerment offences which do not require proof of death or injury and abolishes the mandatory life sentence.

196. See, for example, B Brown "Culpable Homicide, Endangerment and Aggravated Violence: New Crimes for the Times?" [1989] *New Zealand Recent Law Review* 299; Brown in Yeo (ed); C Cato "Violent Offending and the Crimes Bill 1989: A Criticism" (1989) *New Zealand Law Journal* 246.

197. Brown (1989) at 300, 307.

198. Crimes Consultative Committee *Crimes Bill 1989: Report of the Crimes Consultative Committee* (1991).

199. They both derive from s 176 of Stephen's English Draft Code.

200. For an analysis of the elements of the offence in Canada, see T Quigley "Deciphering the Defence of Provocation" (1989) 38 *University of New Brunswick Law Journal* 11; E Colvin *Principles of Criminal Law* (2nd ed, Carswell, 1991).

201. (1986) 25 CCC (3d) 322.

202. T Quigley "Battered Women and the Defence of Provocation" (1991) 55 *Saskatchewan Law Review* 223 at 244.

203. Quigley (1991) at 249-50.

204. The Code was also adopted in Sri Lanka, Malaysia, Singapore, Nigeria and the Sudan. The information in this section is taken from S Yeo "Lessons on Provocation from the Indian Penal Code" (1992) 41 *International and Comparative Law Quarterly* 615.

205. House of Lords Select Committee on Murder and Life Imprisonment *Report* (1989).

206. Criminal Code Review Committee *Final Report* (1992).

207. Clause 128 of Draft *Crimes Bill* 1989 (NZ) implementing the recommendations of the New Zealand Criminal Law Reform Committee *Report on Culpable Homicide* (1976). Note that the Crimes Consultative Committee in its review of the *Crimes Bill* (*Crimes Bill 1989: Report of the Crimes Consultative Committee* (1991)) thought that it was unnecessary to provide that provocation be taken into account in respect of penalty lest it give greater emphasis to provocation over other mitigating factors.

208. Australia. Attorney General's Department *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters* (AGPS, 1990) (The Gibbs Report) at para 13.56.

209. Law Reform Commission of Canada *Recodifying Criminal Law* (Report 31, 1987), see Quigley (1991) at 257.

210. South Australia Criminal Law and Penal Methods Reform Committee *The Substantive Criminal Law* (Fourth Report, 1977) (The Mitchell Report) at para 11.1; Victorian Law Reform Commissioner *Provocation and Diminished Responsibility as Defences to Murder* (Report 12, 1982) at para 1.30; *People v MacEoin* [1978] 112 ILTR 53 (abolishing the objective test in Ireland) and a number of Judges and academic commentators.

211. This was recommended by Criminal Law Review Committee *Offences Against the Person* (Report 14, 1980) at para 81-2. The England and Wales Law Commission *A Criminal Code for England and Wales* (Report 177, 1989) proposed a slightly different formulation which retained the gravity/self control distinction, cl 58.

212. Victorian Law Reform Commission *Homicide* (Report 40, 1991) recommendation 21.

213. VLRC Report 40 recommendation 25.

214. VLRC Report 40 recommendation 23.

215. CLRC Report 14 at para 85. See also cl 58 of the England and Wales Law Commission Report 177; VLRC Report 40 recommendation 24.

216. Australian Law Reform Commission *Multiculturalism and the Law* (Report 57, 1992) at para 8.36 referring to *Evidence Bill* 1991 (Cth). See also Australian Law Reform Commission *Recognition of Aboriginal Customary Laws* vol 1 (Report 31, 1986) at para 441 and law reform reports on evidence referred to above at footnote 137.

217. M Sides QC, Acting Senior Public Defender *Submission* (18 May 1993). It might, however, be noted that where men killed in a domestic context, there was a *recorded* history of domestic violence in over half of

the cases. See Wallace and note that as domestic violence is significantly under-reported this figure is likely to be low, see C Devery *Domestic Violence in NSW: A Regional Analysis* (New South Wales Bureau of Crime Statistics and Research, 1992) at 9. These offenders cannot be said to be "otherwise of good character".

218. New South Wales Bureau of Crime Statistics and Research, unpublished data.

219. (1987) 162 CLR 645. See the discussion by Goode in Yeo (ed) at 51-52.

220. See, for example, Fisse at 102ff.

221. For arguments in favour of self-defence, see J Tolmie "Provocation or Self-Defence for Battered Women Who Kill" in Yeo (ed). For proposals for a defence specific to victims of domestic violence, see Z Rathus *Response to the First Interim Report of the Criminal Code Review Committee* (Women's Legal Services Inc, 1991). See also proposals by South Australian Domestic Violence Council *Report of the South Australian Domestic Violence Council* (Adelaide, 1987) for a new complete defence where there is a proven history of violence against the defendant. But cf Z Rathus *Rougher Than Usual Handling: Women and the Criminal Justice System* (Queensland Association of Independent Legal Services, 1993) questioning the viability of such a defence and preferring to concentrate on expanding the law of self-defence and provocation.

4. Diminished Responsibility

INTRODUCTION

4.1 Diminished responsibility operates to reduce liability for murder to manslaughter if the defendant was suffering from some form of mental disorder at the time of the killing which substantially impaired his or her mental responsibility, but was not legally insane. The defence was introduced in New South Wales in 1974 using section 2 of the English *Homicide Act* 1957 as a model. That Act had itself drawn inspiration from the Scottish common law. In Australia, only the Australian Capital Territory, Queensland and the Northern Territory have similar defences. Unlike the defence of mental illness[1] to which it has certain similarities, it is only available as a (partial) defence to murder.

4.2 In many ways, diminished responsibility is a defence which defies categorisation. On the one hand the defendant is arguing that he is responsible for his actions, but only partly. He is also arguing that he is "mad" but, again, only partly. It is in this "contradictory middle ground between responsibility and non-responsibility"[2] that the defence resides. This is not merely a theoretical issue. As will be seen, the concept of diminished mental responsibility can create acute practical problems. In addition, many of the concepts utilised by the section as drafted are unclear, problematic or unknown to either the law or psychiatry. It is with these issues and, in particular, with the problems inherent in the juxtaposition of law and medicine that this Chapter will be primarily concerned.

BRIEF HISTORY

4.3 The defence of diminished responsibility developed at common law in Scotland and was first articulated in 1867 in the case of *HM Advocate v Dingwall.*[3] The defendant, who had killed his wife, suffered from epilepsy, was a heavy drinker and had attacks of delirium tremens. Lord Deas instructed the jury that they could return a verdict of culpable homicide (manslaughter) if the defendant's state of mind was considered by them to be an extenuating circumstance although not sufficient to warrant an acquittal on the grounds of insanity. Dingwall was convicted of culpable homicide and sentenced to ten years imprisonment.

4.4 Walker[4] has traced developments in the area of insanity in England and Scotland leading up to *Dingwall*. In the sixteenth century both the English and Scottish law dealt with insanity in much the same way, but by 1674 a notion of partial insanity to "lessen and moderate the punishments" of those whose reason was partially clouded was beginning to be evident.[5] Thus:

> Since the law grants a total impunity to such as are absolutely furious, it should by the rule of proportions lessen and moderate the punishments of such.[6]

4.5 After the Act of Union with England the differences between English and Scottish law were largely glossed over, but partial insanity played a role in the recommendation of pardons by the jury as well as being evidenced by outright acquittals. Subsequent cases picked up and developed the concept articulated in *Dingwall*. Thus "weakness of mind",[7] "a state of mind bordering on, though not amounting to, insanity"[8] or "partial insanity"[9] were variously held to allow the defendant to escape a murder conviction. By 1909, the particular term "diminished responsibility" was being used in the cases[10] and Walker asserts that:

> By the nineteen-thirties the stage had been reached at which the defence of insanity was rarely offered in a Scots court to a charge of murder. Either the accused was found "insane in bar of trial" or he pleaded diminished responsibility.[11]

4.6 In England, dissatisfaction with the M'Naghten Rules for insanity led to suggestions for an alternative "diminished responsibility" verdict from as early 1883.[12] But for many years after that the idea was not taken up. It was raised again in the 1950s in the context of the debate over capital punishment. While such a reform was rejected by the Royal Commission on Capital Punishment 1949-53, it was recommended by the Heald Committee in 1956[13] and the result was the enactment of s 2 of the *Homicide Act* 1957, which provided as follows:

> (1) Where a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts or omissions in doing or being a party to the killing.
>
> (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

4.7 It is not necessary to discuss in detail the history of the subsequent case law. A number of things should, however, be noted. It was not until *Byrne* in 1960[14] that a definitive interpretation of the section began to emerge. Before that judges either left the section to the jury to interpret or described the relevant state of mind as "borderline insanity" without further explanation.[15] Further, studies have shown that in the early years of the defence it was highly successful, that a wide variety of conditions were regarded as satisfying the definition in the Act but that the total number of people using either diminished responsibility or insanity did not change.[16] Thus Walker asserts that the effect of s 2 was to "take over the sort of case which previously would have been accepted by courts as within the M'Naghten Rules".[17]

CURRENT LAW IN NEW SOUTH WALES

4.8 Section 23A was introduced into the *Crimes Act* 1900 (NSW) in 1974[18] and provides as follows:

> (1) Where, on the trial of a person for murder, it appears that at the time of the acts or omissions causing the death charged the person was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for the acts or omissions, he shall not be convicted of murder.
>
> (2) It shall be upon the person accused to prove that he is by virtue of subsection (1) not liable to be convicted of murder.
>
> (3) A person who but for subsection (1) would be liable, whether as principal or accessory to be convicted of murder shall be liable instead to be convicted of manslaughter.
>
> (4) The fact that a person is by virtue of subsection (1) not liable to be convicted of murder in respect of a death charged shall not affect the question of whether any other person is liable to be convicted of murder in respect of that death.
>
> (5) Where, on the trial of a person for murder, the person contends:
>
> (a) that he is entitled to be acquitted on the ground that he was mentally ill at the time of the acts or omissions causing the death charged; or
>
> (b) that he is by virtue of subsection (1) not liable to be convicted of murder,
>
> evidence may be offered by the Crown tending to prove the other of those contentions, and the Court may give directions as to the stage of the proceedings at which that evidence may be offered.

The elements of the defence

4.9 The defendant[19] is required to show, on the balance of probabilities[20] that:

> at the time of the act he or she was suffering from an abnormality of mind;
>
> the abnormality arose from one of the causes listed in the parenthetical reference in s 23A(1); and

the abnormality substantially impaired his or her mental responsibility for the act or omission.

Abnormality of Mind

4.10 The defendant must have been suffering from the abnormality of mind at the time of the offence. It has been said that abnormality of mind means:

> A state of mind so different from that of ordinary human beings that a reasonable man would term it abnormal. It appears ... to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment.[21]

4.11 The range of conditions which may amount to an abnormality of mind are quite broad. For example, psychosis, organic brain disorder, schizophrenia, psychopathy, epilepsy, hypoglycaemia, depression (reactive and endogenous), post-traumatic stress syndrome, chronic anxiety and personality disorders have all been found to come within the scope of the defence. The defence will cover those people who are mentally ill as well as those with an intellectual disability. Premenstrual tension is another "condition" which may amount to an abnormality of mind.[22]

4.12 There have been a number of criticisms that the range of abnormalities of mind is too broad. Thus, for example, the inclusion of personality disorders and cases of sexual psychopathy within the term "abnormality of mind" is highly contentious.[23] It has been suggested that further consideration should be given to whether personality disorders ought to be included within the scope of "abnormality of mind" and, if so, whether legislative provision should be made to clarify this.[24]

4.13 In general terms, "abnormality of mind" is problematic because it is neither a medical nor a legal concept. For example, it is unclear whether abnormality of mind is restricted to known mental illnesses or whether the condition must be serious. It has been submitted to the Commission that juries have particular trouble making sense of this requirement.[25]

The causes of the abnormality

4.14 It was held in *Purdy* that the causes of the abnormality of mind found in s 23A - arrested or retarded development of mind, disease or injury or inherent causes - were exhaustive and not merely illustrative.[26] It is worth noting the dissent of Roden J in *Purdy* and the reasons his Honour gave for rejecting the interpretation that the parenthesised causes are exhaustive. Amongst other reasons, his Honour thought that unburdening the jury from the necessity of considering the difficult question of aetiology would simplify complicated jury directions. It has also been pointed out that there is no particularly good policy reason for the causes to be so limited. The New South Wales provision was copied from the English legislation which, itself, was a "remarkably inept reconstruction of the definition of 'mental defectiveness' in section 1(2) of the Mental Deficiency Act 1927".[27] This less than impressive pedigree suggests that there is no magic in the legislative formula.

4.15 Where the aetiology of the abnormality of mind is disease, injury, brain damage or arrested development of mind, the situation is relatively straightforward. Thus for defendants with an intellectual disability, for example, there is generally little problem in finding that their "mental abnormality" stemmed from a condition of "arrested or retarded development"[28] although complications can arise where the defendant has both an intellectual disability and a mental illness. It has been held that psychological injury is included in the term "disease".[29] However, acute problems are presented when the cause relied upon is "inherent cause". In these cases it is not so easy to analyse the defence in terms of the three elements. It appears that the relevant principles are:

> Inherent causes do not mean "inherited" causes. They can stem from outside sources, upbringing, development and so on.[30]
>
> The abnormality of mind itself can be temporary or fleeting but if the cause relied on is an "inherent cause" then that cause must have the quality of permanence.[31]

> In some cases abnormality of mind is not capable of being identified as distinct from some inherent cause and s 23A can be satisfied by proof of an "inherent abnormality of mind".[32] This is often the case with personality disorders. In these cases the abnormality itself must be permanent and expert evidence on the question of "inherent abnormality of mind" is necessary.

