NSW Law Reform Commission

Report 83 (1997) - Partial Defences to Murder: Provocation and Infanticide Contents

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New South Wales Law Reform Commission

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

Dear Attorney

Partial defences to murder: Provocation and Infanticide

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

October 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 s 22A, 23 and 23A of the Crimes Act 1900 (NSW) respectively;*

- *to develop proposals for reform and clarification of the substantive elements of the defences.*

Participants

The Law Reform Commission is constituted by the Law Reform Commission Act 1967 (NSW). 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)

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Recommendation 1

The defence of provocation should be retained in New South Wales.

Recommendation 2

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

(1) A person who would otherwise be guilty of murder shall not be guilty of murder and shall be guilty of manslaughter if that person committed the act or omission causing death under provocation.

(2) For the purpose of subsection (1), a person commits an act or omission causing death under provocation if:

(a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by:

(i) the conduct; or
(ii) a belief of the accused (based on reasonable grounds) as to the existence of the conduct;

of someone towards or affecting the accused, in circumstances where the accused kills:

(iii) the person who offered the provocation; or
(iv) the person believed on reasonable grounds to have offered the provocation; or
(v) a third party when attempting to kill or to injure the person who offered or was believed on reasonable grounds to have offered the provocation; and

(b) the accused, taking into account all of his or her characteristics and circumstances, should be excused for having so far lost self-control as to have formed an intent to kill or to inflict grievous bodily harm or to have acted with reckless indifference to human life as to warrant the reduction of murder to manslaughter.

(c) For the purpose of subsection 2(a), "conduct" includes grossly insulting words or gestures.

(3) For the purpose of determining whether an act or omission causing death was an act done or omitted under provocation as provided by subsection (2), there is no rule of law that provocation is negatived if:

(a) the conduct of the deceased or of any other person did not occur immediately before the act or omission causing death;
(b) the conduct of the deceased or of any other person did not occur in the presence of the accused;
(c) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased or of any other person that induced the act or omission;
(d) the act or omission causing death was not an act done or omitted suddenly;

(e) the act or omission causing death was an act done or omitted with any intent to take life or inflict grievous bodily harm; or

(f) the conduct of the deceased or of any other person was lawful.

(4) Where a person is intoxicated at the time of the act or omission causing death, and the intoxication is self-induced, loss of self-control caused by that intoxication or resulting from a mistaken belief occasioned by that intoxication is to be disregarded.

"Self-induced intoxication" in this subsection has the same meaning as it does in s 428A (of the *Crimes Act 1900*).

(5) For the purpose of subsection (1), a person does not commit an act or omission causing death under provocation if that person provoked the deceased or any other person with a premeditated intention to kill or to inflict grievous bodily harm or with foresight of the likelihood of killing any person in response to the expected retaliation of the victim or of any other person.

(6) Where, on the trial of a person for murder, there is any evidence that the act causing death was an act done or omitted under provocation as provided by subsection (2), the onus is on the prosecution to prove beyond reasonable doubt that the act or omission causing death was not an act done or omitted under provocation.

(7) This section does not exclude or limit any defence to a charge of murder, with the exception that no claim to the defence of provocation shall lie other than as provided by this section.

Recommendation 3

Section 22A of the *Crimes Act 1900* (NSW) should be repealed. This recommendation is conditional on there being a defence of diminished responsibility in some form in New South Wales, as formulated in terms similar to those recommended by the Commission in Recommendation 4 of Report 82.

1. Introduction

- Overview
- The course of the reference
- Summary of Report 82
- Legislative action since Report 82
- Outline of this Report

OVERVIEW

1.1 This Report deals with the defence of provocation and the offence/defence of infanticide. It is the second of two final reports on the Commission's inquiry into the partial defences to murder in New South Wales. The first report, *Partial Defences to Murder: Diminished Responsibility* (Report 82, May 1997), was primarily concerned with the operation of the partial defence of diminished responsibility.

1.2 "Partial defence to murder" is the expression commonly used to refer to the defences of diminished responsibility and provocation, and the offence/defence of infanticide. They are partial rather than full defences because, if successful, 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 The New South Wales Law Reform Commission received a reference on 17 March 1993 from the then Attorney General, the Hon John P Hannaford, MLC, to review the partial defences to murder.[1] The reference was made following a call for reform of the defence of diminished responsibility by the Chief Justice of New South Wales, the Hon A M Gleeson AC.[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 in favour of a single offence of "unlawful homicide". The

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 New South Wales Law Reform Commission, *Partial Defences to Murder: Diminished Responsibility* (Report 82, 1997) at paras 3.30-3.32.

Commission invited submissions on DP 31, particularly on the proposed options for reform. A list of submissions received appears as Appendix A to this Report.

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 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. This request resulted in the release of Report 82.

SUMMARY OF REPORT 82

1.7 Report 82 focused specifically on the defence of diminished responsibility. As a defence to a charge of murder, diminished responsibility provides a partial excuse to an accused person who kills another on the basis that the accused suffered from a mental disorder or impairment of some kind at the time of killing. Under the existing law, an accused person who pleads diminished responsibility must prove that, at the time of killing, he or she suffered from an "abnormality of mind" which substantially impaired his or her mental responsibility.

1.8 Report 82 began with an overview of the legal framework for unlawful homicide in New South Wales. As part of that discussion, the Commission considered the threshold question of whether the traditional distinction between murder and manslaughter within that framework should be abolished and replaced with a single offence of "unlawful homicide". The Commission concluded that the traditional distinction should be retained, on the basis that the terms "murder" and "manslaughter" are well understood by the general community as conveying differing degrees of culpability for killing, which understanding is essential for public acceptance of sentences reflecting varying levels of criminal responsibility.

1.9 Having recommended that the distinction between murder and manslaughter should be retained, the Commission then considered whether the defence of diminished responsibility should be retained as a partial defence to murder. We recommended that it should. We also recommended a reformulation of the definition of the defence of diminished responsibility under s 23A of the *Crimes Act 1900* (NSW).

1.10 Our main reason for recommending the retention of the defence of diminished responsibility was the importance of involving the community, through the jury, in making decisions on culpability and thereby enhancing community acceptance of the due administration of criminal justice, especially community acceptance of sentences imposed. While issues relating to diminished responsibility theoretically may be taken into account by imposing a reduced sentence for murder, the Commission considered that it was essential to retain a separate defence of diminished responsibility in some form in order to allow the jury to make the final evaluation of the degree of criminal culpability involved in each individual case. In the reformulation of the defence of diminished responsibility recommended by the Commission, we aimed to clarify the criteria for the defence in order to make it clear that the task of evaluating the level of criminal culpability lies ultimately with the jury. Our recommended reformulation also aimed to make the application of the defence of diminished responsibility more consistent, more straightforward, and more easily understandable by juries and expert witnesses.

LEGISLATIVE ACTION SINCE REPORT 82

1.11 In June 1997, the *Crimes Amendment (Diminished Responsibility) Bill 1997* was introduced in the Parliament of New South Wales. The object of this Bill is to abolish the defence of diminished responsibility in New South Wales and replace it with a defence of substantial impairment by abnormality of mind. Although the Bill abolishes the defence of diminished responsibility, it adopts the substance of the recommendations made in Report 82, in so far as it retains in some form a distinct defence to a charge of murder based on mental impairment. The underlying rationale of this new defence is to allow the jury, as representatives of the community, to decide whether murder

should be reduced to manslaughter in the light of any proven substantial impairment.[3]

1.12 The new defence of substantial impairment by abnormality of mind is defined in terms which follow, for the most part, the Commission's recommended reformulation for a defence of diminished responsibility, with the exception that the new defence refers to an "abnormality of mind". The Commission's recommended reformulation refers to an "abnormality of mental functioning".

1.13 The *Crimes Amendment (Diminished Responsibility) Bill 1997* had not yet been passed at the time of writing. For this reason, references in this Report are to the defence of diminished responsibility, rather than to the defence of substantial impairment by abnormality of mind.

OUTLINE OF THIS REPORT

1.14 In this Report, the Commission reviews, first, the defence of provocation and, secondly, the offence/defence of infanticide.

The defence of provocation

1.15 The Commission recommends that the defence of provocation be retained in New South Wales, having fully considered the arguments advanced for abolition of the defence. Several of those arguments are similar to the arguments commonly raised in favour of the abolition of the defence of diminished responsibility. In recommending that the defence of provocation be retained, the Commission adopts the same policy approach as that taken in recommending that the defence of diminished responsibility be retained, which approach has also been followed in the *Crimes Amendment (Diminished Responsibility) Bill 1997*. The policy adopted is that it is essential to retain a separate partial defence to murder which permits the community, as represented by the jury, to make judgments as to an individual's culpability for killing where there is evidence of provocation, in

3. See *Crimes Amendment (Diminished Responsibility) Bill 1997* explanatory note; New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 25 June 1997 at 11064.

order to enhance public confidence in the criminal justice system and community acceptance of sentences imposed.

1.16 As with the defence of diminished responsibility, the Commission recommends that the definition of the elements of the defence of provocation be reformulated. The Commission's recommended reformulation seeks to simplify the law on provocation and make its application more consistent and more logical by adhering to a uniform underlying policy for reform. As with our recommended reformulation of diminished responsibility, the Commission's recommended reformulation of provocation aims to make it clear that the degree of culpability of the accused is for the jury to decide.

The offence/defence of infanticide

1.17 In relation to the offence/defence of infanticide, the Commission assesses the arguments for and against retaining a specific offence/defence which relates only to women who kill their young children. We recommend that infanticide be abolished. Our recommendation is conditional on there being a defence of diminished responsibility in New South Wales, formulated in terms similar to those recommended by the Commission in Report 82. We anticipate that cases currently falling within the infanticide provisions will instead come within the defence of diminished responsibility.

2. The defence of Provocation

- Introduction
- Operation of the defence of provocation
- Retention of the defence of provocation
- Reformulation of the defence of provocation
- The ordinary person test of provocation
- Conduct amounting to provocation
- Actual loss of self-control
- Scope of the defence
- The Commission’s reformulation
- Procedural issues

INTRODUCTION

2.1 An unlawful killing which would otherwise constitute murder may amount to manslaughter if the accused acted under provocation. The defence of provocation reduces liability from murder to manslaughter on the basis that the killing resulted from a loss of self-control in response to provocation, in circumstances where an ordinary person could also have lost self-control.

2.2 The doctrine of provocation in unlawful homicide was first developed by the courts in England in the 16th and 17th centuries.[1] In the 16th century, "murder" was defined as killing with "malice aforethought", at that time interpreted as meaning killing with cold-blooded premeditation. Malice aforethought was implied by law unless it could be shown that the killer acted upon provocation, in sudden anger or "hot blood", in which case he or she would be convicted of manslaughter instead of murder. The distinction between murder and manslaughter was based on different underlying degrees of blameworthiness, reflected in differences in the punishment imposed.

2.3 In the 17th century, the doctrine of provocation developed as a rule of mitigation which classified certain types of killing committed in anger or hot blood as manslaughter rather than murder, on the basis that these killings were less reprehensible. The courts nominated certain categories of conduct which they regarded as sufficiently grave to constitute provocation and so give rise to the mitigation offered by the doctrine of provocation. These categories comprised conduct which was considered offensive to a person's honour.[2] Angry retaliation to such affronts was generally considered to be understandable, according to the social code of honour of the time. In the 18th and 19th centuries, the doctrine of provocation continued to evolve

1. See J Stephen, *A History of the Criminal Law of England* (MacMillan and Co, London, 3 volumes, 1883) vol 3 at 47, 58-60, 62-64; W Blackstone, *Commentaries on the Laws of England of Sir William Blackstone* (John Murray, London, 4 volumes, 1876) vol 4 at 192-193; J Horder, *Provocation and Responsibility* (Clarendon Press, Oxford, 1992) chapters 1 and 2; R Singer, "The Resurgence of Mens Rea: I - Provocation, Emotional Disturbance, and the Model Penal Code" (1986) 27 *Boston College Law Review* 243.
2. These categories consisted of: gross insult accompanied by an assault; an attack upon one's friend, relative, or kinsman; unlawful deprivation of liberty; and witnessing a man in the act of adultery with one's wife. This last category was later expanded to include witnessing a man committing sodomy on one's son.

through the courts, gradually expanding to include hot-blooded killings generally, wherever grave provocation was offered.[3]

2.4 In New South Wales, the partial defence of provocation was adopted under legislation in 1873 and later reproduced in the *Crimes Act 1900* (NSW).[4] That statutory formulation of the defence required a killing committed under provocation to occur suddenly and in the heat of passion, in a state of lost self-control in circumstances where an ordinary person could also have lost self-control. If the accused established the defence of provocation, he or she was convicted of manslaughter instead of murder. The sentence for manslaughter was discretionary; that is, the sentencing judge could impose a sentence which was considered appropriate to the circumstances of the case. In contrast, the sentence for murder was mandatory at that time, meaning that the sentencing judge must impose the statutory sentence regardless of any mitigating circumstances.

2.5 In 1982, the old statutory formulation of provocation in the *Crimes Act 1900* (NSW) was replaced by a new provision dealing with the defence of provocation.[5] The 1982 amendments were the result of recommendations by a Government Task Force on Domestic Violence, which was established to examine, amongst other things, the operation of the defence of provocation in the context of domestic killings by women of their abusive partners. There was a perception that the defence of provocation was too restrictive to accommodate killings of this type.[6] The new provision dealing with the

3. The expansion of the doctrine of provocation was linked to the demise of "chance-medley manslaughter". In the 17th century, chance-medley manslaughter developed as a separate category of manslaughter which applied to killings occurring in combats such as duels or brawls. Chance-medley manslaughter differed from manslaughter by provocation in so far as manslaughter by provocation amounted to a unilateral attack by the killer on the victim outside the context of combat. Chance-medley manslaughter fell into disuse in the 19th century, and consequently the doctrine of provocation was expanded to include hot-blooded killings committed in combat. See G Coss, "'God is a righteous judge, strong and patient: and God is provoked every day.' A Brief History of the Doctrine of Provocation in England" (1991) 13 *Sydney Law Review* 570.
4. See *Criminal Law Amendment Act 1883* (NSW) s 370; *Crimes Act 1900* (NSW) s 23.
5. See *Crimes (Homicide) Amendment Act 1982* (NSW) Sch 1[2].
6. See New South Wales, Task Force on Domestic Violence, *Report of the New South Wales Task Force on Domestic Violence to the Honourable N K Wran*

defence of provocation under the 1982 amendments was intended to broaden the definition of provocation in order to make it more appropriate for women who kill in situations of domestic violence, particularly for women who kill in response to a culmination of long-term abuse rather than immediately following a single act of provocation. The amending legislation transferred the onus of proof to the prosecution, to disprove a claim that a killing was provoked.[7]

2.6 There have been no amendments to the statutory formulation of the defence of provocation in New South Wales since 1982. Today, provocation is available as a partial defence to murder in every Australian jurisdiction.[8]

2.7 The defence of provocation has in the past given rise to a great deal of academic and judicial discussion, and has been the subject of widespread criticism on a number of grounds. Some have argued that the defence should be abolished, on the basis that it is unnecessary in a legal system with a discretionary sentence for murder, and on the more fundamental basis that the rationales of the defence are unsound and out of touch with contemporary standards of behaviour. Others have criticised the defence because of a perceived gender bias in its application to female offenders as opposed to male offenders, as well as on the basis that it excuses violence, particularly in the domestic setting. It is also argued that the law relating to the defence of provocation is unnecessarily complex and unclear, making the operation of the defence in individual cases difficult and inconsistent. Uncertainties remain about the application of the defence to certain types of cases, such as cases where the relevant provocative conduct does not occur in the presence of the accused. Above all, criticism and uncertainty has arisen from the central requirement of the defence that an ordinary person be capable of

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QC, MP, Premier of New South Wales (Government Printer, Sydney, 1981) at 67-70 and recommendation 24; New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 11 March 1982 at 2485-2486.

