

NSW Law Reform Commission

REPORT 82 (1997) – Partial Defences to Murder: Diminished Responsibility

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REPORT 82 (1997) - Partial Defences to Murder: Diminished Responsibility

To the Honourable Jeff Shaw QC MLC
Attorney General for New South Wales

Dear Attorney

Partial Defences to murder: Diminished responsibility

We make this final Report pursuant to the reference to this Commission dated 17 March 1993.

Michael Adams QC
Chairman

Professor Brent Fisse
Commissioner

The Hon Justice Peter Hidden AM
Commissioner

The Hon Justice David Hunt
Commissioner

Professor David Weisbrot
Commissioner

May 1997

Terms of Reference

Pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW), the then Attorney General, the Hon John P Hannaford MLC, referred the following matter to the Law Reform Commission by letter dated 17 March 1993:

- to review the partial defences of infanticide, provocation and diminished responsibility under s22A, 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:

Mr Michael Adams QC
Professor Brent Fisse*

The Hon Justice Peter Hidden AM
The Hon Justice David Hunt
Professor David Weisbrot
(* denotes Commissioner-in-Charge)

Officers of the Commission

Executive Director

Mr Peter Hennessy

Research and Writing

Ms Rebecca Kang

Ms Fiona Manning

Librarian

Ms Beverley Caska

Desktop Publishing

Ms Julie Freeman

Administrative Assistance

Ms Zoya Howes

Ms Suzanna Mishhawi

Ms Rachel Way

LIST OF RECOMMENDATIONS

RECOMMENDATION 1

The distinction between murder and manslaughter in unlawful homicide should be retained.

RECOMMENDATION 2

The defence of diminished responsibility should be retained in New South Wales.

RECOMMENDATION 3

The Director of Public Prosecutions' Guidelines for consent to an accused's election for trial by judge alone should be reviewed to make it clear that the defence of diminished responsibility requires a judgment on issues raising community values, which issues should ordinarily be decided upon by a jury.

RECOMMENDATION 4

Section 23A of the *Crimes Act 1900* (NSW) should be amended as follows:

- (1) A person, who would otherwise be guilty of murder, is not guilty of murder if, at the time of the act or omission causing death, that person's capacity to:
- (a) understand events; or
 - (b) judge whether that person's actions were right or wrong; or
 - (c) control himself or herself,

was so substantially impaired by an abnormality of mental functioning arising from an underlying condition as to warrant reducing murder to manslaughter.

"Underlying condition" in this subsection means a pre-existing mental or physiological condition other than of a transitory kind.

- (2) Where a person is intoxicated at the time of the act or omission causing death, and the intoxication is self-induced, the effects of that self-induced intoxication are to be disregarded for the purpose of determining whether or not the person suffered from diminished responsibility under this section.

- (3) For the purpose of subsection (2), "self-induced intoxication" has the same meaning as it does in s428A (of the *Crimes Act 1900*).

[The current section 23A(2)-(5) remain unaltered, though renumbered].

1. Introduction

- Overview
- The course of the reference
- Outline of this report

OVERVIEW

1.1 This Report is primarily concerned with the operation of diminished responsibility as a partial defence to murder in New South Wales. It is the first of two final reports on the Commission's inquiry into the partial defences to murder. Our second report will focus on the defence of provocation and the offence/defence of infanticide.

1.2 "Partial defence to murder" is the expression commonly used to refer to diminished responsibility, provocation, and infanticide. They are partial rather than full defences because, if they succeed, they do not result in a complete acquittal but instead reduce liability for unlawful homicide from murder to manslaughter. The offender is then sentenced for manslaughter.

THE COURSE OF THE REFERENCE

1.3 On 17 March 1993, the New South Wales Law Reform Commission received a reference from the then Attorney General, the Hon John P Hannaford, MLC, to review the partial defences to murder.¹ This reference was made following a call for reform of the defence of diminished responsibility by the Chief Justice of the Supreme Court of New South Wales, the Hon Mr Justice Murray Gleeson.²

1.4 In August 1993, the Commission issued a Discussion Paper entitled *Provocation, Diminished Responsibility, and Infanticide* ("DP 31"). The Discussion Paper traced the historical development of each of the partial defences, and outlined the main problems relating to their current operation. It then set out a number of options for reform of each defence, which included their abolition and, alternatively, their reformulation. As a preliminary matter, DP 31 also examined a proposal to abolish the traditional distinction between murder and manslaughter in the law of unlawful homicide. The Commission invited submissions on DP 31, particularly on the options for reform there advanced.

1.5 Work on this reference was suspended in 1995 because of requests by the Attorney General to give priority to other references. The project was revived at the beginning of this year.

1.6 It was the Commission's original intention to issue one final report incorporating our recommendations on all three partial defences, provocation, diminished responsibility and infanticide. However, as a result of some public

1. The terms of reference are set out on page vi.

2. See *R v Chayna* (1993) 66 A Crim R 178 at 189, 191. See further at paras 3.30-3.32.

controversy which arose earlier this year concerning the defence of diminished responsibility, we were requested by the Attorney General, the Hon Jeff Shaw QC, to expedite the release of our final recommendations on that defence. Given this request, we are issuing a separate report on the defence of diminished responsibility.

1.7 The Commission received a total of 28 submissions on DP 31, a list of which appears as Appendix A to this Report. In addition, we have consulted various groups specifically in relation to our proposals regarding the defence of diminished responsibility. These consultations, listed in Appendix B to this Report, provided particular assistance in arriving at a reformulation of the defence of diminished responsibility.

OUTLINE OF THIS REPORT

1.8 This Report begins with a general overview of the law of unlawful homicide in New South Wales. As part of this discussion, we address the threshold question of whether or not the distinction between murder and manslaughter in unlawful homicide should be retained, and conclude that it should be. Chapter three of the Report deals with the defence of diminished responsibility. In that chapter, the Commission discusses the criticisms made of the defence and recommends its retention, subject to reformulation.

2.

The murder / manslaughter distinction in unlawful homicide

- Overview
- The existing framework for unlawful homicide
- Proposal for reform of unlawful homicide
- The Commission's conclusion

OVERVIEW

2.1 "Unlawful homicide" is the killing of a human being in circumstances where the law does not excuse killing. In New South Wales, unlawful homicide is generally classified as either murder or manslaughter. The murder/manslaughter distinction is a long-standing feature of our law, emerging first in England in the 16th century as a mechanism used to ensure that capital punishment was imposed for certain killings classified as "murder".¹ Today, the distinction between murder and manslaughter is seen to reflect degrees of seriousness of unlawful killings, based on the everyday understanding that some killings are more blameworthy than others. Liability for murder is reserved for the most serious or reprehensible killings, whereas manslaughter applies to unlawful killings which are recognised by the law as less blameworthy, whether because the offender's mental state was affected by some mitigating influence, or because the offender did not intend to kill or otherwise lacked the requisite guilty mind for murder.

2.2 In DP 31, the Commission considered a proposal to abolish the murder/manslaughter distinction, in light of criticisms that the distinction creates uncertainty, complexity, and inconsistency, and that it ultimately fails to reflect with any accuracy community views on degrees of moral blameworthiness.² Discussion of

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1. According to the ancient common law in England, all homicide other than that committed in the enforcement of justice was punishable by death (although in cases of "excusable" killing, the offender might receive a royal pardon). A person who might otherwise be sentenced to death could, however, avoid execution if that person received the "benefit of clergy". The benefit of clergy assigned jurisdiction to deal with an offender to the ecclesiastical court, which never imposed the death penalty. The benefit of clergy was therefore used as a device to avoid the death penalty, and could be extended to any person who was able to read. Then, in the late 15th and early 16th century, a series of statutes were introduced to exclude from the benefit of clergy certain more serious forms of homicide, referred to as murder committed with malice aforethought. Unlawful homicide therefore came to be divided into two main categories, the more serious of which resulted in the imposition of the death penalty: see R M Perkins, "A Re-Examination of Malice Aforethought" (1934) 43 *Yale Law Journal* 537; O Dixon, "The Development of the Law of Homicide" (1935) 9 *Australian Law Journal Supplement* 64 at 67; B Fisse, *Howard's Criminal Law* (5th edition, LBC, Sydney, 1990) at 25.
 2. NSWLRC *Provocation, Diminished Responsibility and Infanticide* (DP 31, 1993) at paras 2.20-2.30. See also, for example, *Hyam v DPP* [1974] 2 All ER 41 per Kilbrandon LJ at 72; G D Woods, "The Sanctity of Murder: Reforming the Homicide Penalty in New South Wales" (1983) 57 *Australian Law Journal*

possible reforms to the partial defences to murder must therefore begin with consideration of reform to the framework for unlawful homicide itself. This chapter reviews the arguments for and against abolition of the murder/manslaughter distinction, and ultimately concludes that the distinction should be retained.

THE EXISTING FRAMEWORK FOR UNLAWFUL HOMICIDE

2.3 As mentioned, unlawful homicide in New South Wales is generally divided into two categories, murder and manslaughter³ (although the Legislature has also created specific statutory offences for death caused by dangerous driving).⁴ Manslaughter is further divided into voluntary and involuntary manslaughter. The maximum sentence for murder is penal servitude for life, whereas for manslaughter it is penal servitude for 25 years.⁵ For both offences, the sentencing judge has a discretion under s 442 of the *Crimes Act 1900* (NSW) to impose a lesser penalty than the maximum sentence where this is appropriate in the circumstances of the individual case.

2.4 Both murder and manslaughter require proof that the accused's act, or failure to act, caused the death of another human being. The distinction between the two, and consequently the assessment of the seriousness of a particular killing, is based on the state of mind of the accused at the time of the killing. The category of "constructive murder" (also known as "felony murder") is the one exception to this principle, and is discussed further at paragraph 2.8. For all other categories, the requisite states of mind are as follows.

161; D Brown, D Farrier and D Weisbrot, *Criminal Laws* (2nd edition, Federation Press, Sydney, 1996) Vol 1 at 500.

3. See *Crimes Act 1900* (NSW) s 18(1).

4. See *Crimes Act 1900* (NSW) s 52A(1) and (2).

5. See *Crimes Act 1900* (NSW) s 19A and 24.

Murder

2.5 For murder (except in the case of "constructive murder"), the prosecution must prove that the accused killed with:⁶

- an intention to kill; or
- an intention to inflict grievous bodily harm, being bodily harm of a really serious kind;⁷ or
- a reckless indifference to human life, meaning that the accused foresaw the *probability* that *death* would result from his or her act or failure to act.⁸

Voluntary manslaughter

2.6 For voluntary manslaughter, the prosecution is required to prove the same mental state as is generally required for murder. That is, the accused must be shown to have either intended to kill or to cause grievous bodily harm, or to have been recklessly indifferent to human life. However, the accused will be convicted of voluntary manslaughter instead of murder where his or her mental state was affected in a way which is recognised by law to reduce his or her culpability for the killing. The factors so affecting the accused's mental state must be shown to constitute either provocation, diminished responsibility, or infanticide.⁹ These are known as the partial defences to murder, and require proof of some form of mental impairment or loss of self-control which significantly affected the accused's culpability at the time of the killing.

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

7. Section 4 of the *Crimes Act 1900* (NSW) defines "grievous bodily harm" to include any permanent or serious disfiguring of the person.

8. See *Royall v The Queen* (1991) 172 CLR 378, following the decision in *R v Crabbe* (1985) 156 CLR 464 in relation to the requisite mental element for "reckless indifference", with the qualification that under the NSW legislation, unlike the position at common law, the accused must be shown to have foreseen the probability of death, rather than simply the probability of grievous bodily harm or the possibility of death.

9. *Crimes Act 1900* (NSW) s 22A, 23 and 23A. In fact, infanticide operates as both a defence to murder and as an offence in its own right: see s 22A(1).

Involuntary manslaughter

2.7 Involuntary manslaughter is an unlawful killing by a person who cannot be proven to have the requisite guilty mind for murder, but whose conduct falls short of conduct expected of a reasonable person in the same circumstances. An accused may be convicted of involuntary manslaughter by an unlawful and dangerous act or by criminal negligence. Manslaughter by an unlawful and dangerous act requires the prosecution to prove that death was caused by a sufficient kind of unlawful act and that a reasonable person, engaged in the same conduct as the accused, would have realised that he or she was exposing another to an appreciable risk of serious injury.¹⁰ Manslaughter by criminal negligence requires the prosecution to prove that the accused's act or omission causing death involved such a great departure from the standard of care to be expected from a reasonable and prudent person as to deserve to be called a crime against the community generally and conduct deserving punishment.¹¹

"Constructive murder"

2.8 "Constructive murder", also known as "felony murder", is the exception to the general principle of unlawful homicide that the seriousness of a particular killing be measured according to the accused's mental state. "Constructive murder" is a killing committed by the accused or by an accomplice, in an attempt to commit, or during or immediately after the commission of a crime punishable by penal servitude for 25 years, such as aggravated armed robbery. Constructive murder does not involve consideration of the accused's state of mind in committing the act causing death, such as whether the accused intended to kill. Indeed, constructive murder has been criticised as an anomaly within the law of homicide, given that it permits people to be convicted of murder without consideration of whether or not they intended or foresaw the particular consequences of their actions.¹²

10. See *R v Wilson* (1992) 174 CLR 313.

11. See *Nydam v The Queen* [1977] VR 430; *R v Bateman* [1925] All ER 45.

12. See I H Pike, *Submission* (3 November 1993) at 2. See also, for example, Law Reform Commission of Victoria, *Homicide* (Report 40, 1991) Recommendation 19 and at paras 145-149, which recommends the abolition of the category of constructive murder. In the United Kingdom, the *Homicide Act 1957* (UK) now provides that a killing committed in the course of some other offence does not amount to murder unless done with the same malice aforethought as is generally required for murder: s 1(1). In Canada, the Supreme Court has ruled that the concept of absolute liability inherent in constructive murder breaches s 7 of the *Charter of Rights and Freedoms* as it is contrary to the principles of

PROPOSAL FOR REFORM OF UNLAWFUL HOMICIDE

2.9 The Commission has considered a proposal for reform of the framework for unlawful homicide, which would abolish the murder/manslaughter distinction in favour of a single offence of "unlawful homicide". Within this single category, differences in the degree of culpability for an unlawful killing would be reflected in the sentence imposed on the accused with regard to any mitigating circumstances. We received eight submissions on this particular proposal. Three of those submissions supported the proposal for reform,¹³ while four opposed it.¹⁴ One submission supported the abolition of the distinction between murder and voluntary manslaughter on the basis that the requisite intention was the same for both categories, but asserted that the distinction between murder and involuntary manslaughter should be retained.¹⁵

Arguments for abolition of the murder/manslaughter distinction

2.10 The following arguments were advanced by those submissions in favour of abolishing the murder/manslaughter distinction.¹⁶

Abolition of mandatory sentencing for murder

2.11 First, it may be argued that the continued classification of an unlawful killing as either murder or manslaughter is unnecessary, because both offences now carry discretionary sentences. Previously in New South Wales, conviction for murder carried with it a mandatory sentence. This meant that a sentencing court was required to impose a specific sentence irrespective of any mitigating factors which were found to exist. Until 1955, the mandatory sentence for murder was death,¹⁷ although the

fundamental justice: see *Vallancourt v The Queen* (1987) 47 DLR (4th) 399. See also Fisse (1990) at 26 and 74-76.

13. R Blanch, *Submission* (7 September 1993) at 1; R Hayes, *Submission* (7 January 1994) at 1; I H Pike, *Submission* (3 November 1993) at 1-4.
14. Law Society, *Submission* (28 October 1993) at 1-3; Legal Aid Commission, *Submission* (2 February 1994) at 1-2; S Yeo and S Odgers, *Submission* (29 October 1993) at 1-2; N Cowdery, *Submission* (23 May 1997) at 1.
15. M L Sides, *Submission* (17 December 1993) at 1-3. Mr Sides did, however, submit that infanticide should be retained as a separate offence.
16. See also NSWLRC DP 31 at paras 2.25-2.30.
17. *Crimes Act 1900* (NSW) s 19.

Governor had the power to grant mercy and thereby commute the death penalty to a sentence of penal servitude for life in individual cases.¹⁸ From 1955 to 1982, the mandatory sentence was penal servitude for life.¹⁹ In contrast, the sentence for manslaughter was always discretionary, that is, sentencing courts had a discretion to impose a sentence which was less than the statutory maximum penalty.²⁰

2.12 In 1982, the courts were given a very limited discretion to impose sentences less than life imprisonment for murder, where it appeared that the offender's culpability was significantly diminished by mitigating circumstances.²¹ Further legislative amendments in 1990 gave the courts a full discretion to impose a lesser sentence than life for murder, although penal servitude for life remains the statutory maximum, with "life" meaning the term of the offender's natural life.²² The recent introduction of legislation for so-called "mandatory" life sentences for murder in certain circumstances and some drug offences does not affect this sentencing discretion since, under the legislation, the court may still impose a sentence which is less than life if this is appropriate in the circumstances of the case.²³

18. *Crimes Act 1900* (NSW) s 459.

19. *Crimes Act 1900* (NSW) s 19, as amended by the *Crimes (Amendment) Act 1955* (NSW) s 5(b).

20. *Crimes Act 1900* s 24 and 442.

21. See *Crimes Act 1900* (NSW) s 19, as amended by the *Crimes (Homicide) Amendment Act 1982* (NSW) Sch 1[1]. See also *R v Bell* (1985) 2 NSWLR 466.

22. See *Crimes Act 1900* (NSW) s 19A, inserted by the *Crimes (Life Sentences) Amendment Act 1989* (NSW) Sch 1[4].

23. The *Crimes Amendment (Mandatory Life Sentences) Act 1996* (NSW) introduced s 431B into the *Crimes Act 1900* (NSW): see Sch 1. Although s 431B purports to set down mandatory life sentences for certain offences, it expressly provides that the court is to retain a discretion to impose a lesser sentence under s 442 of the *Crimes Act*. See NSWLRC *Sentencing* (Report 79, 1996) at paras 9.7-9.17. See also *R v Kalajzich* (Supreme Court, NSW, Hunt CJ at CL, 16 May 1997, CLD L00011/95, unreported) at 13.