4.16 It is clear that the relationship between the two elements of abnormality and cause is quite complex. The jury is, in effect, required to ascertain a state (which may be temporary) and ascribe its origin to a cause (which must be permanent). But the alternative form, "inherent abnormality of mind" is even more complex. When all of this is couched in psychiatric terminology - which is not tailored to fit the legally constructed categories - the jury's task becomes extremely difficult.

4.17 One particularly problematic area is where the defendant killed while intoxicated. It is clear that a temporary state of irresponsibility induced by alcohol will not fall within s 23A.[33] However brain damage from the effects of drugs or alcohol may be a relevant cause.[34] It has also been held that alcoholism that rendered the use of drink involuntary may come within the section.[35]

Mental responsibility

4.18 In *Byrne*, Lord Parker described "mental responsibility" in the following way:

> The expression "mental responsibility for his acts" points to a consideration of the extent to which the accused's mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise will-power to control his physical acts.[36]

4.19 This element of the defence has been subject to a great deal of criticism. It has been said that the phrase "mental responsibility" has no clear meaning and that it is neither a legal nor a psychiatric concept. If anything it appears to be a moral one. In particular it has been argued that the concept conflates two distinct ideas: the capacity of the defendant (impaired or reduced capacity) and an assessment of culpability (reduced or diminished liability).[37] Despite this theoretical criticism, it has been said that juries find the concept much less puzzling than do lawyers and psychiatrists and generally tend to approach the question with "good practical common sense".[38] Thus the jury may well be able to make the necessary moral assessment without undue concern for technical problems.

Substantial impairment

4.20 Section 23A requires that mental responsibility be "substantially impaired". This means that the impairment must fall somewhere between total and merely trivial or minimal impairment.[39] This issue is often assessed by psychiatrists but it is a particularly difficult task. Indeed Glanville Williams has described the requirement that the abnormality of mind must substantially impair the defendant's mental responsibility as follows:

> [It is] as embarrassing a formula for the scientifically-minded witness as could be devised ... [it is] a question of subjective estimation, not of medical science.[40]

Issues of proof

Onus

4.21 At present the defendant is required to prove, on the balance of probabilities, that she or he falls within the defence. This is out of step with the other criminal defences which place the onus of proof on the prosecution, but is in keeping with the position in respect of the related defence of mental illness. Such an onus is clearly disadvantageous to the defendant who has to prove the three separate and complicated elements of the defence. In cases where there is conflicting medical evidence, the burden falls particularly heavily on the accused - a jury that is simply unsure which version to prefer must find against the defendant. It also may be confusing to the jury to be instructed on the differing burdens and standards of proof where, for example, the diminished responsibility and provocation defences are run together.

4.22 It was suggested in one submission that the burden of proof is discriminatory.[41] This is because a person who does not suffer from an abnormality of mind but who loses control and kills has the benefit of the requirement that the prosecution must negative his or her defence of provocation beyond a reasonable doubt. On the other hand, a person who is suffering from an abnormality of mind and who consequently may have a lower level of self-control must be able to affirmatively prove this. It may be that this discriminates against people with intellectual disabilities and/or mental illnesses.

Medical evidence

4.23 There is no legal requirement that a plea of diminished responsibility be supported by medical evidence. In practice, however, the defence will not succeed without it.[42] The following picture emerges from the cases:[43]

> Medical evidence is admissible on all three elements of the defence; that is, abnormality, cause and substantial impairment of mental responsibility.
>
> The jury is entitled to reject the medical evidence with respect to the first (abnormality) and third (substantial impairment of mental responsibility) elements if there is other evidence which conflicts with and outweighs it.
>
> There *must* be medical evidence on the second element (cause) although it is not necessary for the exact statutory terminology to be employed.
>
> The jury can come to a conclusion that differs from the medical experts on any of the three elements only where there is other evidence doubting it or where the medical evidence is not unanimous.

4.24 There are a number of quite serious problems associated with the use of expert medical evidence in diminished responsibility cases.

4.25 *Terminological problems.* In the first place, there are difficulties with the terminology of mental disorder which may have passed inaccurately into everyday language. A good example is the difference between the colloquial and clinical use of the term “depression”.[44] This is, of course, not a problem that is peculiar to a diminished responsibility defence - similar problems may arise, for example, in the context of other “mental disability defences”. It could be avoided to some extent if medical witnesses refrained from giving diagnoses and instead described as fully as possible the mental and emotional state of the defendant at the time of the offence. This would give the jury all the information it needs without involving them unduly in terminological issues.[45] However, it has been submitted to the Commission that as a practical matter it would be almost impossible *not* to provide diagnoses and that current court practice compels it.[46]

4.26 *Contradictory medical evidence.* Secondly, it has been noted that the medical evidence is often contradictory. In *Chayna*, for example, seven psychiatrists offered seven differing opinions. Because there are three elements involved in a s 23A plea, the psychiatrists often give evidence on each and there may be differences of opinion on each element. In cases in which mental illness is also at issue - under s 23A(5) it is open to the prosecution to lead evidence tending to prove mental illness where the defence raises diminished responsibility - the problem is further exacerbated.[47] This can be highly confusing for the jury and can consequently be disadvantageous to the defendant who carries the onus of proof on the relevant issues. It has been suggested that a non-diagnostic approach would also allow less scope for experts to disagree. If the ultimate goal of diminished responsibility proceedings is trial by jury, and not trial by medical experts, then:

> Judges and juries need behavioural facts about the defendant’s functioning, not labels that have been developed for nonlegal purposes.[48]

4.27 Another suggestion for reform in this area is to give consideration to the utilisation of techniques proposed for the simplification of serious and complex criminal trials.[49] Such techniques include holding preparatory hearings at which the judge could make a variety of directions and at which points of agreement and disagreement between the medical experts could be settled, eliminating the need for them to be fought out before the jury.

4.28 Despite the perceived problems with conflicting expert testimony, the frequency of this occurring must be closely examined. A 1982 English study found that medical experts disagreed in only 13% of cases.[50] What is particularly interesting, though, is that in over half these cases the disagreement was over the question of "substantially impaired mental responsibility", which arguably does not require a *medical* opinion at all. If medical experts were prohibited from expressing opinions on this issue then the percentage of cases in which conflicts arose might be low. However, the position appears to be significantly different in New South Wales where there seem to be more trials (that is, fewer pleas to manslaughter are accepted by the prosecution) and more contested medical evidence. The Commission is interested in receiving submissions concerning the position in New South Wales on this issue.

4.29 *Evidence of "substantial" impairment.* There are also problems with respect to the element of "substantial impairment of mental responsibility". One arises because of the nature of a psychiatric evaluation. If a psychometric test is used, there is some quantifiable data about the defendant that can be compared to others in the community so that a meaningful assessment of "substantial" can be made. However, a psychiatric report or diagnosis does not generally involve a comparative aspect and often an opinion on "substantial impairment" is made without an explanation as to why this is so.[51]

4.30 *Evidence on the "ultimate issue".* However, the major problem in this area is whether medical experts should testify to this issue at all. This is because the expert is essentially giving evidence on the very question that the jury must decide. This is allowed to occur because the evidentiary rule known as the "ultimate issue rule" apparently does not apply in cases of diminished responsibility.[52] Evidence of this nature is routinely given by psychiatrists at diminished responsibility trials and a number of local psychiatrists consider that "in New South Wales courts [psychiatrists are] more or less expected to do so".[53] However, noting the criticisms of the concept of "mental responsibility" given above and realising that the concept is not a medical one, this practice means that:

> Doctors routinely testify to matters that are not within their professional competence and judges accept and act on that testimony.[54]

4.31 It has therefore been suggested that legislation (or Court rules) could provide that expert witnesses are not to give opinions on these issues.[55] However, it also has been submitted to the Commission that it is sometimes desirable and even necessary for medical witnesses to give evidence on this question. For example, the jury may need to be told what effect a psychotic condition or other abnormality would have on the defendant's conduct. This would involve addressing questions of responsibility.[56] It has also been suggested that counsel will inevitably develop ways to ask expert witnesses the question by other means.[57]

4.32 *Inadequacy of expert testimony.* It has been suggested that expert testimony is often inadequate. Sometimes experts are unaware of the legal issues involved and their reports may be sketchy, reliant on a short interview with the accused and based on inadequate information, particularly about the background of the defendant.[58] It has been suggested that more adequate training and/or accreditation for forensic psychologists and psychiatrists is required and that a special Code of Ethics for such practitioners be developed.[59]

4.33 *The use of psychological evidence.* Another issue is the reluctance of judges to accept the evidence of psychologists (as distinct from psychiatrists) in diminished responsibility cases.[60] Although there is usually little problem with psychologists testifying as to the results of various psychological or psychometric tests,[61] there is resistance to allowing them to express their opinions on whether the mental responsibility of the defendant was substantially diminished. Noting the criticisms above, it is doubtful that this is an issue on which *any* expert is qualified to testify. Nevertheless, if psychiatrists are permitted to give such evidence, it is illogical to prevent psychologists from doing so. This is particularly the case in respect of evidence about people with intellectual disabilities.

4.34 *Lack of notice that defence is to be run.* Finally, it has been submitted to the Commission that there is a problem for the prosecution in respect of medical evidence.[62] This arises because in many cases they are not informed that a diminished responsibility defence is to be run (or are informed at the very last moment) and consequently have no opportunity to arrange for their psychiatrists to evaluate the defendant. In other cases the defendant refuses to make him or herself available for examination by prosecution psychiatrists or by a particular

prosecution psychiatrist. Another problem noted by this submission is that the defence can "shop around" for a sympathetic psychiatrist and has no obligation to disclose contrary psychiatric opinions to the prosecution.

4.35 On the other hand it has been submitted that it may be difficult for the defence to make the accused available for examination where the prosecution doctor is known to have a particular philosophical or medical disagreement with the defence of diminished responsibility in general or with specific conditions.[63] And it has also said to be problematic that the prosecution has access to prison medical files when the defendant on remand is being treated by the prison medical service. This is because the defendant has no choice but to be examined by this doctor, especially if he or she needs treatment.[64] It has been suggested that the prosecution not be allowed access to the files of the treating prison doctor. At the same time, this course will only be viable if the defendant is required to be made available for examination by prosecution doctors.

Diminished responsibility and the defence of mental illness

4.36 The defence of mental illness is a complete defence and can be pleaded in relation to any charge. By contrast, diminished responsibility only reduces a charge of murder to one of manslaughter. Following acquittal on the grounds of mental illness, the defendant is confined indefinitely in a psychiatric institution while the diminished responsibility offender will receive a determinate sentence. The onus of proof lies on the defendant in respect of both defences.

4.37 The common law defence of insanity is defined in the "M'Naghten Rules" formulated in 1843.[65] The Rules state that a person is not criminally responsible if he or she is "labouring under such a defect of reason, from disease of the mind" that he or she is incapable of understanding the "nature and quality" of the act or, if this was understood, incapable of understanding that the act was wrong.

4.38 Almost from their inception, the M'Naghten Rules have been subjected to serious criticism. In particular, they have been criticised for being unduly restrictive and relying on outdated assumptions that the human mind is divisible into separate compartments - the intellect, the will and the emotions - each operating independently of the other. Read literally, they exclude, for example, emotional disorders deriving from disease of the mind. The onus of proof with respect to the defence has also raised questions of whether it is fair and consistent with other defences to place the onus on the defendant, albeit on the balance of probabilities.

4.39 In New South Wales, the defence is now known as the defence of mental illness and is found in s 38 of the *Mental Health (Criminal Procedure) Act* 1990 (NSW). That section does not redefine the M'Naghten Rules or attempt to codify the defence. It merely renames the common law defence. In addition there is now a statutory requirement[66] that the jury is to be given an explanation of the legal and practical consequences of a finding of mental illness.

4.40 The scope of the defence of mental illness is narrower than the defence of diminished responsibility. For example, it will rarely be available where the defendant acts under an uncontrollable impulse[67] or in cases of psychopathy were the accused appreciates the nature of his acts but chooses nevertheless to do them. It is essentially directed towards a failure of cognition and if the defendant understands what he or she is doing and that it is wrong then the fact that the act could not be controlled is irrelevant. Diminished responsibility by contrast is broader in that "abnormality of mind" covers uncontrollable urges and emotional states as well as cognitive disorders which fall short of the defence of mental illness.

4.41 Under s 23A(5) the prosecution can tender evidence of mental illness where diminished responsibility has been raised by the defence and vice versa. Because the defences are separate the jury must be instructed as to their elements independently. In *Ayoub,*[68] the New South Wales Court of Criminal Appeal held[69] that where the prosecution raises the defence of mental illness it need only prove this contention on the balance of probabilities. The rationale for this is said to be that it would be artificial for the standard of proof to differ according to who had raised the defence. Enderby J, in dissent, considered that such a course contravenes the basic principle that the prosecution must prove its case beyond a reasonable doubt.

4.42 In New South Wales, the number of people found not guilty by reason of mental illness is low: between 1990 and 1992 there were only 8 such acquittals on charges of murder.[70] There are clear disadvantages to using the insanity defence and it is not hard to see why diminished responsibility might be preferred (especially if

a plea is accepted).[71] The English experience of diminished responsibility has been that the defence has largely taken over from the insanity defence which now results in only one or two acquittals per year.[72] This is despite the fact that studies have shown that a number of those convicted of manslaughter on the grounds of diminished responsibility would have come within the insanity defence.[73] There do not appear to have been any comparable studies in New South Wales and the Commission is interested in receiving submissions on the position in this State.