7. See *Crimes (Homicide) Amendment Act 1982* (NSW) Sch 1[2].

8. *Crimes Act 1900* (ACT) s 14; *Criminal Code* (NT) s 37; *Criminal Code* (Qld) s 304; *Criminal Code* (Tas) s 160; *Criminal Code* (WA) s 281. In South Australia and Victoria, the defence of provocation is available at common law. See also *Crimes Act 1961* (New Zealand) s 169; *Criminal Code* (Canada) s 232; *Homicide Act 1957* (UK) s 3. In the Northern Territory, legislation also provides for provocation as a complete defence (that is, results in acquittal) for offences other than homicide: see *Criminal Code* (NT) s 34(1). In Queensland and Western Australia, provocation is a complete defence to offences which are defined to include an element of assault: see *Criminal Code* (Qld) s 269; *Criminal Code* (WA) s 246.

losing self-control when faced with the provocation with which the accused was faced. The "ordinary person" requirement is regarded by some as unworkable in practice, as well as inherently discriminatory and unfair. The problems relating to the ordinary person test are seen by some as reason alone for abolishing the defence of provocation, and by many as necessitating reformulation of the defence.

2.8 In this chapter, the Commission discusses the main objections to the defence of provocation. We begin with a brief outline of the current operation of the defence in New South Wales. We then examine the rationales underlying the defence of provocation and explain our policy approach for reform. We make recommendations, first, for the retention of the defence of provocation in New South Wales and, secondly, for its reformulation. We consider in some detail the problems and inconsistencies arising under the current legislative formulation of the defence. Our recommended reformulation aims to overcome these problems and inconsistencies by clarifying uncertainties in the law and adhering to consistent underlying policy and principle. The most significant feature of our recommended reformulation is the excision of the ordinary person test, which we consider will make the defence easier to understand and its application more straightforward.

OPERATION OF THE DEFENCE OF PROVOCATION

The current law of provocation in New South Wales

2.9 In New South Wales, the rules relating to the defence of provocation are contained in s 23 of the *Crimes Act 1900* (NSW). That section reads:

> 23. (1) Where, on the trial of a person for murder, it appears that the act or omission causing death was an act done or omitted under provocation and, but for this subsection and the provocation, the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.
>
> (2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where:
>
> (a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by any conduct of the

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

2.10 Section 23 of the *Crimes Act 1900* (NSW) has, to a large extent, been interpreted by the courts as being an affirmation, rather than an alteration, of the common law defence of provocation.[9] The key elements of the defence, as formulated in s 23, may be summarised as follows:

- All the elements of murder must be established, namely that the accused caused the death of another person, the victim, and that the

9. *Parker v The Queen* (1963) 111 CLR 610 at 660; *Stingel v The Queen* (1990) 171 CLR 312 at 320; *Masciantonio v The Queen* (1995) 183 CLR 58 at 66.

accused acted with an intention to kill or to cause grievous bodily harm, or was recklessly indifferent to human life.[10]

- The unlawful killing must be the result of a temporary loss of self-control by the accused that was induced by provocative conduct, although it is not necessary that the killing occurred suddenly and immediately after the act of provocation.[11]
- The provocation must have been so serious that it could[12] have caused an ordinary person to lose self-control and form an intention to kill or inflict grievous bodily harm on the victim (the "ordinary person" or "objective" test).
- Conduct sufficient to amount to provocation may be either actions or grossly insulting words or gestures. It appears that there is no requirement under s 23 that the provocative conduct be unlawful.[13]
- The provocative conduct must generally be committed by the victim, in the presence of the accused.[14] The provocation must affect the accused somehow, although it is not necessary that it be directed specifically against him or her.[15]
- There is no requirement that the accused's act causing death be proportionate to the victim's provocative conduct.[16] In applying the ordinary person test, the test is whether, in light of the provocation

10. *Johnson v The Queen* (1976) 136 CLR 619 at 633-634; *Stingel v The Queen* (1990) 171 CLR 312 at 328; *Masciantonio v The Queen* (1995) 183 CLR 58 at 66 and 71.
11. *Parker v The Queen* (1964) 111 CLR 665 at 679; *Crimes Act 1900* (NSW) s 23(2), 23(3)(b).
12. The test is "could", not "would", cause an ordinary person to lose self-control: see *R v Fricker* (1986) 42 SASR 436 at 443, followed by the High Court in *Stingel v The Queen* (1990) 171 CLR 312 at 329 and *Masciantonio v The Queen* (1995) 183 CLR 58 at 66.
13. See paras 2.102-2.105.
14. The law relating to hearsay provocation and the source of the provocation remains unsettled: see further at paras 2.85-2.101.
15. Section 23(2)(a) of the *Crimes Act 1900* (NSW) specifies that the provocative conduct must be "towards or affecting" the accused. The NSW Court of Criminal Appeal has held that the provocation need not be directed specifically at the accused, but may instead, for example, involve an act committed against a member of the accused's family: see *R v Quartly* (1986) 11 NSWLR 332.
16. *Crimes Act 1900* (NSW) s 23(3)(a).

offered, an ordinary person could have lost self-control so as to form an intention to kill or cause grievous bodily harm.[17]

2.11 It is a question of fact for the jury to determine whether or not the circumstances of a particular case amount to provocation under s 23 of the *Crimes Act 1900* (NSW). However, before the defence of provocation may be left for the jury to consider, there is a threshold question for the trial judge to decide as a question of law. The question for the trial judge is whether, on the version of events most favourable to the accused as suggested by the evidence, the jury acting reasonably might fail to be satisfied beyond reasonable doubt that the killing was unprovoked. Only if this question is answered affirmatively by the trial judge may the defence of provocation be left for the jury to consider,[18] although the judge is to exercise caution before declining to leave provocation to the jury.[19] If there is sufficient evidence to satisfy the threshold test, the trial judge must direct the jury to consider the defence of provocation even if the defence has not been raised by the accused's legal representative.[20]

2.12 Once there is sufficient evidence of provocation to leave to the jury, it is the prosecution who bears the burden of proving beyond a reasonable doubt that the defence of provocation has not been established.[21] If the prosecution does not succeed in proving beyond reasonable doubt that the accused was not provoked in accordance with the defence of provocation, the accused will be convicted of manslaughter instead of murder. The maximum statutory penalty for manslaughter is penal servitude for 25 years,[22] in contrast to the maximum penalty of penal servitude for life which may be imposed for murder.[23]

2.13 Examples of conduct which has been found sufficient to leave the defence of provocation for the jury to consider in an accused's trial for

17. *Johnson v The Queen* (1976) 136 CLR 619 at 639-640, 659; *Masciantonio v The Queen* (1995) 183 CLR 58 at 67.
18. *Stingel v The Queen* (1990) 171 CLR 312 at 334; *Masciantonio v The Queen* (1995) 183 CLR 58 at 67-68. See also *R v D.A.R.* (Court of Criminal Appeal, NSW, 8 November 1995, CCA 60540/94, unreported) per Sperling J at 12.
19. *Stingel v The Queen* (1990) 171 CLR 312 at 334.
20. *Parker v The Queen* (1964) 111 CLR 665 at 681; *Pemble v The Queen* (1971) 124 CLR 107 at 117-118.
21. *Crimes Act 1900* (NSW) s 23(4). See para 2.5.
22. *Crimes Act 1900* (NSW) s 24.
23. *Crimes Act 1900* (NSW) s 19A(1).

murder include: physical and emotional abuse by the victim of the accused's daughter followed by a physical assault by the victim on the accused;[24] discovery by the accused, a conservative Muslim Turk, that his daughter, the victim, is in a sexual relationship with a young man;[25] words and gestures of affection by the victim towards the accused shortly after the accused has discovered that the victim, her husband, has been sexually abusing their daughters for years;[26] taunting by the victim about the accused's sexual inadequacies and about the victim's infidelity.[27]

2.14 The incidence of provocation cases in New South Wales was examined in a study by the Judicial Commission of sentenced homicide offenders between 1990 and 1993. The study revealed that the defence of provocation was raised in 7.8% of homicide cases in that period.[28] The defence was successful in reducing murder to manslaughter in 70% of cases in which the defence was raised (whether by the prosecution's acceptance of a plea[29] or at trial). Sentences for manslaughter on the ground of provocation ranged from a four year bond under s 558 of the *Crimes Act 1900* (NSW), to penal servitude for 10 years and six months.

Conflicting rationales of the defence: the Commission's approach

2.15 A criticism commonly made of the defence of provocation is that it has no clear and consistent rationale.[30] The defence is often described on the one

24. *Masciantonio v The Queen* (1995) 183 CLR 58.
25. *R v Dincer* [1983] 1 VR 460.
26. *The Queen v R* (1981) 28 SASR 321.
27. *Moffa v The Queen* (1977) 138 CLR 601.
28. See H Donnelly, S Cumines and A Wilczynski, *Sentenced Homicides in New South Wales 1990-1993: A Legal and Sociological Study* (Judicial Commission of New South Wales, Monograph Series Number 10, 1995) at 58-59, 94 and Appendix A.
29. As part of its power to accept pleas of guilty to lesser charges, the prosecution has a discretion to accept an accused person's plea of guilty to manslaughter in satisfaction of an indictment for murder: see *Crimes Act 1900* (NSW) s 394A.
30. See for example, F McAuley, "Provocation: Partial Justification, Not Partial Excuse" in S Yeo (ed), *Partial Excuses to Murder* (Federation Press, Sydney, 1990) at 19-29; M Goode, "The Abolition of Provocation" in Yeo (ed) (1990) at 39-40; J Dressler, "Rethinking Heat of Passion: A Defense in Search of a Rationale" (1982) 73 *Journal of Criminal Law and Criminology* 421,

hand as being a "partial excuse" and on the other hand as a "partial justification" for unlawful killing. The excuse-based rationale explains the defence of provocation in terms of partially excusing provoked killers because their mental state is impaired by a loss of self-control, and for that reason they are less culpable than killers who act with premeditation. The justification-based rationale explains the defence of provocation in terms of recognising that the victim's own blameworthy conduct has contributed to the killer's actions in circumstances which could have moved an ordinary person to retaliate.

2.16 The courts have not been consistent in applying one rationale rather than the other when interpreting and applying s 23 of the *Crimes Act 1900* (NSW).[31] Consequently, the defence reflects characteristics of both justification and excuse. For example, to the extent that it requires the accused to have lost self-control, the defence of provocation is excuse-based. It does not apply to every type of retaliatory killing, but only to those where the accused's state of mind is affected in so far as control over his or her actions is impaired. On the other hand, the defence reflects a justification-based rationale to the extent that it requires the victim's conduct to have contributed to the accused's actions, in circumstances where the accused's response is understandable according to the standards of an ordinary person.

2.17 It has been suggested that, as a result of the potential conflict between the excuse-based and justification-based rationales of provocation, the defence of provocation has suffered in the past from a lack of clear policy backing and direction.[32] Indeed, some of the uncertainties which remain

especially at 423-424. On the other hand, one submission argued that the doctrinal bases for the defence have been the subject of a great deal of judicial and academic comment and are now sufficiently clear: S Yeo and S Odgers, *Submission* (29 October 1993) at 3.

31. For example, in *Parker v The Queen* (1963) 111 CLR 610 at 651, Windeyer J gave emphasis to the excusatory nature of the defence of provocation. In contrast, Brooking J in *R v Kenney* [1983] 2 VR 470 at 472-473 referred to the notion of "tit for tat" underlying the defence of provocation, reflecting a conception of provocation based on justification. See generally, J Dressler, "Rethinking Heat of Passion: A Defense in Search of a Rationale" (1982) 73 *Journal of Criminal Law and Criminology* 421; J Horder, *Provocation and Responsibility* (Clarendon Press, Oxford, 1992); D Lanham, "Provocation and the Requirement of Presence" (1989) 13 *Criminal Law Journal* 133.

32. M Goode, "The Abolition of Provocation" in S Yeo (ed), *Partial Excuses to Murder* (Federation Press, Sydney, 1990) at 45.

about the operation of the defence, such as whether it applies in the context of "hearsay provocation",[33] arise directly from the tension between the two rationales of the defence.

2.18 In reformulating the defence of provocation, the Commission has given priority to the excuse-based rationale of the defence of provocation, while at the same time recognising that it remains essential to the nature of the defence that there be some kind of external trigger which incites the accused to lose self-control. Our reasons for this approach are as follows.

2.19 First, to characterise the defence of provocation as a partial justification for killing is inconsistent with contemporary conceptions of civilised society, which does not approve personal acts of retaliation or retribution as opposed to acts of self-defence. While the doctrine of provocation may have first developed at a time when violent reaffirmation of one's honour was in part accepted by society, social attitudes towards violent retribution have changed. Criminal law is now more concerned with the individual accused's mental state in committing an offence than with the external justifications for his or her actions. A contemporary model of provocation should therefore focus on the accused's lack of self-control rather than on whether or not the victim's wrongful conduct was deserving of retribution.

2.20 Secondly, we consider that the "ordinary person" test, which arguably embodies the justification-based rationale of provocation, is unworkable. Besides being extremely complex to apply, the ordinary person test assesses criminal responsibility according to an objective standard of the "ordinary person", irrespective of the personal characteristics and personal blameworthiness of the particular accused. In our reformulation of the defence of provocation, we recommend the abolition of the ordinary person test, focusing instead on the individual accused's mental state rather than whether his or her actions were justified, in light of the gravity of the victim's conduct as assessed according to the standards of a hypothetical ordinary person.

2.21 Thirdly, an approach which emphasises the excuse-based rationale of the defence of provocation is consistent with the central requirement of the defence that the accused lose self-control. It is also consistent with the approach recently followed by other law reform agencies and commentators,

33. See paras 2.85-2.91.

who have favoured a model of provocation based on excuse and a loss of self-control, rather than on justification.[34]

RETENTION OF THE DEFENCE OF PROVOCATION

RECOMMENDATION 1
The defence of provocation should be retained in New South Wales.