2.13 Since there is now a discretionary sentence for murder as well as for manslaughter, the distinction between murder and manslaughter is suggested to be no longer necessary for the purpose of differentiating between penalties. Given the difficulties and complexities which can arise in defining the criteria for each category, it may arguably be simpler to have one crime of unlawful homicide, with variations in sentences to reflect differences in gravity.²⁴

Conflict in assigning legal and moral culpability

2.14 Secondly, the distinction between murder and manslaughter recognises differences in culpability for an unlawful killing. However, it may be argued that, in exceptional cases, the legal classification of a killing as murder or manslaughter does not reflect some current views in the community of moral culpability. For example, euthanasia may amount to murder at law while killing under provocation may be reduced to manslaughter. Yet these legal labels do not necessarily correspond to the way in which members of the community would assign moral responsibility in these cases. Nor is it necessarily always clear, in terms of moral culpability, who should be labelled a murderer rather than a person guilty of manslaughter. Arguably, the sentencing process is better able to make finer and more appropriate distinctions between degrees of culpability than is a two-level categorisation of unlawful homicide as either murder or manslaughter.²⁵

Artificiality of distinction

2.15 Thirdly, it may be argued that the murder/manslaughter distinction is artificial because murder and manslaughter are in fact regarded as degrees of one offence, rather than as two separate offences. This is evident from the fact that an accused may be convicted of manslaughter where he or she was indicted for murder, despite the common law rule that prevents conviction for one felony on the charge of another.²⁶ If murder and manslaughter are regarded as parts of a whole, it may be argued that it is artificial to retain the barriers between them, and that instead the law should implement a unified scheme for homicide offences.²⁷ A consequent practical benefit of implementing a unified scheme may be that more people will plead guilty to

24. See Kilbrandon LJ in *Hyam v DPP* [1974] 2 All ER 41 at 72.

25. See Law Society, *Submission* (28 October 1993) at 1.

26. See B Fisse (1990) at 79.

27. See I H Pike, *Submission* (3 November 1993) at 3.

a charge of "unlawful homicide", as opposed to a charge of "murder". If so, there could conceivably be a significant saving of court time, although this is speculative.²⁸

Arguments against abolition

2.16 The following are the main arguments against abolition of the murder/manslaughter distinction.

2.17 First, the terms "murder" and "manslaughter" have long been recognised by the general community to convey differing degrees of moral condemnation for different cases of killing, with particular stigma attaching to the term "murder". If the murder/manslaughter distinction were abolished, the moral force of those labels would be lost.²⁹ There would follow public confusion and misunderstanding of the court's finding on an individual's criminal responsibility, and consequently the public would be less likely to understand and accept sentences imposed for unlawful homicide. With the current trend for sensationalist reporting of sentencing matters in the media, low sentences for a crime of "unlawful homicide", without any other term to indicate distinctions in degrees of culpability, could easily be misunderstood by the public. Such misunderstanding would tend to bring the criminal justice system into disrepute.

2.18 Secondly, abolition of the murder/manslaughter distinction would shift the role of determining the appropriate level of culpability for an unlawful killing away from the jury in the trial context and onto the sentencing judge at the sentencing stage. This would mean that the jury, as representatives of the community, would be excluded from the process of determining who is sufficiently culpable to warrant being convicted of murder. This question of culpability is fundamental to the consequences of being convicted, and as such should properly be left to the jury as representatives of the community to decide, and not to a single judge within the sentencing process.³⁰ A

28. R Blanch, *Submission* (7 September 1993) at 1. The Law Society, though ultimately rejecting the option, nevertheless recognised this point as an argument in favour of abolition: Law Society, *Submission* (28 October 1993) at 1.

29. Indeed, the New South Wales government in 1982 rejected a similar proposal to abolish the murder/manslaughter distinction on the basis that it was important to retain the term "murder", being a powerful term which conveyed the full force of the law's condemnation: see New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 11 March 1982 at 2483.

30. See *Kingswell v The Queen* (1985) 159 CLR 264 per Deane J (dissenting) at 296 ff; *Brown v The Queen* (1986) 160 CLR 171 per Brennan, Deane and Dawson JJ.

group of people drawn from the community are more likely to be broadly representative of community opinions and moral sensibility than a single judge. This is important in terms of the legitimacy of the criminal process for those who are charged with and convicted of an offence as serious as murder or "unlawful homicide". It is also important in terms of public acceptance of decisions in the criminal process.

2.19 Thirdly, while there may be particular instances where the way in which the law assigns culpability does not correspond to the way in which the community assigns culpability, that in itself is not sufficient justification for abolishing altogether the well-established distinction between murder and manslaughter. Perceived anomalies in the way in which the law determines degrees of culpability might instead be overcome through legislative reform within existing categories of unlawful homicide in order that these categories may correspond more closely to community standards.³¹

2.20 Fourthly, although complex, the criteria for distinguishing between murder and manslaughter have been developed by the courts to a level of sufficient clarity to make them workable in practice.

2.21 Fifthly, at least in respect of involuntary manslaughter, the requisite mental state for involuntary manslaughter falls short of the intent required for murder. This should be reflected by differentiating manslaughter from murder and by means of a lesser maximum statutory penalty for manslaughter.

2.22 Sixthly, if the distinction between murder and manslaughter were to be abolished, there is a perceived risk that the length of sentences could increase in cases which are now defined as manslaughter. At present, based on sentences imposed in New South Wales from 1990 to 1996, the median full-term prison sentence imposed for murder is 18 years, compared to the median full-term prison sentence of six years in cases of manslaughter.³² If the distinction between murder

31. S Yeo and S Odgers, *Submission* (29 October 1993) at 2.

32. Figures taken from the Judicial Commission's Judicial Information Research System. Similarly, in the Judicial Commission's study of sentenced homicide offenders in New South Wales between 1990 and 1993, all of the offenders convicted of murder received custodial sentences, with the majority (64.5%) receiving a full term exceeding 14 years and up to 20 years. Of the offenders convicted of manslaughter, 88.1% received custodial sentences, two offenders were sentenced to imprisonment to be served by way of periodic detention, and 11.9% received non-custodial sentences. The majority of those offenders who were sentenced to full-time imprisonment for manslaughter received full terms of eight years or less, with approximately 23% receiving full terms of eight years or more: see H Donnelly, S Cumines and A Wilczynski, *Sentenced Homicides in New South Wales 1990-1993: A Legal and Sociological Study*

and manslaughter were abolished, then arguably sentencing patterns alone might not be adequate to differentiate between cases involving differing levels of culpability. Consequently, judges might be inclined to impose sentences at the upper end of the scale, simply because they are no longer guided by the bench-mark distinction between murder and manslaughter.³³

2.23 Lastly, the fact finding process in a sentencing hearing may be less rigorous than that undertaken in the trial context, with fewer protections for the accused.³⁴

THE COMMISSION'S CONCLUSION

Recommendation 1

The distinction between murder and manslaughter in unlawful homicide should be retained.

2.24 In the Commission's view, the arguments raised in support of the murder/manslaughter distinction are compelling. In particular, we are concerned that the public understand and accept sentences which reflect varying levels of criminal responsibility, and that the assessment of the level of responsibility in individual cases remain the function of the jury, not the sentencing judge. These concerns can be met only if the murder/manslaughter distinction is retained. We note that other jurisdictions³⁵ have advocated retention of the murder/manslaughter distinction for similar reasons.

(Monograph Series No 10, Judicial Commission of New South Wales, 1995) at 75-76 and 89-90.

33. Legal Aid Commission, *Submission* (2 February 1994) at 1; M L Sides, *Submission* (17 December 1993) at 2.
34. Law Society, *Submission* (28 October 1993) at 2. The principles governing the onus and the standard of proof in sentencing were recently discussed in great detail by the Victorian Court of Appeal in *R v Storey* (Court of Appeal, Vic, 6 December 1996, CA 9606011, unreported).
35. The Law Reform Commission of Victoria rejected the option to abolish the distinction between murder and manslaughter in 1991: see Law Reform Commission of Victoria, *Homicide* (Report 40, 1991) at paras 118-120. Similarly, in the United Kingdom, in the context of considering abolition of the partial defences to murder, it has been emphasised that the

2.25 While some inconsistencies and complexities do arise from the distinction between murder and manslaughter, we are not persuaded that the law relating to unlawful homicide would be made any less complex or more understandable if the distinction were abolished. Submissions in favour of one overall offence of unlawful homicide did not suggest any possible formulations of the mental state which would be sufficient for liability for a single offence of "unlawful homicide". In any event, issues relating to the accused's mental state would still need to be considered at the sentencing stage in order to determine the degree of culpability, and therefore complexities arising from the definitions or principles concerning the relevant degrees of culpability would not be overcome, but simply postponed. In our view, it would be far better to address any inconsistencies and anomalies within the existing categories of unlawful homicide by redefinition rather than by taking the radical and precipitant step of abolishing the murder/manslaughter distinction. We therefore recommend that the murder/manslaughter distinction in unlawful homicide be retained.

murder/manslaughter distinction remains important for the purpose of preserving the jury's function as arbiters of criminal responsibility and of retaining the denunciatory power inherent in the term "murderer": see England and Wales, Criminal Law Revision Committee, *Offences Against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) at 33; Great Britain, Select Committee on Murder and Life Imprisonment, *Report of the Select Committee on Murder and Life Imprisonment* (HMSO, London, HL Paper 78, 1989) at 27; England and Wales, Committee on Mentally Abnormal Offenders, *Report of the Committee on Mentally Abnormal Offenders* (HMSO, London, Cmnd 6244, 1975) ("the Butler Report") at 246. In New Zealand, the Criminal Law Reform Committee in 1976 recommended abolition of the murder/manslaughter distinction in favour of a single offence of unlawful homicide: Criminal Law Reform Committee, *Report on Culpable Homicide* (Wellington, 1976). However, proposed legislation giving effect to that recommendation was widely criticised and was sent for further review. As a result of that review, it was decided that the traditional categories of murder and manslaughter should be retained: see Crimes Consultative Committee, *Crimes Bill 1989: Report of the Crimes Consultative Committee* (Wellington, 1991).

3. The defence of diminished responsibility

- Introduction
- Current operation of the defence in New South Wales
- Retention of the defence of diminished responsibility
- Reformulation of diminished responsibility
- Procedural aspects of the defence
- Sentencing of diminished responsibility offenders

INTRODUCTION

3.1 Diminished responsibility is a defence to murder which, if proven, reduces liability for unlawful homicide from murder to manslaughter. It is based on a general principle of our criminal law that a person's responsibility for committing a serious offence should be assessed in light of any substantial mental impairment which that person suffered. The central feature of diminished responsibility is the existence of a mental disorder which can be shown to have substantially impaired the accused's mental responsibility at the time of the killing.

3.2 The defence of diminished responsibility originated in Scotland in the 19th century. It was there developed by the courts as a means of avoiding murder convictions for those offenders otherwise liable for murder, who did not satisfy the restrictive test for the "insanity defence" (now referred to as the defence of mental illness), but whose mental state was nevertheless impaired.¹ The United Kingdom later enacted legislation to provide for a defence of diminished responsibility.² In 1974, diminished responsibility was introduced in New South Wales by legislation which was modelled on the United Kingdom's legislative formulation.³ At that time in New South Wales, there was a mandatory life sentence for murder. Diminished responsibility therefore served the purpose of avoiding a murder conviction and consequent mandatory life sentence in those cases where an offender was mentally impaired but not mentally ill, as defined under the defence of mental illness.⁴ Today, the defence of diminished responsibility is available in four Australian jurisdictions, namely New

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1. See *HM Advocate v Dingwall* (1867) 5 Irvine 466, as discussed in N Walker, *Crime and Insanity in England* (Edinburgh University Press, Edinburgh, 1968) Vol 1, chapter 8. See also P Gillies, *Criminal Law* (2nd edition, LBC, Sydney, 1990) at 252; G Williams, *Textbook of Criminal Law* (2nd edition, Steven & Sons, London, 1983) at 685; D Brown, D Neal and D Weisbrot, *Criminal Laws* (2nd edition, Federation Press, Sydney, 1996) Vol 2 at 589. See also NSWLRC *Provocation, Diminished Responsibility and Infanticide* (DP 31, 1993) at paras 4.3-4.7.
 2. See *Homicide Act 1957* (UK) s 2.
 3. See *Crimes Act 1900* (NSW) s 23A, as introduced by the *Crimes and Other Acts (Amendment) Act 1974* (NSW) s 5(b).
 4. See Criminal Law Committee, *Report of the Criminal Law Committee on Proposed Amendments to the Criminal Law and Procedure* (NSW Parliamentary Papers No 54, 1973) at 6.

South Wales, Queensland, the Australian Capital Territory, and the Northern Territory.⁵

3.3 The defence of diminished responsibility has at various times been the subject of controversy. Some, including several law reform agencies in other Australian states, have suggested that it is both unnecessary and undesirable to provide for diminished responsibility as a partial defence to murder. Others have criticised the current legislative formulation of diminished responsibility on the grounds that it is out of touch with medical notions of mental impairment, that it generates a high level of disagreement amongst expert witnesses, and that it is too complex. Sentencing for manslaughter on the basis of diminished responsibility has also proven difficult, particularly since, at least in New South Wales, there is no specific provision to allow diminished responsibility offenders to receive medical or psychiatric treatment. On the other hand, some of these offenders may suffer from disorders which are untreatable, and consequently they may continue to pose a danger to the community even after their sentences are served.

3.4 In this chapter, the Commission reviews the central issues relating to the defence of diminished responsibility as it operates in New South Wales. We make recommendations for:

- retention of a defence of diminished responsibility; and
- reformulation of the statutory definition of diminished responsibility.

In addition, we discuss procedural aspects of the defence, and issues relating to the sentencing of diminished responsibility offenders.

CURRENT OPERATION OF THE DEFENCE IN NEW SOUTH WALES

3.5 The statutory provisions governing the defence of diminished responsibility in New South Wales are contained in s 23A of the *Crimes Act 1900* (NSW). That section defines diminished responsibility in the following terms:

(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

5. See *Criminal Code* (Qld) s 304A; *Crimes Act 1900* (ACT) s 14; *Criminal Code* (NT) s 37.

Partial defences to murder: Diminished responsibility

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 as 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 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.

3.6 It is a precondition to the application of the defence that the prosecution has proven, beyond reasonable doubt, that the accused is otherwise liable for murder. That is, the prosecution must prove that the accused caused the death of another human being,⁶ and that he or she had the requisite mental state for murder at the time of the killing. If that is proven, there are then three elements which must be satisfied in order to establish the defence of diminished responsibility. These are:

1. that at the time of the killing, the accused was suffering from an abnormality of mind;
2. that the abnormality of mind arose from one of the causes listed within the parentheses in s 23A(1), that is from a condition of arrested or retarded

6. See para 2.5.

development of mind, or from any inherent cause, or induced by disease or injury; and

3. that the abnormality of mind substantially impaired the accused's mental responsibility for the killing.

It is the accused who bears the burden of proving, on the balance of probabilities, that these three elements have been established.⁷ If the defence is proven, the accused is convicted of manslaughter, for which the statutory maximum sentence is penal servitude for 25 years, in contrast with the maximum penalty of penal servitude for life which is available for murder.

3.7 The defence of diminished responsibility may potentially be pleaded on the basis of one of a wide range of mental disorders, provided that the disorder results from a cause listed in parentheses in s 23A(1). In this sense, the scope of diminished responsibility is much wider than the defence of mental illness. The defence of mental illness applies only to those mental conditions which can be shown to affect the accused's cognitive process to such an extent as to render that person incapable of knowing the nature or quality of his or her act, or incapable of knowing that that act was wrong.⁸ In contrast, diminished responsibility requires a substantial impairment caused by an abnormality of mind. This may cover, for example, uncontrollable urges and extreme emotional states, as well as cognitive disorders falling outside the defence of mental illness.

3.8 On the other hand, diminished responsibility is a more limited defence than the defence of mental illness in the sense that, unlike the defence of mental illness, it applies only to proceedings for murder. Moreover, a successful plea of not guilty by reason of mental illness results in a complete "acquittal", although in fact this means that the person is held in "strict custody" in a prison or psychiatric hospital for an

7. *Crimes Act 1900* (NSW) s 23A(2). See also *R v Purdy* [1982] 2 NSWLR 964; *R v Tumanako* (1992) 64 A Crim R 149 at 159-160.

8. At common law, the test for "insanity" was set down in *M'Naghten's Case* (1843) 10 CL & F 200. The test requires the accused to prove that he or she was suffering from such a defect of reason, from disease of the mind, as not to know the nature and quality of his or her act, or as not to know that what he or she was doing was wrong. The common law test applies in New South Wales under the defence of mental illness, as regulated by s 38 and 39 of the *Mental Health (Criminal Procedure) Act 1990* (NSW).

indeterminate period.⁹ In contrast, conviction for manslaughter by reason of diminished responsibility does not result in an acquittal but instead reduces liability from murder to manslaughter, with the imposition of a determinate sentence of up to 25 years' penal servitude.

3.9 Typical examples of cases in which diminished responsibility may be pleaded are where the accused suffers from a mental condition such as schizophrenia or severe depression, or has an intellectual disability.¹⁰ In more controversial cases, the defence may be raised where the accused claims to have suffered from an antisocial personality disorder,¹¹ or from premenstrual tension.¹² As for the frequency with which the defence is pleaded, a study of sentenced homicide offenders in New South Wales between 1990 and 1993 revealed that diminished responsibility was raised by

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9. A person who is found not guilty of an offence by reason of mental illness must be detained in prison or hospital as a forensic patient. That person cannot then be released unless the Mental Health Review Tribunal is satisfied that he or she does not pose a danger to himself or herself, or to the public: see *Mental Health Act 1990* (NSW) s 81(2)(b) and 82. The Attorney General has a power to veto a recommendation for release: see *Mental Health Act 1990* (NSW) s 84. See New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System* (Report 80, 1996), chapter 6. The *Mental Health Legislation Amendment Bill 1997* omits the requirement that a person found not guilty by reason of mental illness be detained "in strict custody", although retaining the requirement that that person be detained: see Sch 1.2[1], [2] and Sch 2.
 10. In the Judicial Commission's study of sentenced homicide offenders in New South Wales between 1990 and 1993, the most commonly diagnosed conditions giving rise to the defence of diminished responsibility were major or severe depression and schizophrenia, followed by brain damage, personality disorders, and post traumatic stress syndrome: see H Donnelly, S Cumines and A Wilczynski, *Sentenced Homicides in New South Wales 1990-1993: A Legal and Sociological Study* (Monograph Series Number 10, Judicial Commission of New South Wales, 1995) at 66.
 11. See, for example, *R v Byrne* [1960] 2 QB 396 (Eng CCA); *R v Evers* (Court of Criminal Appeal, NSW, 16 June 1993, CCA 60086/92, unreported).
 12. See H Allen, "At the Mercy of Her Hormones: Premenstrual Tension and the Law" (1984) *m/f* 19, extracted in D Brown, D Farrier and D Weisbrot, *Criminal Laws* (2nd edition, Federation Press, 1996) Vol 2 at 649; "Lecturer says crimes, PMT not linked" *The West Australian* (11 April 1994) at 13.

approximately 14% of people accused of murder. A verdict of manslaughter was returned in approximately 61% of those cases (whether following a trial or following the Crown's acceptance of a plea).¹³

RETENTION OF THE DEFENCE OF DIMINISHED RESPONSIBILITY

RECOMMENDATION 2

The defence of diminished responsibility should be retained in New South Wales.