THE DEFENCE OF DIMINISHED RESPONSIBILITY IN PRACTICE

Guilty pleas

4.43 Although the role of the jury may well be raised in this context, it has been common practice in England since 1960 for trial judges to accept manslaughter pleas where medical evidence of abnormality of mind is uncontested. The practice was confirmed by the Court of Appeal in 1968[74] and 85-90% of diminished responsibility cases in England are disposed of in that way.[75] The Commission estimates that the figures would be lower in a jurisdiction with a discretionary murder penalty but would appreciate submissions or comments on this issue. It appears that pleas are often accepted where the medical evidence is all one way but that this is not a common occurrence.[76] It has been submitted to the Commission that plea negotiations are sometimes difficult where the defendant refuses to submit to psychiatric examination by the prosecution[77] or where the prosecution is unaware that a diminished responsibility is to be run at trial.

The role of the jury

4.44 In *Chayna*, Gleeson CJ pointed to the reluctance of juries to make a finding of manslaughter in cases which clearly appeared to them to be murder and thought that because of this:

> in recent times in this State there has been a tendency for the legal representatives of accused persons who wish to raise a case of diminished responsibility to prefer a trial without a jury.[78]

4.45 This tendency may stem from the reluctance of defence counsel to run a diminished responsibility defence in front of a jury where the circumstances of the crime (apart from the mental state of the defendant) are particularly horrific.[79] The view of some defence counsel is that diminished responsibility is rarely successful in front of a jury.[80] Although trials by judge alone[81] are rare - there have only been five murder trials before a judge in the past 12 months[82] - it is still worth considering how the defence may operate differently in this context. In *O'Bree*,[83] Finlay J thought that the diminished responsibility defence, involving as it does the question of whether the accused suffered from a state of mind so different from that of the ordinary person that a reasonable person would term it abnormal, was one that was better dealt with by a jury.

Sentence

4.46 Sentencing diminished responsibility offenders raises some very difficult issues. On the one hand the verdict is a recognition of a lower level of culpability and this should be reflected in sentence. On the other hand some such offenders might present a danger to the community and this may be thought to warrant a longer period of detention, even up to the maximum sentence.[84] This, in effect, imposes a greater penalty for abnormality of mind. It was this balance between a sentence proportional to the offence and the need to protect the community that was at issue in *Veen.*[85] In that case the majority of the High Court thought that while it was not permissible to impose a disproportionate sentence in order to achieve the preventative detention of an offender, it was permissible to consider the protection of society as a factor in the exercise of the sentencing discretion. The minority considered that this gave too much weight to the protection of society and Deane J suggested that the appropriate solution would be:

> The introduction of some acceptable statutory system of preventive restraint to deal with the case of a person who has been convicted of violent crime and who, while not legally insane, might represent a grave threat to the safety of other people by reason of mental abnormality if he were to be released as a matter of course at the end of what represents a proper punitive sentence.

4.47 There are at present no special institutions for those suffering from an abnormality of mind under s 23A and, other than prison hospitals or units for prisoners with intellectual disabilities, there is no alternative to imprisonment. This situation has been described as illogical and inhumane because the diminished responsibility offender who receives a longer sentence because of danger to the community is merely incarcerated and provided with little treatment to minimise that danger.[86] There is also no provision in New South Wales for the making of hospital orders analogous to those available under the English *Mental Health Act* 1983. These orders are discussed below at para 4.60. The most that a sentencing judge can do is to recommend the incarceration of the offender in a gaol with psychiatric facilities.

4.48 It should be noted that special sentencing principles may be involved when dealing with diminished responsibility offenders. For example, principles of deterrence are usually given very little weight.[87] In *Falconetti,*[88] the New South Wales Court of Criminal Appeal approved the expedient adopted by Mathews J of imposing a short minimum term and a substantial additional term. In cases where the defendant is potentially dangerous, this course of action is said to allow:

> the prison medical authorities a large area of discretion as to when the prisoner should be released, according to his mental state at the time. In the interests of the community the total sentence will have to be a long one for there will be no discretion as to ... release when it expires.[89]

4.49 Because of these issues it is important in cases in which diminished responsibility and provocation are run together to know on what basis the jury has returned a manslaughter verdict.[90] It appears that the New South Wales Court of Criminal Appeal has adopted the practice that in dual diminished responsibility and provocation cases the jury should be told that they will be called upon to state the basis for their manslaughter verdict.[91]

THE POSITION IN OTHER JURISDICTIONS

Other Australian jurisdictions

The substantive law

4.50 Of the other Australian jurisdictions, only the Australian Capital Territory,[92] Queensland and the Northern Territory have a defence of diminished responsibility. The Code defence in Queensland and the Northern Territory is somewhat different from the New South Wales and Australian Capital Territory provision, primarily because it does not use the concept of "mental responsibility", relying instead on the substantial impairment of three named capacities. It should also be noted that both Code jurisdictions have a mandatory life sentence for murder.

4.51 Section 304A of the Queensland *Criminal Code*, introduced in 1961, provides that:

> (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair capacity to understand what he is doing, or his capacity to control his actions, or his capacity to know that he ought not to do the act or make the omission, he is guilty of manslaughter only.[93]

4.52 In *Rolph*[94] the Queensland Court of Criminal Appeal held that abnormality of mind under s 304A covers the same ground as the insanity defence under s 27 of the Code. The only difference then is a question of degree - insanity deals with complete deprivation of the relevant capacities and diminished responsibility is concerned with their substantial impairment.[95] This must be contrasted with the position in New South Wales (and England). In the latter jurisdictions the difference is one of kind as well as degree because the insanity defence does not deal with uncontrollable impulse whereas the defence of diminished responsibility does.

4.53 In *Whitworth*[96] the Queensland Court of Criminal Appeal interpreted abnormality of mind in a very broad way. The Court found that the abnormality of mind itself could be temporary if it arose from permanent underlying causes and included within these causes an "inherent limitation of the mind to withstand stress". With respect to disease or injury as a cause, the Court found that psychological injury fell within the terms of the section, thus a "psychological scar" from a childhood experience could be a cause for abnormality of mind.

4.54 As in New South Wales, the burden of proof under the Codes falls on the defendant. It should also be noted that while both the New South Wales and English legislation specifically provides for the prosecution to elicit evidence to prove insanity or diminished responsibility where the defence has raised the other[97] the Queensland and Northern Territory Codes make no such specific provision.[98]

Procedure

4.55 In Queensland, the question of diminished responsibility can be dealt with at trial or by the Mental Health Tribunal under the provisions of the *Mental Health Act* 1974 (Qld). When a person is charged with an indictable offence and there is reasonable cause to believe that he or she was mentally ill at the time of that alleged offence, he or she can be referred to the Tribunal, either on his or her own motion, by the prosecution or by the Department of Health.[99] The Tribunal is constituted by a Supreme Court Judge assisted by two psychiatric assessors.[100] The Tribunal decides whether the person was suffering from unsound mind and whether he or she was fit to stand trial. If the person is found to be of unsound mind and/or not fit for trial he or she is detained as a restricted patient and his or her case is periodically reviewed by the Patient Review Tribunal. On a charge of murder, if the Tribunal finds the person was not suffering from unsound mind, it must then determine whether he or she was suffering from diminished responsibility.[101] If such a determination is made, the prosecution cannot indict the person for murder but proceedings may be continued in respect of any other offence constituted by the act to which the proceedings relate.[102] This usually means that the person is indicted for manslaughter.

4.56 If no reference is made to the Tribunal, the defence of diminished responsibility can still be raised at trial. It appears that this course of action is not common.[103] Further, the Tribunal's determination that a person was not suffering from diminished responsibility does not preclude that person from raising the issue at trial. If the issue is raised, the finding of the Tribunal is not admissible in evidence at the trial.[104]

4.57 The Tribunal operates in a non-adversarial fashion although the defendant is represented by counsel, as is the prosecution and, if he or she has made the reference, the Director of Mental Health. Psychiatrists are called by the Tribunal to examine the defendant and their reports are made available to all parties. The psychiatrists then give evidence before the Tribunal and may be cross examined by counsel.

4.58 There are said to be several advantages to this system.[105] One is that the atmosphere is less antagonistic and, consequently, more humane to the defendant. There are far fewer divergences of opinion as terminological and other medical issues can be agreed upon. Because the psychiatrist is essentially speaking to a body of experts, this is said to make a difference to the nature of the psychiatric evidence presented and this makes the task of the psychiatrist a great deal easier. One disadvantage of this system is that it essentially removes the role of deciding whether the defendant is guilty of murder or manslaughter from the jury although if the Tribunal does not make a finding of diminished responsibility, the defendant can still choose to go to trial. It is also noted that there are several practical problems with the operation of the Tribunal and the area is currently under review.[106]

New Zealand

4.59 There is no defence of diminished responsibility in New Zealand. In *McGregor*, a provocation case, the Court was concerned to limit the interpretation of "characteristics" to those mental peculiarities of "sufficient permanence" in order to prevent the introduction of a back-door diminished responsibility defence.[107] Later cases, however, tended to leave provocation to the jury where some mental disturbance was shown. It has been argued that this tendency means the courts have developed a "de-facto diminished responsibility defence".[108]

England

4.60 Section 2 of the English *Homicide Act* 1957 and s 23A are very similar although there are some minor differences in interpretation. A major point of difference is the power of English courts to make hospital orders.[109] Under s 37 of the *Mental Health Act* 1983 a convicted person can be committed to a mental hospital or to a local services authority. The offence must be punishable by imprisonment but does not include murder. The order can be made on the evidence of two medical practitioners who testify that detention for treatment is appropriate. In addition, restriction orders under s 41 may be made which prevent discharge, transferral or leave of absence without the consent of the Home Secretary. Without such an order the responsible medical officer or the Mental Health Review Tribunal can discharge the offender at any time.

Canada

4.61 There is no statutory defence of diminished responsibility in Canada. However in a number of cases the defendant has been able to advance a defence of lack of intent on the grounds of a mental disorder not amounting to insanity. Although the case law is not consistent, its overall effect may be to introduce a de-facto diminished responsibility defence.[110] It is also to be noted that the insanity defence in s 16 of the Canadian *Criminal Code* is wider than the M'Naghten Rules. It has been said that:

> The draftsman of the Code, as originally enacted, made a deliberate change in language from the common law rule in order to broaden the legal and medical considerations bearing upon the mental state of the accused and to make it clear that cognition was not to be the sole criterion. Emotional, as well as intellectual, awareness of the significance of the conduct, is an issue.[111]

4.62 Because of this, the insanity defence in Canada incorporates elements of what we include within our defence of diminished responsibility, that is, emotional awareness of the significance of the conduct.

The United States

4.63 Those States which have enacted the Law Institute's Model Penal Code have a type of defence of diminished responsibility which provides that a killing is manslaughter if:

> committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse [such reason to be] determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

4.64 Other jurisdictions do not have a specific statutory defence but instead rely on arguments negating *mens rea* or attaching some meaning to "malice aforethought" where the defendant claims he or she was mentally disturbed.[112] This has been described as follows:

> [Diminished capacity] is directed at the evidentiary duty of the State to establish those elements of the crime charged requiring a conscious mental ingredient ... [D]iminished capacity is legally applicable to disabilities not amounting to insanity, and its consequences, in homicide cases, operate to reduce the degree of the crime rather than to excuse its commission. Evidence offered under this rubric is relevant to prove the existence of a mental defect or obstacle to the presence of a state of mind which is an element of the crime, for example; premeditation or deliberation.[113]

4.65 In cases such as this, the defendant would be convicted of second degree murder only. Further, the diminished capacity defendant may also be without malice aforethought and thus:

> Even intentional killings can be mitigated to voluntary manslaughter if ... the defendant did not attain the mental state of malice due to mental illness, mental defect or intoxication.[114]

4.66 In California, however, these doctrines proved to be so confusing and were said to lead to such unjust results that legislation was enacted to remove the defence on the grounds of public policy.[115]

Singapore

4.67 The doctrine of diminished responsibility was introduced into Singapore law in 1961. Exception 7 to s 300 of the *Penal Code* is substantially the same as s 23A. [116] The two significant differences in the practical operation of the defence is that there are no juries in Singapore criminal trials and that a conviction for murder carries a mandatory death penalty.

European jurisdictions

4.68 The House of Lords Select Committee on Murder and Life Imprisonment[117] conducted a survey of the Member States of the Council of Europe with respect to their law of diminished responsibility. It is difficult to appreciate the actual significance of the presence or absence of an analogous defence without considering the entire law of homicide in the relevant jurisdiction and, in particular, the murder/manslaughter distinction and the penalty for murder. However it is noted that no other jurisdiction has a specific partial excuse of mental disorder or diminished responsibility which operates only in the context of homicide. A number have partial defences of provocation or self-defence (Luxembourg, Malta, Cyprus) and a number (Turkey, Denmark, Italy, the Netherlands, Switzerland) provide that mental disorder is relevant to punishment or as a general defence. The Netherlands, for example, deals with concepts of diminished responsibility in terms of punishment. All offences carry a maximum sentence and mental illness can be taken into account at the sentencing stage. Thus mental disorder, though not totally exculpatory, is taken into account in determining punishment and the punishment can include special treatment or (infrequently) restrictive measures.[118]

OPTIONS FOR REFORM

Option One: Retain defence without amendment

Implementation

No changes would be required.

Other recommendations to this effect

There have been no recommendations by other law reform bodies to retain the New South Wales defence (or the English defence to which it is similar) in its present form.

Option Two: abolish defence

Implementation

The defence of diminished responsibility could be abolished altogether. This would mean that issues now going to reduced culpability would be taken into account in respect of sentence. This could be achieved by simply repealing s 23A although consideration could also be given to making specific legislative provision for matters currently going to establish the defence to be taken into account in respect of sentence.

The other matter worth considering is whether, if the defence of diminished responsibility is abolished, the defence of mental illness should be expanded or reformulated. The problems with the present mental illness defence are detailed above at paras 4.36 - 4.42. This issue is not strictly within the Commission's present terms of reference but, as a matter of policy, it is crucial that the possibility of reform in this area be considered. Indeed it may also be necessary, even if diminished responsibility is retained, for the defence of mental illness to be reformed.