2.22 In DP 31, the Commission considered a proposal to abolish the defence of provocation in New South Wales.[35] If the defence were abolished, an accused person who killed with the requisite guilty mind for murder but who acted as a result of a loss of self-control in response to provocation would be convicted of murder. The sentencing judge, in exercising his or her discretion in sentencing the accused for murder, could take account of evidence indicating a loss of self-control and provocation as mitigating factors in sentencing, in accordance with general principles.[36] In addition, it has been suggested that sentencing legislation could expressly provide that

34. See, for example, England and Wales, Criminal Law Revision Committee, *Offences Against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) at paras 79-88; American Law Institute, *Model Penal Code and Commentaries (Official Draft and Revised Comments)* (Philadelphia, 1980) article 10.3 and at 54. See also J Dressler, "Rethinking Heat of Passion: A Defense in Search of a Rationale" (1982) 73 *Journal of Criminal Law and Criminology* 421; J Horder, *Provocation and Responsibility* (Clarendon Press, Oxford, 1992); V Nourse, "Passion's Progress: Modern Law Reform and the Provocation Defense" (1997) 106 *Yale Law Journal* 1331; M Latham, *Oral Submission* (6 August 1997); *cf* F McAuley, "Provocation: Partial Justification, Not Partial Excuse" in S Yeo (ed), *Partial Excuses to Murder* (Federation Press, Sydney, 1990) at 19-36.

35. New South Wales Law Reform Commission, *Provocation, Diminished Responsibility and Infanticide* (DP 31, 1993) at 61-62.

36. It has been held that a sentencing judge may take into account as a mitigating factor in sentencing the fact that an offender commits a crime of violence without premeditation and after being subjected to considerable provocation: see *R v Okutgen* (1982) 8 A Crim R 262. In contrast, the fact that a crime is deliberately planned may be considered as an aggravating factor in sentencing: see *R v Tait* (1979) 24 ALR 473 at 485; *Hook v Ralphs* (1987) 45 SASR 529 at 542; *R v Sumner* (1985) 19 A Crim R 210 at 218.

evidence of provocation be taken into account in determining an offender's sentence for murder.[37]

2.23 After careful consideration of the arguments for and against abolition, including those raised in submissions, the Commission recommends that the defence of provocation be retained as a partial defence to murder in New South Wales. Our reasons for this are set out below. We note that our recommendation is supported by half of the submissions which addressed this issue,[38] and is also the view adopted in a number of other jurisdictions in which a review of the defence of provocation has been undertaken.[39]

2.24 There are instances where the culpability of a person who kills is reduced by reason of that person's mental state being impaired by a loss of self-control. In such cases, the offender does not warrant being labelled a

37. See Australia, Attorney General's Department, Review Committee of Commonwealth Criminal Law, *Review of Commonwealth Criminal Law: Interim Report: Principles of Criminal Responsibility and Other Matters* (AGPS, Canberra, 1990) ("the Gibbs Report") at para 13.57.

38. See Law Society, *Submission* (28 October 1993) at para 1.2.1; Women's Legal Resources Centre, *Submission* (3 December 1993) at 4; S Yeo and S Odgers, *Submission* (29 October 1993) at 2. One submission supported retention of the defence with the qualification that it should be more clearly defined to ensure that it is not used as an excuse for men who kill women: see P Easteal, *Submission* (14 September 1993) at 2. Two submissions favoured abolition of the defence because of a perception that the defence reinforces male violence in our community: see R Blanch, *Submission* (7 September 1993) at 1; M L Sides, *Submission* (17 December 1993) at 2-3. Two more submissions favoured abolition of the defence of provocation, primarily on the basis that it seems impossible to devise a formulation of the defence which is just and logical: see P Berman, *Submission* (28 July 1997) at 2; M Latham, *Oral Submission* (6 August 1997).

39. See England and Wales, Criminal Law Revision Committee, *Offences Against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) at paras 77-81; 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 paras 81-82; Law Reform Commission of Victoria, *Homicide* (Report 40, 1991) at paras 172-175; South Australia, Criminal Law and Penal Methods Reform Committee, *The Substantive Criminal Law* (Report 4, Government Printer, Adelaide, 1977) at 21-23. *Cf* New Zealand, Department of Justice, Criminal Law Reform Committee, *Report on Culpable Homicide* (Wellington, 1976) at para 5; New Zealand, Department of Justice, Crimes Consultative Committee, *Crimes Bill 1989: Report of the Crimes Consultative Committee* (Wellington, 1991).

"murderer".[40] A conviction of manslaughter ensures a greater likelihood that the community will understand and accept a reduced sentence which reflects a lesser degree of culpability. As we have previously stated in support of retaining the defence of diminished responsibility,[41] community acceptance of sentences is vital to the due administration of criminal justice. The question of whether or not a person's culpability is reduced by reason of a loss of self-control following provocation essentially involves a judgment in which the community should be directly involved, through the jury, within the trial process. The community's involvement also enhances acceptance of the sentence imposed, since it is the community, represented by the jury, that has decided on the crucial question of the degree of blameworthiness.

2.25 Various arguments have been advanced for the abolition of the defence of provocation. In the Commission's view, none is persuasive, for the reasons given below.

2.26 One argument advanced for the abolition of the defence of provocation is that there is no compelling rationale which warrants its retention as a distinct defence. In paragraph 2.15, we noted that there are two potentially conflicting rationales for the defence of provocation, based on justification and, alternatively, excuse. It has been suggested that, whichever of these two rationales is accepted as the primary rationale for provocation, neither is sufficiently compelling to warrant retaining provocation as a defence to murder.[42]

2.27 If justification is accepted as the primary rationale for the defence of provocation, then, as we discussed in paragraph 2.19, the idea that the law (partly) condones a retributive killing where the victim is seen to deserve his or her fate runs contrary to fundamental principles of civilised society. The Commission has rejected justification as the primary basis for provocation on that ground. If, on the other hand, the defence of provocation is characterised as a partial excuse for killers who lose self-control upon provocation, then it

40. One submission disagreed with this claim, and argued that a person who is convicted of manslaughter on the basis of provocation intends to kill or cause grievous bodily harm, and would generally be regarded by the community as someone who has committed murder: see P Berman, *Submission* (28 July 1997) at 2.

41. See New South Wales Law Reform Commission, *Partial Defences to Murder: Diminished Responsibility* (Report 82, 1997) at para 3.11.

42. M Goode, "The Abolition of Provocation" in S Yeo (ed), *Partial Excuses to Murder* (Federation Press, Sydney, 1990) at 52.

may be questioned why loss of self-control should necessarily be regarded as a condition which makes those killers less culpable than others who kill under the influence of strong emotions such as despair or envy.[43] Similarly, it may be argued that some people who kill with premeditation, such as people who commit mercy killings, are no more blameworthy than some provoked killers. Although the provoked killer may have lost a degree of self-control, he or she still kills intentionally or with foresight of the likelihood of death. It may be argued, therefore, that there should be no distinction in degrees of culpability, as reflected in conviction for murder or manslaughter, between the provoked and the unprovoked killer.[44]

2.28 In the Commission's view, there *are* circumstances in which a person's power to reason and control his or her actions accordingly is impaired by a loss of self-control to such an extent as markedly to reduce that person's culpability for killing. Through the defence of provocation, the law offers a degree of compassion to those whose will to act rationally is overcome by a loss of self-control in circumstances where the community generally can understand or sympathise with their reaction. While there may be other extenuating circumstances in which a person kills and which ought to be recognised as mitigating that person's punishment, it is appropriate that loss of self-control be expressly recognised by way of a defence of provocation because it is a condition which significantly impairs the accused's mental state and reduces his or her blameworthiness. Given that, in our criminal justice system, culpability for serious offences is assessed according to an accused's mental state in committing that offence, factors which significantly affect that mental state should be recognised as reducing the accused's responsibility for his or her actions.

2.29 A second argument advanced for abolition of the defence of provocation is that it is unnecessary to retain provocation as a partial defence to murder in a jurisdiction such as New South Wales, which has a discretionary sentence for murder.

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43. See J Horder, *Provocation and Responsibility* (Clarendon Press, Oxford, 1992) at 194.
44. This was the view of the dissenting members of the Victorian Law Reform Commission in arguing for the abolition of the defence of provocation: Law Reform Commission of Victoria, *Homicide* (Report 40, 1991) at para 177. See also M L Sides, *Submission* (17 December 1993) at 2-3.

2.30 The defence of provocation was originally adopted into legislation in New South Wales at a time when there was a mandatory sentence for murder. Until 1955, the mandatory sentence for murder was death.[45] From 1955 to 1982, the mandatory sentence was penal servitude for life.[46] In contrast, the sentence for manslaughter was always discretionary, that is, sentencing courts had a discretion to impose a sentence less than the statutory maximum penalty.[47] The defence of provocation therefore provided a means of avoiding the mandatory sentence for murder by reducing liability to manslaughter.

2.31 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.[48] In 1990, further legislative amendments gave the courts a full discretion to impose a lesser sentence than life for murder, with penal servitude for life remaining the statutory maximum penalty.[49] This discretion is not affected by the recent introduction of legislation for so-called "mandatory" life sentences for some drug offences and for murder in certain circumstances: under that legislation, the sentencing judge may still impose a sentence which is less than life if this is appropriate in the circumstances of the case.[50]

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45. *Crimes Act 1900* (NSW) s 19. The Governor had the power to commute the death sentence to penal servitude for life in individual cases: see *Crimes Act 1900* (NSW) s 459.
46. *Crimes Act 1900* (NSW) s 19, as amended by the *Crimes (Amendment) Act 1955* (NSW) s 5(b).
47. *Crimes Act 1900* (NSW) s 24 and 442.
48. 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.
49. See *Crimes Act 1900* (NSW) s 19A, inserted by the *Crimes (Life Sentences) Amendment Act 1989* (NSW) Sch 1[4]. "Life" means the term of the offender's natural life.
50. 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 1900* (NSW). See *R v Kalajzich* (Supreme Court, NSW, Hunt CJ at CL, 16 May 1997, CLD L00011/95, unreported) at 13. See also New South Wales Law Reform Commission, *Sentencing* (Report 79, 1996) at paras 9.7-9.17; New South Wales Law Reform Commission, *Partial Defences to Murder: Diminished Responsibility* (Report 82, 1997) at para 2.12.

2.32 Given that judges now have a full discretion to impose a sentence less than the maximum penalty for murder, it may be argued that evidence currently considered under the defence of provocation might instead be adequately taken into account in sentencing for murder. It has been suggested that a separate defence of provocation is now both unnecessary and undesirable, especially in light of the complexities and inconsistencies in the law relating to the operation of the defence.[51]

2.33 The Commission has considered a similar argument in support of the abolition of the partial defence of diminished responsibility, which suggested that the defence of diminished responsibility is unnecessary in a jurisdiction where there is a discretionary sentence for murder.[52] We rejected that argument as a basis for abolishing the defence of diminished responsibility and, for the same reasons, we do not find it to be a persuasive argument in support of abolishing the defence of provocation. While the defence of provocation is no longer necessary for the purpose of providing judges with a discretion in sentencing for unlawful homicide, the defence remains vitally important in terms of gaining community acceptance of reduced sentences for manslaughter rather than murder. The defence of provocation remains necessary as a means of involving the community, as represented by the jury, in the process of determining the degree of an accused's culpability according to his or her loss of self-control in response to provocation.[53] It also means that people who kill with reduced culpability as a result of a loss of self-control under provocation are not misleadingly and unfairly stigmatised by the label "murderer".

2.34 A third argument advanced for abolition of the defence of provocation is that the defence condones violence in the community, particularly domestic violence.

2.35 While loss of self-control under the defence of provocation may be due to a mixture of fear and anger, anger is typically said to be the primary

51. See Murphy J in *R v Voukelatos* [1990] VR 1 at 6. See also the dissent in Law Reform Commission of Victoria, *Homicide* (Report 40, 1991) at para 178.
52. See NSWLRC Report 82 at paras 3.14-3.16.
53. See also Law Society, *Submission* (28 October 1993) at para 1.2.1; Women's Legal Resources Centre, *Submission* (3 December 1993) at 4; S Yeo and S Odgers, *Submission* (29 October 1993) at 2.

feature of provocation.[54] As such, the defence may be seen as partially excusing violent acts of anger. In particular, concern is sometimes expressed that the defence of provocation is used inappropriately to excuse domestic violence, such as where the victim is killed for reasons of sexual jealousy or possessiveness.[55] The doctrine of provocation originally emerged at a time when violent retaliation to breaches of honour was common and generally accepted, including violence as a response to a wife's adultery. Now, however, social intolerance of violence is much greater and, it may be argued, the defence of provocation should be abolished as a legal anachronism which perpetuates excuses for violence, especially in the domestic setting.

2.36 In the Commission's view, the defence of provocation should not be regarded as condoning violence in our society. On the contrary, the defence recognises that a particular killing was wrongful and unjustified, and for this reason the accused is not acquitted but is convicted of manslaughter (for which the maximum penalty is 25 years' penal servitude). At the same time, the law considers that certain provoked killings, committed as a result of a loss of self-control, do not fall within the worst category of unlawful homicide, and therefore should not be classified as "murder".

2.37 As with all evidence, there may be a risk that a particular accused will seek to rely on the defence of provocation to excuse an act of violence which was in fact premeditated and was committed in the context of a history of violence and domestic abuse. However, that risk hardly justifies abolishing the defence. To do so would exclude other, deserving cases from the reduction of murder to manslaughter by way of the defence of provocation and, in effect, would be to throw the baby out with the bathwater. In any event, the risk of a spurious claim of provocation succeeding has been much reduced by the repeal of the legislative provision permitting an accused to make an unsworn statement at trial. In the past, if an accused wished to give evidence at trial that he or she had been provoked into killing the victim, that evidence could be unsworn, and was consequently not subject to cross-

54. *Masciantonio v The Queen* (1995) 183 CLR 58 at 68; *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 167.