3.10 The fundamental question concerning diminished responsibility is whether the defence should be retained. In DP 31, the Commission discussed a proposal to abolish the defence in New South Wales.¹⁴ If it were abolished, a person who unlawfully killed another and who suffered from some form of mental impairment which affected his or her criminal responsibility would be convicted of murder, provided the prosecution could prove the necessary guilty mind for murder. Any evidence of the effect of mental impairment on the actions under consideration could be taken into account as a mitigating factor to reduce the sentence for that offender, in accordance with ordinary principles of sentencing.¹⁵

3.11 The Commission is of the firm view that the defence of diminished responsibility should be retained. The majority of submissions received support this conclusion.¹⁶ The principal and fundamental reason for our recommendation is the

13. See H Donnelly, S Cumines and A Wilczynski (1995) at 58-69.

14. See NSWLRC DP 31 at 101-105 and at paras 4.69-4.77.

15. It has been held that the fact that an offender suffers from a mental disorder or an intellectual disability may be taken into account as a mitigating factor when sentencing that offender: see, for example, *R v Smith* (1958) 75 WN (NSW) 198; *R v Masolatti* (1976) 14 SASR 124; *R v Skipper* (1992) 64 A Crim R 260.

16. See B Boettcher, *Submission* (18 October 1993) at 1; Law Society, *Submission* (28 October 1993) at 4; Legal Aid Commission, *Submission* (2 February 1994) at 2; R Williams, *Submission* (7 June 1995) at 4; Women's Legal Resources Centre, *Submission* (3 December 1993) at 5; S Yeo and S Odgers, *Submission* (29 October 1993) at 6; Royal Australian and New Zealand College of Psychiatrists (RANZCP), Section of Forensic Psychiatry, Forensic Study Group, *Submission* (15 October 1993) at 4; Mental Health Co-ordinating Council Inc, *Submission* (4 November 1993) at 1; J Barker,

vital importance of involving the community, by way of the jury, in making decisions on culpability and hence enhance community acceptance of the due administration of criminal justice (including acceptance of sentences imposed). As we stated in Chapter 1,¹⁷ we consider there to be an important distinction between the concepts of "murder" and "manslaughter", the underlying basis for which is well understood by the general public. "Manslaughter" carries with it a lesser degree of blameworthiness and condemnation than the term "murder", and a reduced sentence will therefore be better understood when imposed for manslaughter. Moreover, there is a greater likelihood that the community will accept a sentence imposed on the basis of mental impairment if it is the community itself, as represented by the jury, that has participated in the process of deciding whether that mental impairment has sufficiently reduced the accused's culpability. The alternative, that is a lower sentence imposed for murder where the sentencing judge considers there to be strong evidence of diminished mental capacity, would inevitably attract criticism, and public confidence in the criminal justice system would suffer as a consequence. There is also a risk that sentences for mentally impaired offenders may increase if they are sentenced for murder rather than manslaughter, which may result in an inappropriately harsh penalty in individual cases.¹⁸

3.12 In light of current trends of public criticism of the courts, which is often ill-informed and intemperate, it would in our view be irresponsible for the Legislature to exclude the community (as represented by juries) from participating in a meaningful way in the process of assessing culpability in cases of this kind. We are firmly of the

Submission (3 April 1997) at 1. One submission gave unqualified support to the abolition of diminished responsibility: see Cabinet Office, *Submission* (7 April 1997) at 1-3. Four submissions supported abolition of the defence, but only in the context of abolishing the distinction between murder and manslaughter: see R Blanch, *Submission* (7 September 1993) at 1; R Hayes, *Submission* (7 January 1994) at 1; I H Pike, *Submission* (3 November 1993) at 1-4; M L Sides, *Submission* (17 December 1993) at 4. Two submissions supported abolition of the defence on the basis that evidence as to diminished responsibility would then be taken into account in sentencing: N Cowdery, *Submission* (23 May 1997) at 1; P Berman, *Submission* (28 April 1997) at 1. Another submission supported abolition of diminished responsibility only if judges were given stricter sentencing guidelines to limit their discretion in deciding what mitigates culpability: see P Easta, *Submission* (14 September 1993) at 3.

17. See paras 2.17 and 2.24-2.25.

18. See para 2.22.

view that to require judges to sentence in these matters without the assistance of a jury's verdict on the critical issue of the degree of culpability would be not only to impose an inappropriate burden on them but also to expose them unjustifiably to public controversy. While it may be argued that judges in sentencing are often required to decide on issues of culpability when considering mitigating and aggravating factors,¹⁹ the question of the degree of culpability for an unlawful killing is a fundamental one which should be reflected in a verdict of guilty of murder or manslaughter in order to be understood and accepted by the community. The administration of criminal justice must be the responsibility of both the judges and the community through participation in trials as jurors deciding on questions of primary culpability.

3.13 When weighed against these considerations, in our view none of the arguments commonly advanced for the abolition of diminished responsibility is persuasive. Those arguments for abolition are outlined and discussed below.

3.14 One argument frequently raised in favour of the abolition of diminished responsibility is that the defence is an unnecessary anachronism given that there is no longer a mandatory life sentence for murder in New South Wales. As we discussed in Chapter 1, judges now have a discretion to impose a lesser sentence than the maximum penalty for murder.²⁰ It follows that one of the original rationales of the defence, namely that it confers a discretion to impose a more lenient sentence for unlawful killing in certain circumstances, is now less important.

3.15 It has been pointed out²¹ that, with the exception of the Australian Capital Territory, no other Australian jurisdiction with a discretionary sentence for murder provides for a defence of diminished responsibility.²² In those jurisdictions which allow

19. See Public Defenders, *Consultation* (17 April 1997).

20. See paras 2.11-2,13. As discussed at para 2.12, this sentencing discretion is not affected by the introduction in 1996 of so-called "mandatory" sentences for murder.

21. See Cabinet Office, *Submission* (7 April 1997) at 2-3.

22. There is no defence of diminished responsibility and no mandatory sentence for murder in Victoria, South Australia and Tasmania: see *Crimes Act 1958* (Vic) s 3; *Criminal Law Consolidation Act 1935* (SA) s 5 and 11; *Criminal Code* (Tas) s 158. Western Australia does not provide for a defence of diminished responsibility, but does have mandatory life sentences for murder. Murder is divided into "wilful murder" and "murder", and there are mandatory sentences for both: see *Criminal Code* (WA) s 282. However, the "insanity defence" (as it

for discretionary sentencing for murder, any evidence of mental impairment may simply be taken into account when sentencing an offender.²³ In contrast, two of the four Australian jurisdictions which do provide for a defence of diminished responsibility have a mandatory sentence for murder.²⁴ The experience in other Australian jurisdictions might therefore suggest that issues of mental impairment can be considered sufficiently at the sentencing stage when there is a discretionary sentence for murder, and that there is no need to have a specific defence to take account of an accused's diminished responsibility.

3.16 The Commission concedes that the defence of diminished responsibility no longer serves its original purpose of providing judges with a discretion in sentencing. However, that argument ignores the concern that the community is less likely to accept a reduced sentence for murder, rather than manslaughter, based on a finding of mental impairment, and also ignores the vital importance of the jury in deciding whether an offender's culpability is substantially reduced because of mental impairment.²⁵ In our view, other law reform bodies which have recommended against the introduction of a defence of diminished responsibility have not attached sufficient weight to the importance of a manslaughter conviction in gaining community acceptance of appropriate sentences in diminished responsibility cases, nor have they given proper consideration to the jury's role in deciding degrees of blameworthiness

is referred to in the Western Australian Criminal Code) is wider than the defence of mental illness in New South Wales, and may possibly apply to cases which are pleaded as diminished responsibility cases in New South Wales: see *Criminal Code* (WA) s 27. It is also worth noting that the Western Australian Law Reform Commission recommended in 1991 that either the mandatory sentence for wilful murder and murder be abolished in Western Australia, or that a defence of diminished responsibility be introduced: see Law Reform Commission of Western Australia, *Report on the Criminal Process and Persons Suffering from Mental Disorder* (Project No. 69, 1991) at paras 2.54 and 2.55.

23. See, for example, *R v Tsiaras* [1996] 1 VR 398; *R v Masolatti* (1976) 14 SASR 124; *Mason-Stuart v The Queen* (1993) 61 SASR 204. In South Australia, the accused's mental condition is expressly included in sentencing legislation as a matter to be considered by the sentencing court when relevant: see *Criminal Law (Sentencing) Act 1988* (SA) s 10(l).

24. See *Criminal Code* (Qld) s 305; *Criminal Code* (NT) s 164.

25. See also S Yeo and S Odgers, *Submission* (29 October 1993) at 6; B Boettcher, *Submission* (18 October 1993) at 1.

and in determining whether criminal liability is to be imposed.²⁶ None of the submissions which proposed the abolition of the defence addressed these fundamental concerns. We note in passing that all Australian jurisdictions provide for provocation as a partial defence to murder,²⁷ although this is also an issue which, like diminished responsibility, can in theory be taken into account in sentencing for murder where there is a discretionary sentence for that offence. The reasons which are commonly given for retaining provocation, especially the importance of the jury's verdict in providing guidance for the sentencing judge and the moral distinction between murder and manslaughter,²⁸ apply equally to the question of whether the defence of diminished responsibility should be retained.

3.17 A second argument advanced for the abolition of diminished responsibility is that the defence wrongly allows people who kill to avoid murder convictions and improperly reduces sentences for unlawful killings.²⁹ There is a perceived danger that the defence of diminished responsibility might succeed in too wide a range of

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26. See England and Wales, Committee on Mentally Abnormal Offenders, *Report of the Committee on Mentally Abnormal Offenders* (HMSO, London, Cmnd 6244, 1975) ("the Butler Report") at para 19.14; Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility* (Report 34, 1990) at para 148; Attorney General's Department, Review Committee of Commonwealth Criminal Law, *Review of Commonwealth Criminal Law: Interim Report: Principles of Criminal Responsibility and Other Matters* ("the Gibbs Report") (AGPS, Canberra, 1990) at 106; Criminal Law and Penal Methods Reform Committee of South Australia, *The Substantive Criminal Law* (Report 4, 1977) ("the Mitchell Report") at para 14.
27. See *Crimes Act 1900* (NSW) s 23; *Crimes Act 1900* (ACT) s 13; *Criminal Code* (NT) s 34; *Criminal Code* (Qld) s 304; *Criminal Code* (Tas) s 160; *Criminal Code* (WA) s 281. The defence of provocation is also available at common law in Victoria and South Australia. The Commission will be considering the defence of provocation in a separate report.
28. See Law Reform Commission of Victoria, *Homicide* (Report 40, 1990) at paras 172-175.
29. Cabinet Office, *Submission* (7 April 1997) at 1; Editorial, "Let down by the let-off law" *Daily Telegraph* (3 April 1997) at 10; M Riley, "Defence of diminished responsibility to remain" *Sydney Morning Herald* (4 April 1997) at 5; J Fife-Yeomans and S Brook, "Defence for diminished responsibility" *The Australian* (4 April 1997) at 5.

circumstances, and that it is susceptible to false claims of mental impairment.³⁰ These sentiments have recently been expressed in relation to the controversy which followed the sentencing of Graham Cassel in the Supreme Court of New South Wales this year. Mr Cassel was initially charged with murder for the killing of Michael McPake. The Crown accepted a plea of manslaughter³¹ on the basis of diminished responsibility after reports from three psychiatrists and a psychologist all expressed the view that the accused was suffering from a major depressive illness at the time of the killing. Mr Cassel was subsequently sentenced to penal servitude for eight years for manslaughter, comprising a minimum term of five years and an additional term of three years.³² It was submitted that this case demonstrates that the defence of diminished responsibility is a "loophole" in the law that permits killers to receive shorter sentences due to manslaughter convictions.³³

3.18 We do not agree that the above example reveals any such "loophole". It is fundamental to our system of criminal justice that culpability for serious offences is measured according to the accused's mental state in committing the offence. It is therefore essential that factors which significantly affect that mental state be taken into account in determining degrees of culpability. People who kill while in a state of substantially impaired responsibility should not be treated as "murderers".³⁴ While there is always a risk of fabrication, evidence that is fabricated can be properly tested,

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30. This argument was cited by the Law Reform Commission of Victoria in recommending against the introduction of the defence of diminished responsibility in that state: see Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility* (Report 34, 1990) at para 142.
 31. Where an accused is charged with an indictable offence, the prosecution may elect to accept a plea of guilty for a lesser offence than that contained in the indictment under s 394A of the *Crimes Act 1900* (NSW). The accused then proceeds to sentencing for that lesser offence.
 32. See *R v Cassel* (Supreme Court, NSW, Bruce J, 14 March 1997, CLD 70065/95, unreported). This means that Mr Cassel will be eligible to be considered for release on parole in five years, at the expiry of his minimum term. Release at that time is by no means automatic: see *Sentencing Act 1989* (NSW) Part 3.
 33. See Cabinet Office, *Submission* (7 April 1997), Attachment A.
 34. See also Law Society, *Submission* (28 October 1993) at 4; RANZCP, Section of Forensic Psychiatry, Forensic Study Group, *Submission* (15 October 1993) at 2.

as is all other evidence, within the trial process, with the accused bearing the burden of proving that the defence of diminished responsibility has been established. Any concerns that the defence may be applied too widely can be adequately addressed by considering changes to its formulation which will avoid uncertainties in its application. Such concerns in themselves fall well short of justifying abolition of the defence. The negative reaction to the tragic killing of Michael McPake by Mr Cassel appears to be based largely on misinformation from highly inaccurate media reports as to the extent of Mr Cassel's mental disturbance. The court found that at the time of the killing Mr Cassel was suicidal and was suffering from a major depressive disorder which substantially impaired his judgment. Yet several media reports focussed on the fact that the accused had consumed alcohol before committing the killing, with the (inaccurate) suggestion that he was permitted to escape full criminal responsibility because he was intoxicated.³⁵ In fact, the effects of alcohol and other intoxicants cannot generally be considered when determining whether an accused suffers from diminished responsibility.³⁶ Reform of the defence of diminished responsibility should take place in the context of considered and informed debate about the advantages or otherwise of retaining the defence, and not, as has happened in some American states, as part of a sensationalised response to the application of the defence in a particular case.³⁷

3.19 A third argument which is sometimes raised in favour of abolition of diminished responsibility is that it may be better to redefine and broaden the defences of mental illness and provocation rather than create a "back-door" excuse for people who do not

35. See, for example, Editorial, "Let down by the let-off law" *The Daily Telegraph* (3 April 1997) at 10; L Goldsbury, "Murder Victim's Family Calls for Law Reform: 'Help Us, Mr Carr'" *Southern Courier* (8 April 1997) at 1; B English, "'Insane' law may be axed" *Daily Telegraph* (12 April 1997) at 4.

36. See paras 3.68-3.73.

37. Section 28 of the Californian *Penal Code* was amended in 1981 to eliminate the defence of diminished capacity "as a matter of public policy". The amendment followed public outcry over the success of the defence in the Dan White case, in which the accused was acquitted of murder, convicted of manslaughter, and sentenced to imprisonment for seven years and eight months. The accused had argued that he was depressed and had suffered from mental impairment as a result of a diet of junk food: see Brown, Farrier and Weisbrot (1996) Vol 2 at 636-637; W Winslade and J Wilson Ross, *The Insanity Plea* (Charles Scribner's Sons, New York, 1983) at 21-51.

fit into the rather narrow tests provided by these two defences.³⁸ In the Commission's view, however, diminished responsibility provides flexibility to determine responsibility according to degrees of mental impairment, rather than according to a strict contrast between sanity and "insanity". Diminished responsibility is an intermediate defence for those offenders whose mental impairment is not so extreme as to warrant an acquittal and consequent indefinite detention in "strict custody" in a prison or psychiatric hospital, but whose mental state is nevertheless such that they should not be convicted of murder.³⁹

3.20 Where a person suffers from a substantial mental impairment which reduces his or her responsibility for an unlawful killing, that impairment must, in any fair system of punishment, be taken into account in dealing with that person. For the reasons stated above, the Commission considers that it is essential to maintaining public confidence in sentences which are imposed for homicide that this issue be decided at trial, and reflected in conviction either for murder or for manslaughter. It is the jury's role to determine whether a person is less responsible for his or her actions because of a particular impairment. The sentencing judge will then impose a sentence which reflects a jury's finding, as community representatives, in relation to an offender's culpability. This maintains the proper role of both judge and jury. We therefore strongly recommend that diminished responsibility be retained as a partial defence to murder in New South Wales.

3.21 If, despite our recommendation to the contrary, diminished responsibility were to be abolished as a partial defence to murder, it would be our expectation that matters now relevant to the defence would be considered in sentencing. Current sentencing law allows for substantial impairment of an accused's mental state to be considered in mitigation of the sentence.⁴⁰ Nevertheless, given that a judge would be sentencing an offender for murder, instead of manslaughter, it may be desirable to insert a specific provision in the *Sentencing Act 1989* (NSW) which gives legislative support to this general principle of sentencing. However, it must be emphasised that this option would exclude the jury from the process of assessing the level of a person's culpability for the purpose of determining the appropriate penalty to be

38. See Cabinet Office, *Submission* (7 April 1997) at 2. See also B Fisse, *Howard's Criminal Law* (5th edition, LBC, Sydney, 1990) at 112.

39. See also S Hayes, "Diminished Responsibility: The Expert Witness' Viewpoint" in S Yeo (ed), *Partial Excuses to Murder* (Federation Press, Sydney, 1990) 145 at 154-156; S Hayes and G Craddock, *Simply Criminal* (2nd edition, Federation Press, Sydney, 1992) at 147-148.

40. See paras 3.10 and 3.111.

imposed in each individual case.⁴¹ The Commission opposes the removal of the jury from that fundamental and traditional role.

Infanticide and the defence of diminished responsibility

3.22 As part of the discussion of our reasons for recommending retention of the defence of diminished responsibility, mention should also be made of the offence/defence of infanticide. In New South Wales, infanticide operates as both an offence in its own right and as a partial defence to murder. Section 22A of the *Crimes Act 1900* (NSW) provides that a woman will be convicted of infanticide if she kills her child aged less than 12 months, where the balance of her mind is disturbed as a result of giving birth or by reason of the effect of lactation.⁴²

3.23 The Commission is soon to release a second report on the partial defences to murder, which report will examine the law on provocation and infanticide. In relation to infanticide, we will be recommending that the offence/defence of infanticide be abolished in New South Wales, on the basis that it reflects outmoded and unsound medical and psychiatric concepts, is out of step with the jurisprudence of gender equality, and is arbitrarily restrictive. In the Commission's view, our recommended reformulation of the defence of diminished responsibility will be sufficient to accommodate cases justifiably falling within the existing infanticide provisions. Disorders such as depression or post partum paranoid psychosis, which may form the basis of a plea of infanticide, would be characterised under our recommended reformulation of diminished responsibility as an "abnormality of mental functioning" affecting the accused's capacity to understand events, to judge right from wrong, or to control herself.⁴³

3.24 If the offence/defence of infanticide is abolished, it is important that the defence of diminished responsibility be retained to accommodate cases now covered by the infanticide provisions. Such cases, while rare, typically involve tragic circumstances in which the offender kills with a significantly reduced level of culpability, and is generally given a non-custodial sentence. If both infanticide and the defence of diminished responsibility were abolished, these offenders would usually

41. See *Kingswell v The Queen* (1985) 159 CLR 264 per Deane J (dissenting) at 296 ff; *Brown v The Queen* (1986) 160 CLR 171 per Brennan, Deane and Dawson JJ.