Other recommendations to this effect

The Gibbs Report in 1990 recommended against the inclusion of a diminished responsibility defence in the consolidation of Commonwealth criminal law.[119] In England, the Butler Committee's first choice was the abolition of the mandatory sentence for murder along with the defence of diminished responsibility.[120] A South Australian committee also has concluded that with the abolition of the death penalty there is no advantage to introducing the defence.[121] The Victorian Law Reform Commission (writing in 1990 when the mandatory life sentence for murder had been abolished in Victoria) recommended that it was

unnecessary to introduce a defence of diminished responsibility.[122] It should be noted that the Victorian position is the most analogous to New South Wales in that both jurisdictions have a discretionary penalty for murder.

Option Three: reformulate defence

Other recommendations to this effect

In general terms the English Criminal Law Revision Committee,[123] the House of Lords Select Committee on Murder and Life Imprisonment[124] and the English Law Commission[125] have all recommended the retention and reformulation of the partial defence of diminished responsibility even if the mandatory life sentence for murder was to be abolished. The Victorian Law Reform Commissioner initially recommended the introduction of a defence of diminished responsibility when there was still a mandatory life sentence for murder.[126]

Implementation

There are a number of possible reforms that could be introduced in an attempt to alleviate some of the problems noted above. A number of suggested changes are discussed below. Some involve redrafting the defence, some are procedural and some are related to sentencing. The changes are independent of each other - except for those presented as alternatives, they could all be introduced although this is not necessary.

1. Simplification of the elements

Suggestion A

A new diminished responsibility provision could be redrafted in the broad terms suggested by the Law Commission of England and Wales:

> A person who, but for this section, would be guilty of murder is not guilty of murder if, at the time of his act, he is suffering from such mental abnormality as is a substantial enough reason to reduce his offence to manslaughter.[127]

At the same time, “mental abnormality” could be redefined. For example it could be defined to include mental illness, intellectual disability, psychopathic disorder and any other disorder or disability of mind.

OR

Suggestion B

The diminished responsibility provision of the Queensland Code could be used as a model, requiring impairment of named capacities rather than relying on the concept of “mental responsibility”.[128]

2. Onus and Procedure

The onus of proof could be placed on the prosecution, in accordance with the general rule.[129]

The committal and indictment on a charge of manslaughter by reason of diminished responsibility could be specifically provided for.[130]

Consideration could be given to determining issues of diminished responsibility in a forum other than a trial. For example:

i. Preparatory hearings to reach agreement or determine points of disagreement between experts prior to trial;

OR

ii. A panel of experts to assess the condition of the defendant prior to trial;

OR

iii. A system of determination by a mental health tribunal similar to that used in Queensland.

3. Scope

It could be clarified that the defence is available to reduce a charge of attempted murder to attempted manslaughter.[131]

Consideration could be given to the extension of the defence to offences other than murder and attempted murder. The notion of an intermediate stage between insanity and full responsibility is relevant to all offences. In a jurisdiction with a discretionary murder penalty there is nothing special about the offence of murder and arguments for a diminished responsibility defence apply to all offences.[132] An option may be introduction of a verdict of "guilty but with diminished responsibility" which could apply to all offences, either including murder or not including murder.

4. Reasons for verdict

It could be provided that the jury must specify the grounds on which they have returned a manslaughter verdict where diminished responsibility and provocation defences are run together.[133]

5. Expert evidence

Expert witnesses could be prevented from offering conclusions on the ultimate issue before the court. If the "mental responsibility" construction is reformulated (that is, Suggestion 1A above) this will go somewhere towards achieving this aim. If it is not it may be appropriate to legislate to apply the ultimate issue rule in diminished responsibility cases.

Consideration could be given to making provision for psychologists to give evidence in the same way as psychiatrists.

6. Notice of defence

The defence could be required to give advance notice to the prosecution of their intention to adduce psychiatric evidence or seek leave of the Court to adduce such evidence.[134] They could also be required to make the defendant available for examination by prosecution psychiatrists.

If this is adopted then consideration should be given to preventing the prosecution from accessing the prison medical files of the defendant.

7. Sentencing issues

To alleviate sentencing difficulties, further sentencing options for diminished responsibility offenders could be considered. It is noted that reform of the sentencing options for diminished responsibility do not fall directly within the Commission's terms of reference. However, in the words of the Victorian Law Reform Commission:

> Any consideration of reform of the substantive criminal law cannot be divorced from the question of sentencing and sentencing options. This is particularly so in the case of homicide where the mental condition of the offender can have such an important bearing both on his criminal responsibility and therefore his guilt and on the problem of his disposition and treatment.[135]

DISCUSSION OF THE OPTIONS

Should the defence of diminished responsibility be retained in one form or another or should it be abolished altogether?

4.69 There are two main arguments for abolishing the defence of diminished responsibility.

4.70 *The defence is irrelevant in a jurisdiction with a discretionary penalty for murder.* To put the defence into its historical context, it is noted that the Committee which called for the introduction of the defence in New South Wales specified that their recommendation was chiefly impelled by the "continuation of the mandatory life sentence for murder and the comparative inflexibility of the M'Naghten approach".[136] Thus, it may be argued that the introduction of the defence arose at a particular point in the development of the criminal law and is now unnecessary in a jurisdiction with a discretionary sentence for murder. It is a "relic of harsher times"[137] and is no longer relevant.

4.71 It is said, therefore, that under current New South Wales sentencing law, factors now going to culpability could go in mitigation of sentence. This is fair, flexible and efficient, particularly in the not uncommon cases where there is conflicting medical evidence. Because of such evidentiary conflicts, a trial based on diminished responsibility is an expensive, lengthy process. Medical evidence may be presented more appropriately in terms of sentence. Finally, it is argued that, despite the different maximum sentences for murder and manslaughter, a maximum sentence of life is so rare as to make it unlikely that actual sentences would rise if diminished responsibility were abolished.

4.72 There is some validity in the argument that, with the disappearance of the original rationale for the defence of diminished responsibility, it has become redundant. However, such an argument ignores the role the jury plays as representatives of the community in considering issues of moral responsibility and the inadequacies of the sentencing process. A jury verdict of diminished responsibility has a number of advantages over reliance on the sentencing process alone. First, it focuses the mind of the sentencing judge on the mental abnormality of the offender. Secondly, at the sentencing stage psychiatric evidence is usually put in the form of a report and oral evidence (subject to examination and cross-examination) is rare. This is not an adequate presentation when a sentence for murder is at stake. Finally, there is concern that if diminished responsibility is abolished sentences could rise as sentencing judges would have regard to the current "tariff" for murder and not adequately take the diminution in culpability because of mental abnormality into account.

4.73 Further, this argument does not realise that it may be inapt and unfair to stigmatise as "murderers" people who kill with a reduced level of moral culpability. These "labelling" arguments are discussed in Chapter 2 at paras 2.17-2.19 and need not be repeated here.

4.74 *Diminished responsibility is simply unnecessary.* It is argued that diminished responsibility as found in s 23A is a relatively rare creature in the common law. Many other common law jurisdictions in Australia (Victoria, South Australia, Western Australia and Tasmania) and overseas (including New Zealand, Canada and most of the United States) seem to function without it. Abolition in New South Wales would achieve greater uniformity between Australian jurisdictions, leaving Queensland as the only Australian jurisdiction to retain the defence.

4.75 Without the defence of diminished responsibility, however, it is possible that the provocation defence may be distorted. This is evident from the New Zealand experience. It may also lead to strained interpretations of the "intent" requirement for murder as is evident in Canada and some United States jurisdictions.

4.76 Further, despite the positions in other jurisdictions, diminished responsibility is arguably a useful and relevant category. It reflects a valid distinction between full culpability and a partial diminution of it. The gap between mental illness and full culpability is too extreme and diminished responsibility recognises the continuum of moral responsibility. It has been said that the defence:

> Enhances precision and therefore justice because the election it presents to the jury is not the all-or-nothing choice between full guilt and complete innocence but one involving recognition of the admixture of some blameworthiness and some ground for exculpation ... it is both just and reasonable.[138]

4.77 Finally, it should be noted that diminished responsibility arose to some extent because of the manifest inadequacies of the insanity defence, especially in respect of uncontrollable behaviour. It has been said that diminished responsibility compensates for the lack of an "insanity defence that can be used".[139] These inadequacies have not yet been remedied. In the absence of reform of the defence of mental illness it is premature to abolish diminished responsibility.

Should the defence of diminished responsibility be amended?

4.78 It has been argued that there is little point in amending the defence of diminished responsibility because, although there are clearly problems with the defence, any change would raise a further set of interpretational difficulties. This is because the basic problem with the defence is the *inherent* difficulty of the concepts and the fact that they represent an uneasy mixture of law and psychiatry.

4.79 It is also argued that while the concepts involved in the defence may be complicated and problematic for lawyers and psychiatrists, there is no indication that juries find them difficult to apply in practice. In essence the jury is asked to answer the common-sense question "was the state of mind of this person at the time of the offence so disturbed that we believe he or she was not fully culpable". Thus the defence of diminished responsibility allows jury members to make value judgments giving expression to their personal sense of the proper boundary between murder and manslaughter. The jury can do this, to a large extent, not in spite of, but *because of* the uncertainties inherent in the defence itself.[140]

4.80 These arguments are not persuasive. It is quite clear that, if the defence is to be retained, some or all of the suggestions for reform presented in Option Three should be adopted.

4.81 There is no need to rehearse the difficulties with the current drafting of s 23A. The deficiencies with the section and with the nature of expert evidence are discussed at paras 4.9 - 4.35 above. The proposed reformulations of the defence in Option Three reconsider the need for the concept "mental responsibility" (suggestions 1A and 1B), redefine "abnormality of mind (suggestion 1A) and consider the need for an exhaustive aetiology (suggestion 1A). The onus of proof and other procedural questions (suggestions 2 and 6) also are considered, as is the attempt to reduce the power of experts to comment on the ultimate issue and to clear up other points with respect to expert evidence (suggestions 1A and 5).

4.82 It should be noted that there are problems with the redrafting in both suggestions 1A and 1B. In respect of suggestion 1A, the redrafting provides no indication of what might be a "substantial enough reason" to reduce the conviction to manslaughter. It essentially leaves the jury to mark out for itself the boundary between murder and manslaughter with very little guidance as to how it is to do this.[141] It also requires "mental abnormality" to be redefined, a complicated process. The definition could not be limited to mental illness, but there is little agreement between psychiatrists on what conditions it might include. In particular, cases of personality disorders are highly contentious. Finally, the redrafting removes the need to find a cause for the abnormality of mind. This may well open a "Pandora's box" with causes such as intoxication, jealous rages or extreme religious or political views included within the diminished responsibility defence.

4.83 In respect of suggestion 1B, it is noted that caution is required in simply copying a Code provision. For one thing, the insanity defence in Queensland is different from the common law and the specified categories in s 304A mirror that defence. Queensland courts therefore have experience in working with the three specified capacities in the context of the insanity defence. Secondly, Queensland procedure is significantly different from that in New South Wales and the Code provision may not function well under our procedure.

Footnotes

1. *Mental Health (Criminal Procedure) Act* 1990 (NSW) s 38. The defence of mental illness was formerly known as the "insanity defence". Section 38 does not amend the common law insanity rules, however.

2. D Fraser "Still Crazy After All These Years: A Critique of Diminished Responsibility" in Yeo (ed) *Partial Excuses to Murder* (The Federation Press, 1991) at 115.

3. (1867) 5 Irvine 466.

4. N Walker *Crime and Insanity in England* vol 1 (Edinburgh University Press, 1968) ch 8.

5. See Sir George MacKenzie *The Laws and Customs of Scotland in Matters Criminal* (1674). MacKenzie was a contemporary of Hale who firmly rejected such partial insanity.

6. Quoted in Walker at 140.

7. *Dingwall* (1867) 5 Irvine 466.

8. *Savage* (1923) JC 49.

9. *Muir* (1933) JC 46.

10. Walker at 144.

11. Walker at 144.

12. Sir James Fitzjames Stephen *History of the Criminal Law of England* (1883) at 175 quoted in Walker at 147.

13. *Murder: some suggestions for the reform of the law relating to murder in England* (Inns of Court Conservative and Unionist Society, 1956).

14. [1960] 2 QB 396.

15. See *Spriggs* [1958] 1 QB 270; *Walden* [1959] 1 WLR 1008.

16. See B Wootton "Diminished Responsibility; a laymans view" (1960) 76 *Law Quarterly Review* 224.

17. Walker at 158.

18. Following the recommendations of the Criminal Law Committee *Report of the Criminal Law Committee on Proposed Amendments to the Criminal Law and Procedure* (Parliamentary Papers No 54, 1973).

19. *Crimes Act* 1900 (NSW) s 23A(2). See below, regarding onus of proof.

20. *Dunbar* [1958] 1 QB 1.

21. *Byrne* [1960] 2 QB 396 per Lord Parker at 403, approved by the New South Wales Court of Criminal Appeal in *Tumanako* (unreported) Supreme Court, NSW, Court of Criminal Appeal, 7 October 1992 at 12.

22. See discussion in H Allen "At the Mercy of Her Hormones: Premenstrual Tension and the Law" (1984) *m/f* 19, extracted in D Brown, D Farrier, D Neal and D Weisbrot *Criminal Laws* (The Federation Press, 1990); R Graycar and J Morgan *The Hidden Gender of Law* (The Federation Press, 1990) at 409 and references there cited.

23. Dr W Barclay *Oral Submission* (8 July 1993); Dr R Milton *Oral Submission* (28 June 1993); Dr B Westmore *Oral Submission* (14 July 1993).