55. This was a concern raised in a number of submissions: see P Easteal, *Submission* (14 September 1993) at 1-2; Ministry for the Status and Advancement of Women, *Submission* (22 November 1993) at 1-2; M L Sides, *Submission* (17 December 1993) at 2 and 5; Women's Legal Resources Centre, *Submission* (3 December 1993) at 3-4.

examination by the prosecution. Now, with the abolition of unsworn statements, if an accused wishes to give evidence of provocation at trial, that evidence can be properly tested through cross-examination.[56] The jury should therefore be in a better position to assess the genuineness or otherwise of an accused's claim that he or she was provoked into losing self-control so as to form an intention to kill or cause grievous bodily harm or to act with reckless indifference to human life. This should greatly reduce the risk that a false claim of provocation succeeds. In reformulating the defence, the Commission has considered further means of minimising the risk that the defence of provocation is used inappropriately to excuse domestic violence.[57]

2.38 In conclusion, there are circumstances in which a person's responsibility for an unlawful killing is reduced as a result of a loss of self-control to an extent which should, in any fair system of punishment, be taken into account when dealing with that person. The defence of provocation does not condone that person's actions, but recognises that this is a case which does not fall within the worst category of unlawful killing and should be viewed by the law with a degree of compassion. Where a person's mental state is significantly impaired by reason of a loss of self-control, it is appropriate that that person not be treated as a "murderer". The question of whether a person's culpability for an unlawful killing is so significantly reduced because of a loss of self-control is an issue which should be decided by a jury, as representatives of the community, and reflected in a conviction for murder or for manslaughter. The sentencing judge will then impose a sentence which reflects the jury's finding on the level of culpability involved. This ensures public confidence in the administration of criminal justice, including confidence in sentences imposed, and maintains the proper role of both the judge and the jury. We therefore recommend that provocation be retained as a partial defence to murder in New South Wales.

56. Section 405 of the *Crimes Act 1900* (NSW) permitted an accused to make an unsworn statement at trial. That section is now repealed: see *Crimes Act 1900* (NSW) s 404A, introduced by the *Crimes Legislation (Unsworn Evidence) Amendment Act 1994* (NSW) Sch 1[1]. Any person charged with an offence on or after 10 June 1994 who wishes to give evidence at trial must now give sworn evidence which is subject to cross-examination.
57. See paras 2.111-2.117.

REFORMULATION OF THE DEFENCE OF PROVOCATION

2.39 The Commission recommends that the legislation defining the defence of provocation be reformulated. This proposal was unanimously supported by those submissions favouring retention of the defence.[58] There is unnecessary complexity and uncertainty surrounding the current elements of the defence, probably as a result of the piecemeal way in which the law on provocation has developed since it was first articulated by the courts in the 16th century.

2.40 In reformulating the defence of provocation, we have considered all the aspects of the defence which have proved controversial, difficult to apply, or uncertain. In particular, we have considered:

- the ordinary person test;
- conduct amounting to provocation;
- the degree of actual loss of self-control required; and
- the scope of the defence of provocation.

2.41 We have also considered the issue of women's access to the defence of provocation under our recommended reformulation as compared to the current formulation of provocation.

THE ORDINARY PERSON TEST OF PROVOCATION

2.42 Section 23(2)(b) of the *Crimes Act 1900* (NSW) provides that the defence of provocation is only available in cases where an ordinary person, faced with the same provocation which the accused faced, could have lost self-control so as to form an intention to kill or cause grievous bodily harm. This is commonly referred to as the "ordinary person" or "objective" test of

58. P Easteal, *Submission* (14 September 1993) at 2; Law Society, *Submission* (28 October 1993) at 3; Legal Aid Commission, *Submission* (2 February 1994) at 2; Ministry for the Status and Advancement of Women, *Submission* (22 November 1993) at 1; Women's Legal Resources Centre, *Submission* (3 December 1993) at 4; S Yeo and S Odgers, *Submission* (29 October 1993) at 3-5. The (then) Acting Senior Public Defender supported abolition of the defence of provocation, but agreed that if it is retained, it should be reformulated: see M L Sides, *Submission* (17 December 1993) at 5.

provocation. The ordinary person test is also a feature of the defence of provocation at common law and under the statutory provisions dealing with the defence of provocation in every other Australian jurisdiction.[59]

2.43 Of all the elements of the defence of provocation, the ordinary person test has, at least in recent years, been the most controversial.[60] Law reform agencies in other jurisdictions have recommended that it be abolished.[61]

2.44 As restated by the High Court in *Stingel*'s case, the ordinary person test has three components:[62]

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59. In Queensland and Western Australia, there is no reference to the "ordinary person" requirement in the statutory provisions for provocation as a defence to murder: see *Criminal Code* (Qld) s 304; *Criminal Code* (WA) s 281. In Queensland, however, it has been held that the common law definition of provocation is to be read into s 304, including the common law requirement that the provocation be capable of causing an ordinary person to lose self-control: see *R v Young* [1957] Qd R 599 (CCA); *R v Johnson* [1964] Qd R 1 (CCA). In Western Australia, it has been held that "provocation" as defined in s 245 of the *Criminal Code* (WA) applies to the defence of provocation as a defence to murder in s 281: see *Mehemet Ali v The Queen* (1957) 59 WALR 28; *Censori v The Queen* [1983] WAR 89 (CCA); *Roche v The Queen* [1988] WAR 278.

60. See for example *Masciantonio v The Queen* (1995) 183 CLR 58 per McHugh J (dissenting) at 70-80; S Yeo, "Sex, Ethnicity, Power of Self-Control and Provocation Revisited" (1996) 18 *Sydney Law Review* 304; I Leader-Elliott, "Sex, Race and Provocation: In Defence of Stingel" (1996) 20 *Criminal Law Journal* 72; M Detmold, "Provocation to Murder: Sovereignty and Multiculture" (1997) 18 *Sydney Law Review* 5; G Orchard, "Provocation - Recharacterisation of 'Characteristics'" (1996) 6 *Canterbury Law Review* 202; S Yeo, "Ethnicity and the Objective Test in Provocation" (1987) 16 *Melbourne University Law Review* 67; T Macklem, "Provocation and the Ordinary Person" (1987) 11 *Dalhousie Law Journal* 126.

61. See, for example, Law Reform Commission of Victoria, *Homicide* (Report 40, 1991) at paras 187-191; England and Wales, Criminal Law Revision Committee, *Offences against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) at paras 81-83, followed by the Law Commission of England and Wales, *A Criminal Code for England and Wales* (Law Com. 177, 1989) cl 58 and para 14.18; American Law Institute, *Model Penal Code and Commentaries (Official Draft and Revised Comments)* (Philadelphia, 1980) article 210.3; South Australia, Criminal Law and Penal Methods Reform Committee, *The Substantive Criminal Law* (Report 4, 1977) at 21-22.

62. See *Stingel v The Queen* (1990) 171 CLR 312, especially at 324-328, affirmed by the majority of the High Court in *Masciantonio v The Queen* (1995) 183 CLR 58, especially at 66-67, McHugh J dissenting. Although these cases dealt

- the ordinary person's perception of the gravity of the provocation;
- the ordinary person's power to exercise self-control in response to that provocation; and
- the form of the ordinary person's response after losing self-control in comparison to the accused's response.

The gravity of the provocation

2.45 Under the first component of the ordinary person test, the jury must consider what would be the ordinary person's perception of the gravity of the provocation offered by the victim. For the purpose of determining the gravity of the provocation, the ordinary person is regarded as having any relevant personal characteristics of the accused. For example, if the accused is addicted to glue-sniffing, that fact may be taken into account in assessing the gravity of taunts directed towards that person's addiction.[63] Similarly, the fact that an accused has previously been subjected to a number of sexual assaults may be taken into account in assessing the gravity of an unwelcome sexual advance made by the victim.[64]

The ordinary person's power of self-control

2.46 The second component of the ordinary person test requires the jury to consider whether an ordinary person could have lost self-control as a result of the provocation. In this context, the "ordinary person" means a person with ordinary powers of self-control, falling within the common range of human

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with the law of provocation in Tasmania and Victoria respectively, the High Court on both occasions expressly stated that there is a degree of unity in the principles underlying the defence of provocation at common law, under the Codes and other statutory provisions: see *Stingel* at 320; *Masciantonio* at 66 and 71. The NSW Court of Criminal Appeal has also held that the objective test as stated by the High Court in *Stingel* represents the law under s 23(2)(b) of the *Crimes Act 1900* (NSW): see *R v Baraghith* (1991) 54 A Crim R 240, approved by the High Court in refusing special leave to appeal from the NSW Court of Criminal Appeal in that case: see *Baraghith v The Queen* (1991) 66 ALJR 212.

63. See *R v Morhall* [1995] 3 All ER 659.

64. See *R v Starr* (Supreme Court, NSW, Hunt CJ at CL, 12 October 1994, CRD 70060/94, unreported).

temperaments.[65] For the purpose of assessing whether an ordinary person could have reacted in the same way as the accused, the personal characteristics of the accused, such as a particularly excitable temperament, must not be considered.[66] For example, evidence that an accused has an intellectual disability which reduces his or her power to exercise self-control must not be considered by a jury in assessing whether an ordinary person could have lost self-control in response to the same provocation.[67]

2.47 There is one exception to the general rule prohibiting the personal characteristics of the accused from being considered when assessing the ordinary person's power of self-control. Where the accused is young, the ordinary person is deemed to be an ordinary person of the accused's age. There is no precise definition of "young" under this exception to the ordinary person test. The High Court has simply stated that the ordinary person is to be regarded as a person of the accused's age, where the accused is immature by reason of youthfulness.[68]

The ordinary person's response after losing self-control

2.48 The third component of the ordinary person test requires consideration of the form which the ordinary person's reaction could have taken, assuming

65. See *Stingel v The Queen* (1990) 171 CLR 312 at 329.
66. This principle has been modified in several Northern Territory cases, in which the Court of Criminal Appeal has held that, where an accused person lives in an isolated Aboriginal enclave, then for the purpose of the ordinary person test in the defence of provocation, the ordinary person may be regarded as a person living in the accused's Aboriginal enclave: see *Jabarula v Poore* (1989) 42 A Crim R 479, 96 FLR 34; *R v Mungatopi* (1991) 57 A Crim R 341, followed in *Rostron v The Queen* (1991) 1 NTLR 191 at 208. The Commission received one submission which supported serious consideration of a "cultural defence" which would reduce murder to manslaughter if the accused could show that he or she killed in the reasonable belief that the customary law of his or her Aboriginal community required the commission of the act causing death: see S Yeo and S Odgers, *Submission* (29 October 1993) at 6. The issue of whether and to what extent our legal system should recognise Aboriginal customary law is currently being considered by the Commission in relation to the sentencing of Aboriginal offenders as part of its reference on sentencing in New South Wales.
67. See *Luc Thiet Thuan v The Queen* [1996] 3 WLR 45 (Privy Council).
68. See *Stingel v The Queen* (1990) 171 CLR 312.

that the ordinary person could have lost self-control in response to the provocation. The law in relation to this third component of the test differs in New South Wales from the common law position and the position under statutory provisions in other Australian states.

2.49 In New South Wales, the ordinary person test simply requires consideration of whether an ordinary person could have formed an intention to kill or cause grievous bodily harm, rather than an intention to kill in the same manner as the accused did.[69] At common law, the law relating to the third component of the ordinary person test is less clear. In *Stingel v The Queen*,[70] the High Court stated that, according to the ordinary person test as it operates under the Tasmanian Criminal Code and at common law, the jury must consider whether an ordinary person, once provoked, could have formed an intention to kill or cause grievous bodily harm, and whether the ordinary person could have retaliated to the provocation "to the degree and method and continuance of violence" as that adopted by the accused. Thus it may be that the more brutal or sadistic the attack on the victim, the less likely it is that an ordinary person could have reacted in the same manner and degree. More recently, however, the High Court appears to have given less importance to this third component of the ordinary person test, stating that while the test involves consideration of the nature and extent of an ordinary person's reaction, it is the formation of an intention to kill rather than the precise form or means adopted which is the jury's primary consideration in assessing the ordinary person's response.[71]

Criticisms of the ordinary person test

2.50 The ordinary person test has been strongly criticised on a number of grounds.

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69. See *R v Jamieson* (Court of Criminal Appeal, NSW, 3 October 1986, CCA 372/85, unreported) at 4. See also P Berman, "Provocation: Difficulties in the Application of the Subjective Test" (1995) 2 *Criminal Law News* at 8 and S Yeo, "Sex, Ethnicity, Power of Self-Control and Provocation Revisited"(1996) 18 *Sydney Law Review* 304 at 308. Professor Yeo criticises this aspect of the defence as it operates in New South Wales as unduly diminishing the moral underpinnings of the provocation defence.
70. (1990) 171 CLR 312 at 325, approving *Holmes v Director of Public Prosecutions* [1946] AC 588 at 597 and *Sreckovic v The Queen* [1973] WAR 85 at 91.
71. See *Masciantonio v The Queen* (1995) 183 CLR 58 at 69.

Unfairness

2.51 First, it may be argued that it is unfair to assess criminal liability for the serious offence of murder according to an objective standard which ignores the particular capacities of the individual accused. An accused person may genuinely have lost self-control in response to provocation, but if his or her capacity for self-control falls below the standard of an "ordinary person", the law deems the accused to be a "murderer". Arguably, that approach is inconsistent with a conception of the defence of provocation as a partial excuse for an impaired mental state. The imposition of an objective standard to measure criminal responsibility may pose particular problems for certain groups of offenders, such as offenders with an intellectual disability.

2.52 One submission disputed the claim that it is necessarily unfair to impose criminal liability according to an objective standard of behaviour.[72] It was submitted that other law reform bodies, in particular the Commonwealth Model Criminal Code Officers' Committee, have proposed the imposition of an objective standard to assess culpability in respect of other criminal offences.[73] On this basis it was argued that it is not generally regarded as self-evident that an objective test is unfair.

2.53 While it is true that the Commonwealth Model Criminal Code Officers' Committee has suggested the imposition of an objective standard for certain less serious offences which carry relatively low maximum penalties,[74] that Committee has recognised that it is unfair and contrary to fundamental principles of criminal responsibility to judge a person for a serious offence

72. See P Berman, *Submission* (28 July 1997) at 1.
73. See Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Sexual Offences Against the Person* (Discussion Paper, 1996) at 82-83.
74. For example, in regards to sexual offences, the Committee has proposed the creation of an offence of unlawful sexual penetration negligent as to consent, which would apply to persons who commit sexual assaults with the genuine though mistaken belief that the victim is consenting, where that belief is unreasonable. The Committee regards this as a lesser offence than the basic offence of sexual assault (or "unlawful sexual penetration"), and has suggested that it carry a maximum penalty of imprisonment for seven years: see Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Sexual Offences Against the Person* (Discussion Paper, 1996) at 82-83.

according to an objective standard.[75] That reasoning must apply to assessing culpability for murder, which is generally regarded as the most serious offence in our criminal system, as reflected in the maximum penalty of penal servitude for life. While it is true that the defence of self-defence requires that culpability be assessed according to an objective standard, a successful plea of self-defence results in a complete acquittal rather than reducing culpability. For that reason, there is a much stronger argument for requiring the accused to have acted on reasonable grounds.

Uncertainty in characterising the "ordinary person"

2.54 Secondly, it may be questioned whether the characteristics or capacities of an "ordinary person" can be defined with any certainty, or whether, in fact, the notion of an ordinary person is "pure fiction".[76] It is difficult to apply the standards of a hypothetical "ordinary person" in the context of a multicultural society.

