

Infanticide

The legal definition of infanticide as it applies in New South Wales is the killing of a child less than 12 months old by the biological mother whose balance of the mind, at the time of the offence was disturbed from the effect of giving birth to that child or from the effects of lactation (Crimes Act 1900 NSW). Infanticide provisions can be used as either an offence by the prosecution or a partial defence by the defendant. A verdict of infanticide would result in a sentence as if she had been found guilty of manslaughter (NSW LRC 1997).

The Infanticide Act has been the focus of discussions in a number of jurisdictions with regards to its retention and amendments to the Act. The NSW Law Reform Commission Report 83 (1997), Butler Report in UK (1975), Final Report of Law Reform Commission of Western Australia (2007) had all recommended for repealing the Infanticide Act and indeed Western Australia has abolished its infanticide provision following recommendations (NSW LRC 2010). There have also been reports supporting the retention of the infanticide provisions with or without some amendments (Victorian Law Commission Report 2004, Fourteenth report of the Criminal Law Revision Committee 1980 & Law reform report of UK Law Commission, 2006). This submission will address certain issues pertaining to the infanticide act such as whether it should be retained or repealed, should its continued operation be conditional on the retention of the partial defence of substantial impairment and if retained, what amendments can be made.

Abolishing Vs Retention of the Infanticide Act

The Infanticide Act 1922 was introduced in the United Kingdom primarily for the judges and juries to exercise leniency for mothers who killed their child in the context of being unmarried and facing adverse social and economic conditions. A verdict of guilty of murder in the early 20th Century would have resulted in death penalty (NSWLRC 2010). This act was replaced by the Infanticide Act 1938(UK) to extend the provisions for children upto 12 months and to negate the need for a specific psychiatric diagnosis. In 1951, the Infanticide Act with similar provisions was introduced in NSW and has not been amended since (NSWLRC 1997). The circumstances surrounding the introduction of the infanticide provisions in the first half of 20th Century are no longer relevant in our current society given the abolishment of death penalty, availability of substantial impairment defence, effective contraceptive measures to avoid unwanted children, more social acceptance of single mothers and better financial support for them (LRCWA 2007).

The scientific assumptions for the infanticide provisions such as the effect of childbirth and lactation on mental status and the prevalence of psychiatric condition amongst perpetrators of infanticide have been discredited by research studies on this topic (Dobson and Sales 2000). Though there is an increased incidence of psychiatric disorders amongst postpartum women, there is no evidence to support a biological factor implicit in etiology of postpartum psychiatric disorders (Buist 1998). There is also no basis for believing that lactation causes disturbance of mental state (Bluglass 1978, Lansdowne 1990). The Butler report 1975 noted that the disturbance of the "balance of mind" that

the Act requires can rarely be said to arise directly from incomplete recovery from the effects of childbirth and even less so from the effects of lactation.

The three common disorders diagnosed following childbirth are postpartum blues, postnatal depression and puerperal psychosis. Postpartum blues tends to occur a few days after delivery and rarely past Day 12 (Scott 1992). The prevalence and presentation of postpartum depression is not any different to non child bearing mothers (Cox 1993) and though postpartum psychosis is more common following childbirth, it has an incidence rate of only 0.2% of childbearing women (Kendell 1985). Though postpartum blues and puerperal psychosis are more common following childbirth, it is incorrect to believe childbirth itself produces a mental state so altered as to impair the mother's balance of mind (Dobson and Sales 2000)

Resnick 1970 and d'Orban 1979 specifically studied women who killed their children and noted that psychiatric conditions were not any more common in women who killed their child within 24 hours of birth. A combination of environmental stress and personality disorder were the usual aetiological factors according to the Butler Report 1975 as opposed to mental illness. Some women seemed to have received infanticide conviction even where has been no evidence of any persisting psychiatric disturbance (Bluglass 1990). It was also shown by D'Orban 1979 that of ten women convicted of infanticide as many as eight had showed no psychiatric abnormality. These findings further erode the validity of the theory that the balance of the mind is disturbed from the effect of childbirth or lactation which forms the basis for an infanticide conviction.