42. See NSWLRC DP 31, chapter 5.

43. See Recommendation 4 and paras 3.44-3.58.

face conviction and sentence for murder. In the Commission's view, given the strong mitigating circumstances, such a result would be unconscionably harsh.

Trials by judge alone

RECOMMENDATION 3

The Director of Public Prosecutions' Guidelines for consent to an accused's election for trial by judge alone should be reviewed to make it clear that the defence of diminished responsibility requires a judgment on issues raising community values, which issues should ordinarily be decided upon by a jury.

3.25 It is evident from our reasons for retaining the defence of diminished responsibility that we consider the jury should remain central to the process of deciding whether a particular person suffered from diminished responsibility. At present in New South Wales, this principle may be qualified by a provision which allows for trials by judge alone. This provision is considered below.⁴⁴

3.26 An accused person standing trial for an indictable offence in New South Wales may elect to have the matter tried by a judge alone, sitting without a jury.⁴⁵ The Director of Public Prosecutions must consent to an election for a trial by judge alone,⁴⁶ and refusal by the DPP to give consent is not reviewable by the courts.⁴⁷ In 1995, the DPP published guidelines for Crown Prosecutors as to consent to an accused's election to be tried by judge alone. These guidelines stipulate that there is no presumption in favour of consent, and that each case is to be decided on its merits. The principal consideration is expressed as being the achievement of justice by the fairest and most expeditious means available. Guideline Six makes it clear that matters which involve a judgment on issues raising community values, such as provocation, should ordinarily be heard by a jury. On the other hand, Guideline Eight

44. A second issue, the extent to which expert witnesses should be permitted to give evidence as to the ultimate issues in a trial, is considered paras 3.60-3.63.

45. See *Criminal Procedure Act 1986* (NSW) s 32(1).

46. *Criminal Procedure Act 1986* (NSW) s 32(3).

47. *M v Director of Public Prosecutions* (Supreme Court, NSW, Dunford J, 6 March 1996, ALD 300015/96, unreported).

states that cases in which the main issues arise out of expert opinions, including medical experts' opinions, may be better suited to trial by judge alone.⁴⁸

3.27 There may be sound reasons for permitting trial by judge alone, such as where the evidence to be relied on is technical and complex, or where the case is tried in a small community where prejudice might jeopardise a fair trial.⁴⁹ Nevertheless, a provision which permits a judge to try an indictable offence without a jury may in principle be seen to supplant the appropriate function of the jury in the criminal process. There is a particularly strong risk of this in cases where diminished responsibility is raised, since it is now clear that the application of that defence requires a value judgment as to whether there was substantial impairment of the accused's responsibility, which is a question of degree reflecting community standards, and not a question which medical experts can properly answer.⁵⁰ For this reason, the Commission is of the view that it will seldom be appropriate for a trial to be heard by judge alone when the accused is pleading the defence of diminished responsibility. At present, Guideline Eight of the DPP's Guidelines may be construed as sanctioning trials by judge alone in diminished responsibility cases, since it approves as generally appropriate to be tried by judge alone those cases involving issues which arise out of expert medical evidence. The Commission therefore recommends that the Guidelines should be reviewed to make it clear that diminished responsibility cases fall within those cases referred to in Guidelines Six, involving a

48. In the Judicial Commission's study of homicide cases in New South Wales between 1990 and 1993, only five of a total of 256 sentenced homicide offenders were tried by judge alone, all five relying on the defence of diminished responsibility to a charge of murder. Four out of the five who elected to be tried by judge alone were convicted of manslaughter rather than murder: see H Donnelly, S Cumines and A Wilczynski (1995) at 67. However, given that these figures relate to a period before the issue of the 1995 Guidelines, they may be of limited assistance in indicating current trends in relation to trials by judge alone. The Office of the Director of Public Prosecutions has not collected figures for the number of homicide cases tried by judge alone since 1993.

49. Forensic Psychiatrists and Psychologists, *Consultation* (6 May 1997). See also J Badgery-Parker, "The Criminal Process in Transition: Balancing Principle and Pragmatism (Part 2)" (1995) 4(4) *Journal of Judicial Administration* 193.

50. See paras 3.41-3.43.

judgment on issues raising community values, and hence which ought ordinarily to be heard by a jury.⁵¹

3.28 The DPP has proposed that, under our recommended reformulation of the defence of diminished responsibility, juries should be given sole power to decide whether the defence is established.⁵² While, as we have already stated, trials by judge alone should be exceptional in diminished responsibility cases, there are such cases where it would be appropriate for the DPP to consent to trial by judge alone, for example where pre-trial publicity might otherwise require a lengthy adjournment. In our view, the DPP's power to withhold consent to trials by judge alone, according to our recommended amendments to the DPP's Guidelines, would be sufficient assurance that juries would try the issue of diminished responsibility in all appropriate cases.

REFORMULATION OF DIMINISHED RESPONSIBILITY

3.29 The Commission recommends that the defence of diminished responsibility be reformulated. This proposal received widespread support in submissions⁵³ and unanimous favour among those submissions favouring retention of the defence.

51. The Commission originally considered a proposal that judges be empowered to veto an accused's election for trial by judge alone in diminished responsibility cases, where they considered it appropriate to have the case tried by a jury. Such a proposal would invoke questions which go beyond the hearing of diminished responsibility cases alone, and would necessarily involve consideration of broader issues such as the proper role of the judge in the trial process, and the accused's right to elect how to be tried. See Public Defenders, *Consultation* (17 April 1997). The Commission's recommendation 3 was opposed by the Senior Public Defender: see M L Sides, *Submission* (23 May 1997) at 1.

52. See N Cowdery, *Submission* (23 May 1997) at 2.

53. B Boettcher, *Submission* (18 October 1993) at 1; P Easteal, *Submission* (14 September 1993) at 3; Law Society, *Submission* (28 October 1993) at 4; Legal Aid Commission, *Submission* (2 February 1994) at 2; Y Lucire, *Submission* (9 November 1993) at 2; Mental Health Co-Ordinating Council Inc, *Submission* (4 November 1993) at 1-2; RANZCP, Section of Forensic Psychiatry, Forensic Study Group, *Submission* (15 October 1993) at 1. The (then) Acting Senior Public Defender and Mr P Berman did not favour retention of the defence, but submitted that if the defence were retained, it should be reformulated: see M L Sides, *Submission* (17 December 1993) at 3 and 6; P Berman, *Submission* (28

Problems with the current formulation

Problems in applying the defence in practice: Chayna's case

3.30 The Commission's reference had its genesis in remarks made by the Chief Justice of the Supreme Court of New South Wales in the case of *R v Chayna*.⁵⁴ That case provides a good illustration of the practical difficulties which may arise in applying s 23A.

3.31 The accused, Andre Chayna, was convicted by a jury of the murder of her two daughters and her sister-in-law. At her trial, the defence of mental illness and the defence of diminished responsibility were left for the jury to consider. Seven psychiatrists gave evidence, offering widely conflicting opinions as to the accused's mental condition. Some stated that she was schizophrenic, others considered that she was not schizophrenic but suffered from severe depression, while another rejected both these diagnoses in favour of a diagnosis of an acute dissociative state. Several expressed the view that the accused was suffering from diminished responsibility, others rejected this conclusion and stated that the defence of mental illness was established, while one doubted that the accused was suffering from any mental impairment at the time of the killings. The trial judge summed up to the jury on the basis that the evidence of this last psychiatrist did not support the defence of mental illness nor the defence of diminished responsibility, but instead supported a finding of murder. The Court of Criminal Appeal held that the trial judge had erred in this aspect of the summing up, and consequently quashed the conviction, substituting it with a conviction for manslaughter. In delivering the leading judgment,⁵⁵ the Chief Justice expressed concern about the fact that there can be such conflicting expert opinion

April 1997) at 3. Mr S Yeo and Mr S Odgers considered that there were problems with the current wording of the defence, but submitted that sufficient case law has developed on its interpretation as to enable it to operate reasonably well in practice. They did however express reservations about several elements of the current formulation, particularly the requirement that mental responsibility be substantially impaired, and suggested that this element might be reformulated: see S Yeo and S Odgers, *Submission* (29 October 1993) at 7-8.

54. (1993) 66 A Crim R 178.

55. Priestley JA and Studdert J concurred with Gleeson CJ.

over the application of the legal principles of diminished responsibility. His Honour concluded that:⁵⁶

The variety of psychiatric opinion with which the jury were confronted strongly suggests that the operation of s 23A of the *Crimes Act* depends upon concepts which medical experts find at least ambiguous and, perhaps, unscientific ... it appears to me that the place in the criminal law of s 23A is a subject ripe for reconsideration.

3.32 Submissions were critical of the defence as it is currently formulated under s 23A of the *Crimes Act 1900* (NSW). Criticism was directed at each of the three elements of the defence requiring proof of abnormality of mind, proof of origin of the abnormality, and proof of substantial impairment of mental responsibility.

Abnormality of mind

3.33 Section 23A requires an accused to show that he or she was suffering from an abnormality of mind at the time of the commission of the offence. In the leading case of *R v Byrne* [1960] 2 QB 396, Lord Parker CJ described "abnormality of mind" as:

"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."⁵⁷

3.34 There are two main objections to the term "abnormality of mind". The first is that it is largely a meaningless expression, being based on neither medical nor legal concepts. Consequently, juries and expert witnesses may have difficulty making sense of it.⁵⁸ In consultation, several psychiatrists expressed the view that the term causes disagreements amongst expert witnesses over what exactly is meant by the

56. *R v Chayna* at 189 and 191.

57. *R v Byrne* [1960] 2 QB 396 at 403 (Eng CCA), followed in, for example, *R v Tumanako* (1992) 64 A Crim R 149 (NSW CCA); *R v Chayna* (1993) 66 A Crim R 178 (NSW CCA).

58. M Tedeschi, *Preliminary Consultation* (21 June 1993); R Milton, *Preliminary Consultation* (28 June 1993).

"mind", and that in fact almost everyone who kills could be said to suffer from some sort of "abnormality of mind".⁵⁹ While the term assumes an ascertainable range of "normal" functionings of the mind, beyond which a mind is abnormal, in practice there is difficulty in marking out with any precision the boundaries between the normal and the abnormal.⁶⁰ Consequently, the more bizarre the crime, the more "abnormal" the offender may be deemed to be.⁶¹ In opposition, however, others submitted that "abnormality of mind", while not a medical term, is an expression used to refer to some kind of mental impairment, and works reasonably well in practice, having been sufficiently well clarified by case law as not to require replacement by some other ambiguous expression.⁶²

3.35 The second main objection is that, because "abnormality of mind" is such an ambiguous term, it is not clear exactly what mental conditions are to be included within its scope. Consequently, a number of conditions may be accepted as constituting an "abnormality of mind" which, according to submissions, ought not to provide grounds for the defence.⁶³ Specific concerns were raised in relation to personality disorders,⁶⁴ dissociation,⁶⁵ and excessive jealousy arising as a result of

59. Forensic Psychiatrists and Psychologists, *Consultation* (6 May 1997). See also Y Lucire, *Submission* (9 November 1993) at 2.

60. See *R v Gieselmann* (Court of Criminal Appeal, NSW, 28 June 1996, CCA 60692/95, unreported) per Mahoney P at 5.

61. R Milton, *Preliminary Consultation* (28 June 1993).

62. See S Yeo and S Odgers, *Submission* (29 October 1993) at 6; Public Defenders, *Consultation* (17 April 1997). This was also one view expressed in Forensic Psychiatrists and Psychologists, *Consultation* (6 May 1997).

63. See Forensic Psychiatrists and Psychologists, *Consultation* (6 May 1997).

64. RANZCP, Section of Forensic Psychiatry, Forensic Study Group, *Submission* (15 October 1993) at 1; B Boettcher, *Submission* (18 October 1993) at 1; Public Defenders, *Consultation* (17 April 1997); B Westmore, *Preliminary Consultation* (14 July 1993); W Barclay, *Preliminary Consultation* (8 July 1993); This was also one view expressed in Forensic Psychiatrists and Psychologists, *Consultation* (6 May 1997).

65. Y Lucire, *Submission* (9 November 1993) at 2; W Barclay, *Preliminary Consultation* (8 July 1993).

marital or relationship breakdown.⁶⁶ Inclusion or possible inclusion of these conditions was seen as an indication that the term "abnormality of mind" is interpreted too broadly. Particular scepticism has been expressed over the application of the term "abnormality of mind" to certain antisocial personality disorders or "psychopathy" where it is claimed that the offender could not control his or her actions. It was argued that it is questionable whether psychiatric experts can effectively distinguish between an impulse which cannot be resisted and one which is not resisted.⁶⁷ It was further submitted that the defence should not be extended to offenders whose altered states of consciousness are self-induced, as in the case of mental impairment triggered by the consumption of alcohol or drugs.⁶⁸

3.36 Several submissions supported greater clarification of the term "abnormality of mind" in an attempt to limit the number of conditions falling within the scope of the defence.⁶⁹ However, others considered that any legislative clarification of the meaning of "abnormality of mind" should not limit the types of conditions falling within the defence but should maintain a high degree of flexibility so as not to restrict unreasonably the psychiatric labels falling within the definition of diminished responsibility.⁷⁰

3.37 The Commission agrees that the term "abnormality of mind" is imprecise and that its meaning may be unclear to expert witnesses. On the other hand, we see a danger in replacing the term with an exhaustive list of conditions which would give rise to the defence of diminished responsibility. A list of this kind would be extremely

66. Women's Legal Resources Centre, *Submission* (3 December 1993) at 5.

67. This was one view expressed in Forensic Psychiatrists and Psychologists, *Consultation* (6 May 1997). See also W Barclay, "Diminished Responsibility: The Third Leg", paper presented to the Section of Forensic Psychiatry, New South Wales Branch, RANZCP (8 April 1991) at 8; *R v Gieselmann* (Court of Criminal Appeal, NSW, 28 June 1996, CCA 60692/95, unreported) per Mahoney P at 9.

68. Y Lucire, *Submission* (9 November 1993) at 2-3; P Easteal, *Submission* (14 September 1993) at 3.

69. P Easteal, *Submission* (14 September 1993) at 2; Women's Legal Resources Centre, *Submission* (3 December 1993) at 5. This was one view expressed in Forensic Psychiatrists and Psychologists, *Consultation* (6 May 1997).

70. Law Society, *Submission* (28 October 1993) at 4; S Yeo and S Odgers, *Submission* (29 October 1993) at 6.

difficult to formulate with any precision, and would prevent consideration of the merits of each individual case.⁷¹

The causes of the abnormality

3.38 The second element of the defence requires the accused to show that his or her abnormality of mind arose from one of the three causes listed in s 23A, namely from a condition of arrested or retarded development of mind, or from an inherent cause, or induced by disease or injury. This is something which must be determined by expert evidence,⁷² although there is no requirement that the expert adopt the statutory terminology.⁷³ In the case of *Purdy*, the words in parentheses were held to be words of limitation, so that any abnormality of mind arising from some other cause will not entitle the accused to benefit from the defence.⁷⁴ In his dissenting judgment in *Purdy*, Justice Roden criticised this interpretation of s 23A as artificial, and considered there to be no logical reason for limiting the defence to these particular causes.⁷⁵ In practice, the restrictive construction of the second element has operated to exclude from the ambit of the defence those persons who kill while intoxicated or who act as a result of mere outbursts of rage or jealousy.⁷⁶

3.39 One objection to the requirement to identify the aetiology (or cause) of an impairment is that it can lead to a great amount of disagreement amongst expert witnesses, who may not be able to nominate the origin of a condition with any

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71. See also Forensic Psychiatrists and Psychologists, *Consultation* (6 May 1997).
72. *R v Byrne* [1960] 2 QB 396 at 403; *R v Purdy* [1982] 2 NSWLR 964 at 966; *R v Tumanako* (1992) 64 A Crim R 149 at 160.
73. *R v Purdy* [1982] 2 NSWLR 964 at 966.
74. *R v Purdy* [1982] 2 NSWLR 964 at 966. See also *R v Byrne* [1960] 2 QB 396 at 403.
75. See *Purdy* per Roden J at 967. The decision of the majority in *Purdy* to limit the defence in this way seems to turn on the grammatical construction of s 23A and the weight of the English authority of *R v Byrne*: see *R v Purdy* [1982] 2 NSWLR 964 at 965.
76. See paras 3.68-3.70.

certainty,⁷⁷ or may disagree on the diagnosis of a particular offender.⁷⁸ A second objection to this second element of the defence is that it gives rise to a great deal of complex, confusing and technical debate in an attempt to define each of the three terms listed and to fit a specific condition into one of the three.⁷⁹ The courts have developed quite complicated criteria to distinguish between the three causes. For example, where an accused relies on an "inherent cause", the condition must be shown to be permanent, though not necessarily hereditary,⁸⁰ but when either disease or injury is relied on as the cause of the abnormality, it need not be permanent, although it must be more than ephemeral or of a transitory nature⁸¹ such as abnormality resulting from steroids, alcohol or drugs.⁸² Where an inherent cause is relied on, it is sufficient to prove that the accused suffered from an "inherent abnormality", without having to prove the cause of the abnormality as a separate element. However, where one of the other two causes is relied on, the cause must be established as a separate element from the abnormality.⁸³ It is questionable whether any of these distinctions are logical or readily understood by juries.

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77. For example, reactive depression is alternatively ascribed to inherent causes and disease of the mind: see *R v Chayna* (1993) 66 A Crim R 178 at 184 (NSW CCA); *R v Sanders* (1991) 93 Cr App R 245 at 247.
78. For example, the seven psychiatrists in *R v Chayna* reached conflicting diagnoses on the cause of the accused's condition, ranging from schizophrenia, to depression, to psychotic dissociation: see paras 3.30-3.31.
79. For example, the meaning of the term "injury" has recently been the subject of some debate in the NSW Court of Criminal Appeal, in the appeal from *R v DeSouza* (Supreme Court, NSW, Dunford J, 20 October 1995, CLD 70105/94, unreported). Submissions in the appeal are based to a large extent on discussion of a technical nature as to whether steroids can be said to destroy brain cells or simply alter brain function, and as such whether the effect from steroids can be classified as an "injury" within the meaning of s 23A of the *Crimes Act 1900* (NSW). Judgment on the appeal is presently reserved.
80. See *R v Tumanako* (1992) 64 A Crim R 149 at 62; *R v McGarvie* (1986) 22 A Crim R 286 at 288.
81. See *R v Purdy* [1982] 2 NSWLR 964 at 966.
82. See *R v DeSouza* (Supreme Court, NSW, Dunford J, 20 October 1995, CLD 70105/94, unreported).
83. See *R v Tumanako* (1992) 64 A Crim R 149 at 162.