2.55 The High Court in *Stingel v The Queen*[77] described the purpose of the ordinary person test in the defence of provocation as ensuring that all persons are judged according to a uniform standard of behaviour under a governing principle of equality before the law. However, in a society comprising a number of different cultural groups, it may be questioned whether every group shares the same values and the same standards and modes of behaviour. It may be discriminatory to import the standards of one group to the "ordinary person", when those standards may not be shared by other groups in the community. It has been suggested that real equality before the law (as stated by the High Court to be the governing principle of the ordinary person test) cannot exist when ethnic or cultural minorities are convicted or acquitted of murder according to a standard that reflects the values of the

75. See Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Sexual Offences Against the Person* (Discussion Paper, 1996) at 63-75. On the basis that it is contrary to fundamental principles of criminal justice, the Committee has proposed a subjective fault element for the basic offence of unlawful sexual penetration, so that the question for the jury is whether the accused genuinely believed that the victim was consenting, rather than reasonably believed in consent.
76. *Masciantonio v The Queen* (1995) 183 CLR 58 per McHugh J (dissenting) at 73.
77. *Stingel v The Queen* (1990) 171 CLR 312 at 324. See also *Bedder v DPP* [1954] 2 All ER 801 at 804.

dominant class but does not reflect the values of those minorities.[78] A rule which tests people's reactions according to values which are alien to them may give rise to injustice.[79]

Complexity

2.56 Thirdly, it may be argued that the ordinary person test is too complicated for a jury to understand and apply to the facts of a particular case. The test requires the jury to consider the accused's personal characteristics for the purpose of assessing the gravity of the provocation, but then to ignore those characteristics for the purpose of determining the ordinary person's power of self-control. Yet it may be unrealistic to expect a jury to ignore evidence which they have already taken into account for the first component of the ordinary person test. Moreover, it may be argued that the distinction between the first and the second components of the ordinary person test is too subtle for a jury to understand[80] and, as a consequence, they may simply ignore the requirements of the ordinary person test in order to decide as they think fair in the circumstances.[81] It may be artificial to dissect human behaviour so as to apply one standard to a person's perception of conduct and another standard to his or her reaction to that conduct. Those factors which make a person particularly sensitive to certain conduct, such as taunts about his or her physical attributes, may also affect that person's ability to exercise self-control when faced with insults of that kind.[82] For example, a person who is beaten as a child may now not only perceive forms of physical aggression as particularly grave but may also react more strongly to them than other people.[83]

Imprecision

78. See *Masciantonio v The Queen* (1995) 183 CLR 58 per McHugh J (dissenting) at 74.
79. See *Moffa v The Queen* (1977) 138 CLR 601 per Murphy J at 626; S Yeo, "Power of Self-Control in Provocation and Automatism" (1992) 14 *Sydney Law Review* 3 at 6-7; S Yeo and S Odgers, *Submission* (29 October 1993) at 5.
80. *DPP v Camplin* [1978] AC 705 at 718. See also S Yeo and S Odgers, *Submission* (29 October 1993) at 5.
81. *R v Voukelatos* [1990] VR 1 per Murphy J at 12.
82. See S Yeo, "Ethnicity and the Objective Test in Provocation" (1987) 16 *Melbourne University Law Review* 67. See also S Yeo and S Odgers, *Submission* (29 October 1993) at 5.
83. See T Macklem, "Provocation and the Ordinary Person" (1987) 11 *Dalhousie Law Journal* 126 at 145.

2.57 Fourthly, it may be argued that the ordinary person test provides the jury with no guidance as to the precise characteristics of the "ordinary person" and, as a consequence, the jury is left to speculate about that person's capacities and likely responses.

2.58 The High Court has stated that jurors should not equate themselves with the "ordinary person" in the defence of provocation. They should not simply ask themselves what their reaction to the particular provocation would be, because that would be substituting the individual juror for the hypothetical ordinary person.[84] Consequently, a jury may be left to guess about the likely capacities of some imaginary "ordinary person", whoever that may be. The jury may also have to speculate about the ordinary person's likely reaction to what may be an extraordinary situation, outside the life experience of the average juror, such as an unwelcome sexual advance following a history of sexual abuse. The life experiences of many jurors may not easily allow them to determine how an ordinary person would react to such behaviour, if they themselves have never been the victims of sexual abuse or been subjected to unwelcome sexual advances. At best, the jury may resort to making "an educated guess" and at worst to taking "a shot in the dark".[85]

84. See *Stingel v The Queen* (1990) 171 CLR 312 at 327-328.

85. See P Berman, "Provocation: Difficulties in the Application of the Subjective Test" (1995) 2 *Criminal Law News* at 8; M Goode, "The Abolition of Provocation" in S Yeo (ed), *Partial Excuses to Murder* (Federation Press, Sydney, 1990) at 48. See also P Berman, *Submission* (28 July 1997) at 1. Mr Berman submits that the subjective test (actual loss of self-control), as well as the objective test, in the defence of provocation are incapable of fair application because, in deciding whether the accused did lose self-control, the jury will inevitably consider whether an ordinary person would have lost self-control in the same situation. That question will be a difficult one for the jury to answer if they have not themselves faced a similar situation.

Support for the ordinary person test

2.59 In response to these criticisms, several arguments have been raised in support of the ordinary person test in the defence of provocation.

2.60 First, it has been asserted that the ordinary person test allows the jury to determine those provoked killers who should be regarded as murderers in terms of blameworthiness and those who are less culpable. It is disputed whether juries have difficulty in applying the ordinary person test in practice.[86] Through the ordinary person test, juries are able to consider whether an accused's reaction to certain circumstances was one which invokes empathy and calls for compassion to the extent of reducing liability to manslaughter. At the same time, the test imposes limits on the exercise of the law's compassion by ensuring that some people who kill after losing self-control are treated as murderers, in cases where their reaction to provocation does not attract the community's empathy.[87] There is concern that, without the ordinary person test, any killing which resulted from a violent loss of temper would be at least partially excused.

2.61 Secondly, it is argued that the imposition of an objective standard in provocation does not fail to recognise differing values of various groups in society.[88] Cultural differences, for example, may be acknowledged when they are relevant to assessing the gravity of the provocative conduct offered by the victim. However, the relevance of cultural differences to that issue must be distinguished from the question of ordinary powers of self-control. Any suggestion that different cultural groups have different capacities for self-control can only be speculative, and should not be considered when assessing the blameworthiness of the accused's response to provocation.[89]

2.62 Lastly, it is contended that the ordinary person test in the defence of provocation is desirable in order to distinguish that defence from the "mental

86. See M Latham, *Oral Submission* (6 August 1997).
87. See I Leader-Elliott, "Sex, Race and Provocation: In Defence of Stingel" (1996) 20 *Criminal Law Journal* 72 at 85-86.
88. See Leader-Elliott (1996); M Detmold, "Provocation to Murder: Sovereignty and Multiculture" (1997) 19 *Sydney Law Review* 5. Michael Detmold contends that the ordinary person test does not amount to the imposition of an external standard of behaviour, but rather represents the mutual respect which binds people together in human relationships.
89. See Leader-Elliott (1996) at 90-91.

illness" defences. The defence of provocation assumes that an accused is mentally "normal" and in that way shares the capacities of the ordinary person. Other defences, such as the defence of mental illness and the defence of diminished responsibility, apply to accused persons who commit offences because they are mentally "abnormal", by reason of some form of inherent mental impairment or mental illness.[90] If the ordinary person test in the defence of provocation were abolished, the distinction between the defence of provocation and the mental illness defences would be made less clear.[91]

Suggestions for reform

2.63 The Commission has considered three options for reform of the ordinary person test.[92] These are:

- an expanded version of the ordinary person test;
- abolition of the ordinary person test in favour of a purely subjective test; and
- abolition of the ordinary person test in favour of a subjective test qualified by the application of community standards of blameworthiness.

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90. See Leader-Elliott (1996) at 84.

91. For example, under the American Law Institute's Model Penal Code, the defence of provocation is recast into a defence of "extreme mental or emotional disturbance". The ordinary person test is omitted under this reformulated defence. The drafters recognised that the omission of an objective standard may allow some offenders suffering from an abnormality of mind, who would traditionally come within the defence of diminished responsibility, to rely on the defence of extreme mental or emotional disturbance: see American Law Institute, *Model Penal Code and Commentaries (Official Draft and Revised Comments)* (Philadelphia, 1980) article 210.3 and at 65-73.

92. A number of submissions favoured reform to the ordinary person test in the defence of provocation: see Law Society, *Submission* (28 October 1993) at para 1.3.2; Legal Aid Commission, *Submission* (2 February 1994) at 2; Women's Legal Resources Centre, *Submission* (3 December 1993) at 3-4. The (then) Acting Senior Public Defender supported abolition of the defence, but as a second choice agreed that the ordinary person test should be abolished: see M L Sides, *Submission* (17 December 1993) at 5. Mr Berman agreed that the ordinary person test was incapable of fair application, but argued that this provided a ground for abolishing the defence of provocation altogether: see P Berman, *Submission* (28 July 1997).

Option One
Expand the ordinary person test to permit consideration of ethnicity and/or gender

2.64 It has been suggested that the ordinary person test should be expanded to allow consideration of the accused's ethnicity and/or gender, either when assessing the ordinary person's power of self-control (the second component of the ordinary person test), or, alternatively, when assessing the form of the ordinary person's likely reaction after losing self-control (the third component).

Ethnicity, gender and the ordinary power of self-control

2.65 Under the first suggestion, as favoured by two submissions,[93] the ordinary person in the ordinary person test would be regarded as having the power of self-control of an ordinary person of the accused's ethnic or cultural background[94] and/or gender.[95] This proposal is based on the idea that there

93. One submission supported a modification to allow both gender and ethnicity to be considered in the second component of the ordinary person test: see Legal Aid Commission, *Submission* (2 February 1994) at 2. A second submission supported modification in relation to ethnicity only: see S Yeo and S Odgers, *Submission* (29 October 1993) at 5. See also I H Pike, *Submission* (3 November 1993) at 3: Mr Pike did not draw any final conclusions on whether the ordinary person test should be modified, but did strongly criticise the potentially discriminatory effect of the current form of the ordinary person test in excluding consideration of ethnicity.

94. See S Yeo, "Ethnicity and the Objective Test in Provocation" (1987) 16 *Melbourne University Law Review* 67; S Yeo, "Power of Self-Control in Provocation and Automatism" (1992) 14 *Sydney Law Review* 3; *Masciantonio v The Queen* (1995) 183 CLR 58 per McHugh J at 74.

95. See *DPP v Camplin* [1978] AC 705 per Diplock LJ at 718. Similarly, the House of Lords recently restated that the hypothetical person in provocation is deemed to have the power of self-control of an ordinary person of the same sex and age as the accused: see *R v Morhall* [1995] 3 All ER 659 at 665-666. No mention was made in *Morhall* of the Australian High Court's decision in *Stingel*, in which it was held that the accused's gender should not be considered when assessing the ordinary person's power of self-control under the second limb of the ordinary person test.

may be differences in capacities for self-control between the sexes and amongst various ethnic or cultural groups, which differences should be acknowledged in the ordinary person test in order to avoid injustice and discrimination.[96]

2.66 There are several compelling objections to taking ethnicity and/or gender into account when considering the ordinary person's power of self-control.[97]

2.67 First, it is unclear how it could be established with any certainty that members of one group have a lower threshold for exercising self-control than others. There is a danger that any such assertion would involve speculation and ill-informed stereotyping.[98]

2.68 Secondly, it is questionable whether the application of the defence of provocation should depend on whether or not violent loss of self-control is more prevalent amongst members of an accused's sex or ethnic group. For example, a man who loses control and kills his wife should not be able to rely on the defence of provocation simply because it can be shown that domestic violence is particularly prevalent or generally accepted by his sex or by members of his ethnic group. Arguably, it is unfair that people should have a greater or lesser chance of success in raising the defence of provocation depending on whether members of their sex or ethnic group can generally be shown to have a greater or lower capacity for self-control.

2.69 Thirdly, it may be argued that the law should not be seen to apply different standards of criminal behaviour to different groups in society by measuring culpability according to an accused's sex or ethnic or cultural background.[99]

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96. See S Yeo, "Ethnicity and the Objective Test in Provocation" (1987) 16 *Melbourne University Law Review* 67 at 79.
97. See also I Leader-Elliott, "Sex, Race and Provocation: In Defence of Stingel" (1996) 20 *Criminal Law Journal* 72 at 89-93.
98. Indeed, this objection has persuaded Professor Stanley Yeo, a main proponent of the suggestion to take ethnicity into account, to resile from his position: see S Yeo, "Sex, Ethnicity, Power of Self-Control and Provocation Revisited" (1996) 18 *Sydney Law Review* 304.
99. See S Kerkyasharian, *Submission* (10 November 1993) at 1. This objection is noted by proponents of the proposal to take ethnicity into account, but is rebutted on the ground that it may be necessary for the law to apply different standards to different groups within society in order to achieve true equality in

Ethnicity, gender and the form of the ordinary person's response

2.70 The second suggestion to expand the ordinary person test involves the third component of the test, that is the likely response of the ordinary person after losing self-control. Under this proposal, the third component would be modified to require consideration of whether, after losing self-control, an ordinary person of the accused's sex and/or ethnic group would be likely to form an intention to kill in the same manner as that adopted by the accused.[100] If this suggestion were adopted, the ordinary person test as it currently operates in New South Wales would need to be amended to require the jury to decide not only whether an ordinary person could lose control so as to form an intention to kill or to inflict grievous bodily harm, but also whether he or she could lose control so as to form an intention to kill or to inflict grievous bodily harm in the same manner as the accused did.[101]

2.71 It is argued that this proposal permits everyone to be judged against a uniform standard of self-control, while acknowledging that people's behaviour may be influenced by their sex or ethnic background.[102] This proposal is said to permit the jury to make a value judgment about the accused person's response to provocation in determining whether that response deserves compassion, while at the same time recognising that the accused's response may be strongly influenced by his or her ethnic or cultural background and gender. The proposal could be extended to include consideration of other factors, such as the accused's age.

2.72 This proposal is preferable to the first suggestion to the extent that, at least in theory, the jury may be able to guide its decision according to empirical evidence about typical response patterns of members of a particular group. However, in the Commission's view, the proposal does not overcome the complexities and confusion of the existing ordinary person test, since it continues to rely on arguably artificial and subtle distinctions which are unlikely to be workable in practice.

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a multicultural community: see McHugh J in *Masciantonio v The Queen* (1995) 183 CLR 58 at 74.

100. See S Yeo, "Sex, Ethnicity, Power of Self-Control and Provocation Revisited" (1996) 18 *Sydney Law Review* 304.
101. See paras 2.48-2.49.
102. See S Yeo, "Sex, Ethnicity, Power of Self-Control and Provocation Revisited" (1996) 18 *Sydney Law Review* 304 at 311.