24. M Sides QC, Acting Senior Public Defender *Submission* (18 May 1993); Legal Aid Commission *Oral Submission* (8 July 1993).

25. M Tedeschi QC, Crown Prosecutor *Oral Submission* (21 June 1993); Dr R Milton *Oral Submission* (28 June 1993).

26. *Purdy* [1982] 2 NSWLR 964 per Glass JA and Maxwell J following *Byrne* (Roden J dissenting).

27. E Griew "The Future of Diminished Responsibility" [1988] *Criminal Law Review* 75 at 77.

28. It has been pointed out that this terminology is outdated, Professor S Hayes *Oral Submission* (25 June 1993).

29. *Whitworth* (1987) 31 A Crim R 453 (Qld CCA).

30. *McGarvie* (1986) 5 NSWLR 270.

31. *McGarvie; Tumanako* (unreported) Supreme Court, NSW, Court of Criminal Appeal, 7 October 1992.

32. *Tumanako*.

33. *Jones* (1986) 22 A Crim R 42 (NSW CCA).

34. *McGarvie* (1986) 5 NSWLR 270 at 272, 273; *Jones* (1986) 22 A Crim R 42.

35. *Tandy* [1989] 1 All ER 267. See discussion in Brown et al at 706 note 1.

36. *Byrne* (1960) 2 QB 396 per Lord Parker at 403, approved by the New South Wales Court of Criminal Appeal in *Tumanako* at 12.

37. Griew at 81.

38. W Barclay *Diminished Responsibility: The Psychiatrist's View* (Public Defenders Seminar, 1992) at 5; M Tedeschi QC, Crown Prosecutor *Oral Submission* (21 June 1993); Dr R Milton *Oral Submission* (28 June 1993).

39. *Lloyd* [1967] 1 QB 175 at 178-9, see also *Biess* [1967] Qd R 470 at 475.

40. *Textbook of Criminal Law* (2nd ed, Stevens & Sons, 1983) at 686.

41. M Ierace *Oral Submission* (2 July 1993).

42. See *Dix* (1981) 74 Cr App R 306; *Tumanako*.

43. See *Byrne* [1960] 2 QB 396; *Purdy* [1982] 2 NSWLR 964; *Tumanako.*

44. S Hayes "Diminished Responsibility - The Expert Witness' Viewpoint" in Yeo (ed) at 150.

45. S Morse "Undiminished Confusion in Diminished Capacity" (1984) 75 *Journal of Criminal Law and Criminology* 1 at 51-55. Dr R Milton *Oral Submission* (28 June 1993) thought that in *most* cases this would be feasible.

46. Professor S Hayes *Oral Submission* (25 June 1993).

47. See *Ayoub* [1984] 2 NSWLR 511.

48. Morse at 53.

49. See J Nader QC *Report to the Attorney General Concerning Complex Criminal Trials* (3 June 1993) for a consideration of these techniques.

50. S Dell "Diminished Responsibility Reconsidered" (1982) *Criminal Law Review* 809. The study considered the period 1976-1977.

51. Professor S Hayes *Oral Submission* (25 June 1993).

52. See *Tonkin and Montgomery* [1975] Qd R 1. In *Chayna,* each of the seven psychiatrists expressed opinions concerning the applicability of the M'Naghten Rules and the provisions of s 23A to the defendant.

53. Barclay at 5; Dr R Milton *Oral Submission* (28 June 1993).

54. Dell (1982) at 818.

55. M Ierace *Oral Submission* (2 July 1993).

56. S Norrish QC *Oral Submission* (30 June 1993).

57. Dr R Milton *Oral Submission* (28 June 1003); Dr B Westmore *Oral Submission* (14 July 1993).

58. Professor S Hayes *Oral Submission* (25 June 1993); M Tedeschi QC, Crown Prosecutor *Oral Submission* (21 June 1993); Dr W Barclay *Oral Submission* (8 July 1993); Dr J Phillips *Oral Submission* (8 July 1993).

59. Professor S Hayes *Oral Submission* (25 June 1993); Dr W Barclay *Oral Submission* (8 July 1993); Dr J Phillips *Oral Submission* (8 July 1993); Dr B Westmore *Oral Submission* (14 July 1993). See, with respect to training, Codes of Ethics and the relationship between the legal and psychiatric professions, I Freckleton "Current Legal Issues in Forensic Psychiatry" in H Strang and S Gerull (eds) *Homicide: Patterns, Prevention and Control* (Australian Institute of Criminology Conference Proceedings No 17, 1993).

60. M Ierace *Oral Submission* (2 July 1993). See, for example, *Peisley* (1990) 54 A Crim R 42 at 52 (NSW CCA).

61. *Mulligan* (unreported) Supreme Court, NSW, Court of Criminal Appeal, 7 June 1985.

62. R Blanch QC, Director of Public Prosecutions *Submission* (12 May 1993).

63. Legal Aid Commission *Oral Submission* (8 July 1993).

64. M Ierace *Oral Submission* (2 July 1993).

65. The Rules were established in *M'Naghten's Case* [1843] 10 Cl & Fin 200; 8 ER 718.

66. *Mental Health (Criminal Procedure) Act* 1990 (NSW) s 37.

67. See *Sodeman* (1936) 55 CLR 230; *AG (SA) v Brown* [1960] AC 432. See the discussion in Brown et al at 684.

68. [1984] 2 NSWLR 511.

69. Street CJ and Slattery J.

70. Data obtained from B Boerma, Registrar of Mental Health Review Tribunal (21 July 1993). In this period there were 24 acquittals overall.

71. Note, however, the rule (albeit much mitigated by recent cases) that a murderer or manslaughterer cannot claim a share in the estate of the victim although a killer acquitted on the grounds of insanity can.

72. S Dell *Murder into Manslaughter: The Diminished Responsibility Defence in Practice* (Oxford University Press, 1984) at 53.

73. Dell (1984) at 53.

74. *Cox* (1968) 52 Cr App R 130.

75. Dell (1984) at 25-6; F Rinaldi "Case and Comment: Purdy" (1983) 7 *Criminal Law Journal* 218 at 219. But note that in some cases, despite unanimous medical opinion, the trial judge has refused to accept a guilty plea. This occurred in the trial of Peter Sutcliffe (the so-called "Yorkshire Ripper"), see Williams at 689-90.

76. S Norrish QC *Oral Submission* (30 June 1993).

77. R Blanch QC, Director of Public Prosecutions *Submission* (12 May 1993).

78. *Chayna* (unreported) Supreme Court, NSW, Court of Criminal Appeal, 15 February 1993.

79. S Norrish QC *Oral Submission* (30 June 1993).

80. M Ierace *Oral Submission* (2 July 1993); Legal Aid Commission *Oral Submission* (8 July 1993).

81. See *Criminal Procedure Act* 1986 (NSW) Pt 9. This Part was inserted in 1990 and came into operation on 17 March 1991 (Gazette No 37 of 1 March 1991).

82. Information from W Soden, Chief Executive Officer and Registrar of the Supreme Court of NSW (29 June 1993).

83. (unreported) Supreme Court, NSW, 16 July 1992.

84. See, for example, *Veen (No 1)* (1979) 143 CLR 458; *Veen (No 2)* (1988) 164 CLR 465; *Evers* (unreported) Supreme Court, NSW, 25 February 1992, noted at (1992) 16 *Criminal Law Journal* 135.

85. *Veen (No 1)* (1979) 143 CLR 548*; Veen (No 2)* (1988) 164 CLR 465. For a discussion of these cases, see R Fox "The Killings of Bobby Veen: The High Court on Proportion in Sentencing" (1988) 12 *Criminal Law Journal* 339; D Wood "The Abolition of the Mandatory Life Imprisonment for Murder: Some Jurisprudential Issues" in H Strang and S Gerull (eds) *Homicide: Patterns, Prevention and Control* (Australian Institute of Criminology Conference Proceedings No 17, 1993). See also *Falconetti* (unreported) Supreme Court, NSW, Court of Criminal Appeal, 24 March 1992.

86. Editorial (1992) 16 *Criminal Law Journal* 135 at 137.

87. *Scognamiglio* (1992) 56 A Crim R 91 (NSW CCA). This is particularly so in respect of offenders with an intellectual disability.

88. *Falconetti* (unreported) Supreme Court, NSW, Court of Criminal Appeal, 24 March 1992.

89. Judgment of Mathews J at first instance, quoted in judgment of Court of Criminal Appeal at 4.

90. See *Rolph* [1962] Qd R 262, per Hanger J at 290; *Veen (No 1)* (1979) 143 CLR 458, per Stephen J at 465-6.

91. *Low* (1991) 57 A Crim R 8 at 16 (NSW CCA); see also *Martin* (1981) 2 NSWLR 640 at 643.

92. Section 14 of the ACT *Crimes Act* is the same as s 23A. The ACT has a discretionary life sentence for murder: *Crimes Act* s 12(2).

93. Section 37 of the Northern Territory *Criminal Code* is essentially the same. In contrast, the Papua New Guinea *Criminal Code* 1974 does not contain such a provision.

94. [1962] Qd R 262.

95. But see the contention of R O'Regan in "Diminished Responsibility Under the Queensland Criminal Code" (1978) 2 *Criminal Law Journal* 183 at 187 that there may also be a qualitative difference.

96. (1987) 31 A Crim R 453.

97. *Crimes Act* 1900 (NSW) s 23A(5); *Criminal Procedure (Insanity) Act* 1964 (UK) s 6.

98. It appears that this is also taken to be the case under the Codes, see *Carter's Criminal Law of Queensland* at 4819.

99. *Mental Health Act* 1974 (Qld) s 28D. This and the following sections (constituting Pt IV of the Act) were inserted in 1984.

100. Section 28B(2).

101. Section 33(1)(b). Diminished responsibility is defined according to s 304A of the Code: s 28A.

102. Section 35A(b).

103. Dr B Westmore, former Director for Psychiatric Services for Queensland *Oral Submission* (14 July 1993).

104. Section 43A(2)(b).

105. Dr B Westmore *Oral Submission* (14 July 1993).

106. See Queensland Health Department *Review of the Mental Health Act: The Forensic Provisions* (Discussion Paper, May 1993).

107. *McGregor*[1962] NZLR 1069 at 1081. See generally B Brown "Provocation in New Zealand: A Characteristic Solution" in Yeo (ed) at 85-87.

108. See W Brookbanks "Provocation - Defining the Limits of Characteristics" (1986) 10 *Criminal Law Journal* 411; W Brookbanks "Criminal Law" [1991] *NZ Recent Law Review* 385; B Brown "Provocation, 'Characteristics' and Diminished Responsibility" (1983) 10 *New Zealand Universities Law Review* 378.

109. JC Smith and B Hogan *Criminal Law* (Butterworths, 1992) at 215. See generally S Dell "The Detention of Diminished Responsibility Offenders" (1983) 23 *British Journal of Criminology* 50; Dell (1984).

110. See the cases and discussion in M Gannage "The Defence of Diminished Responsibility in Canadian Criminal Law" (1981) 19 *Osgoode Hall Law Journal* 301; J Walsh "The Concepts of Diminished Responsibility and Cumulative Intent: A Practical Perspective" (1991) 13 *Criminal Law Quarterly* 229.

111. *Cooper* (1980) 51 CCC (2d) 129 at 145.

112. See, generally, Morse; R Boyce and R Perkins *Cases and Materials on Criminal Law and Procedure* (7th ed, The Foundation Press, 1989) at 621ff.

113. *State v Smith* (1978) A 2d 126; see also *People v Baker* (1954) 268 P 2d 705.

114. *People v Burton* (1971) 491 P 2d 793; see also *People v Henderson* (1963) 386 P 2d 677.

115. Section 28 of *Penal Code.* This was introduced following the "twinkie defence" (impairment of mental processes from diet of junk food) raised by Dan White, tried for the murder of Harvey Milk, the gay activist and mayor of San Francisco. See Brown et al at 709 note 5.

116. See the cases and discussion in K Peng, M Cheang and C Tsee "Diminished Responsibility - the Position in Singapore" (1987) 16 *Anglo-American Law Review* 268.

117. House of Lords Select Committee on Murder and Life Imprisonment *Report* (1989).

118. M Zeegers "Diminished Responsibility - A Logical, Workable and Essential Concept" (1981) 4 *International Journal of Law and Psychiatry* 433.

119. Australia. Attorney-General's Department *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters* (AGPS, 1990) at paras 9.43-9.44.

120. Committee on Mentally Abnormal Offenders *Report of the Committee of Mentally Abnormal Offenders* (Home Office, 1975) (The Butler Report) at para 19.14.

121. Criminal Law and Penal Methods Reform Committee *The Substantive Criminal Law* (Fourth Report, 1977) (The Mitchell Report) at para 14.

122. Law Reform Commission of Victoria *Mental Malfunction and Criminal Responsibility* (Report 34, 1990) recommendation 26 at para 148.

123. Criminal Law Revision Committee *Offences Against the Person* (Report 14, 1980).

124. House of Lords Select Committee on Murder and Life Imprisonment *Report* (1989) at para 83.

125. As reported in Select Committee Report at para 82.

126. Victorian Law Reform Commissioner *Provocation and Diminished Responsibility as Defences to Murder* (Report 12, 1982).

127. This is the formulation of the Law Commission of England and Wales *A Criminal Code for England and Wales* (Report 177, 1989) in cl 58 which essentially implemented the recommendations of the CLRC Report 14. The CLRC recommendation referred to "mental disorder" as defined in the Mental Health Act. The CLRC had based their recommendation on a reformulation in the Butler Report to similar effect. Unlike the Butler Committee, the CLRC's recommendations were made even if the mandatory penalty were to be removed. The VLRC Report 12 at para 2.55 accepted the CLRC's reformulation.