3.40 It has been submitted to the Commission that the requirement to identify a specified cause adds unnecessary complexity to the defence, and that the three causes listed in parenthesis should simply be omitted in any reformulation of diminished responsibility.⁸⁴ The Commission agrees that the restriction of the defence to conditions arising from the three listed causes appears quite arbitrary and may generate a high level of complexity and confusion in relation to the expert evidence which is led in diminished responsibility cases.

Substantial impairment of mental responsibility

3.41 Section 23A requires the accused to prove that his or her mental responsibility for the act causing death was "substantially impaired" as a result of the abnormality of mind. This third element requires the tribunal of fact to determine whether the accused's capacity for rational conduct was impaired, whether that impairment was substantial, and whether there was the necessary causal relationship between that impairment and the acts which the accused committed.⁸⁵ "Substantial" impairment does not necessarily mean total impairment, but the impairment must be more than trivial or minimal.⁸⁶ Expert evidence may be admitted and is frequently led in relation to this element of the defence.⁸⁷ However, it has been emphasised by the courts, at least in recent years, that the question of whether a person's mental responsibility was substantially impaired is really a question of degree, essentially involving a moral judgment. As such, it is a matter for the jury to determine, after approaching the question in a common sense way and applying community standards. Since it primarily involves the making of a moral judgment, it is a matter on which juries may legitimately differ from expert medical opinion.⁸⁸

84. Public Defenders, *Consultation* (17 April 1997); Forensic Psychiatrists and Psychologists, *Consultation* (6 May 1997).

85. See *R v Gieselmann* (Court of Criminal Appeal, NSW, 28 June 1996, CCA 60692/95, unreported) per Mahoney P at 11.

86. *R v Lloyd* [1967] 1 QB 175 at 178-9; *R v Biess* [1967] Qd R 470 at 475; *R v Ryan* (Court of Criminal Appeal, NSW, 30 October 1995, CCA 60299/93, unreported) per Hunt CJ at CL at 8.

87. See *R v Tumanako* (1992) 64 A Crim R 149 at 160.

88. See for example *R v Byrne* [1960] 2 QB 396 at 403-404; *R v Tumanako* (1992) 64 A Crim R 149 at 160; *R v Trotter* (1993) 35 NSWLR 428; *R v Ryan* (Court of

3.42 It may be argued that juries have difficulty understanding what is meant by this third element, and that the wording does not make it sufficiently clear that it is a question for juries, rather than experts, to decide. It has been submitted that a preferable expression may be that proposed by the English Criminal Law Revision Committee, namely that there be "substantial enough reason to reduce his offence to manslaughter."⁸⁹ This expression would focus the jury's attention on the essentially moral choice which they are required to make. On the other hand, it was submitted during one consultation by the Commission that this third element is now sufficiently well understood by juries, as it is generally made clear to them by the trial judge that it ultimately turns on a moral question for them, rather than medical experts, to determine.⁹⁰

3.43 While case law may have developed to assist in the interpretation of this third element of the defence, the Commission agrees that it is not a precise expression. The term may be misleading in so far as it does not make it expressly clear that it is a question for the jury, not experts, to answer.

The Commission's reformulation

RECOMMENDATION 4

Section 23A of the *Crimes Act 1900* (NSW) should be amended as follows:

Criminal Appeal, NSW, 30 October 1995, CCA 60299/93, unreported) per Hunt CJ at CL at 8-9; *R v Gieselmann* (Court of Criminal Appeal, NSW, 28 June 1996, CCA 60692/95, unreported) per Mahoney P at 15.

89. S Yeo and S Odgers, *Submission* (29 October 1993) at 7. See England and Wales, Criminal Law Revision Committee, *Offences against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) at para 93, and also England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales* (Law Com 177, 1989) cl 56.

90. Public Defenders, *Consultation* (17 April 1997).

(1) A person, who would otherwise be guilty of murder, is not guilty of murder if, at the time of the act or omission causing death, that person's capacity to:

- (a) understand events; or**
- (b) judge whether that person's actions were right or wrong; or**
- (c) control himself or herself,**

was so substantially impaired by an abnormality of mental functioning arising from an underlying condition as to warrant reducing murder to manslaughter.

"Underlying condition" in this subsection means a pre-existing mental or physiological condition other than of a transitory kind.

(2) Where a person is intoxicated at the time of the act or omission causing death, and the intoxication is self-induced, the effects of that self-induced intoxication are to be disregarded for the purpose of determining whether or not the person suffered from diminished responsibility under this section.

(3) For the purpose of subsection (2), "self-induced intoxication" has the same meaning as it does in s428A (of the *Crimes Act 1900*).

[The current section 23A(2)-(5) remain unaltered, though renumbered].

3.44 In reformulating s 23A, the Commission has been conscious of the risk of devising a new test which may possibly produce as many problems as it solves. While there may be difficulties with the present wording of s 23A, a substantial body of case law has developed to assist in its interpretation and application. There would be little point in replacing the current formulation with different but equally imprecise expressions which require further judicial interpretation.

3.45 The Commission's final reformulation is the product of considerable deliberation. The proposed reformulation was developed following a series of consultations, including consultations with a group of forensic psychiatrists and psychologists, whose assistance we gratefully acknowledge.⁹¹

3.46 In reformulating s 23A(1) of the *Crimes Act 1900* (NSW), the Commission's aim was to clarify the test for diminished responsibility. In this way, the defence should be easier to understand for both experts and juries, which in turn should make its application in individual cases more consistent and more straightforward. Our general approach in defining diminished responsibility was not to limit it arbitrarily to any specific condition or group of persons, but instead to allow for the proper consideration of the effect of mental impairment on an individual's criminal responsibility in each case. Our test makes it clear that there must be quite a high degree of impairment to reduce an accused's culpability to manslaughter, and that the question whether an accused's culpability should be so reduced ultimately turns on a moral judgment made by the trier of fact.

3.47 Under the Commission's recommended reformulation, the following elements must be satisfied in order to establish the defence of diminished responsibility:

1. The accused is otherwise liable for murder.⁹²
2. At the time of the killing, there was a substantial impairment of the accused's capacity to:
 - understand events; or
 - judge whether his or her actions were right or wrong; or
 - control himself or herself.

91. See Forensic Psychiatrists, *Consultation* (20 December 1995) (comprising Drs Ellard and Milton); Forensic Psychiatrists and Psychologists, *Consultation* (6 May 1997) (comprising Drs Barclay, Ellard, Milton, Shea, Taylor and Westmore).

92. As to our discussion regarding the proposal to expand the scope of the defence beyond murder, see further at paras 3.75-3.78.

3. The impairment was due to an abnormality of mental functioning arising from an underlying condition.
4. The impairment was so substantial as to warrant reducing murder to manslaughter.
5. The effect on the accused was not the result of the accused being intoxicated at the time of the killing, where intoxication was self-induced.⁹³

"Abnormality of mental functioning arising from an underlying condition"

3.48 The Commission's reformulation replaces the term "abnormality of mind" with the expression "abnormality of mental functioning arising from an underlying condition".

3.49 In paragraphs 3.34 and 3.35, we noted the criticisms made of "abnormality of mind", that it is an ambiguous and not particularly meaningful term. Our initial reaction to these criticisms was to omit altogether any reference to "abnormality of mind" or a similar phrase, since we considered that any such phrase would be likely to lead to disputes amongst experts as to its exact meaning, and as to whether or not a particular mental condition could be said to fall within it. Instead, diminished responsibility could simply be defined in terms of whether or not the accused was affected as to capacity to understand, to judge, or to control his or her actions. That definition would have the advantage of not requiring experts to reach conclusions on whether a specific condition could be said to amount to an "abnormality of mind". Instead, the expert's attention would be focused on describing the way in which the accused was affected at the time of the killing.

3.50 However, a formulation which does not include a term expressly linking the defence to an underlying concept of mental impairment or mental disorder would risk widening the ambit of the defence too far. Potentially, diminished responsibility might then be pleaded by any person who killed in a heightened emotional state.⁹⁴ We have therefore adopted the term "abnormality of mental functioning arising from an underlying condition". The expression "abnormality of mental functioning" was devised with the assistance of forensic psychiatrists and psychologists. It was considered to overcome some of the confusion amongst experts as to what exactly is intended by the word "mind" in the term "abnormality of mind", and would instead expressly

93. See paras 3.67-3.74.

94. See M Latham, *Consultation* (16 April 1997); Public Defenders, *Consultation* (17 April 1997); P Berman, *Submission* (28 April 1997) at 2.

require experts to consider the way in which an accused's mental processes were affected by reason of some underlying or pre-existing condition.⁹⁵ It also adopts the language of the *Mental Health Act 1990* (NSW), which refers to "mental functioning".⁹⁶ That expression should therefore be more readily understood by expert witnesses. While our formulation retains a reference to "abnormality", which is not a precise expression, we have defined "abnormality" in terms of a person's capacity to understand, judge, and control actions. By limiting the meaning of the term "abnormality" in this way, it is made clear that, by "abnormality of mental functioning", we are really referring to seriously disturbed mental processes, caused by an underlying condition, which affect the accused's capacity in those three respects, and not simply to any behaviour which seems unusual or bizarre. It is considered that, under this formulation, the defence might typically apply to people who, for example, suffer from severe depression or have an intellectual disability, or hypomanic people, but only if they can prove that by reason of these conditions, their capacity to judge, understand, or control their actions was substantially affected.⁹⁷

3.51 Under the reformulation recommended in this Report, the accused's "abnormality of mental functioning" must arise from an "underlying condition". The term "underlying condition" is defined as a pre-existing mental or physiological condition other than of a transitory kind. By including the phrase "arising from an underlying condition" in our reformulation, it is not the Commission's intention to replicate in another form the causes in parentheses under the existing definition in s 23A of the *Crimes Act 1900* (NSW). Nor do we intend to limit the defence to endogenous mental diseases to the exclusion of, for example, people whose capacities are impaired by reason of brain injury. The term "arising from an underlying condition" is intended to link the defence to a notion of a pre-existing impairment requiring proof by way of expert evidence, which impairment is of a more permanent nature than a simply temporary state of heightened emotions. This does not mean that the condition must be shown to be permanent. It simply requires that the condition be more than of an ephemeral or transitory nature. So, for example, a severe depressive illness which is curable would still be considered to come within the definition of "underlying condition", notwithstanding that it is not permanent. On the other hand, a transitory disturbance of mind brought about by heightened emotions, such as extreme anger in typical cases of "road rage", would be excluded from the definition of "underlying condition" and therefore could not form the basis of a plea of diminished responsibility.

95. Forensic Psychiatrists and Psychologists, *Consultation* (6 May 1997).

96. See *Mental Health Act 1990* (NSW) Sch 1.

97. See Forensic Psychiatrists and Psychologists, *Consultation* (6 May 1997).

"Capacity to understand, judge or control"

3.52 The Commission's formulation defines diminished responsibility in terms of a substantial impairment of the capacity to understand events, to judge whether actions are right or wrong, or to control those actions. In this way, we have spelt out what has generally been regarded since *Byrne* as the essential meaning of "abnormality of mind" under the existing statutory formulation.

3.53 While adapting the *Byrne* definition of "abnormality of mind", the Commission has given careful consideration to whether or not the third component, "capacity to control", should be included within our new definition of diminished responsibility.

3.54 We are conscious of the concerns expressed in submissions and in consultations that it will often be difficult for experts to state with any certainty whether or not a person was incapable of controlling that person's actions, or whether that person simply chose not to. In some cases, this is an issue on which expert witnesses inevitably will disagree. We are also aware of the objections concerning the possible application of the defence to people suffering from so-called anti-social personality disorders or "psychopathy". The Commission agrees that so-called "psychopaths" or people suffering from antisocial personality disorders ought not for that reason alone to benefit from the defence of diminished responsibility. Under our formulation, such people may try to raise the defence on the basis that they were incapable of controlling themselves in killing. However, we do not consider that such a claim would succeed, especially given that the accused must satisfy the jury that the impairment arose from an underlying condition and that the impairment was so substantial as to warrant reducing liability from murder to manslaughter. If, on the other hand, consideration of a person's capacity to control himself or herself were excluded altogether from our reformulation of diminished responsibility, there is a risk that other people who should be receiving the benefit of the defence will be unfairly excluded, such as brain damaged people, hypomanic people, or people suffering from auditory hallucinations.⁹⁸ For this reason, we have decided to include this third component, "capacity to control himself or herself", within the reformulation. It will then ultimately be for the jury to decide whether a person really was incapable of controlling himself or herself, to the extent that that person satisfies the additional requirement of proving that murder should therefore be reduced to manslaughter.

3.55 The Commission's reformulation also omits any requirement to identify a specific cause of the accused's condition. Thus it would no longer be necessary to

98. See Forensic Psychiatrists and Psychologists, *Consultation* (6 May 1997).

prove that the accused's condition was caused by an arrested or retarded development of mind, an inherent cause, or a disease or injury. Under the recommended reformulation, the accused must demonstrate an "abnormality of mental functioning arising from an underlying condition" which substantially impaired the capacity to understand, judge, or control actions. This formulation removes the essentially arbitrary requirement for experts and the jury to make a particular diagnosis of an accused's condition. It is our view that, by removing the requirement to diagnose a specific cause, a great deal of disagreement and uncertainty will be avoided in the expert evidence which is presented at diminished responsibility trials.⁹⁹

3.56 We consider that, by removing the requirement to identify a specific cause for mental disorder, we are not widening the scope of the defence of diminished responsibility.¹⁰⁰ On the contrary, the reformulation now makes it very clear that the defence is available only if the accused's *capacity* is impaired in one of three respects, and this impairment arose from some pre-existing condition. As we discussed in paragraph 3.51, this would exclude, for example, people who kill simply as a result of heightened emotions, such as a loss of temper as typically occurs in cases of "road rage". Without additional evidence demonstrating substantial malfunctioning of their mental processes arising from an underlying condition, these people would not be able to prove that their *capacity* to control their actions was impaired.

"Substantial impairment as to warrant reducing murder to manslaughter"

99. See also Forensic Psychiatrists and Psychologists, *Consultation* (6 May 1997); R Milton, *Preliminary Consultation* (28 June 1993).

100. It was suggested in one submission that, by removing the aetiological requirements, the scope of the defence of diminished responsibility would be expanded: see N Cowdery, *Submission* (23 May 1997) at 2. Indeed, the DPP suggested that an offender such as Martin Bryant might have been able to take advantage of the defence of diminished responsibility if it were reformulated according to an earlier draft formulation which we had proposed. The DPP did not specify, however, on what basis or by reason of what mental impairment Martin Bryant would be able to rely in order to raise the defence. In any event, the DPP's suggestion appears to reflect a fundamental misunderstanding of that draft formulation, which would require a person to prove that that person did not have the *capacity* to control his or her actions, rather than simply choosing not to control those actions, and would also require that the jury be satisfied that the impairment of that person's capacity warrants a reduction of liability from murder to manslaughter.

3.57 The Commission's reformulation omits any reference to a substantial impairment of the accused's "mental responsibility". "Mental responsibility" is an ambiguous term which has caused confusion amongst juries and medical experts. Instead, we have included a requirement that there be so substantial an effect on the accused as to warrant reducing murder to manslaughter. In our opinion, this formulation reflects the aim of the phrase "substantial impairment of mental responsibility", namely to direct the jury's attention to its primary task of making a value judgment as to the accused's blameworthiness in light of her or his impaired mental capacity. Our formulation makes clear the distinction between the respective roles of the expert and the jury, with the jury left to determine the ultimate issue of whether the accused should be convicted of manslaughter.¹⁰¹

3.58 In reformulating this element of the defence, the Commission considered adopting the wording proposed by the English Criminal Law Revision Committee, which requires the jury to be satisfied that there is "substantial enough reason to reduce the offence to manslaughter".¹⁰² That formulation probably encapsulates the essence of "substantial impairment of mental responsibility" by presenting the jury starkly with the choice which they are required to make between murder and manslaughter. However, the Commission has concluded that the English formulation is too vague, and does not give the jury an indication of the nature of the criteria which are to guide the decision to acquit of murder and convict of manslaughter on the ground of diminished responsibility.¹⁰³ In contrast, our reformulation requires the jury

101. The Senior Public Defender opposed the Commission's wording of this final element under our recommended reformulation, and suggested instead that the reformulation end in "was substantially impaired by an abnormality of mental functioning so as to warrant reducing murder to manslaughter": see M L Sides, *Submission* (23 May 1997) at 1. The Commission does not adopt Mr Sides' suggestion, however, because we consider it crucial to qualify the words "substantially impaired" in order to indicate a high degree of impairment.

102. England and Wales, Criminal Law Revision Committee, *Offences against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) at para 93, adopted by the Law Commission of England and Wales in cl 56 of its *Criminal Code for England and Wales* (Law Com 177, 1989) and by the Law Reform Commissioner of Victoria, *Provocation and Diminished Responsibility as Defences to Murder* (Report 12, 1982) at para 2.55.

103. See also the criticism of a similar test proposed by the Victorian Law Reform Commission in respect of the defence of provocation: I Leader-Elliott, "Sex, Race and Provocation: In Defence of Stingel" (1996) 20 *Criminal Law Journal* 72 at 96.

to decide whether murder should be reduced to manslaughter by considering the extent to which the accused's capacity to understand events, or to judge, or to control his or her actions, was affected by reason of an underlying condition.

Distinguishing diminished responsibility from the defence of mental illness

3.59 It has been submitted that, under the Commission's reformulation of diminished responsibility, the test for the application of that defence too closely resembles the traditional jury direction for the defence of mental illness,¹⁰⁴ and hence that confusion may arise where both defences are raised in the same trial.¹⁰⁵ In the Commission's view, however, to the extent that our reformulation includes reference to the accused's capacity to control himself or herself, diminished responsibility remains distinct from the defence of mental illness and potentially applies to a wider range of mental conditions. To the extent that our reformulation does resemble the test for the defence of mental illness, by requiring consideration of the accused's capacity to understand events or judge right from wrong, we do not consider that this gives rise to any great difficulty. It must be remembered that the original purpose of the defence of diminished responsibility was to provide a defence for offenders whose mental impairment was not so extreme as to come within the defence of mental illness, yet was significant enough to require departure from the severity of a murder conviction. The two defences are therefore related, and in some cases it will be a question of degree for the jury to determine whether the accused's impairment was so extreme as to come under the defence of mental illness, or was of a lesser degree so as to come within the defence of diminished responsibility.