Option Two
Abolish the ordinary person test in favour of a purely subjective test for the defence of provocation

2.73 A second option for reform, supported in one submission,[103] is to abolish the ordinary person test in provocation altogether in favour of a purely subjective test. Under this proposal, the sole question for the jury to decide would be whether the accused did in fact kill while provoked and after losing self-control.

2.74 A version of the subjective approach for provocation was recommended by the Law Reform Commissioner of Victoria in 1982. Under that recommendation, the jury would consider:

> Was the accused person really provoked and did he or she genuinely lose the power of self-control, and as the result of that loss and of the provocation act as the accused person did, or was the conduct not the result of natural and sudden anger but of brutal and planned ferocity?[104]

2.75 Under this version of the subjective test, the jury would need to consider matters such as the nature of the provocative conduct and the mode of the accused's retaliation in order to determine whether, as a question of fact, the accused really did act under provocation at the time of the killing.

2.76 In Ireland, a subjective approach to the defence of provocation has been adopted on the basis that the ordinary person test is illogical. Under the Irish version of the subjective test, the jury must consider whether the accused was provoked and killed as a result of a loss of self-control, with the added proviso that the jury be satisfied that the force used by the accused was not unreasonable or excessive, having regard to the gravity of the provocative conduct.[105]

2.77 An important objection to a purely subjective test for provocation is that it may be perceived as preventing the jury from making any evaluation

103. See S Yeo and S Odgers, *Submission* (29 October 1993) at 4-5.
104. Law Reform Commissioner of Victoria, *Provocation and Diminished Responsibility as Defences to Murder* (Report 12, 1982) at para 1.24.
105. See *The People v MacEoin* [1978] IR 27 at 34.

about whether or not the accused should be convicted of murder rather than manslaughter as a matter of blameworthiness. The jury's task would simply be to determine whether, based on the evidence, the accused was provoked and lost self-control. If the evidence showed that the accused was provoked, the jury would be obliged to convict him or her of manslaughter, notwithstanding the fact that they may consider that, in terms of blameworthiness, the accused's liability should not be reduced to manslaughter in the particular circumstances of the case. Arguably, it may be unduly lenient to allow every case of unlawful killing where there is a loss of self-control to be reduced to manslaughter.

Option Three
Replace the ordinary person test with a subjective test together with the application of community standards.

2.78 A third option for reform, supported by two submissions,[106] is essentially a subjective test for provocation, subject to a test incorporating community standards of blameworthiness. Under this proposal, the jury makes the final assessment of whether, having established that the accused did lose self-control, he or she should be convicted of manslaughter instead of murder.

2.79 Several versions of this option have been suggested. For example, the (then) Acting Senior Public Defender proposed a test which allows the jury to return a verdict of manslaughter where they are satisfied that the accused was in fact provoked and where "having considered all the circumstances, that it is fair and just that the lesser verdict be entered". In the United States, a test was proposed for a defence of extreme mental or emotional disturbance "for which there is reasonable explanation or excuse".[107] The Law Society favoured the following test:

> Where a person suffers a loss of self-control as a result of provocation (whether by things done or words said and whether by the deceased or by someone else) and intentionally kills or is a party to the killing of another, he or she is not guilty of murder but guilty of manslaughter if,

106. Law Society, *Submission* (28 October 1993) at 3; M L Sides, *Submission* (17 December 1993) at 5.
107. American Law Institute, *Model Penal Code and Commentaries (Official Draft and Revised Comments)* (Philadelphia, 1980) article 210.3.

> in all the circumstances, including any of the defendant's personal characteristics, there is sufficient reason to reduce the offence from murder to manslaughter.[108]

2.80 One advantage of Option Three is that it avoids the complexities of the ordinary person test while still allowing the jury to make a value judgment about whether or not a particular accused should be convicted of murder or manslaughter, in light of the particular mitigating circumstances of the provocation and the accused's blameworthiness. All of the accused's personal characteristics may be considered, without broadening the ambit of the defence to the extent that any provoked killing will result in a verdict of manslaughter. On the other hand, this option has been criticised on the basis that it is too vague and offers insufficient guidance as to the nature of the criteria to guide the jury in their determination of whether to convict of murder or manslaughter. Instead, the jury would be asked to determine community standards on a case by case basis.[109]

Conclusion

108. This was the recommended formulation put forward by the Law Reform Commission of Victoria, based on a formulation devised by the Criminal Law Revision Committee (England and Wales): see Law Reform Commission of Victoria, *Homicide* (Report 40, 1991) recommendation 21 and at para 191; England and Wales, Criminal Law Revision Committee, *Offences against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) recommendation 99.2 and at paras 81-83. The test as originally proposed by the Criminal Law Revision Committee required the jury to consider whether the provocative conduct in question "can reasonably be regarded as a sufficient ground for the loss of self-control leading the defendant to react against the victim with murderous intent".

109. I Leader-Elliott, "Sex, Race and Provocation: In Defence of Stingel" (1996) 20 *Criminal Law Journal* 72 at 96; S Yeo, "Sex, Ethnicity, Power of Self-Control and Provocation Revisited" (1996) 18 *Sydney Law Review* 304 at 321; M Goode, "The Abolition of Provocation" in S Yeo (ed), *Partial Excuses to Murder* (Federation Press, Sydney, 1990) at 51; V Nourse, "Passion's Progress: Modern Law Reform and the Provocation Defense" (1997) 106 *Yale Law Journal* 1331 at 1373. Two submissions also expressed concern that this test does not provide much guidance to the jury and leaves the question of provocation to be decided on a case by case basis: see M L Sides, *Submission* (31 July 1997) at 1; M Latham, *Oral Submission* (6 August 1997).

2.81 The Commission concludes that a version of Option Three should be incorporated into the reformulation of the defence of provocation. This option allows for all the personal characteristics of the accused to be considered while at the same time providing a simple, straightforward means by which the jury may make a final evaluation on the degree of culpability involved. The Commission adopted a similar approach in its recommended reformulation of the defence of diminished responsibility.[110] That formulation is based on the application of community standards through the jury's determination of whether the accused's mental functioning is impaired so significantly as to warrant reducing murder to manslaughter. A reformulation to the same effect in respect of the defence of provocation ensures that the jury has ultimate control over who is successful under the defence as well as directing the jury's attention to its primary task of assessing whether, in the circumstances, the loss of self-control warrants reduction of the charge from murder to manslaughter.

2.82 The Commission's preferred version of Option Three would require consideration of whether, taking into account all the characteristics and circumstances of the accused, he or she should be excused for having so far lost self-control as to have formed an intention to kill or inflict grievous bodily harm or to act with reckless indifference to human life as to warrant the reduction of murder to manslaughter. Other versions of Option Three, outlined above, may be too vague in that they present the jury with the stark choice of deciding whether murder should be reduced to manslaughter. On the other hand, the Commission's preferred version guides the jury's decision by directing their attention to the degree of the accused's loss of self-control and whether or not that loss of self-control should be excused to the extent of reducing liability to manslaughter. This task will involve consideration of all relevant factors, including the nature of the provocative conduct which triggered the loss of self-control; whether the accused person formed the requisite guilty mind for murder because of that loss of self-control; and whether the degree of loss of self-control warrants reducing that person's liability to manslaughter.

2.83 The Commission acknowledges the concerns expressed in several submissions[111] about the risks of defining the success of the defence of provocation in terms which essentially rely on a discretionary judgment by

110. See NSWLRC Report 82 recommendation 4.

111. See M L Sides, *Submission* (31 July 1997) at 1; P Berman, *Submission* (28 July 1997) at 2; M Latham, *Oral Submission* (6 August 1997).

individual juries. It was submitted that some of the risks which arise in applying the ordinary person test are not necessarily overcome by the Commission's recommended reformulation, for example the risk that a particular jury's decision will be wrongly influenced by prejudice or by reason of the fact that the case before them lies far outside their life experiences. The Commission does not suggest that these types of risks will be completely overcome by the recommended reformulation. However, they are risks which are inherent in the jury system itself, which system is fundamental to our process of determining liability for serious criminal offences. While we acknowledge that there may be general concern about jury trials, we consider it vitally important that juries remain central to the task of determining liability for serious offences. Although perhaps not completely overcoming the risks already involved in the ordinary person test, our recommended reformulation of the defence of provocation is clearer and therefore easier to apply; avoids much of the complexity generated by the ordinary person test; and focuses attention on the principal question, which is whether murder should be reduced to manslaughter. These are significant and decisive advantages.

CONDUCT AMOUNTING TO PROVOCATION

2.84 Under the existing formulation of the defence of provocation in New South Wales, there appears to be some uncertainty about whether certain conduct falls within the statutory definition of provocation. In addition, there have been suggestions that some conduct should be expressly excluded from the scope of the defence. These issues have arisen in relation to the following types of conduct:

- conduct occurring outside the accused's presence;
- provocation not induced by the victim;
- lawful conduct;
- self-induced provocation;
- conduct of women as victims of provoked killings; and
- non-violent homosexual advances.

Conduct occurring outside the accused's presence

2.85 It is not clear whether s 23 of the *Crimes Act 1900* (NSW) recognises conduct occurring outside the presence of the accused as amounting to provocation under the defence of provocation.

2.86 Under the defence of provocation at common law, conduct amounting to provocation must occur within the sight or hearing of the accused.[112] This is commonly referred to as the rule against "hearsay provocation". According to this common law rule, the defence of provocation would not be available, for example, to an accused person who kills his girlfriend's rapist when he is informed of the rape but does not witness it personally.[113] The common law rule against hearsay provocation has been modified to the extent that, when assessing the gravity of provocative conduct occurring in the accused's presence, the jury may take into account background information, including hearsay reports to the accused from third parties about past provocative conduct of the victim.[114]

2.87 Section 23 of the *Crimes Act 1900* (NSW) does not contain any specific requirement that the accused be present at the time of the provocative conduct. It has been suggested that the legislature intended to allow for hearsay provocation under the 1982 amendments to s 23(2)(a), which now specifies that provocation may be conduct "towards or affecting the accused".[115] However, the Court of Criminal Appeal held in one case that the 1982 amendments do not alter the common law rule requiring presence.[116] That question was left unanswered in a later case.[117]

112. *R v Fisher* (1837) 173 ER 452; *R v Arden* [1975] VR 449. See NSWLRC DP 31 at paras 3.27-3.29.
113. These were the facts in *R v Arden*.
114. Thus in *The Queen v R* (1981) 28 SASR 321, affectionate words and caresses by the victim towards the accused were held to amount to provocation when considered in the context of the daughters' reports of abuse by the victim.
115. See S Yeo, "Peisley: Case and Comment" (1992) 16 *Criminal Law Journal* 197 at 200. The 1982 amendments to s 23(2)(a) of the *Crimes Act 1900* (NSW) were described by the Attorney General as intended to cover the situation in *The Queen v R* (1981) 28 SASR 321, where the accused killed her husband after being informed of his sexual abuse of their daughters: see New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 11 March 1982 at 2485-2486.
116. See *R v Quartly* (1986) 11 NSWLR 332 at 339.
117. See *R v Peisley* (1990) 54 A Crim R 42 at 49.

2.88 The Commission considers that there is a need to clarify the legislation as to whether or not hearsay provocation falls within the definition of provocation under the defence. In DP 31, we considered a proposal to redefine provocation so that it expressly includes conduct occurring outside the accused's presence.[118] Three submissions supported this proposal.[119]

2.89 Two arguments have traditionally been advanced for excluding hearsay provocation from the defence of provocation. The first is that hearsay provocation involves an element of belief on the part of the accused and that allegedly there is nothing tangible on which the accused can be said to have acted.[120] This argument has been criticised for failing to recognise that a person's honest belief that some provocative incident has occurred may affect that person's capacity for self-control to the same extent as if he or she witnessed the conduct personally.[121]

2.90 The second reason typically given for excluding hearsay provocation from the defence of provocation is that such a restriction ensures the defence is not available to people who kill "innocent" victims, that is, victims who did not in fact commit the provocative acts which they are alleged to have committed in the hearsay reports. This argument is based on a construction of the defence of provocation as a (partial) justification for killing, where the victim's own blameworthy conduct has contributed to the accused's actions.[122] However, it has been pointed out that, even if justification is accepted as the primary rationale for the defence of provocation, the rule against hearsay provocation goes too far, because it may also protect those victims who are in fact guilty of the provocative conduct which, when reported to the accused, causes him or her to lose self-control.[123] If there is concern that the defence not be made available to people who kill "innocent" victims, a qualification could be added to the definition of provocation that, if the accused does not

118. See NSWLRC DP 31 at para 3.29 and at 63.
119. Law Society, *Submission* (28 October 1993) at para 1.3.4; M L Sides, *Submission* (17 December 1993) at 5; Women's Legal Resources Centre, *Submission* (3 December 1993) at 4.
120. See *R v Arden* [1975] VR 449 at 452; *R v Quartly* (1986) 11 NSWLR 332 at 338.
121. S Yeo, "Peisley: Case and Comment" (1992) 16 *Criminal Law Journal* 197 at 200; D Lanham, "Provocation and the Requirement of Presence" (1989) 13 *Criminal Law Journal* 133 at 148.
122. See para 2.15.
123. D Lanham, "Provocation and the Requirement of Presence" (1989) 13 *Criminal Law Journal* 133 at 148-149.

witness the provocative conduct personally, then he or she must have reasonable grounds for believing both that the provocation has occurred and that it was committed by the victim.[124]

2.91 In the Commission's view, the legislation should not automatically exclude from the defence of provocation those people who lose self-control following hearsay reports of provocation, rather than witnessing such conduct personally. This conclusion is consistent with our general approach to the defence of provocation, that it is primarily a partial excuse for killing on the basis of a loss of self-control, and should not therefore be restricted to provocation occurring in the accused's presence.[125] The legislation should be amended to make it clear that the defence of provocation may apply to provocative conduct occurring outside the accused's presence. Where the accused loses self-control as a result of a belief in provocative conduct, which provocative conduct the accused does not witness personally, then the accused's belief in the conduct must be based on reasonable grounds. Our reasons for recommending a requirement for belief based on reasonable grounds in this particular context are set out in paragraph 2.135.

Provocation not induced by the victim

2.92 Section 23(2)(a) of the *Crimes Act 1900* (NSW) stipulates that the accused's loss of self-control must be "induced by any conduct of the deceased". This reflects the general rule of the defence of provocation at common law that the provocative conduct must be committed by the victim.[126] The rule has been modified at common law to the extent that, if the

124. In New Zealand, while recognising conduct occurring outside the accused's presence as conduct which may amount to provocation, it has been held that the ordinary person test in the defence of provocation requires the accused to have belief on reasonable grounds that the provocation has in fact occurred, since the report of the provocation must be such that an ordinary person could also have believed it: see *R v White* [1988] 1 NZLR 122; B Brown, "Provocation in New Zealand: A Characteristic Solution" in S Yeo (ed), *Partial Excuses to Murder* (Federation Press, Sydney, 1990) at 92.