The infanticide Act does not require for a causal relationship between the mental imbalance and the homicide (Parker 1981, LRC WA 2007). Historically infanticide has been found in most societies and motivated by a number of different reasons including eugenics, gender selection, social stigma of unwed mothers and economic/subsistence issues (Durstun 2004). Factors such as unwanted child (Resnick 1970), physical anomalies (Sakuta 1981), lifestyle concerns, unwanted pregnancy, marital stress, jealousy or spousal revenge (LRCWA 2007) have been implicated in infant homicide. Overlooking the causative link can potentially result in mothers killing their infants for reasons unrelated to any psychiatric condition availing the infanticide defence.

Infanticide provision is infrequently used. Only four cases were convicted as infanticide between 2001 and 2008 (NSW LRC 2007) and two convictions between 1990 and 1996 (NSW LRC Report 83). In a UK study between 1967 and 1978 there was a declining trend in the convictions of infanticide though the total number of homicide victims under age 1 year with the mother as principal suspect has remained the same (Parker 1981). There are some challenges in its practicality within the legal system. Infanticide can be raised by the prosecution as a defence but then all aspects of infanticide provisions including disturbance in the balance of mind have to be proven beyond a reasonable doubt by the prosecution. Failure to prove the elements beyond a reasonable doubt would result in acquittal making it an unappealing option for the prosecution (LRC WA 2007). Also, refusal of the defendant to admit to killing the infant (at times due to poor judgement from mental illness) can negate the plea of infanticide and if the prosecution is

unlikely to raise it as an offence, it could result in a verdict of murder as in *R v Kai-Whitewind*. The defendant was charged with killing her 3 month old son and she was found guilty of murder as she did not admit to killing the child and the infanticide defence could not be raised.

The arguments for retaining infanticide act have included that with its replacement by the partial defence of substantial impairment, causal link needs to be demonstrated at the trial, sentences are likely to increase and the trauma of facing murder trial is inevitable in the absence of the prosecution charging infanticide as an offence (Law Commission, UK 2006). Causal link need to be demonstrated in insanity defence and substantial impairment. As described earlier, number of factors apart from mental disturbance could result in the offence and a lenient verdict should be made available only if the act or omission causing death was result of a mental disturbance to avoid preferential treatment. Infants are a particularly vulnerable population and preferential treatment of offenders against such population is not warranted (Parker 1981).

Infanticide convictions commonly result in non custodial sentences (NSW LRC 2010) as in *R v Cooper* where a good behaviour bond of 4 years and in *R v Pope* where a bond for 3 years were given after reaching the verdict of infanticide. The manslaughter convictions for homicide of child can result in custodial sentences as in *R v RG* where a custodial sentence of three years was given. However, non custodial sentences have been given for women convicted of manslaughter of their child as in *R v Li* (2000) where a good behaviour bond for five years following a verdict of manslaughter. The sentencing terms

are greatly influenced by the circumstances surrounding the offence rather than merely the verdict of infanticide or manslaughter.

If the prosecution were to use infanticide provisions as an offence, this would avoid the defendant, a grieving mother experiencing the trauma of facing a murder trial. However, infanticide being raised as an offence is extremely uncommon (LRC WA 2007, NSW LRC 2010). In *R v Hutt* [1953], the Judge criticized that the law provisions did not protect women in cases of infanticide from facing a murder trial. Thus the infanticide provisions do not in reality reduce the likelihood of the defendant facing a murder trial.

Infanticide and Substantial Impairment

NSW is the only jurisdiction in Australia which has both a defence of substantial impairment and offence/defence of infanticide. The states of Tasmania and Victoria have infanticide provisions but not the defence of substantial impairment (LRC WA 2007, NSW LRC 1997 and NSW LRC 2010). Therefore in some jurisdictions the infanticide provisions do operate in the absence of the defence of substantial impairment in some jurisdictions. However, this section will highlight the need for retention of the defence of substantial impairment if the infanticide provisions as they stand currently should continue to operate.