The ultimate issue rule

3.60 In reformulating diminished responsibility under s 23A of the *Crimes Act 1900* (NSW), the Commission has given consideration to the "ultimate issue rule". In DP 31,¹⁰⁶ we raised a concern about expert witnesses expressing opinions on the "ultimate issue" of the case, that is the very question which the jury must decide in determining whether the defence of diminished responsibility is established.

104. See *R v Porter* (1933) 55 CLR 182.

105. See P Berman, *Submission* (28 April 1997) at 2. This was also one view expressed in Public Defenders, *Consultation* (17 April 1997).

106. See NSWLRC DP 31 at paras 4.30-4.31.

3.61 Several submissions contended that psychiatrists often give evidence on whether or not they consider the accused's mental responsibility to be substantially impaired, even though this is a matter for the jury to determine.¹⁰⁷ Indeed, a criticism which is sometimes made of the defence of diminished responsibility is that it opens the way to abdication of responsibility by the jury because of excessive reliance on the opinions of expert witnesses.¹⁰⁸ To overcome this problem, it was suggested that legislation could preclude expert witnesses from giving evidence on this issue, with the result that juries would be required to decide for themselves without reliance on expert opinions.¹⁰⁹

3.62 The *Evidence Act 1995* (NSW) now abolishes the ultimate issue rule in New South Wales¹¹⁰ (although even prior to its enactment there was some doubt as to whether and in what circumstances the rule applied, particularly in respect of cases involving the defence of diminished responsibility).¹¹¹

3.63 The key concern in relation to the ultimate issue is whether expert evidence should be admissible on the central issue of culpability where the defence of diminished responsibility is relevant. Our reformulation of the definition of diminished responsibility omits the term "substantial impairment of mental responsibility" and focuses instead on the question of whether there was a sufficiently substantial effect on the accused to warrant reducing the charge to manslaughter. This makes it clear that the ultimate issue for the jury is not a medical question but one of culpability and liability. Expert evidence is irrelevant to that ultimate issue. The Commission considers that under the proposed reformulation, expert evidence will only be relevant and admissible in relation to: (a) whether or not there was an abnormality of mental functioning arising from an underlying condition and the relationship of that abnormality to the accused's capacity to understand events, or to judge whether his or her actions are right or wrong, or to control himself or herself; and (b) assessing the effects of self-induced intoxication under our proposed subsection (2).¹¹²

107. R Milton, *Preliminary Consultation* (28 June 1993).

108. See Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility* (Report 34, 1990) at para 143.

109. See M Ierace, *Preliminary Consultation* (2 July 1993).

110. See *Evidence Act 1995* (NSW) s 80.

111. See *R v Tonkin and Montgomery* [1975] Qd R 1 (Qld CCA).

112. See paras 3.67-3.74.

The Commission's reformulation in practice: Chayna's case revisited

3.64 It is useful to test the way in which our reformulation would operate in practice by applying it to the facts in *Chayna's* case, given the particular difficulties which arose in that case in applying the existing formulation for diminished responsibility.

3.65 The jury in *Chayna* was presented with conflicting evidence from seven different psychiatrists regarding their diagnoses of the accused. If this case were retried under the Commission's formulation of diminished responsibility, there would be less scope for such strongly conflicting evidence, since the formulation does not require the expert witness to form a conclusion or diagnosis about the aetiology of the accused's condition. Expert evidence would be focused on the presence of an abnormality of mental functioning, on whether that abnormality arose from an underlying condition, and the effect of that abnormality, if any, on the accused's capacity to understand events, or to judge whether his or her actions were right or wrong, or to control his or her actions. While there would still be potential for conflict in expert evidence as to the existence of an abnormality of mental functioning arising from an underlying condition and as to whether and to what extent the relevant capacities were impaired, that conflict should be reduced. Expert opinions about the ultimate diagnosis of the accused's condition, such as whether that condition happened to amount to schizophrenia or depression or a dissociative state, would not be directly relevant to the issues for the jury to determine.

3.66 Lastly, the trial judge in *Chayna* instructed the jury that the evidence of one of the seven expert witnesses did not support a finding of diminished responsibility. The Court of Criminal Appeal later held that the trial judge had erred in this aspect of his summing up. Under our reformulation, it is clear that the final question of whether an accused suffered from diminished responsibility depends on the jury's assessment of whether there is reason enough to reduce the charge to manslaughter. An expert's opinion about whether the accused suffered from diminished responsibility would not be relevant, and the jury would necessarily have to be instructed by the trial judge that this final question is for them to decide.

Diminished responsibility and intoxication

3.67 Our reformulation of s 23A provides that self-induced intoxication is to be excluded as a ground for pleading diminished responsibility. That provision is an exception to our general approach in relation to diminished responsibility, which is not to exclude any specific condition automatically as a ground for the defence, in order to allow proper consideration of the merits of each individual case. However, the approach taken in relation to self-induced intoxication is consistent with existing legislative policy on the admissibility of evidence of intoxication in relation to criminal offences. That policy is said to be based on the view that it is unacceptable to excuse

otherwise criminal conduct because the accused is suffering from self-induced intoxication, and that people who voluntarily take the risk of becoming intoxicated should be held responsible for their actions.¹¹³

The existing law on intoxication and diminished responsibility

3.68 The courts have consistently refused to regard self-induced intoxication on its own as a condition coming within the defence of diminished responsibility. It has been excluded on the basis that it does not cause damage or destruction of brain cells, but temporarily affects the way in which they function, and is therefore not an "injury" under s 23A of the *Crimes Act 1900* (NSW).¹¹⁴ Alternatively, it has been held that there is no evidence of an abnormality of mind arising from self-induced intoxication so as to satisfy the first element of the defence.¹¹⁵

3.69 While the temporary effects of intoxication have been deemed insufficient to amount to diminished responsibility, it is possible under existing law to establish the defence where the accused is intoxicated but also suffers from a pre-existing condition, such as substantial brain damage arising from past substance abuse. Therefore, there is no defence of diminished responsibility in this situation unless it can be shown that the abnormality of mind exists even when the accused is sober.¹¹⁶ In the case of the brain damaged accused, for example, it must be shown that it is the brain damage, and not simply the temporary state of intoxication, which has caused the accused's abnormality of mind, and subsequent impairment of mental responsibility.¹¹⁷ Similarly, the English Court of Appeal has held that where a person suffers from a pre-existing condition such as an intellectual disability, and kills while

113. See New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 6 December 1995 at 4279.

114. See, for example, *R v Jones* (1986) 22 A Crim R 42 (NSW CCA); *R v DeSouza* (Supreme Court, NSW, Dunford J, 20 October 1995, CLD 70105/94, unreported); cf written submissions for appeal from *R v DeSouza*.

115. See *R v Fenton* (1975) 61 Crim App R 261.

116. *R v Jones* (1986) 22 A Crim R 42 (NSW CCA) per Street CJ at 44; *R v Ryan* (Court of Criminal Appeal, NSW, 30 October 1995, CCA 60299/93, unreported) per Hunt CJ at CL at 9-11.

117. *R v Jones* (1986) 22 A Crim R 42 (NSW CCA) per Street CJ at 44; *R v Ryan* (Court of Criminal Appeal, NSW, 30 October 1995, CCA 60299/93, unreported) per Hunt CJ at CL at 9-11.

Partial defences to murder: Diminished responsibility

intoxicated, that person's intoxicated state must be ignored in order to establish that diminished responsibility results solely from the pre-existing condition.¹¹⁸

3.70 The law is less clear in the case of a person who is addicted to alcohol or drugs and becomes intoxicated as a result of this addiction. The English Court of Appeal held in *R v Tandy*¹¹⁹ that cravings from substance addiction can render involuntary the use of alcohol and its consequential impairment of judgment so as to fall within the defence of diminished responsibility. However, it remains questionable whether this view of the defence would be followed in New South Wales.¹²⁰

3.71 In August 1996, amendments to the *Crimes Act 1900* (NSW) were introduced¹²¹ which provide that evidence of self-induced intoxication cannot be taken into account in determining whether an accused had the requisite intention to commit the offence in question, unless that offence is an offence of specific intent.¹²² Examples of offences of specific intent are listed in the table annexed to s 428B, and include murder. Section 428E of the *Crimes Act 1900* (NSW) provides:

If the evidence of intoxication at the time of the relevant conduct results in a person being acquitted of murder:

(a) in the case of intoxication that was self-induced - evidence of that intoxication cannot be taken into account in determining whether the person had the requisite mens rea for manslaughter, or

118. *R v Egan* [1992] 4 All ER 470.

119. *R v Tandy* [1989] 1 All ER 267.

120. In *R v Ryan*, the New South Wales Court of Criminal Appeal did not need to decide upon this question, although Hunt CJ at CL described the decision in *Tandy* as a "somewhat curious approach": see *R v Ryan* (Court of Criminal Appeal, NSW, 30 October 1995, CCA 60299/93, unreported) per Hunt CJ at CL at 10.

121. See *Criminal Legislation Amendment Act 1996* (NSW) Sch 1[10]. The amendments apply to offences committed after 16 August 1996, the date on which the amendments commenced.

122. *Crimes Act 1900* (NSW) s 428C and 428D. By distinguishing between offences of specific intent and other offences, the amendments adopt the approach taken by the House of Lords in *DPP v Majewski* [1976] 2 All ER 142, and overrule the High Court's decision in *R v O'Connor* (1980) 146 CLR 64.

(b) in the case of intoxication that was not self-induced - evidence of that intoxication may be taken into account in determining whether the person had the requisite mens rea for manslaughter.

3.72 "Intoxication" is defined in s 428A as "intoxication because of the influence of alcohol, a drug or any other substance", and "self-induced intoxication" is defined in the same section as any intoxication except intoxication that:

(a) is involuntary, or

(b) results from fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force, or

(c) results from the administration of a drug for which a prescription is required in accordance with the prescription of a medical practitioner or dentist, or of a drug for which no prescription is required to be administered for the purpose, and in accordance with the dosage level recommended, in the manufacturer's instructions.

3.73 These amendments relating to intoxication do not appear to cover the defence of diminished responsibility. They relate to the question of the accused's "mens rea" or intention in committing the offence, rather than the impact of intoxication on his or her "mental responsibility" under the test for diminished responsibility as provided for in s 23A of the *Crimes Act 1900* (NSW).

The position under the Commission's reformulation

3.74 The Commission's reformulation of the defence removes any requirement to identify the aetiology of the impairment. Following the reasoning of the case law on diminished responsibility and intoxication, there is a risk that our formulation might be misunderstood as applying to states of intoxication, since there is no stated requirement for the effect on the accused to be linked to a specified cause. While the requirement under our reformulation for an underlying condition should be sufficient to limit the defence to pre-existing rather than merely temporary states of mental impairment, we have expressly excluded self-induced intoxication from our definition of diminished responsibility under subsection (2) in order to make it clear that the defence is not to apply to people who kill while under the effects of self-induced intoxication. "Self-induced intoxication" is to be defined in the same terms as it is in s 428A of the *Crimes Act 1900* (NSW). It is our intention that this subsection will reflect the existing legislative policy in New South Wales, so as to ensure that, in assessing a claim of diminished responsibility, the effect of self-induced intoxication is

disregarded where the accused is intoxicated at the time of the killing. The approach taken in *Tandy* toward substance addiction is not adopted in our reformulation. Alcohol and other substances taken to feed an addiction fall within the definition of "self-induced intoxication" and are therefore not covered by the recommended reformulation of the defence.

The scope of the defence

3.75 In reformulating the defence of diminished responsibility, the Commission has given consideration to proposals to extend the defence to charges of attempted murder and to other offences.¹²³

3.76 A number of submissions expressly supported widening the scope of the defence to cover attempted murder and other offences.¹²⁴ It was submitted that it is illogical to restrict diminished responsibility to murder, when offenders who attempt murder or who commit other offences may also be acting under impaired mental capacity. On the other hand, one submission opposed the proposal to extend the defence to charges of attempted murder, although the question of whether to extend it to other offences was not addressed.¹²⁵ It was argued that it is unnecessary to extend the defence to attempted murder, because the maximum statutory penalty for attempted murder is the same as that for manslaughter, that is 25 years' imprisonment.¹²⁶

3.77 The Commission does not support extending the scope of the defence to attempted murder and other offences. Our conclusion is based on a number of considerations. First, while we acknowledge that other offenders may also be acting under impaired mental capacity, conviction for other offences does not carry the same stigma as does conviction for murder. Secondly, it is not evident how diminished responsibility could operate to reduce liability in respect of offences other than murder. Unlike unlawful homicide, which may generally be divided into murder and manslaughter, other criminal offences cannot easily be divided into categories

123. See NSWLRC DP 31 at 104.

124. B Boettcher, *Submission* (18 October 1993) at 1; Mental Health Co-Ordinating Council Inc, *Submission* (4 November 1993) at 2. The Law Society qualified its support by suggesting that the defence be extended to all offences involving violence: Law Society, *Submission* (28 October 1993) at 5.

125. See M L Sides, *Submission* (17 December 1993) at 6.

126. See *Crimes Act 1900* (NSW) s 24 and 27-30.

reflecting degrees of moral blameworthiness. This is a matter which is appropriately left to the sentencing stage. In order to widen the scope of the partial defence of diminished responsibility, either a wide range of criminal offences would have to be redefined, or a finding of diminished responsibility would result in a full acquittal. It is likewise unclear how a successful plea of diminished responsibility would affect a charge of attempted murder. In relation to the defence of provocation and attempted murder, the case law is not consistent as to whether provocation would operate to reduce attempted murder to attempted manslaughter, or whether instead the accused would be fully acquitted.¹²⁷ By analogy, these uncertainties also apply to the potential effect of the defence of diminished responsibility to a charge of attempted murder. In addition, as has been pointed out, conviction for "attempted manslaughter" would not at present result in a lesser maximum penalty than attempted murder. Lastly, as a practical consideration, the impact which extension of diminished responsibility would have on the efficiency of court administration and court time is uncertain.

3.78 When weighed against the difficulties entailed in widening the scope of diminished responsibility, we do not find the arguments outlined in the submissions to be sufficiently compelling to justify extending the defence of diminished responsibility to attempted murder and other offences.

PROCEDURAL ASPECTS OF THE DEFENCE

3.79 The Commission has considered a number of procedural issues in its reform of the defence of diminished responsibility. These relate to:

- use of an alternative forum;
- presentation of expert evidence;
- disclosure of adverse expert evidence;
- disclosure of an intention to plead diminished responsibility;
- compulsory medical assessments;
- burden of proof; and
- indictments for manslaughter on the grounds of diminished responsibility.

127. See, for example, *McGhee v The Queen* (1995) 183 CLR 82; *R v Duvivier* (1982) 29 SASR 217.

Use of an alternative forum: the Queensland model

3.80 A number of submissions, particularly from the medical profession, proposed that diminished responsibility be determined in a forum other than the courts, such as is provided for in Queensland.¹²⁸

3.81 Under the Queensland model, diminished responsibility may be determined by either the courts or by the Mental Health Tribunal under the *Mental Health Act 1974* (Qld).¹²⁹ The Mental Health Tribunal is constituted by a Supreme Court judge assisted by two psychiatric assessors.¹³⁰ Section 28D of the *Mental Health Act* provides that persons charged with an indictable offence (including murder), in cases where there is reasonable cause to believe that they were mentally ill at the time, may be referred to the Tribunal by their nearest relative, legal adviser, or Crown Law Officer, or may apply to the Tribunal themselves. Alternatively, under s 29, where at a trial for an indictable offence, an accused pleads guilty and it appears that he or she is or was mentally ill at the time of the commission of the offence, the court may enter a plea of not guilty on the accused's behalf and order his or her mental condition be assessed by the Tribunal. The Tribunal has power to determine whether the accused suffered from diminished responsibility as defined in s 304A of the *Criminal Code* (Qld). Where the Tribunal determines that diminished responsibility did exist at the relevant time, the proceedings for murder are discontinued, although proceedings may be continued in respect of any other offence constituted by the relevant act or omission.¹³¹ If the Tribunal determines that diminished responsibility did not exist, the accused is not precluded from raising the defence at trial, and evidence of the Tribunal's

128. B Boettcher, *Submission* (18 October 1993) at 1; RANZCP, Section of Forensic Psychiatry, Forensic Study Group, *Submission* (15 October 1993) at 1; S Yeo and S Odgers, *Submission* (29 October 1993) at 7; R Williams, *Submission* (7 June 1995) at 4; B Westmore, *Preliminary Consultation* (14 July 1993) The Mental Health Co-Ordinating Council favoured pre-trial hearings to clarify points of dispute between psychiatrists and to establish clear terms of reference: Mental Health Co-Ordinating Council Inc, *Submission* (4 November 1993) at 1.

129. The Mental Health Tribunal also has jurisdiction to determine whether a person charged with an indictable offence is fit for trial or is of unsound mind: see *Mental Health Act 1974* (Qld) s 33.

130. *Mental Health Act 1974* (Qld) s 28B(2).

131. *Mental Health Act 1974* (Qld) s 35A.

determination is not admissible.¹³² However, medical reports which were ordered or made available to the Tribunal are admissible in any subsequent trial to determine whether the accused suffered from diminished responsibility.¹³³ If a case is not referred to the Tribunal, the accused can still raise the defence of diminished responsibility at trial. A review of the *Mental Health Act 1974 (NSW)* in 1993 supported the continuation of the Mental Health Tribunal as an alternative forum for determining matters relating to mentally ill offenders, on the basis that it contributes to the humane and cost effective management and treatment of these offenders.¹³⁴

3.82 Those submissions which supported the Queensland model claimed that it would provide a non-adversarial context in which to inquire into the true mental state of the accused and would allow for expression of psychiatric views in a co-operative rather than divisive atmosphere. In contrast, the adversarial system as it now exists in New South Wales was said to lead to bias amongst experts in favour of the prosecution or the accused, as well as suppression of information, which discourages accurate psychiatric evaluation. An important advantage of the Queensland model was said to be that expert reports which are relevant to the accused's mental condition are freely available to all persons concerned in the reference of a case to the Mental Health Tribunal.¹³⁵ One submission asserted that there are important benefits for the accused in being able to raise the issue of mental impairment outside of the trial process.¹³⁶ It was argued that it may be strategically difficult for an accused to raise the defence of diminished responsibility at trial, where this conflicts with a principal defence. However, if the accused chooses not to raise diminished responsibility at trial, and he or she is then convicted of murder, the sentencing judge must impose a sentence for murder, not manslaughter, even if there is evidence to

132. *Mental Health Act 1974 (Qld)* s 43A. The accused also has a right to appeal to the Court of Appeal against a determination by the Tribunal that diminished responsibility did not exist. If the appeal is dismissed, the accused may still raise the defence at trial, and evidence of the Court of Criminal Appeal's decision is not admissible: see s 43B.

133. *Mental Health Act 1974 (Qld)* s 28E(4).