128. The Queensland Criminal Code Review Committee *Final Report* (1992) at 95 has recommended the retention of the present Queensland diminished responsibility provision. Note that Queensland has a mandatory life penalty for murder. The Western Australian Law Reform Commission in *The Criminal Process and Persons Suffering From Mental Illness* (Project 69, Report 1991) at para 2.54 has recommended the introduction of the defence in its Queensland form should the mandatory life sentence for murder be retained,

129. Butler Report at para 19.18; CLRC Report 14 at para 94; VLRC Report 12 at para 2.67.

130. Butler Report at para 19.19; CLRC Report 14 at paras 95, 96; VLRC Report 12 at para 2.72.

131. CLRC Report 14 at para 98; VLRC Report 12 at para 2.76

132. See arguments for a general defence in R Meakin "Diminished Responsibility: Some Arguments for a General Defence" (1988) 52 *Journal of Criminal Law* 406; Law Reform Commission of Victoria *Mental Malfunction and Criminal Responsibility* (Discussion Paper 14, 1988) at paras 171-177.

133. England and Wales Law Commission *Codification of Criminal Law* (Report 143, 1985) cl 57(2). This suggestion was thought unnecessary in Report 177 on the ground that it may divide jurors and is adequately dealt with by present practice of judges directing the jury that they should state the ground in order to assist sentencing.

134. Butler Report at para 19.21. The CLRC did not think this was necessary, Report 14 at para 97. The Commission has received a number of submission indicating that reform in this area is desirable: R Blanch QC, Director of Public Prosecutions *Submission* (12 May 1993); Dr R Milton *Oral Submission* (28 June 1993).

135. VLRC Report 12 at para 2.21.

136. Criminal Law Committee *Report of the Criminal Law Committee on Proposed Amendments to the Criminal Law and Procedure* (Parliamentary Papers No 54, 1973) at 6.

137. B Fisse *Howard's Criminal Law* (5th ed, Law Book Company, 1990) at 112.

138. S Glueke *Law and Psychiatry* (1963) at 23 quoted in Hayes in Yeo (ed) at 154.

139. S Dell "Wanted: An Insanity Defence that Can be Used" [1983] *Criminal Law Review* 431.

140. This point is made by Griew who argues that, paradoxically, the expansion of the defence has been facilitated by the "nonsensical quality of the statutory language".

141. Griew at 86.

5. Infanticide

INTRODUCTION

5.1 Infanticide is unique in that it is both a substantive offence and a partial defence. Thus infanticide can be raised as a defence to a charge of murder and, if successful, will result in the offender being dealt with as if convicted for manslaughter. Alternatively, the prosecution can specifically charge a woman with infanticide. Infanticide is only applicable in New South Wales where a woman whose mind is "unbalanced" by reason of the effects of birth or subsequent lactation kills her own child who is under the age of 12 months.

5.2 Infanticide is now controversial in several respects. First, it is relatively rarely used and, on one view, may be subsumed within the broader partial defence of diminished responsibility (which entered New South Wales law at a later time). Secondly, there is considerable doubt about the scientific validity of the medical basis for infanticide - and, indeed, whether the basis is to be found in psychology, physiology or sociology.

5.3 Finally, there is concern expressed in feminist legal thought that it is inappropriate for women to be given "special treatment" by the law for "biological" reasons, as this is certain to rebound to the detriment of women in other areas of the law and runs contrary to the drive for gender equality. On the other hand, there is an argument that, whatever its theoretical basis, there is value in a defence which mitigates against a conviction for murder for a small class of "sympathetic defendants".

BRIEF HISTORY

5.4 While "it is difficult in this child centred society to imagine the enormity of the child disposal problem throughout the ages",[1] the practice of infanticide was widely used as a method of population control and was often condoned by the general mores of many pre-Christian societies.[2] Although Christian morality emphasised the sanctity of life and consequently censured infanticide, the practice remained widespread.[3] Legal censure began in 1624[4] with the statutory presumption of guilt when a woman concealed her (illegitimate) pregnancy and the child died. However, the statute was not strictly applied, an "ingenious case law ... developed to avoid the harshness of conviction for murder"[5] and the statute was repealed in 1803. *Lord Ellenborough's Act,*[6] which replaced it, created an alternative verdict of concealment of birth carrying a maximum penalty of two years imprisonment. This Act and its successors[7] formed the basis for the modern English and Australian concealment provisions.[8]

5.5 By the mid-nineteenth century, the killing of young children was a major social issue in England and Australia. Victorian attitudes to illegitimacy meant that unwanted pregnancies were economically and socially disastrous, particularly for women in domestic service and for many young women infanticide must have seemed unavoidable.[9] The killing of infants occurred in a wide variety of circumstances, from abandonment, exposure and ill-treatment to intentional killings and an entire "baby farming" industry. Indeed its prevalence indicated that it was very much a "part of everyday life".[10]

5.6 Despite the widespread occurrence of various "reproduction-related crimes" indictment rates were relatively low and actual convictions extremely rare.[11] Thus while the law itself was severe - child killing was murder and carried the death penalty - police enforcement was selective and sporadic[12] and jury verdicts were invariably lenient. Thus, for example, Keating J testified to the Capital Punishment Commission in England in 1866 that:

> It is in vain that judges lay down the law and point out the strength of the evidence, as they are bound to do; juries wholly disregard them and eagerly adopt the wildest suggestions which the ingenuity of counsel can furnish ... juries will not convict while infanticide is punished capitally.[13]

5.7 Evidence was often "stretched" to avoid conviction. On a charge of murder the prosecution has to prove that the child was completely born before it died and doctors frequently testified that the child may have still been in the birth canal when it was strangled or had its throat cut and other such improbabilities.[14] Judges themselves were very reluctant to contribute to a conviction. Seaborne Davies concluded that:

> Judges not merely tacitly acquiesced in the methods used by lawyers to circumvent the law, but frequently played an active part in these conspiracies.[15]

5.8 Finally, where a conviction was inevitable and the mandatory death sentence was pronounced, it was usually commuted.[16]

5.9 There were a number of reasons given for the mercy shown to mothers who committed infanticide. One was, according to Stephen, that because the victims were children, their loss was considered to be inestimable and therefore less.[17] Again, because infanticide was said not to create public alarm like other homicides, society did not insist on the death penalty as a deterrent.[18] Because of generally high infant mortality rates, the death of children was not uncommon and this may have made a deliberate killing more acceptable.[19] In addition, juries were sensitive to the oppressive social and economic conditions an unmarried mother would experience.[20] It was also the case that infanticide was not easy to prove, it was often difficult to determine whether the child had been born alive and whether the death had been accidental.[21] Finally, the harshness of the mandatory death penalty was an important factor in the reluctance of juries to convict.

5.10 It was in this paradoxical context that the "lobbying by medical groups, social reformers and - behind the scenes - judges ... led to the English *Infanticide Act* 1922".[22] The judges were concerned at the "solemn mockery"[23] of imposing a death sentence which everyone (except perhaps the defendant) knew was not going to be carried out. The reformers were concerned with the social conditions under which infanticide was likely to take place: poverty, abandonment and the social stigma of illegitimacy. Despite these "social" concerns, the Act adopted an essentially medical model, requiring that the "balance of mind" of the mother be disturbed as a consequence of childbirth. Thus the Act provided that a woman was guilty of infanticide if she killed her "newly born child" when she had not "fully recovered from the effect of giving birth to such child and by reason thereof the balance of her mind was then disturbed". According to O'Donovan:

> The Act was the product, not of nineteenth century medical theory about the effects of childbirth, but of judicial effort to avoid passing death sentences which were not going to be executed. But medical theory provided a convenient reason for changing the law.[24]

5.11 The 1922 Act was amended in 1938. As a reaction to the finding in *R v O'Donoghue*[25] that a 35 day-old child was not "newly born", the new provisions applied to children killed within one year of birth. In order to make the length of this period plausible, "lactation" was added as a ground for disturbance of mind. The 1938 Act is the basis for s 22A of the *Crimes Act* 1900 (NSW) which was introduced in 1951.

CURRENT LAW IN NEW SOUTH WALES

5.12 The relevant provision is s 22A *Crimes Act* 1900 (NSW):

> (1) Where a woman by any wilful act or omission causes the death of her child, being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child then, notwithstanding the circumstances were such that but for this section the offence would have amounted to murder, she shall be guilty of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of such child.
>
> (2) Where on the trial of a woman for the murder of her child, being a child under the age of twelve months, the jury are of the opinion that she by any wilful act or omission caused its death, but that at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child then, notwithstanding the circumstances were such that but for the provisions of this section they might have returned a verdict of murder, return in lieu thereof a verdict of infanticide and the woman may be dealt with and punished as if she had been guilty of the offence of manslaughter of the said child.

> (3) Nothing in this section shall affect the power of a jury upon an indictment for the murder of a child to return a verdict of manslaughter or a verdict of not guilty on the ground of insanity or a verdict of concealment of birth.

Elements of infanticide

The act of killing and the perpetrator

5.13 The defendant must kill the child, either by act or omission. It appears that the offence is not applicable in New South Wales where the mother is not the principal offender. The defendant also must be the natural mother of the child: adoptive mothers, fathers and other carers are not included within the scope of the provision.

The mental element

5.14 There is no specified mental element for the offence of infanticide. All that is necessary is that the act or omission be wilful. This has the possible consequence that a defendant could be convicted where she accidentally kills her child; that is, where she kills without the *mens rea* for either murder or manslaughter. This issue has not received judicial consideration but in the light of *He Kaw Teh*,[26] where the High Court held that there is a presumption that *mens rea* is required before a person can be found guilty of a serious criminal offence, this consequence is highly unlikely. What is not clear is what the mental element would be: must it be the *mens rea* for murder or would the mental element for involuntary manslaughter suffice?

A medical model

5.15 The rationale of the legislation is that the physical processes of birth can produce an effect that reduces a defendant's culpability. One consequence of this model is that the provisions only cover natural mothers. As mentioned above, fathers, other carers and adoptive parents do not fall within the scope of the legislation.

5.16 In recent times, the medical model has come under attack. It is pointed out that there is no evidence for a relationship between lactation and mental disorder and that the so called "post-puerperal psychoses" are not different from any other type of mental disturbance. Recent research shows that puerperal psychosis is very rarely the cause of a woman killing her infant.[27] In fact, stress from the social environment highlighted by the birth of a baby, stress from an additional family member in an impoverished household, psychological pressure from inability to cope and other environmental factors are usually the operative elements in the killing of infants.[28]

Mental disturbance and causation

5.17 On the strict wording of the statute there is no need to show a causal connection between the mental disturbance and the act causing death.[29] This is in contrast to both the diminished responsibility and insanity defences. One effect of this is that it considerably simplifies the jury's task who have merely to find that the defendant has a temporary disorder and otherwise falls within the terms of the statute.

The age of the victim

5.18 Section 22A specifies that the victim must be under the age of 12 months. A woman who kills two of her children, one under 12 months and one over, may be charged with infanticide for the first act but must be charged with murder (or manslaughter if appropriate) for the second. This is so even if they occur at the same time and arise from the same psychological or emotional state. This will probably also be the case where a woman has two children under the age of 12 months and kills the older. On a strict reading of the section, she cannot be charged with or plead infanticide for the killing of the older child.

The onus of proof

5.19 If a charge is brought under s 22A(1), the onus is clearly on the prosecution to prove all the essential elements of the crime beyond a reasonable doubt. However, there is some uncertainty surrounding the onus of proof when infanticide is raised as a defence. Section 22A(2) is silent on the matter. By analogy with diminished responsibility it might be thought that the onus lies on the defendant to prove infanticide as an alternative to murder. However, by analogy with provocation and consistently with most defences, it may be argued that the onus lies on the prosecution to negative infanticide where the defendant has produced some evidence towards proving the defence. There is no New South Wales authority on the issue, but where it has been considered the latter approach has been adopted. For example, in two Papua New Guinea cases in the 1960s, construing a similar provision, the Supreme Court ruled that the onus of proof was on the prosecution.[30]

Child destruction and concealment of birth

5.20 Finally, mention should be made of the analogous offences of child destruction and concealment of birth. Child destruction is covered by s 21 of the *Crimes Act* 1900 (NSW). Its object is to cover cases where the child is born dead because of acts done which, had the child died after birth, would have amounted to homicide. Essentially it is aimed at the killing of a child which was capable of being born alive due to acts done before (and usually in connection with) delivery. The penalty is imprisonment for a maximum term of 10 years. The offence of concealment of birth is found in s 85 of the Act which provides that wilfully concealing or attempting to conceal the dead body of a child (whether the child dies before, during or after birth) is punishable by a maximum of two years imprisonment. The object of this offence is to give the jury an intermediate option between a verdict of murder or manslaughter and a complete acquittal.[31] Thus s 22 allows the jury to return a verdict of concealment of birth on a charge of murder or manslaughter.

INFANTICIDE LAW IN PRACTICE

Offending, charging and conviction patterns

5.21 It is clear that the nature of the crime of infanticide has changed significantly since the late nineteenth century. As the cases involving the death of a newborn illegitimate baby decreased, the numbers of married women killing older children correspondingly increased.[32] The offence has come to cover two relatively distinct types of act: neonaticide, where the mother is distressed by the birth but usually not mentally disturbed, and the killing of older babies, where the mother is often seriously disturbed.[33] Wallace classifies cases of child killing into six major categories (1) neonaticide; (2) neglect; (3) battered baby; (4) childbirth depression; (5) murder-suicide and (6) miscellaneous.[34] Those cases to which the infanticide provisions would be most applicable - neonaticide, battered baby and childbirth depression - are considered further below.