The mandatory punishment for murder was death in NSW until death penalty was abolished in 1955, following which it became life imprisonment. This resulted in mentally ill defendants who did not satisfy the stringent criteria of the defence of insanity

were given life sentences. In 1974, the NSW Parliament on the recommendations of the report of the Criminal Law Committee introduced the defence of diminished responsibility (NSW LRC 2010). R v Chayna highlighted the practical difficulties in availing the defence of diminished responsibility as it relied on concepts which medical experts found ambiguous and unscientific. Following recommendation on the defence provisions from the NSW LRC, the NSW Government made amendments and termed it the defence of substantial impairment (NSW LRC 2010). This defence requires a substantial impairment of mental capacity to understand, judge or control actions at the time of the killing due to abnormality of mind from an underlying condition. Thus it is less stringent than insanity defence and results in a verdict of manslaughter (Crimes Act, NSW 1900)

The infanticide verdict will not be available to mothers if the balance of mind was not an effect of childbirth or lactation. Thus defendants who had a pre-existing psychiatric condition that persisted through childbirth or developed psychiatric conditions subsequent to adverse psychosocial factors following childbirth will not be able to avail the infanticide provisions even if their mental state was impaired (NSW LRC 2010). Social/financial/ psychological factors which are commonly implicated in the pathogenesis of postnatal disorders are not given credibility for a successful infanticide verdict. Also infanticide provisions can not be utilised if the infant was one day older than twelve months which is an arbitrary time frame with no scientific credibility (LRC WA 2007). Thus, in these cases which are as deserving as those that meet criteria for infanticide conviction, a verdict of murder will be reached in the absence of substantial

impairment defence. Some of them may be able to satisfy the stringent criteria for insanity defence but others will be convicted of murder.

In jurisdictions where substantial impairment defence is not available, mental impairment is considered during sentencing after a conviction of murder. However, this overlooks the potential trauma of a murder verdict on an already traumatised mother who has lost her child.

Substantial impairment also allows for a manslaughter verdict to be reached in other kinds of homicide so that women who kill their children are not viewed as having a preferential treatment over other mentally impaired offenders. Based on these grounds, it is argued that the substantial impairment defence should be retained with the ongoing operation of the insanity defence.

Amendments to the Infanticide Act

Some of the amendments to the Infanticide Act that have been recommended include extending the offence to cover the killing of an infant aged up to two years and also killing of older children as a result of the defendant not having recovered from the effect of giving birth (VLRC 2004), removing the arbitrary restriction on the 12 month age, removing reference to lactation, removing the disturbance to be caused by birth and extending application to beyond natural mother and lowering the maximum penalty (NSW LRC 2010) and extending to cases where the balance of the mother's mind was disturbed by "environmental or other stresses" (Law Commission UK 2006).

The age limit of 1 year was known to be arbitrary even at the time of the introduction of the act (NSW LRC report 83). Postpartum psychosis has been strongly associated with killing of children older than 1 day (Resnick 1970 and d'Orban 1979) and women are more vulnerable to experiencing psychosis in the first 2 years following the child birth (Kendell 1987). This would give some credibility to setting a time limit of 2 years since childbirth. The provisions should specify the time from childbirth rather than the age of the child. This would then allow for the defence/offence to be extended to other children when multiple child victims are involved which is not uncommon in cases of infanticide (VLRC 2004).

If the infanticide provisions were to be continued, reference to lactation need to be removed as there is no scientific basis to this assumption (Bluglass 1978, Lansdowne 1990).

The infanticide provision should specify that the disturbance in the balance of mind be causally linked to a disorder consequent to childbirth where both the direct effect of childbirth and any adverse psychosocial factors specific to motherhood can play a role in the etiology of such a disorder. This would counter arguments that socio economic factors are not seen as exculpatory factors in other crimes (NSW LRC report 83) and that father and other relatives of the infant could then avail the defence/offence on the grounds of adverse socio economic factors.

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