134. Queensland Health, *Review of the Mental Health Act: The Forensic Provisions* (Discussion Paper, Number 4, May 1993) at 1.

135. *Mental Health Act 1974 (Qld)* s 28E.

136. See R Williams, *Submission* (7 June 1995) at 1-4.

support diminished responsibility.¹³⁷ If the defence could be heard outside the trial context, the accused would not be disadvantaged by these tactical considerations.

3.83 The proposal to adopt the Queensland model was expressly opposed by two submissions. The Law Society rejected the proposal on the basis that the issue of diminished responsibility should be left entirely with the jury.¹³⁸ In contrast, the (then) Acting Senior Public Defender considered that consideration of an alternative forum was unnecessary since there is provision for trials by judge alone in New South Wales.¹³⁹

3.84 The Commission does not consider that an alternative body should be established to hear diminished responsibility cases. In our view, the defence of diminished responsibility ought primarily to be left to the jury to consider within the trial process. The defence requires value judgments to be made regarding the extent of an accused's culpability for a very serious crime. As such, it should be the jury, within a publicly conducted hearing of the usual kind, and not a specialist panel of experts, which determines culpability. The defence of mental illness and the issue of an accused's fitness to be tried are both matters which are currently determined within the criminal trial process by a jury (unless the accused elects the matter to be heard by judge alone).¹⁴⁰ We see no reason why an exception should be made to allow for the defence of diminished responsibility to be heard by a specialist body. Many of the complaints raised by the submissions in relation to the current procedure for hearing diminished responsibility reflect criticisms which are made in respect of the adversarial system generally, and in particular in respect of the use of expert evidence

137. This was the outcome in *R v Turner* (Court of Criminal Appeal, NSW, 4 March 1994, CCA 60683/92, unreported).

138. Law Society, *Submission* (28 October 1993) at 5.

139. M L Sides, *Submission* (17 December 1993) at 6.

140. See *Mental Health (Criminal Procedure) Act 1990* (NSW) s 11(1), 21A, 22(1)(b) and 37. There is provision in the Act for the accused to elect for a judge to determine the question of fitness to be tried: s 11A. Similarly, an accused who raises the defence of mental illness at trial may elect for a trial by judge alone, subject to the prosecution's consent: see *Criminal Procedure Act 1986* (NSW) s 32(1). See further at paras 3.25-3.28.

within the trial process.¹⁴¹ These are issues which fall outside the Commission's terms of reference.

3.85 We do recognise that there are potential disadvantages and particular practical difficulties in relation to the hearing of diminished responsibility cases within the trial context. In the discussion which follows, we consider ways in which some of these difficulties might be overcome.

Presentation of expert evidence

3.86 Several concerns regarding procedures for psychiatric and psychological assessment of diminished responsibility offenders have been brought to the Commission's attention.

3.87 First, concern has been expressed about delays which may occur between the time of the commission of an offence and referral for assessment. One study of homicide offenders in New South Wales in 1992 found that the accused was often not referred for assessment until many months after the commission of the offence, and shortly before trial. As a consequence of such delays, psychiatrists and psychologists may have to enter into some degree of speculation in an attempt to reconstruct the accused's mental state at the time of the killing, and determine whether any mental disturbance now evident is simply a reaction to the killing, or was in fact present at the time of the killing. This in turn may result in disagreement between expert witnesses, who may have differing views of what the accused's mental state was at the time of the killing.¹⁴²

141. See, for example, I Freckelton, *The Trial of the Expert: A Study of Expert Evidence and Forensic Experts* (Oxford University Press, Melbourne, 1987), especially at 132-136; I Freckelton, "The Evolving Role of the Forensic Expert" in *Tomorrow's Law* (Federation Press, Sydney, 1995) at 52; AJ Rogers, "Judges in Search of Justice" (1987) 10 *University of New South Wales Law Journal* 93. See also K Gosman, "AMA push for expert court panel" *The Sunday Telegraph* (3 September 1995) at 33.

142. See J Parmegiani, *Homicide and Mental Illness: The Role of Forensic Psychiatry in NSW Courts* (Dissertation for Section Two of the FRANZCP Examination, November 1992) at 41. For example, in *Chayna's case*, one psychiatrist disagreed with other expert witnesses to the extent that she considered the accused's disturbed mental state at the time of examination to be simply a reaction to the killing, rather than as evidence of any disturbance present at the time of the killing.

3.88 Secondly, two submissions expressed concern that some experts' reports are prepared in an unprofessional manner, often after spending minimal time with the accused.¹⁴³ In a similar vein, it has been suggested that the frequency of different diagnoses and expert opinions regarding the defence may be due to a large extent to the unstructured way in which the accused is interviewed by the psychiatrist or psychologist.¹⁴⁴

3.89 As to the contents of the expert's report, Associate Professor Susan Hayes, a psychologist, has noted the importance of including precise details of the assessment process.¹⁴⁵ This practice would be especially helpful to the courts where there is a large amount of conflicting evidence. It has also been suggested that psychiatrists should be more critical of the evidence they put forward and should be more stringent about their opinions.¹⁴⁶

3.90 Several submissions supported the introduction of a special code of ethics for forensic psychologists and psychiatrists, and the provision of more adequate training and/or accreditation for such experts to address the concerns raised above.¹⁴⁷

3.91 While the Commission encourages discussion of these issues within the appropriate professional bodies, particularly in relation to the formulation of guidelines or a code of ethics, we do not consider it either necessary or appropriate to make any recommendation regarding greater regulation of forensic psychiatrists and psychologists. At present, there is scope for issues affecting the accuracy of an expert's report or testimony, such as delay in interviewing the accused, to be brought to the jury's attention through cross-examination of the expert witness.

143. W Barclay, *Preliminary Consultation* (8 July 1993); J Phillips, *Preliminary Consultation* (8 July 1993).

144. J Parmegiani (1992) at 41.

145. S Hayes, "Diminished Responsibility: The Expert Witness' Viewpoint" in S Yeo (ed) (1990) at 156.

146. Especially regarding brain damage and the neurophysiological basis for the control of aggression: see W Barclay, *Diminished Responsibility: The Psychiatrist's View*, paper presented at Public Defenders' seminar (Sydney, 20 February 1992) at 14.

147. Mental Health Co-Ordinating Council Inc, *Submission* (4 November 1993) at 1; W Barclay, *Preliminary Consultation* (8 July 1993); B Westmore, *Preliminary Consultation* (14 July 1993).

Disclosure of adverse expert evidence

3.92 The accused is not required to disclose to the prosecution any experts' reports which do not support the accused's case. It was submitted that, as a consequence, the jury is not presented with an unbiased, accurate psychiatric evaluation of the accused.¹⁴⁸ The present system was said to encourage "report shopping", whereby the accused consults a number of experts and suppresses any unfavourable reports. In contrast, the prosecution has a general duty to disclose to the defence all material which the prosecution has assembled, including material which is advantageous to the accused.¹⁴⁹

3.93 At law, only those reports which are prepared in contemplation of a criminal trial are likely to be protected from access by the prosecution under cover of legal professional privilege (or "client legal privilege").¹⁵⁰ Reports prepared by treating doctors before the trial was contemplated will not be protected by privilege, and the prosecution should therefore be able to gain access to them, although the accused is under no duty to disclose their existence. However, there is concern that in some cases particular specialists will be retained by the defence in a deliberate effort to ensure that they will not be available as witnesses for the prosecution and with the knowledge that the resulting report, if unfavourable, can be suppressed.

3.94 The concerns expressed in relation to suppression of unfavourable reports reflect a general criticism which is made of the adversarial system and its potential for "expert shopping" which may result in a biased presentation of expert views. The Commission recognises these concerns. However, we do not consider that there is any justification for compelling the accused in diminished responsibility cases to disclose adverse medical reports, which may otherwise be privileged, when there is no such compulsion in any other area of criminal proceedings.

148. RANZCP, Section of Forensic Psychiatry, Forensic Study Group, *Submission* (15 October 1993) at 3.

149. See *Clarkson v DPP* [1990] VR 745 at 755; *R v Ward* [1993] 2 All ER 577; *R v CPK* (Court of Criminal Appeal, NSW, 21 June 1995, CCA 60330/94, unreported).

150. See *Evidence Act 1995* (NSW) s 119. It would now appear that s 119 governs the operation of legal professional privilege in respect of pre-trial procedures as well as trial procedures: see *Telstra Corp Limited v Australis Media Holdings Pty Limited* (Supreme Court, NSW, McLelland CJ in Eq, 20 February 1997, ED 3633/96, unreported).

Defence disclosure, compulsory assessment, and the right to silence

3.95 The Commission has become aware of problems which the prosecution in particular may encounter in trials where the defence of diminished responsibility is pleaded. These arise from the absence of any legal compulsion of the accused to disclose an intention to plead diminished responsibility or to submit to psychiatric or psychological assessment. Traditionally, such requirements have been resisted on the basis that they infringe upon the accused's right to remain silent.

Disclosure by the accused of an intention to plead diminished responsibility

3.96 There is no legal requirement in New South Wales that an accused give advance notice of an intention to plead diminished responsibility at trial. This reflects the general principle that an accused has the right to remain silent, being presumed innocent until the prosecution proves guilt.¹⁵¹ However, a limited exception to these fundamental principles is made in respect of alibi evidence led by the accused, so that if the accused wishes to lead such evidence, he or she is required to give advance notice of such intention to the prosecution.¹⁵² In DP 31, the Commission considered a proposal to make a similar exception in respect of the defence of diminished responsibility, in order to allow the prosecution proper opportunity to arrange for their psychiatrists or psychologists to evaluate the accused.¹⁵³

151. See New South Wales Law Reform Commission, *Criminal Procedure: Procedure from Charge to Trial: Specific Problems and Proposals* (Discussion Paper 14, 1987) Vol 1 at para 5.1; R Leng, "Losing Sight of the Defendant: The Government's Proposals on Pre-Trial Disclosure" [1995] *Criminal Law Review* 704. Similarly, the Law Society opposed any proposal requiring the accused to give advance notice to the prosecution of an intention to lead evidence in support of the defence, on the grounds that such a requirement would be an unreasonable intrusion on the right of the accused to remain silent: see Law Society, *Submission* (28 October 1993) at 5.

152. See *Crimes Act 1900* (NSW) s 405A(1). Similarly, if a party in proceedings, including the accused in criminal proceedings, intends to lead evidence of tendency or coincidence, or first-hand hearsay evidence, that party must now generally give advance notice of that intention: see *Evidence Act 1995* (NSW) s 67, 97 and 98.

153. See NSWLRC DP 31 at para 4.34-4.35 and at 104.

3.97 In practice, although the accused has no legal obligation to disclose, there are some informal procedures in place for pre-trial disclosure generally. For example, the prosecution and the accused's legal representative may often be involved in informal negotiations or may exchange experts' reports before the trial. In addition, the Supreme Court has developed Standard Directions for pre-trial disclosure in criminal proceedings, although these do not specifically direct the accused to reveal whether he or she will be relying on a particular defence.

3.98 A number of submissions strongly supported the proposal that legislation provide for compulsory disclosure of an intention to rely on the defence of diminished responsibility.¹⁵⁴ The present system was said to allow for trials by ambush by the accused, in which the prosecution has little opportunity to engage a psychiatrist or psychologist to evaluate the accused, prepare a report, and give evidence. This may produce inequities in so far as the jury is not presented with a balanced or accurate view of the accused's mental state. A requirement of advance notice should assist in overcoming these problems, and should also have the advantage of clarifying points of dispute between experts in advance of trial, thus making their evidence more readily understandable to juries.¹⁵⁵ However, one submission strongly resisted any requirement for compulsory disclosure by the accused, on the basis that this would lead to a gradual erosion of the accused's right to silence.¹⁵⁶

Requirement to submit to expert's assessment

3.99 There is no legal provision to compel an accused within a criminal trial to submit to an assessment by the prosecution's psychiatrist or psychologist. It was suggested that this may greatly impede the prosecution's ability to rebut a plea of diminished responsibility. If the prosecution's expert witnesses are not able to interview the accused, their evidence is necessarily limited.¹⁵⁷ Arguably the jury is then denied the opportunity to consider the plea based on adequate information from both sides. Indeed, it was suggested that the introduction of a requirement for

154. See N Cowdery, *Submission* (23 May 1997) at 3; Mental Health Co-Ordinating Council Inc, *Submission* (4 November 1993) at 1; R Milton, *Preliminary Consultation* (28 June 1993); M Ierace, *Preliminary Consultation* (2 July 1993); R Blanch, *Preliminary Submission* (12 May 1993).

155. See Mental Health Co-Ordinating Council Inc, *Submission* (4 November 1993) at 1.

156. R Button, *Submission (Oral)* (16 April 1997).

157. R Blanch, *Preliminary Submission* (12 May 1993).

compulsory disclosure of an intention to plead diminished responsibility would be of little practical benefit if the prosecution were then unable to compel the accused to submit to an assessment by the prosecution's experts.¹⁵⁸

3.100 A provision to compel the accused to submit to an assessment in diminished responsibility cases would appear to be a significant infringement of the accused's right to remain silent. There is a risk that the accused will be questioned by the prosecution's expert about facts relating to the commission of the offence, which may later be used to incriminate him or her.¹⁵⁹ On the other hand, it may be argued that it is in the interests of justice that the prosecution's experts be able to undertake their own examination of the accused. Limited provisions do currently exist to allow a judge to request an accused person to submit to a psychiatric or other examination in the context of proceedings for fitness to be tried and certain summary proceedings before a magistrate against a person affected by a mental disorder.¹⁶⁰ However, these procedures operate, at least in theory, outside the adversary context, and are separate from the trial of that person for the offence with which he or she is charged.¹⁶¹ There is therefore not the same risk that the accused may incriminate himself or herself. There is no legislative provision which compels an accused to submit to a medical examination where the defence of mental illness has been raised at trial.

3.101 It is evident that concerns about compulsory disclosure and assessment in diminished responsibility cases are part of a much larger issue, namely the extent to which the accused's right to silence should continue to be protected in our criminal justice system. That issue has been the subject of various reviews in a number of jurisdictions, particularly in relation to procedures for compulsory pre-trial disclosure in criminal proceedings. For example, under Victorian legislation since 1993, a court may compel the defence in criminal proceedings to serve on the prosecution copies of

158. See M Latham, *Consultation* (16 April 1997); Public Defenders, *Consultation* (17 April 1997); P Berman, *Submission* (28 April 1997) at 3.

159. This is especially so now under s 60 of the *Evidence Act 1995* (NSW), which provides that evidence of an out-of-court statement that is admissible for a non-hearsay purpose is also admissible as evidence of the facts asserted, as an exception to the rule against hearsay.

160. *Mental Health (Criminal Procedure) Act 1990* (NSW) s 10(3)(d), 10(3)(e) and 32(3)b).

161. See NSWLRC Report 80 at paras 5.31-5.34.

statements of expert witnesses whom the defence intends to call at trial.¹⁶² In other jurisdictions, however, the proposal for compulsory pre-trial disclosure by the accused has been rejected for pragmatic reasons¹⁶³ and on the basis that such a requirement violates the accused's privilege to refrain from disclosing his or her case until the prosecution presents its case.¹⁶⁴ The question of pre-trial disclosure by the accused was previously considered in New South Wales in the late 1980s, and legislative provisions for a form of pre-trial disclosure were proposed.¹⁶⁵

3.102 The question of the extent to which the accused's right to silence generally should be protected by the law is beyond the scope of the Commission's present reference. We consider that a separate review of this issue needs to be undertaken.¹⁶⁶ For this reason, we make no recommendations in this Report in

162. *Crimes (Criminal Trials) Act 1993* (Vic) s 5 and 11.

163. For example, the Criminal Law Revision Committee, England and Wales, specifically considered the question of whether there should be compulsory disclosure of an intention to plead diminished responsibility, but rejected any such requirement on the ground that it was unnecessary since, in practice, the prosecution was rarely ever taken by surprise: England and Wales, Criminal Law Revision Committee, *Offences against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) at para 97. The Canadian Federal/Provincial Task Force on Uniform Rules of Evidence rejected the proposal for compulsory pre-trial disclosure of expert reports by the accused, partly on the basis that such a requirement would cause delays and would be impracticable in cases where the expert was unable to provide an opinion until immediately before the trial: Federal/Provincial Task Force on Uniform Rules of Evidence, *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (Carswell Company Ltd, Toronto, 1982) at 101.

164. See Federal/Provincial Task Force on Uniform Rules of Evidence, *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (Carswell Company Ltd, Toronto, 1982) at 101.

165. See NSWLRC DP 14, Vol 1, chapter 5, especially at paras 5.65-5.68; J Dowd, *Discussion Paper on Reforms to the Criminal Justice System* (NSW Attorney General's Department, May 1989) at 2 and 51-56.

166. At the DPP Criminal Justice Workshop on 16 March 1997, there was unanimous agreement amongst participants that the NSW Law Reform Commission should be given a reference on the accused's right to silence. Such a request has already been made by the DPP on behalf of those participants.

relation to procedures for compulsory disclosure and assessment in diminished responsibility cases. However, we do note that there are special considerations in this type of case which support a legal requirement for the accused to give advance notice of an intention to plead diminished responsibility, to serve those medical reports intended to be relied on, and, perhaps, to submit to a psychiatric or psychological assessment. First, evidence of diminished responsibility is generally a matter which is wholly within the accused's knowledge. Secondly, the integral role of expert evidence in relation to the defence means that the prosecution encounters particular difficulties in rebutting diminished responsibility without adequate notice and provision to examine the accused. Thirdly, it may be argued that in such cases, the accused's right to silence and presumption of innocence are not infringed, since admission of having committed the act in question is implicit in reliance on the defence. Lastly, we consider that it is necessary to balance the interests of the accused with the interests of the general community in ensuring that adequate time is allowed for the accused's case to be properly tested by the prosecution. While we recognise that there is a risk of compromising an accused's right to silence by any form of compulsory disclosure and assessment, we consider that the special circumstances of pleading diminished responsibility justify such a requirement in relation to that defence. In principle, the same considerations may also apply to procedures for pleading the defence of mental illness.

Indictments for manslaughter by reason of diminished responsibility

3.103 At present, diminished responsibility may only be raised by the accused as a partial defence on an indictment for murder. In DP 31,¹⁶⁷ the Commission considered an option to provide for indictments for manslaughter on the grounds of diminished responsibility. Diminished responsibility would then operate as both an offence and a defence, similar to the current provisions for infanticide.¹⁶⁸ This might be said to have advantages where, for example, there is strong medical evidence available to the Crown from the outset of the case which indicates that the accused suffered from diminished responsibility.