Neonaticide

5.22 Wallace's study of all homicide cases in New South Wales between 1968 and 1981 identified 17 cases of homicide of a newborn baby.[35] Ten women were charged, one with the death of six babies and two cases were unsolved by police. The typical offender was very young, all but one were single and most lived at home with their families. In every case the pregnancy and the birth were concealed and denial of the pregnancy, both to the woman herself and to others, was a constant factor. In Wallace's opinion:

> Given the strength of the woman's denial, sometimes right up until the delivery, the subsequent birth of the baby clearly can have a cataclysmic effect on the woman.[36]

5.23 In very few of these cases was there any evidence of deliberate action by the mother to kill the child. Problems in demonstrating intent to kill, along with the difficulty of establishing the cause of death are evident in the subsequent history of these cases. Three cases were discharged at committal, two were no-billed and two of the women were acquitted. Two were convicted of concealment of birth and only the woman who had killed six babies was convicted of manslaughter. Only she received a prison sentence.

Childbirth depression

5.24 All offenders in this category were young, married women in their twenties. At the time of the homicides all offenders were suffering from severe mental distress and all had received treatment for their condition, most

were under medication at the time of the death.[37] However, as Wallace points out, social, cultural and economic forces play a decisive role in this post-natal depression.[38]

Battered baby

5.25 Half of the deaths in this category were children under the age of one year but in most cases the offender was the child's father or the de-facto spouse of his or her mother.[39] The context of such killings was usually one of significant financial, marital and familial stress interwoven with the "belief both in the desirability and legitimacy of the use of physical violence in child rearing".[40]

Cases covered by the infanticide provisions

5.26 This section considers the cases in which the infanticide provisions were applicable - that is, where a woman kills her child who is under the age of one. By way of background, in her comprehensive study of homicide in New South Wales between the years 1968 and 1981, Wallace found that over eighty percent of all child homicide victims were killed by a parent, with men and women offenders equally represented. Thus she concludes that:

> Women's participation in the deaths of young children is certainly high, but the prevailing myth that child killings are the prerogative only of women is found to be patently wrong. Clearly both men and women are involved in the violent deaths of young children.[41]

5.27 The study also found that while 92% of the female offenders had no violent criminal records, the majority of male offenders did.[42] In addition, over half of the women had had prior professional treatment for a mental disorder, compared with only 20% of the men.[43] However it is also clear that over seventy percent of children under the age of one were killed by women.[44]

5.28 According to Landsdowne's research,[45] in the years 1976-1980 seventeen women were charged with the homicide of a child under the age of one. Seven were indicted for murder. Of this seven, two pleaded guilty to manslaughter by reason of diminished responsibility and five pleaded guilty to infanticide. No trial was held in four cases and five were charged with manslaughter. In only one case was a woman indicted for infanticide (and she was initially charged with murder). Landsdowne found that:

> Infanticide is seemingly regarded, both by prosecution and defence counsel, as a defence to reduce what would otherwise be a murder charge, rather than a substantive offence. It is utilised in a very similar way to the partial defence of diminished responsibility.

5.29 Her conclusion is that the prosecution prefers infanticide as a defence because it places them in a superior bargaining position - a charge of murder encourages the defendant to plead guilty to infanticide. On the other hand, a recent Victorian study has found that although originally charged with murder, all women pleading guilty to infanticide had actually been presented for that offence.[46]

5.30 In conclusion, it is clear that infanticide cases are not common. From 1965 to 1991 there were only 53 recorded homicide cases in New South Wales where the victims were under the age of one and the accused was the victim's mother. Such cases averaged 2 or 3 per year.[47] In 1990 there was one charge of infanticide, the offender was found guilty after a defended hearing and received a non-custodial sentence.[48]

Sentence

5.31 In terms of sentencing, Landsdowne[49] found that there was a significant difference between the sentencing patterns for infanticide and diminished responsibility. All five women convicted of infanticide were placed on good behaviour bonds, usually conditional on acceptance of psychiatric care. Of the seven women convicted of manslaughter (three by assault, two by negligence, two by reason of diminished responsibility), only two were given bonds and both women who pleaded diminished responsibility were given custodial sentences. Later figures back up these findings. Of the five cases between 1982-1984 in which a woman was charged with murder of her child under the age of a year, the two infanticide pleas received bonds, as did one diminished

responsibility plea. The other woman who pleaded diminished responsibility was sentenced to seven and a half years imprisonment (reduced to two years on appeal). Landsdowne concludes that :

> The disparity in sentencing between infanticide and manslaughter by reason of diminished responsibility is not necessarily explicable by different facts. The disparity is due not so much to particularly harsh sentencing in the diminished responsibility cases, as to consistently lenient sentencing for infanticide.[50]

5.32 This sentencing pattern for infanticidal mothers is born out by two recent English studies. In a survey of the 27 infanticide homicides between 1982 and 1989, Wilczynski and Morris found that 44% of charges were not proceeded with and in almost all of the other cases, the women were given probation orders.[51] Mackay found that of 47 cases of child homicide in England, 4.3% of defendants were charged with murder, 31.9% with infanticide, 27.6% were not charged and 21.3% were charged with manslaughter. In terms of sentence 36.2% of these cases were given probation, 12.8% were given a prison sentence and 8.5% were put under a hospital order. All of the infanticide convictions resulted in either probation or a hospital order.[52] The Victorian *Homicide Prosecutions Study* recorded that all five women convicted of infanticide received non-custodial sentences.[53]

The role of the expert witness

5.33 Landsdowne found that all but one of the psychiatrists' reports surveyed for her study:

> included an opinion as to the legal impact of their medical diagnosis ... strictly this could be said to be an infringement of the common law rule that an expert witness may not be asked the question which the trier of fact itself has to decide ... In practice this objection is never taken.[54]

5.34 She also found that it was problematic for psychiatrists to testify as to the causal link between childbirth and the mental disturbance.[55] This was because current medical thought regards "post-puerperal" psychoses as no different from any other and because there is no evidence at all that lactation is a cause of mental disorder.[56] Most psychiatrists were content with establishing a temporal link, a link which falls short of what the statute actually requires.

THE POSITION IN OTHER JURISDICTIONS

Other Australian jurisdictions

5.35 Section 6 of the Victorian *Crimes Act*[57] is in substantially similar terms to s 22A. Section 165A of the Tasmanian *Criminal Code*[58] and s 281A of the Western Australian *Criminal Code*[59] provide for an offence of infanticide but do not specifically provide for its use as a defence to a charge of murder. The Tasmanian provision does not refer to lactation and the Western Australian provision specifically provides that the mental element for infanticide is the same as for wilful murder or murder. There are no infanticide provisions in the Australian Capital Territory, Queensland or South Australia.

England

5.36 The position in the United Kingdom is similar to that in New South Wales with s 22A essentially reflecting the provisions of s 1 of the *Infanticide Act* 1938. In 1975 the Butler Committee proposed that the section be abolished although subsequent reviews have recommended that it be reformulated. Nevertheless, the provision has remain unchanged since 1938. The reform proposals are discussed below.

New Zealand

5.37 Section 178(1) of the *Crimes Act* 1961 (NZ) provides as follows:

> Where a woman causes the death of any child of hers under the age of ten years in a manner that amounts to culpable homicide, and where at the time of the offence the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to that or any other child, or by reason of the effect of lactation, or by reason of any disorder consequent on

> childbirth or lactation, she is guilty of infanticide, and not of murder or manslaughter, and is liable to imprisonment of a term not exceeding three years.

5.38 It is evident that this section differs from the New South Wales provision in a number of important respects. First, it covers a woman who causes the death of her child under the age of ten. Secondly, it applies where the balance of the defendant's mind was disturbed by reason of her having given birth to the child killed or to any other child. Thirdly, the provision specifies that the *mens rea* of the act causing death must otherwise be sufficient for murder or manslaughter. Finally, the maximum penalty for the offence is three years. Note that in *R v P*[60] a broad interpretation was given to the phrase "a child of hers" which was said to extend to a child under the legal guardianship of the defendant and treated as part of her family.

5.39 It should be noted that cl 124 of the New Zealand Draft *Crimes Bill* 1989 provides that in relation to the former crime of infanticide, the jury can return a verdict of culpable homicide with mitigating circumstances if the acts amount to what was formerly infanticide. The penalty is three years.

Canada

5.40 In Canada, infanticide is found in sections 233 and 663 of the *Criminal Code*. Section 233 provides for an offence of infanticide where a mother causes the death of her "newly born child".[61] Under s 663 if, on a charge of infanticide, the evidence establishes that the mother caused the death of the child but does not establish that her mind was disturbed or that she was not fully recovered from childbirth it is still possible to convict of infanticide, unless the act was not wilful. This obviates the need for the prosecution to charge the defendant with both murder and infanticide in case these elements cannot be proved. The maximum penalty for the offence is five years.

European jurisdictions

5.41 The House of Lords Select Committee on Murder and Life Imprisonment conducted a survey of the Member States of the Council of Europe with respect to their law of infanticide.[62] It is difficult to appreciate the actual significance of the presence or absence of an analogous defence without considering the entire law of homicide in the relevant jurisdiction and, in particular, the murder/manslaughter distinction and the penalty for murder. However it is noted that Italy, Norway and Switzerland, for example, recognise child killing as a specific, less culpable form of homicide. On the other hand, Luxembourg provides for *more severe* penalties for the killing of a child.

OPTIONS FOR REFORM

Option One: retain offence/defence without amendment

Implementation

Infanticide in its current form could be retained without change.

Other recommendations to this effect

The Western Australian Law Reform Commission has recently recommended the retention of s 281A of the Western Australian *Criminal Code,* which is substantially similar to the New South Wales provision.[63]

Option Two: abolish offence/defence

Implementation

The second option is to abolish infanticide altogether which could be achieved simply by repealing s 22A. Consideration also could be given to making specific legislative provision that matters currently going to establish the defence should be taken into account in respect of sentence.

Other recommendations to this effect

The abolition of the infanticide offence/defence was suggested by the Butler Committee in England[64] and the Law Reform Commission of Canada.[65] In Queensland, where there are no infanticide provisions, the Criminal Code Review Committee concluded that the introduction of the offence was unnecessary given the scope of the diminished responsibility defence.[66]

Option Three: reformulate the offence/defence of infanticide

Implementation

The defence/offence could be reformulated to include some or all of the following points:

> It has been suggested that, since the medical bases for infanticide are either discredited or unproven, the references to lactation and recovery from birth should be removed from the definition. Thus infanticide could be made out, for example, when the balance of a woman's mind is disturbed "by reason of the effect of giving birth or circumstances consequent on the birth".
>
> The age limit in respect of the victim could be extended beyond one year.
>
> The offence could extend to children above the age limit if killed at the same time as children within the age limit.
>
> A specific statutory offence of attempted infanticide could be introduced.
>
> It could be clarified that the defence applies to a woman charged as an accessory.
>
> The *mens rea* could be specified as being the *mens rea* for murder or manslaughter.
>
> The burden of proof could be clarified where infanticide is used as a defence.
>
> Consideration could be given to extending infanticide to fathers, other carers and adoptive parents.
>
> The penalty may need to be reconsidered. At present it is the same as manslaughter. Perhaps a lower maximum sentence would be more appropriate.

Other recommendations to this effect

Option Three was the option favoured by the English Criminal Law Revision Committee reporting in 1980.[67] The Committee's recommendation was that the references to lactation and recovery from birth should be removed from the definition; that the act leading to death must have otherwise amounted to murder or manslaughter; that there be no change to the age of the children killed and that there be an offence of attempted infanticide. The burden of proof was recommended to be placed on the prosecution and the maximum recommended penalty was five years. The Committee's recommendations form the basis of cl 64(1) of the *Draft Criminal Code* proposed by the Law Commission of England and Wales:

> A woman who, but for this section, would be guilty of murder or manslaughter of her child is not guilty of murder or manslaughter but is guilty of infanticide, if her act is done when the child is under the age of 12 months and when the balance of her mind is disturbed by reason of the effect of giving birth or of circumstances consequent upon birth.[68]

The Victorian Law Reform Commission also has recommended that infanticide be retained and reformulated.[69] The reformulated offence would require the mens rea for murder or manslaughter, it would be limited to natural mothers acting as the principal offender or under the principles of complicity and the offence would be made out if "the balance of [the defendant's mind] is disturbed by reason of the effect of giving birth or circumstances consequent on that birth". This mental disturbance must be "a substantial enough reason to reduce the offence to infanticide". The age of the children is not extended and a maximum penalty of five years is recommended. The burden of negativing the elements of the

defence should be expressed to lie on the prosecution. Finally, the Report recommended that infanticide should operate as a defence to a charge of murder, attempted murder, manslaughter, child destruction and attempted child destruction.

DISCUSSION OF THE OPTIONS

Should infanticide be retained in one form or another or should it be abolished altogether?

5.42 *Infanticide is unnecessary in a jurisdiction with a discretionary murder sentence and/or a defence of diminished responsibility.* The argument in favour of abolition is that the offence is unnecessary in a jurisdiction with a discretionary murder sentence and/or a defence of diminished responsibility. New South Wales currently has both. Most of the cases with which it deals could be caught by the defence of diminished responsibility. Abolition would avoid multiplication of offences. Even without regard to diminished responsibility, in a jurisdiction with a discretionary sentence for murder, community demands for leniency could be given expression in terms of sentence. The retention of infanticide is merely sentiment because, without a mandatory death penalty, juries will no longer refuse to convict of murder.

5.43 Despite suggestions that infanticide is unnecessary where there is a discretionary murder penalty, it is noted that the choice of a new offence, labelled "infanticide" rather than murder or manslaughter, was historically very important. In particular, the distinction from murder enabled increasingly lenient sentencing.[70] It may be particularly inapt to label infanticidal mothers "murderers". These are defendants who are unlikely to reoffend, unlikely to have prior convictions and are often very disturbed people.