125. This was also the recommendation of the Law Reform Commission of Victoria in *Homicide* (Report 40, 1991) recommendation 23.

126. See, for example, *R v Croft* [1981] 1 NSWLR 126 at 140; *R v Kenney* [1983] 2 VR 470. The case law is not completely consistent, however. The common law rule appears to have been rejected by the Victorian Court of Criminal Appeal in *R v Gardner* (1989) 42 A Crim R 279. In that case, the fact that the male victim was sleeping in the house of the accused's estranged wife was sufficient basis for the defence of provocation, when considered in the context

victim has used a third party as an agent to provoke the accused or has acted in concert with others, the conduct may still be deemed to emanate from the victim so as to amount to provocation.[127]

2.93 Beyond this modification, it remains unclear whether the defence of provocation either at common law or under s 23(2)(a) of the *Crimes Act 1900* (NSW) is available in circumstances where the victim does not cause the provocation. This issue has arisen in three situations: first, where the accused kills an innocent bystander who intervenes to stop an attack by the accused on his or her provoker;[128] secondly, where the accused holds an honest but mistaken belief that the provocation was induced by conduct of the victim;[129] and thirdly, where the innocent bystander is killed by accident, the accused intending to inflict injury on the actual provoker.[130]

2.94 The first of these three situations, the case of the innocent bystander who intervenes, has been held at common law not to amount to provocation on the basis that, applying the ordinary person test, an ordinary person could not have lost self-control so as to inflict injury on a person who has not offered any provocation.[131]

2.95 In respect of the second situation of mistaken belief, the case law is not entirely consistent. The New South Wales Court of Criminal Appeal has remarked that an accused who, while intoxicated, honestly though mistakenly believes that the victim has committed some provoking act, may be able to rely on the defence of provocation, provided that an ordinary, sober person, making the same mistake, could have been provoked in the same way as a result of the belief.[132] That proposition has since been doubted.[133] More

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of the wife's taunting of the accused moments before the killing. The Court distinguished the case from the facts in *Kenney* but did not refer to any other common law authority.

127. See *R v Kenney* [1983] 2 VR 470 at 470-471; *R v Fricker* (1986) 42 SASR 436 at 445, 448.
128. See *R v Scriva (No 2)* [1951] VLR 298, where the accused killed a bystander who tried to stop the accused attacking a passenger in a car which had just knocked down and killed the accused's young son.
129. *R v Croft* [1981] 1 NSWLR 126 at 149-150; *R v Kenney* [1983] 2 VR 470.
130. *R v Kenney* [1983] 2 VR 470 at 472.
131. *R v Scriva (No 2)* [1951] VLR 298, cited with approval in *R v Fricker* (1986) 42 SASR 436 per Zelling J at 448.
132. See *R v Croft* [1981] 1 NSWLR 126 per O'Brien CJ of CrD at 149-150, Street CJ and Samuels JA agreeing.

recently, the Victorian Court of Criminal Appeal has stated that, at common law, the defence of provocation is available to an accused who kills as a result of delusional beliefs that the victim has committed some provocative act, provided that an ordinary person could have reacted in the same way if the delusion were presumed to be true.[134] There are indications, however, that this decision will not be followed in subsequent cases, although the issue remains to be settled.[135]

2.96 In the third situation, where an accused accidentally kills an innocent bystander while intending to inflict injury on the actual provoker, the defence of provocation at common law has been held to be available on the basis of the doctrine of transferred malice,[136] although once again that proposition has since been doubted.[137] In New Zealand, "misdirected retaliation" is expressly included within the legislative definition of provocation.[138]

2.97 It is uncertain to what extent the common law cases on provocation not induced by the victim can be imported into s 23(2)(a) of the *Crimes Act 1900* (NSW), given the wording of s 23 requiring that provocation be induced by the victim.[139] In the Commission's view, the legislation should be amended to make it clear whether or not conduct must be induced by the victim in order to amount to provocation under the defence of provocation.

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133. See *R v Kenney* [1983] 2 VR 470 per Brooking J at 473.
134. *R v Voukelatos* [1990] VR 1.
135. In *Voukelatos*, Murphy J in the majority considered that delusionary beliefs could form the basis for provocation since the "ordinary person" in the objective test is endowed with the particular physical and mental characteristics of the accused in order to determine the effect of the provocative conduct on the ordinary person: see *R v Voukelatos* at 12-19, especially at 18. The Victorian Court of Criminal Appeal has since stated that, to the extent to which the decision in *Voukelatos* was based on the proposition that the subjective characteristics of the accused could be taken into account in considering the power of self-control of an ordinary person, that decision has now been overruled by *Stingel v The Queen*: see *R v Masciantonio* (1993) 69 A Crim R 258 at 273 (Vic CCA). The High Court did not address this issue in *Masciantonio v The Queen* (1995) 183 CLR 58.
136. See *R v Kenney* [1983] 2 VR 470 at 472.
137. See *R v Fricker* (1986) 42 SASR 436 per Zelling J at 448.
138. See *Crimes Act 1961* (NZ) s 169(6).
139. It is argued that s 23(2) restricts the conduct which may amount to provocation to conduct committed by the deceased: see B Fisse, *Howard's Criminal Law* (5th edition, Law Book Company, Sydney, 1990) at 97; D Weisbrot, "Homicide Law Reform" (1982) 6 *Criminal Law Journal* 248 at 254.

2.98 In the past, courts have refused to extend the defence of provocation to conduct not committed by the victim by referring to an essentially justification-based rationale of provocation.[140] That is, it has been argued that the defence of provocation should not be available to killings of "innocent" victims who have not contributed to the accused's loss of self-control through any blameworthy conduct of their own.

2.99 In the Commission's view, the defence of provocation should not be automatically excluded from cases where the provocation is not induced by the victim. This reflects the notion of the defence of provocation as a partial excuse for people who kill after losing self-control. It is a view which has been adopted by law reform agencies in other jurisdictions.[141] It is also supported by several submissions.[142]

2.100 The Commission recommends that the legislation be amended to make it clear that the defence of provocation is available in all three situations discussed above, that is, where the accused kills the person whom the accused believes has offered the provocation, or kills a person when attempting to kill or to injure the person who offered or was believed to have offered the provocation. In cases where the accused kills a person whom the accused believes has offered the provocation, then for the reasons set out in paragraph 2.135, we recommend that the belief be based on reasonable grounds. This would exclude, for example, a person who loses self-control as a result of a delusional belief as to the nature or existence of allegedly provocative conduct.

2.101 In the Commission's view, an amendment in the legislative definition of provocation to include conduct not committed by the victim would not open the floodgates to permit undeserving cases to come within the defence of provocation. According to our recommended reformulation, the defence of

140. See for example *R v Kenney* [1983] 2 VR 470; *R v Fricker* (1986) 42 SASR 436; *R v Gardner* (1989) 42 A Crim R 279; *Roche v The Queen* [1988] WAR 278.

141. See England and Wales, Criminal Law Revision Committee, *Offences Against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) at para 85; Law Reform Commission of Victoria, *Homicide* (Report 40, 1991) recommendation 24.

142. Law Society, *Submission* (28 October 1993) at para 1.3.4; M L Sides, *Submission* (17 December 1993) at 5; Women's Legal Resources Centre, *Submission* (3 December 1993) at 4.

provocation would only succeed where the jury finds that the loss of self-control should be excused so as to warrant reducing the charge from murder to manslaughter.

Lawful conduct

2.102 Section 23 of the *Crimes Act 1900* (NSW) is silent on the question of whether provocative conduct under the defence of provocation must be unlawful. The position at common law is uncertain, although in recent years it appears to be accepted by the courts that conduct which amounts to provocation need not necessarily be unlawful.[143]

2.103 In DP 31, the Commission proposed that s 23 of the *Crimes Act 1900* (NSW) be amended to make it clear that the defence of provocation does not require the provocative conduct to be unlawful.[144] Two submissions supported that proposal.[145]

2.104 The Commission concludes that the legislation should be amended to make it clear whether conduct must be unlawful in order to amount to provocation under s 23 of the *Crimes Act 1900* (NSW). In our view, there should be no such restriction prohibiting lawful conduct from amounting to provocation in the appropriate case. Our reasons for this are as follows. First, to focus on the lawfulness or otherwise of the victim's conduct is to adopt an essentially justification-based rationale for the defence of provocation. As we have discussed, the defence should not be based on that rationale. The nature of the provocative conduct, including for example its triviality or whether it was lawful, are factors to be considered by the jury when determining

143. *The Queen v R* (1981) 28 SASR 321 per King CJ at 327, Jacobs J agreeing at 345. In its most recent formulation of the defence of provocation, the High Court makes no mention of any requirement that the conduct be unlawful: see *Masciantonio v The Queen* (1995) 183 CLR 58 at 66-67, 71. In contrast, in *The Queen v* R, Zelling J, dissenting, took the view that conduct must be unlawful in order to amount to provocation, otherwise the law would be taking away protection from persons in the community who most need protecting, such as police officers: see *The Queen v R* at 339. In fact, it appears that at common law, lawful arrest will not amount to provocative conduct: see *R v Scriva (No 2)* [1951] VLR 298.

144. NSWLRC DP 31 at paras 3.24-3.26 and at 63.

145. Law Society, *Submission* (28 October 1993) at para 1.3.4; M L Sides, *Submission* (17 December 1993) at 5.

whether the accused should be excused for losing self-control under the Commission's recommended reformulation. Secondly, any automatic exclusion of lawful conduct may lead to arbitrary and arguably unjust results in individual cases. It may be difficult to define "lawful" in a legislative reformulation with any clarity. In addition, there may be cases where the victim's conduct is apparently lawful, but nevertheless the jury may empathise with the accused's loss of self-control. For example, if an accused suffers from a severe physical disability about which he or she is very sensitive, and the victim, aware of that sensitivity, teases the accused incessantly about that disability, it is unjust to prohibit consideration of the special circumstances of that case because the victim's conduct was "lawful".

2.105 One example typically used to argue against permitting lawful conduct to be considered as provocation is that of lawful arrest. It is contended that, where an accused kills a person while resisting lawful arrest, he or she should not be able to rely on the defence of provocation.[146] There is concern that, if legislation does not preclude lawful conduct from amounting to provocation, an accused person may wrongly rely on the defence of provocation where he or she has resisted lawful arrest. While the Commission acknowledges this concern, we consider it unlikely that any undeserving cases involving lawful arrest will be able to succeed under the defence of provocation given the requirement under our recommended reformulation that the jury consider whether the accused should be excused for losing self-control so as to warrant reducing the charge from murder to manslaughter. In most cases of lawful arrest, it seems probable that a jury would not find that the accused should be excused for losing self-control. In other cases, for example where the accused knows that he or she is innocent of the crime for which he or she is being arrested, and loses self-control because of this, that person should not be automatically excluded from the defence on the basis that the arrest was lawful. Automatic exclusion would be inconsistent with the policy position taken in our recommendations that provocation be defined on the basis of a partial excuse for loss of self-control.

146. Some law reform agencies have recommended a statutory formulation which specifically excludes lawful arrest as a ground giving rise to the defence of provocation: see Law Reform Commissioner of Victoria, *Provocation and Diminished Responsibility as Defences to Murder* (Report 12, 1982) at paras 1.29-1.30; England and Wales, Criminal Law Revision Committee, *Offences Against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) at para 89.

Self-induced provocation

2.106 The question has sometimes arisen whether or not the defence of provocation is or should be available in circumstances where the provocation is "self-induced".[147] In general, the term "self-induced provocation" has been interpreted as referring to one of two situations: first, where the accused, acting with a premeditated intention to kill or to inflict grievous bodily harm or to act with reckless indifference to human life, deliberately incites the victim to retaliate and then kills the victim in response to that retaliation; or, second, where the accused engages in conduct which he or she should have foreseen would provoke the victim to retaliate and subsequently kills the victim in response to the victim's retaliation. An example of self-induced provocation may arise where the accused blackmails the victim and the victim retaliates in a way which provokes the accused.[148]

2.107 It is uncertain whether the defence of provocation, both at common law and under s 23 of the *Crimes Act 1900* (NSW), precludes consideration of self-induced provocation as a ground to reduce liability for killing from murder to manslaughter. Section 23(2)(a) requires that the accused's loss of self-control be induced by "any conduct of the deceased". It is not clear whether that phrase extends to situations of self-induced provocation as described above. At common law, the cases have not been consistent in defining the parameters of what amounts to self-induced provocation, nor in determining whether or not such conduct may be considered under the defence of provocation.[149] However, self-induced provocation of a certain

147. See *Laws of Australia* (Law Book Company, Melbourne, 1993) volume 10 at para 100; *R v Edwards* [1973] AC 648 (Privy Council); *R v Voukelatos* [1990] VR 1 (Vic CCA).

148. See *Edwards v The Queen* [1973] AC 648 (Privy Council).

149. For example, in *R v Allwood* (1975) 18 A Crim R 120, the Victorian Court of Criminal Appeal held that the defence of provocation was not available because the provocation was self-induced, and that, in circumstances where the accused induces the provocation, he or she can only rely on the defence of provocation if the victim's hostile reaction goes beyond the reasonably predictable. In contrast, in *R v Dutton* (1979) 21 SASR 356, which involved facts similar to those in *Allwood*, the defence of provocation was left to the jury where the accused confronted the victim and the victim responded in a provocative but predictable way. Similarly, in *Masciantonio v The Queen* (1995) 183 CLR 58, the defence of provocation was left to the jury where the

type is expressly excluded from the defence of provocation under the Criminal Codes of Western Australia, Tasmania, and the Northern Territory. In Western Australia and Tasmania, the test for exclusion is whether the accused incited the victim in order to provide an excuse for assaulting the victim. The test in the Northern Territory is whether the accused "incited the provocation".[150]

2.108 Given the uncertainty in the present law in New South Wales, the statutory definition should be amended to clarify the circumstances where self-induced provocation is excluded as a ground giving rise to the defence. In resolving this issue, we make a distinction between provocation which the accused deliberately induces with a premeditated intention to kill or cause grievous bodily harm, or with actual foresight of the likelihood of killing, and provocation which the accused, although not having any premeditated intention or actual foresight, ought reasonably to have foreseen would cause the victim to retaliate in a provocative way.