3.104 A similar proposal has previously been considered by the English Criminal Law Revision Committee and the Law Reform Commission of Victoria.¹⁶⁹ Both

167. See NSWLRC DP 31 at 103.

168. See *Crimes Act 1900* (NSW) s 22A. See further at paras 3.22-3.23.

169. See England and Wales, Criminal Law Revision Committee, *Offences against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) at paras 95, 96; Law Reform Commissioner of Victoria, *Provocation and Diminished Responsibility as Defences to Murder* (Report 12, 1982) at para 2.72.

recommended that the prosecution should be permitted to lay an indictment for manslaughter by reason of diminished responsibility instead of murder, but only if the accused consents to the indictment. It was considered necessary to require the accused's consent because there may be situations where he or she wishes to plead another defence to a charge of murder, such as alibi or mistaken identity.

3.105 The proposal to allow indictments for manslaughter by reason of diminished responsibility was considered by the Law Society of New South Wales, which supported this option.¹⁷⁰ Despite the Law Society's support, the Commission has concluded that it is unnecessary to provide for indictments for manslaughter by reason of diminished responsibility. There is already provision under s 394A of the *Crimes Act 1900* (NSW) to allow the prosecution to accept a plea of guilty to manslaughter in discharge of an indictment for murder. In addition, where it is clear that the accused suffered from an impaired mental capacity at the time of commission of the offence, the prosecution may choose simply to exercise its discretion by laying an indictment for manslaughter, which does not require proof of the same degree of criminal intention as is required for murder. Given these existing powers, it would be unnecessary to provide the prosecution with an additional power to lay an indictment for manslaughter by reason of diminished responsibility. Moreover, such a provision would raise problems relating to the elements of the offence which the prosecution would be required to prove. Presumably, it would be necessary for the prosecution to prove not only that the accused killed the victim, but also that he or she suffered from some impairment at the time. While in practice the prosecution would be unlikely to lay an indictment for manslaughter by reason of diminished responsibility unless there was strong evidence to support a finding of mental impairment, in theory there would be the risk that the accused would be acquitted where the tribunal of fact found that he or she killed the victim but did not suffer any impairment at the time.

Burden of proof

3.106 There is said to be a general presumption that an accused person is sane until he or she proves otherwise. As a consequence of this, the burden of proof for both the defences of mental illness and diminished responsibility rests on the accused. In relation to diminished responsibility, therefore, it is the accused who must prove, on the balance of probabilities, that he or she suffered from diminished responsibility at the time of the unlawful killing.¹⁷¹

170. Law Society, *Submission* (28 October 1993) at 4.

171. *Crimes Act 1900* (NSW) s 23A(2).

3.107 This position has been criticised for being inconsistent with the general principle that it is the prosecution who bears the persuasive burden of proving its case against the accused. Following this principle, it is argued that, once an accused has raised evidence of mental disturbance to rebut the presumption of sanity, it should then be the prosecution who bears the burden of disproving the defence.¹⁷² Moreover, the burden of proof for diminished responsibility is inconsistent with the burden of proof in respect of the partial defence of provocation: where there is sufficient evidence that an accused may have been provoked, it is for the prosecution to prove beyond a reasonable doubt that the defence of provocation is not made out.¹⁷³ There is concern that, where both diminished responsibility and provocation are raised together, juries may be confused by the distinctions in the burden and standard of proof for the two defences.¹⁷⁴ In view of these criticisms, several submissions supported a shift in the burden of proof for diminished responsibility to the prosecution.¹⁷⁵

3.108 Despite these criticisms, the Commission is of the view that the burden of proof in relation to the defence of diminished responsibility should remain on the accused. Diminished responsibility is a special matter which calls for expert evidence intimately connected with facts wholly known to the accused. It is therefore appropriate that the accused should continue to bear the burden of proof. To the extent that the burden of proof is different for the defence of provocation, this reflects the different nature of that defence, which does not rely on expert evidence to rebut the general presumption of sanity. Provided that diminished responsibility and provocation remain markedly different in concept and by definition, we do not agree that confusion will arise from the differing burdens of proof where the two are raised together.

172. See Fisse (1990) at 472; Williams (1983) at 645.

173. *Crimes Act 1900* (NSW) s 23(4). The Commission will be releasing a separate report which reviews the defence of provocation and the offence/defence of infanticide.

174. See England and Wales, Criminal Law Revision Committee, *Offences against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) at para 94; Law Reform Commissioner of Victoria, *Provocation and Diminished Responsibility as Defences to Murder* (Report 12, 1982) at para 2.67.

175. See NSWLRC DP 31 at paras 4.21-4.22.

SENTENCING OF DIMINISHED RESPONSIBILITY OFFENDERS

3.109 The Commission has considered the sentencing options which are available to offenders convicted of manslaughter by reason of diminished responsibility. In particular, we have considered whether provision should be made for hospital orders for diminished responsibility offenders, and what provision, if any, should or could be made for the sentencing of "dangerous offenders".

3.110 In New South Wales, diminished responsibility offenders are sentenced for manslaughter, the statutory maximum penalty for which is penal servitude for 25 years.¹⁷⁶ Manslaughter generally attracts a wide range of sentencing options, ranging from the maximum prison term, to release on a good behaviour bond. In the Judicial Commission's study for the period 1990 to 1993, offenders who were convicted of manslaughter by reason of diminished responsibility were all sentenced to full time custody.¹⁷⁷ There is at present no provision for hospital orders to be made as a specific alternative to imprisonment for diminished responsibility offenders. Instead, such offenders, while serving their sentences in prison, may participate in psychological programmes or be placed in units for offenders with an intellectual disability.¹⁷⁸ There are also general provisions in the mental health legislation for prisoners suffering from a mental illness to be transferred to a hospital. These provisions are discussed in more detail below.

3.111 Determining appropriate sentences for diminished responsibility offenders may be difficult, as special and potentially contradictory sentencing principles apply. Indeed, the courts have commented on the difficulty in reconciling these principles, describing sentencing in these cases as a "sensitive and difficult task".¹⁷⁹ On the one

176. *Crimes Act 1900* (NSW) s 24.

177. See H Donnelly, S Cumines and A Wilczynski (1995) at 98.

178. The Long Bay Development Unit was opened in October 1995 and caters for up to 18 inmates with intellectual disabilities of all security classifications. There is also a development unit at Goulburn, but that unit is restricted to 12 minimum security inmates. The Department of Corrective Services also runs a Psychology Service. Psychologists are available at all correctional centres in New South Wales, with the exception of Broken Hill Correctional Centre. Psychology staff provide assessment, individual and group interventions and reports on inmates: see Department of Corrective Services, *Annual Report 1995/96* at 15 and 32. See also NSWLRC Report 80 at paras 11.4-11.16.

179. See *R v Falconetti* (Court of Criminal Appeal, NSW, 24 March 1992, CCA 60436/91, unreported) at 3.

hand, the fact that the offender suffered from a reduced mental capacity may operate as a mitigating factor in sentencing, and principles of general deterrence and retribution may be given little weight.¹⁸⁰ However, considerations of general or even personal deterrence are not completely irrelevant, and the significance of an offender's mental incapacity must be evaluated in the light of the particular circumstances of the individual case.¹⁸¹ Therefore, a finding of diminished responsibility will not in itself automatically result in a more lenient sentence.¹⁸² The fact that an offender's mental disorder makes him or her a continuing danger to society may mean that the sentence will not be reduced, even though the offender acted under diminished mental capacity. The sentencing court may consider the need to protect society when determining what is an appropriate sentence, although this consideration cannot justify a longer sentence than would be objectively appropriate in light of the gravity of the crime.¹⁸³ Thus an offender may be sentenced to the maximum term of penal servitude for 25 years where the sentencing judge considers that he or she is a continuing danger to the community, and the gravity of the crime makes this an appropriate penalty.¹⁸⁴ Both anecdotal¹⁸⁵ and statistical evidence¹⁸⁶ suggests that sentences for diminished responsibility offenders tend to fall at the upper end of the sentencing range for manslaughter. Moreover, in such cases the

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180. For example *R v Anderson* [1981] VR 155. On sentencing principles and factors determining individual sentences, see further NSWLRC DP 33 at chapters 3 and 5.
181. See *R v Wright* (Court of Criminal Appeal, NSW, 28 February 1997, CCA 9700360, unreported).
182. See *R v Low* (1991) 57 A Crim R 8 per Lee CJ at CL at 19; *R v Engert* (Court of Criminal Appeal, NSW, 20 November 1995, CCA 60654/94, unreported).
183. *R v Kocan* [1966] 2 NSW 565; *Veen v The Queen (No 2)* (1988) 164 CLR 465.
184. See *R v Evers* (Court of Criminal Appeal, NSW, 16 June 1993, CCA 60086/92, unreported).
185. See Public Defenders, *Consultation* (17 April 1997).
186. In the Judicial Commission's study, the median sentence for manslaughter in New South Wales for 1990-1993 was slightly over five years. However, over half (72 per cent) of offenders sentenced on the basis of diminished responsibility received full terms of eight years or more: see H Donnelly, S Cumines and A Wilczynski (1995) at 98.

sentencing judge may be likely to find special circumstances under s 5(2) of the *Sentencing Act 1989* (NSW), to allow the imposition of a substantial additional term so that the Parole Board, acting on the advice of prison medical authorities, has a discretion as to when the offender should be released.¹⁸⁷

3.112 The Commission has considered a proposal to expand the range of sentencing options available for diminished responsibility offenders by permitting hospital orders to be made as an alternative to imprisonment.¹⁸⁸ Such provision exists in the United Kingdom under s 37 of the *Mental Health Act 1983* (UK), which applies to people convicted of offences punishable by imprisonment, not including murder. The section permits a person to be committed to a psychiatric hospital or to a local services authority, based on the evidence of two medical practitioners that detention for treatment is appropriate. Section 41 of the *Mental Health Act 1983* (UK) permits the making of restriction orders to prevent the discharge of these offenders without the consent of the Home Secretary. Similar provisions for the making of hospital orders as an alternative to prison exist in Victoria, and under the Commonwealth *Crimes Act 1914*.¹⁸⁹

3.113 It was submitted to the Commission that there is a need for reform of the sentencing options for diminished responsibility offenders in New South Wales.¹⁹⁰ It was argued that many of these offenders suffer serious emotional disorders which are likely to cause them to repeat the offence unless these disorders are evaluated, treated, and taken into account before release. Under the present system, these offenders may receive little psychiatric counselling or treatment in prison, and are then released according to the normal system for parole. It was suggested that this can potentially lead to the release of people with persisting psychiatric disorders, with resultant further tragedy. It may be that hospital orders provide a more humane alternative to imprisonment for offenders who are suffering from certain mental disorders, since they allow an opportunity for proper treatment. As well, they may offer greater protection to the community if offenders who continue to pose a threat may be indefinitely detained in hospital.

187. *R v Falconetti* (Court of Criminal Appeal, NSW, 24 March 1992, CCA 60436/91, unreported) at 3.

188. See NSWLRC DP 31 at 105.

189. See *Sentencing Act 1991* (Vic) Part 5; *Crimes Act 1914* (Cth) s 20BS.

190. RANZCP, Section of Forensic Psychiatry, Forensic Study Group, *Submission* (15 October 1993) at 3.

3.114 Legislative provisions in New South Wales now deal with mentally ill prisoners generally (as well as other mentally ill persons), under the *Mental Health Act 1990* (NSW). There is provision for the involuntary detention in a hospital of persons suffering from a "mental illness" where this is considered necessary for the person's own protection from serious harm, or for the protection of others from serious harm.¹⁹¹ Detention in these circumstances is potentially indefinite and does not require the person to have committed any criminal offence before it is imposed. As well, there is provision for a prisoner to be transferred to a hospital as a "forensic patient"¹⁹² on the order of the Chief Health Officer of the Department of Health, where that person is "mentally ill".¹⁹³ A prisoner who is not "mentally ill" but who suffers from a mental condition for which treatment is available in hospital may also be transferred from prison to hospital, but only if the prisoner consents to the transfer.¹⁹⁴ If there is no earlier recommendation by the Mental Health Review Tribunal that the prisoner cease to be held in hospital as a forensic patient,¹⁹⁵ that prisoner will cease to be held as a forensic patient upon the expiry of his or her sentence, or upon release on parole.¹⁹⁶

191. See *Mental Health Act 1990* (NSW) s 9 and 21. Under s 9, a mentally ill person may also be detained where this is considered necessary to protect that person from serious financial harm or serious damage to the person's reputation. Amendments to s 9 are proposed in the *Mental Health Legislation Amendment Bill 1997* which is currently before Parliament. These amendments are not relevant to this discussion.

192. See *Mental Health Act 1990* (NSW) Sch 1.

193. *Mental Health Act 1990* (NSW) s 97.

194. *Mental Health Act 1990* (NSW) s 98.

195. See *Mental Health Act 1990* (NSW) s 82 and 86. Under s 82, the Tribunal must make recommendations every six months as to (amongst other things) the release of a forensic patient. However, the Attorney General has the power to veto any recommendation made by the Tribunal for the release of a forensic patient under s 82: see s 84. As to the Attorney General's power of veto, see NSWLRC Report 80 at paras 5.51 to 5.55.

196. See *Mental Health Act 1990* (NSW) s 105 and 107.

Any time spent by a prisoner in hospital as a forensic patient is treated as if it were a period of imprisonment served in prison.¹⁹⁷

3.115 While these legislative provisions are available for the treatment of mentally disturbed prisoners, it may be that some diminished responsibility offenders will not be covered by them if the mental impairment from which they suffer does not fall within the definition of "mental illness" under the *Mental Health Act 1990*. "Mental illness" is limited by the Act to conditions which seriously impair, either temporarily or permanently, a person's mental functioning and which are characterised by delusions, hallucinations, serious disorder of thought form, a severe disturbance of mood; and/or repeated or sustained irrational behaviour indicating the presence of one or more of the symptoms listed above.¹⁹⁸ Some have expressed particular concern that this definition of mental illness may not apply to some offenders who, by reason of mental disturbance, pose a continuing danger to the community at the end of their sentence, and who must therefore be released without any means to detain them in a hospital or in prison.¹⁹⁹

3.116 While the Commission acknowledges the various concerns raised in relation to the sentencing of diminished responsibility offenders, we do not make any recommendation for additional sentencing options for these people. Our reasons for this are as follows. First, unlike the defence of mental illness, an offender who successfully pleads diminished responsibility is not completely acquitted but is

197. *Mental Health Act 1990* (NSW) s 100.

198. *Mental Health Act 1990* (NSW) Sch 1.

199. See Forensic Psychiatrists and Psychologists, *Consultation* (6 May 1997). These concerns were recently expressed in relation to the controversy in New South Wales arising from the case of Gregory Kable, who had been sentenced to a minimum term of four years' imprisonment after the Crown accepted a plea of guilty to manslaughter on the grounds of diminished responsibility. While in prison, Mr Kable sent threatening letters to the victim's relatives. He did not come under the provisions of the *Mental Health Act 1990* (NSW), and so at the expiration of his sentence, the government introduced legislation to detain him in prison on the basis of his continuing "dangerousness" to the community: see *Community Protection Act 1994* (NSW). That legislation was later struck down by the High Court as invalid, on the basis that it required a State court, vested with Federal jurisdiction, to exercise non-judicial power in breach of the conditions imposed on Federal courts by Chapter 3 of the Commonwealth Constitution: see *Kable v Director of Public Prosecutions* (NSW) (1996) 70 ALJR 814.

convicted of a lesser charge for an unlawful killing. It is appropriate that this be recognised by the imposition of a determinate sentence. Secondly, provision exists already under the mental health legislation for offenders in need of psychiatric treatment to be referred to a hospital. We are conscious of the fact that, in practice, mental illness amongst prisoners may frequently be left undetected and undiagnosed, and subsequently mentally ill prisoners may often be denied the opportunity for proper treatment. The definition of "mental illness" under the *Mental Health Act 1990* (NSW) may also be too narrow to accommodate all mentally ill prisoners in need of treatment.²⁰⁰ However, these are issues which fall outside our terms of reference. We note that legislation does exist for the psychiatric care of mentally ill offenders, and stress that the problems relating to the operation of that legislation would not necessarily be overcome by introducing further legislation for the making of hospital orders.

200. See Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (AGPS, Canberra, 1993) ("the Burdekin report"), chapter 25.

APPENDIX A: SUBMISSIONS RECEIVED

1. Mr R Blanch QC (Director of Public Prosecutions), 7 September 1993
2. Dr P Easteal, 14 September 1993
3. Dr A Wilczynski, 23 September 1993
4. Confidential, 24 September 1993
5. Mr N Hampton, 30 September 1993
6. Royal Australian and New Zealand College of Psychiatrists, Section of Forensic Psychiatry, Forensic Study Group, 15 October 1993
7. Dr B Boettcher, 18 October 1993
8. Mr E Teiffel, Mr R Thorncroft, Mr M Craddock, 25 October 1993
9. Law Society of New South Wales, 28 October 1993
10. Dr S Uniacke, 28 October 1993
11. Mr S Yeo and Mr S Odgers, 29 October 1993
12. Mr I H Pike (Chief Magistrate of the Local Courts), 3 November 1993
13. Mental Health Co-Ordinating Council Inc, 4 November 1993
14. Dr Y Lucire, 9 November 1993
15. Mr S Kerkyasharian (Chair of the Ethnic Affairs Commission, NSW), 10 November 1993
16. Ministry for the Status and Advancement of Women, 22 November 1993
17. Women's Legal Resources Centre, 3 December 1993
18. Mr M L Sides QC (Acting Senior Public Defender), 17 December 1993
19. Dr R Hayes (President of the Mental Health Review Tribunal), 7 January 1994
20. Legal Aid Commission of New South Wales, 2 February 1994

Appendix A: Submissions received

21. Mr R Williams, 7 June 1995
22. Mr J Barker, 3 April 1997
23. Cabinet Office, 7 April 1997
24. Mr S Odgers, 14 April 1997
25. Mr R Button (Director, Criminal Law Review Division, NSW Attorney General's Department), (oral) 16 April 1997
26. Mr P Berman (Crown Prosecutor), 28 April 1997
27. Mr N Cowdery QC (Director of Public Prosecutions), 23 May 1997
28. Mr M L Sides QC (Senior Public Defender), 23 May 1997

APPENDIX B: CONSULTATIONS

1. Forensic psychiatrists: Drs Milton and Ellard, 20 December 1995
2. Ms M Latham (Crown Advocate), 16 April 1997
3. Public Defenders, 17 April 1997
4. Forensic psychiatrists and psychologists: Drs Barclay, Ellard, Milton, Shea, Taylor and Westmore, 6 May 1997

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s 23	2.6, 3.16
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s 23A	2.6, 3.5-3.6
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s 24	2.3, 3.76, 3.110
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s 67	3.96
s 80	3.62
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s 119	3.93
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s 21	3.114
s 81(2)(b)	3.8
s 82	3.114
s 86	3.114
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s 100	3.114
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s 28E(4)	3.81
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s 33	3.81
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Criminal Law (Sentencing) Act 1988

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s 11	3.101
Sentencing Act 1991	
Part 5	3.112
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Criminal Code	
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