5.44 Further, despite the suggestions that infanticide is unnecessary in a jurisdiction with a defence of diminished responsibility, it can be convincingly argued that the scope of diminished responsibility and infanticide are not the same. First, research indicates there are infanticide cases involving mental conditions which diminished responsibility will not cover. Mackay's research in England found that while in some cases the psychiatrists thought that both infanticide and diminished responsibility would be available there were many other cases where this was clearly not so.[71] He concludes that his research:

> lends no support to the fact that diminished responsibility is either being widely used in cases which might otherwise be infanticide or that as it stands the [diminished responsibility provisions] would safely cover all cases which presently fall within the [infanticide] provisions".[72]

5.45 Secondly, unlike diminished responsibility, the infanticide offence enables the prosecution to charge the defendant with the offence directly rather than having to face a murder trial. Recent English and Victorian research shows that this is indeed the dominant way in which infanticide convictions were obtained.[73] On the other hand, New South Wales research found that women were usually indicted for murder and were encouraged to plead guilty to infanticide.[74] Thirdly, by charging infanticide, the prosecution concedes the mental disturbance which the defence then does not have to prove. Indeed Mackay's research indicates that in all cases the medical evidence was conceded by the prosecution.[75] Finally, there have been found to be significantly different sentencing patterns for infanticide and diminished responsibility cases.[76]

5.46 *Infanticide rests on antiquated medical ideas.* The second argument in favour of abolishing infanticide is that the offence rests on antiquated medical ideas of post-puerperal psychosis. Most killings of young children are based on depression, stress and other environmental factors consequent on childbirth or child rearing. This is no doubt true but it ignores the fact that the medical model was never scientifically established and was never the real reason for the introduction of the legislation. It was simply a relatively uncontentious way to justify the courts' lenient treatment of infanticidal mothers.[77] It is perhaps worth making the policy reasons behind the infanticide offence explicit - that is, that community expectations require merciful treatment of homicide offenders in certain situations, of which this is one.

5.47 *Infanticide is problematic for women.* The third argument for abolition of the offence is that infanticide is problematic for women. Some feminists criticise the link between a woman's biology, particularly with respect to reproduction, and criminal responsibility.[78] They also criticise the "medicalisation" of the experiences of women in these situations. On the other hand, it can be quite plausibly argued that infanticide is a specific solution to an identified problem. The offence was initially introduced as a response to the refusal of juries to convict of murder

in cases where women killed their infants. Thus the community recognises the special nature of these cases. The offence recognises a specific form of human tragedy and "encapsulates the sympathy" society feels for women who kill in these situations.[79] It retains the special protection offered to women offenders and recognises the specific problems and strains associated with childbirth.

5.48 *Infanticide may lead to inappropriate convictions.* Fourthly, it is possible that a plea of infanticide may lead to convictions in cases in which acquittals may be appropriate. This is because the woman might be encouraged to plead guilty to the lesser charge of infanticide in circumstances in which, had she gone to trial for murder or manslaughter, she might have been acquitted.

5.49 *Infanticide is an anachronism.* Finally, it is argued that infanticide is rarely used and that it is not worth retaining an offence or defence which is essentially an anachronism and which has so little application. In response it is contended that there are some values and community expectations which take precedence over tidy classification. If infanticide is abolished there is always the possibility that juries will again refuse to convict infanticidal mothers of murder or manslaughter. In light of clear public sympathy for such women, the law should not again be allowed to become a "solemn mockery".

Should the offence/defence of infanticide be amended?

5.50 It may be argued that there is little point in amending the infanticide offence because it is so rarely used and because infanticide cases almost invariably proceed by way of guilty pleas. Thus, problematic areas do not arise for consideration in practice. This is not a convincing argument. If infanticide is to be retained, it is surely preferable that its elements are as clear and as unproblematic as possible.

5.51 Legal problems such as the onus of proof (suggestion 7), the requisite mental state (suggestion 6) and questions of attempt and conspiracy (suggestions 4 and 5) are dealt with by the suggestions indicated in Option Three. In addition, the lower penalty (suggestion 9) accords more nearly with the actual sentences imposed for infanticide. These changes are clearly desirable.

5.52 However, the other suggestions raise more difficult issues. Although reformulation in the terms suggested (suggestion 1) will alleviate problems relating to the scientific bases for the defence by removing references to abnormality consequent on lactation, it still relies on a model that directly links childbirth to abnormality of mind rather than allowing that post-natal depression, for example, can go towards establishing the more general diminished responsibility defence. In addition, the use of infanticide where the balance of a woman's mind is disturbed by circumstances surrounding birth removes the defence from the medical realm into the social realm. It recognises that societal pressures are instrumental. Once this is recognised there is no justification for restricting the infanticide provisions to natural mother - fathers, other carers and adoptive parents would also be subject to the same pressures. However, such an extension (suggestion 8) broadens the scope of infanticide far beyond its historical roots and beyond what the community may be prepared to accept. Indeed, it seems that while lenient treatment for infanticidal mothers is socially accepted, men who kill their children or step-children receive little sympathy.

5.53 Amending the age limit of the victim is also problematic (suggestion 2). It has been argued that the age distinction is arbitrary and that there is no evidence to indicate that the effects of childbirth - medical or social - cease after 12 months. On the other hand, empirical evidence suggests that the age limit accords with experience - children are far more likely to be killed by their mothers when they are under one year old.[80] Even if it is arbitrary, there is no reason why any other age (the age limit in New Zealand, for example, is 10 years) should be any less arbitrary. However, if there is no age limit, the connection to birth becomes very weak and consequently extends beyond the historical roots of the defence.

5.54 The other problem with the current legislation is that it does not cover older children killed at the same time even where their deaths arise out of the same condition of mind as the deaths of the younger children. However, changing this situation is fraught with difficulty (suggestion 3). It is contended that there is no justification for the current restriction, and if the mind of the woman was disturbed by reason of the birth of one child, this state of mind is equally present with respect to the killing of that or any other child. On the other hand, if the woman's state of mind was disturbed, what justification is there for restricting the category of victims covered by the provisions to her own children?

Footnotes

1. K Laster "Infanticide: A Litmus Test for Feminist Criminological Theory" (1989) 22 *Aust & NZ Journal of Criminology* 151 at 152.

2. J Osborne "The Crime of Infanticide: Throwing Out the Baby with the Bathwater" (1987) 6 *Canadian Journal of Family Law* 47 at 49.

3. Osborne at 49.

4. 21 Jac I c 27.

5. R Landsdowne "Infanticide: Psychiatrists in the Plea Bargaining Process" (1990) 16 *Monash University Law Review* 41 at 43; Osborne at 50-51.

6. 43 Geo 3 c 58.

7. *Offences Against the Person Act* 1828 (UK) s 14; *Offences Against the Person Act* 1861 (UK) s 60.

8. See, for example, *Crimes Act* 1900 (NSW) s 22 and 85.

9. Osborne at 49-50.

10. Laster at 154.

11. J Allen "Octavius Beale reconsidered: Infanticide, baby-farming and abortion in NSW 1880-1939" in Sydney Labour Group (ed) *What Rough Beast? The State and Social Order in Australian History* at 121, extracted in D Brown, D Farrier, D Neal, D Weisbrot *Criminal Laws* (The Federation Press, 1990) at 719-720.

12. Allen at 124 notes that police often had the same class origins as the working class women who killed their infants and understood their lack of options.

13. Quoted in D Seaborne Davies "Child Killing in English Law" [1937] *Modern Law Review* 203 at 219.

14. Landsdowne at 44. Seaborne Davies writes that every advantage was taken of the technicalities of proof involved in the definition of a "person in being", at 221.

15. Seaborne Davies at 219.

16. N Walker *Crime and Insanity in England* Vol 1 (Edinburgh University Press, 1968) at 128 points out that it was established Home Office practice to advise the commutation of the death penalty. The last execution of an infanticidal mother took place in 1849.

17. Sir James Fitzjames Stephen, cited in Walker at 128; Seaborne Davies at 221. It is interesting to note that the criminal codes of Medieval Europe regarded infanticide as a *particularly* heinous form of murder because of the vulnerable nature of the victim, see Walker at 126.

18. Seaborne Davies at 221.

19. Osborne at 52.

20. See Allen at 124-5; Seaborne Davies at 221.

21. Osborne at 53.

22. Brown et al at 720. For a history of other reform proposals leading up to the Act, see Walker at 129-131.

23. Seaborne Davies quoting Keating J at 220.

24. K O'Donovan "The Medicalisation of Infanticide" [1984] *Criminal Law Review* 259 at 261.

25. (1927) 20 Cr App R 132.

26. (1985) 157 CLR 523.

27. See the studies quoted in A Wilczynski "Images of Women Who Kill Their Infants: The Mad and the Bad" (1991) 2 *Women and Criminal Justice* 71 at 75.

28. Committee on Mentally Abnormal Offenders *Report of the Committee on Mentally Abnormal Offenders* (Home Office, 1975) (The Butler Report); Criminal Law Review Committee *Offences Against the Person* (Report 14, 1980); O'Donovan at 263; P d'Orban "Women Who Kill Their Children" (1979) 134 *British Journal of Psychiatry* 560.

29. See Walker at 134-5.

30. *R v Yigwai and Aku* [1963] PNGLR 40; *R v Brigitta Asamakan* [1964] PNGLR 193. See D Chalmers, D Weisbrot and W Andrew *Criminal Law and Practice of Papua New Guinea* (2nd ed, Law Book Company, 1985) at 450-1. The *Infanticide Act* 1953-1956 was subsequently incorporated into the Papua New Guinea *Criminal Code* 1974 and now appears as s 301.

31. B Fisse *Howard's Criminal Law* (5th ed, Law Book Company, 1990) at 113.

32. See the studies cited by Landsdowne at 46.

33. Landsdowne at 47. A Wallace in *Homicide the Social Reality* (New South Wales Bureau of Crime Statistics and Research, 1986) at 117 also makes the point that neonaticide can be regarded as a specific and distinct type of crime.

34. Wallace at 116-117. There are various other classifications, see for example d'Orban at 561.

35. Wallace at 117-120.

36. Wallace at 118.

37. Wallace at 129.

38. Wallace at 130.

39. Wallace at 124-125.

40. Wallace at 127.

41. Wallace at 114.

42. Wallace at 115.

43. Wallace at 115.

44. Wallace at 114.

45. Landsdowne at 48ff.

46. Victorian Law Reform Commission *Homicide Prosecutions Study* (Report 40, Appendix 6, 1991) at para 109. Note the criticism of Barry J in *Hutty* [1953] VLR 338 at 339 that the prosecution should not present for murder where infanticide is indicated.

47. New South Wales Bureau of Crime Statistics and Research, unpublished data.

48. New South Wales Bureau of Crime Statistics and Research, unpublished data.

49. Landsdowne at 59-60.

50. Landsdowne at 60.

51. A Wilczynski and A Morris "Parents Who Kill Their Children" [1993] *Criminal Law Review* 31 at 34-35.

52. R Mackay "The Consequences of Killing Very Young Children" [1993] *Criminal Law Review* 21. See also the earlier research of d'Orban whose study of matricidal filicides found that half of those convicted received medical dispositions while only 13% received custodial sentences all of which (apart from two murder convictions) ranged from 18 months to 3 years. Of those convicted of infanticide only 2 out of 23 received custodial sentences, while 18 were put on probation. See d'Orban at 566-7.

53. *Homicide Prosecutions Study* at para 140.

54. Landsdowne at 50.

55. Dr W Barclay *Oral Submission* (8 July 1993) who has given evidence in infanticide cases also commented on this issue.

56. Landsdowne at 50-52.

57. Introduced in 1949.

58. Initially in similar terms to the 1922 English Act, s 165A was amended in 1973 to introduce a 12 month age limit following *R v Taylor* [1969] Tas SR 1 in which the offence found to be inapplicable in respect of a three month old child.

59. Inserted as recently as 1986. The maximum penalty is 7 years.

60. [1991] 2 NZLR 116.

61. Defined in s 2 as a person under the age of one year.

62. House of Lords Select Committee on Murder and Life Imprisonment *Report* (1989).

63. Western Australian Law Reform Commission *The Criminal Process and Persons Suffering From Mental Illness* (Project 69, Report 1991) at para 2.60.

64. The Butler Report recommended that, if the Crown was allowed to lay a charge of diminished responsibility, infanticide should be abolished, at para 19.27.

65. Canada Law Reform Commission *Homicide* (Working Paper 33, 1984).

66. Criminal Code Review Committee *Final Report* (1992) at 195.

67. Criminal Law Review Committee *Offences Against the Person* (Report 14, 1980) at para 114.

68. England and Wales Law Commission *A Criminal Code for England and Wales* (Report 177, 1989).

69. Victorian Law Reform Commission *Mental Malfunction and Criminal Responsibility* (Report 34, 1990) recommendation 28.

70. Walker at 134.

71. Mackay at 29.

72. Mackay at 30. These findings back up the earlier research of d'Orban who found that the "degree of abnormality [in infanticide cases] is much less than that required to substantiate abnormality of mind" under s 2 of the *Homicide Act*, at 570. See also Wilczynski (1991).

73. Mackay at 29; VLRC *Homicide Prosecutions Study*.

74. Landsdowne at 49.

75. Mackay at 29.

76. Landsdowne at 60.

77. This point is made by Osborne at 58.

78. See, for example, Laster (1989); K Laster "Infanticide and Feminist Criminology: 'Strong' or 'Weak' Women?" (1990) 2 *Criminology Australia* 14; H Allen "At the mercy of her hormones: premenstrual tension and the law" (1984) 9 *m/f* 19, as extracted in Brown et al at 710ff; J Scutt *Women and the Law* (Law Book Company, 1990) at 409ff.

79. S Norrish QC *Oral Submission* (30 June 1993).

80. Wallace at 126.

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