2.109 In our view, the first situation, that is where the accused acts with premeditation or with actual foresight, should be excluded as a ground giving rise to the defence of provocation. In that situation, the accused does not act as a result of a loss of self-control, and therefore should not receive the benefit of the defence. The Commission would include within this category any provocative conduct committed by the accused with actual foresight of the likelihood of killing a person in response to any retaliation to that provocative conduct. This corresponds with the definition of murder by reckless indifference as provided for in s 18 of the *Crimes Act 1900* (NSW), and is consistent with the view that, where an accused person provokes another with the pre-existing mental state for murder, that person should not receive the benefit of the defence of provocation.

2.110 In relation to the second situation, which involves consideration of reasonable rather than actual foresight, the Commission considers that an accused in such a situation should not be automatically excluded from pleading the defence of provocation. The underlying basis for the defence of provocation is that the accused lost self-control and acted without premeditation. It follows that a person should not be automatically excluded

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accused confronted the victim with a knife, and killed him following a struggle between the two.

150. See *Criminal Code* (WA) s 245; *Criminal Code* (Tas) s 160(4); *Criminal Code* (NT) s 34(2)(a).

from raising the defence when that person acts as a result of a loss of self-control and without premeditation, but ought to have foreseen that the victim would retaliate.[151] To inject a test of reasonable foresight into the defence of provocation would be to add an unnecessary complication to the defence, and arguably would run contrary to a view of the defence as an excuse for loss of self-control. It may be that, as a question of fact, where it seems that the victim's reaction to the accused's conduct was predictable, the jury may determine that the accused really did foresee that reaction and consequently did not act as a result of a loss of self-control, but rather with the premeditated intention of goading the victim so as to kill or cause grievous bodily harm to the victim or with foresight of the likelihood of killing. In addition, where an accused acted in a manner which provoked the victim to retaliate, this may be a consideration that the jury takes into account in determining, under the recommended reformulation, whether murder should be reduced to manslaughter.

Conduct of women as victims of provoked killings

2.111 A number of submissions received by the Commission expressed concern that certain conduct is wrongly regarded by the law as amounting to provocation, which may result in the defence being used inappropriately to reduce legal culpability and sentences.[152] Submissions focused specifically on cases where men kill their female partners out of jealousy or following a woman's confession of infidelity or taunts about the man's sexual inadequacies. It was submitted by some that legislation should expressly exclude this type of conduct from the definition of provocation, so that male offenders would not be able to rely on the defence where they killed women in such circumstances.[153]

2.112 At present, s 23 of the *Crimes Act 1900* (NSW) does not place any restrictions on the type of conduct which may form the grounds of provocation. Instead, it is generally the role of the trial judge in each

151. See *R v Voukelatos* [1990] VR 1 per Murphy J at 19.
152. P Easteal, *Submission* (14 September 1993) at 1-2; Ministry for the Status and Advancement of Women, *Submission* (22 November 1993) at 1-2; M L Sides, *Submission* (17 December 1993) at 2 and 5; Women's Legal Resources Centre, *Submission* (3 December 1993) at 3-4.
153. See M L Sides, *Submission* (17 December 1993) at 5; P Easteal, *Submission* (14 September 1993) at 2.

individual case to decide whether, as a question of law, there is material in the evidence which is capable of constituting provocation.[154]

2.113 Historically, discovery of a wife's adultery was a well-recognised ground for provocation at common law.[155] Today, however, there appears to be greater reluctance by trial judges in general to leave the defence of provocation to a jury to consider where the only evidence consists of the victim's confession of adultery or his or her declaration of an intention to end the relationship with the accused.[156] In one recent case, the court stated that the ordinary person test in the defence of provocation provides a uniform standard of self-control expected of people and consequently:

> In Australia in the 1990s it would be entirely out of line with that standard if the mere telling of a partner that a relationship is over, whether accompanied or not by an admission of infidelity, were taken as potentially sufficient to induce an ordinary person to so lose control as to deliberately or recklessly inflict fatal violence on the other.[157]

2.114 Although a confession of adultery or statement of an intention to leave may not in themselves generally amount to provocation, when these are taken together with evidence that the victim taunted the accused or was physically aggressive, or where the accused has personally witnessed the act of adultery, the courts have seemed more disposed to leave provocation to the jury to consider.[158] For example, in the case of *Moffa v The Queen*, the accused's wife (the victim) had allegedly sworn at the accused, called him a "black bastard", told him that she had slept with everyone on the street, threw at him photographs of her posing naked, and then threw a telephone at him. In delivering his judgment on the appeal to the High Court, Mason J in the majority stated:

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154. See para 2.11.
155. See para 2.3.
156. See *Moffa v The Queen* (1977) 138 CLR 601; *R v Buttigieg* (1993) 69 A Crim R 21 (Qld CCA); *Arrowsmith v The Queen* (1994) 55 FCR 130.
157. *Arrowsmith v The Queen* (1994) 55 FCR 130 at 138.
158. See for example *Moffa v The Queen* (1977) 138 CLR 601; *R v Baraghith* (1991) 54 A Crim R 240 (NSW CCA) (*Baraghith v The Queen* (1991) 66 ALJR 212, refusing special leave to appeal to the High Court); *R v Gardner* (1989) 42 A Crim R 279 (Vic CCA); *R v Romano* (1984) 36 SASR 283. *Romano* was not followed in *R v Buttigieg* (at 38); *R v Khan* (1996) 86 A Crim R 552 (NSW CCA).

> [H]is wife's remarks went far beyond a confession of adultery, even a sudden confession of adultery ... they amount to words which are 'violently provocative in character'. What is more, they were in my opinion so provocative that they might well so enrage an ordinary man beyond endurance as to goad him into impulsive action of a most drastic kind.[159]

2.115 There have been a number of empirical studies in New South Wales which have considered (among other things) fatal assaults on women by their male partners.[160] Most recently, the Judicial Commission examined the incidence of killing of sexual partners amongst sentenced homicide offenders in New South Wales within the period 1990 to 1993.[161] The Judicial Commission's study revealed that 47 sentenced male offenders in that period killed their sexual partners. For five of those 47 male offenders, the defence of provocation was successfully raised to reduce liability from murder to

159. *Moffa v The Queen* (1977) 138 CLR 601 at 622. See however the strong dissent by Gibbs J in that case, who found that based on the evidence the issue of provocation should not have been left to the jury. His Honour stated that in light of contemporary attitudes, and the fact that a greater measure of self-control is expected as society develops, the victim's conduct could not be seen as amounting to provocation: see *Moffa v The Queen* at 617.

160. These studies have consistently found that men are more likely to be victims of homicide than women, but that women are at greatest risk of being the victim of a fatal assault by a family member, particularly by a male partner. See for example, P Easteal, *Killing the Beloved: Homicide Between Adult Sexual Intimates* (Australian Institute of Criminology, Canberra, 1993); Law Reform Commission of Victoria, *Homicide* (Report 40, 1991); M T Nguyen Da Huong and P Salmelainen, *Family, Acquaintance and Stranger Homicide in New South Wales* (New South Wales Bureau of Crime Statistics and Research, Sydney, 1992); H Donnelly, S Cumines and A Wilczynski, *Sentenced Homicides in New South Wales 1990-1993: A Legal and Sociological Study* (Judicial Commission of New South Wales, Monograph Series No 10, 1995) chapter 5. Dr Easteal's study included homicides in both New South Wales and Victoria.

161. Donnelly, Cumines and Wilczynski (1995) chapter 5. "Sexual partner" was defined (at 41) as denoting the existence at one time of an intimate relationship between the offender and victim, and covering current or former spouses, de facto partners and lovers. It should be noted that the study does not necessarily represent a full picture of the actual frequency of this type of homicide, as it does not include those people who kill their partners and then commit suicide: see Donnelly, Cumines and Wilczynski (1995) at 41-42.

manslaughter.[162] In two of those five cases, the victim had allegedly provoked the male offender by hitting him. In the three remaining cases, the killing was the consequence of the victim leaving or threatening to leave the offender. In contrast, the study revealed that nine sentenced female offenders killed their sexual partners, eight of those nine female offenders having killed in response to physical abuse or threats by the victim immediately prior to the killing. All nine women were convicted of manslaughter, five of those nine having relied on the defence of provocation. The Judicial Commission concluded from these findings that there was little support for the proposition that juries routinely accept provocation defences by men who kill their female partners.[163]

2.116 The Commission recognises that there is, at least in theory, a risk that the defence of provocation may be inappropriately applied to cases of alleged provocation where in fact the killing is motivated by factors such as revenge, jealousy, sexual possessiveness, or an assertion of power over the accused's partner. However, we do not consider that an appropriate solution is the imposition of legislative restrictions precluding specific categories of conduct, such as acts of infidelity, taunts, or threats to leave, from amounting to provocation. It would be extremely difficult to identify specific categories of conduct which should be excluded without potentially requiring a long list of other types of conduct which should also be excluded. Moreover, automatic legislative exclusion prevents proper consideration of the merits of each individual case.

2.117 As we discussed in paragraph 2.37, we consider that the risk of spurious claims of provocation in the context of domestic killings has decreased considerably due to the abolition of unsworn statements. Now, where an accused wishes to give evidence of provocation at trial, he or she must submit to cross-examination. There are other evidential provisions which should permit evidence of prior violent conduct, threats or a history of domestic abuse to be admitted in order to assist the prosecution in rebutting an accused's claim of provocation.[164] In addition, under the Commission's

162. In one of the five cases, the male accused killed his male partner out of jealousy and fear of imminent separation. In the remaining four cases, the victim was female.
163. See Donnelly, Cumines and Wilczynski (1995) at 63-64.
164. For example, s 65 of the *Evidence Act 1995* (NSW) relates to hearsay evidence where the maker of the statement is unavailable. This section could be relied on to admit evidence of previous statements by the victim to third

recommended reformulation of the defence of provocation, the jury will have the final task of evaluating whether, based on the evidence before them, the accused should be excused for losing self-control so as to warrant reducing the charge from murder to manslaughter. This allows the jury to judge the merits of each individual case according to contemporary standards of accepted behaviour, rather than automatically excluding any particular type of case without any consideration of the facts.

Non-violent homosexual advance

2.118 Concern has been raised about the possible application of the defence of provocation to provide a partial excuse for homophobic violence against homosexuals in a society in which such violence is said to be increasing.[165] The term "homosexual advance defence" has evolved to refer to cases where an accused claims to have killed the victim either in self-defence or under provocation, in response to a homosexual advance made by the victim. The primary concern is whether, in relation to the defence of provocation, a non-violent homosexual advance (as opposed to a violent homosexual assault) should ever be sufficient to amount to provocation so as to give rise to the defence.[166] It may be argued that in homosexual advance defence cases there is a risk that homophobic prejudice will influence the jury's deliberations in determining whether or not the accused should be partially excused for his or her reaction to a homosexual advance.

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parties of prior acts of violence by the accused or threats to the victim's life. It was proposed in one submission that a separate body could be established to intervene and challenge an accused's allegations of provocation in cases where there is a history of domestic violence against the victim: see Women's Legal Resources Centre, *Submission* (3 December 1993) at 3-4. In the Commission's view, it is unnecessary to establish a separate body, since the prosecution is now able to cross-examine the accused at trial about past acts of domestic violence.

165. See NSW, Attorney General's Department, *Review of the "Homosexual Advance Defence"* (Discussion Paper, August 1996). See also, for example, G Bearup, "Murdered gay men: most are bashed" *Sydney Morning Herald* (17 August 1996) at 8; M Sweet, "Shock at increase in violence against gays" *Sydney Morning Herald* (23 June 1997) at 3.

166. This question is currently under consideration by the High Court in an appeal from the case of *R v Green* (Court of Criminal Appeal, NSW, 8 November 1995, CCA 60419/94, unreported).

2.119 The homosexual advance defence is currently the subject of a separate inquiry.[167] For this reason, the Commission has not discussed this issue in any detail. In our view, non-violent homosexual advances should not generally be regarded as conduct sufficient to amount to provocation under the defence of provocation. However, for the same reasons as those given in relation to domestic killings of women, we do not consider that there should be any legislative restrictions on the types of conduct that can give rise to the defence of provocation.

167. The Working Party on the Review of the Homosexual Advance Defence published its Discussion Paper in August 1996, and is currently preparing its final report.

ACTUAL LOSS OF SELF-CONTROL

2.120 It is a central element of the defence of provocation that the accused did in fact lose self-control as a result of the provocative conduct and killed while in that state. It was submitted to the Commission that the law should be clarified in relation to the degree of actual loss of self-control that is required.[168] It was argued that there are few cases dealing with this issue, and that those few cases are unclear.

2.121 In describing the degree of actual loss of self-control required under the defence of provocation, judges at various times have referred to a state where the "blood is boiling" and the accused's reason is temporarily suspended.[169] If this statement were interpreted literally, however, it may be seen to support a finding of automatism under the defence of automatism, which results in a complete acquittal. Automatism requires a determination that the accused's actions were not committed voluntarily but rather were committed independently of that person's will, where he or she had no capacity to control his or her actions.[170] In addition, it may be argued that a requirement under the defence of provocation for a suspension of the accused's reason is inconsistent with another element of the defence, that the accused intended to kill or to cause grievous bodily harm or to act with reckless indifference to human life. There is in fact an important conceptual distinction between the defence of provocation and the "defence" of automatism in so far as automatism requires a complete absence of volitional control whereas provocation requires a reduction in the power to control one's actions due to strong emotions such as anger or fear.

2.122 In reformulating the defence of provocation, the Commission considered incorporating a separate defining provision which spells out the degree of actual loss of self-control required by the defence. However, we have come to the conclusion that such a provision is unnecessary if, under our recommended reformulation, the jury is required to consider whether the accused should be excused for having so far lost self-control as to form the

168. S Yeo and S Odgers, *Submission* (29 October 1993) at 3.

169. See *Parker v The Queen* (1963) 111 CLR 610 (High Court) per Dixon J at 627; *R v Peisley* (1990) 54 A Crim R 42 per Wood J at 48.

170. Automatism is often characterised in terms of non-insane and insane automatism. See *Bratty v Attorney-General for Northern Ireland* [1961] 3 All ER 523 (House of Lords); *Ryan v The Queen* (1967) 121 CLR 205; *R v Falconer* (1990) 171 CLR 30.

requisite guilty mind for murder as to warrant the reduction of murder to manslaughter. This question will necessarily involve consideration of the degree of the accused's loss of self-control. It requires the jury to make the value judgment of whether the loss of self-control was sufficiently substantial to reduce the accused's responsibility for his or her actions and therefore to warrant reducing liability from murder to manslaughter.

SCOPE OF THE DEFENCE

2.123 At present in New South Wales, the defence of provocation appears to be available only as a partial defence to murder. The Commission has considered whether the scope of the defence should be expanded so as to apply to attempted murder and other offences involving violence. One submission was in favour of expanding the scope of the defence of provocation to apply to charges of attempted murder and other offences involving an intention to murder.[171] Another submission opposed the proposal to extend the defence of provocation to attempted murder on the basis that the maximum penalty for attempted murder is the same as that for manslaughter.[172]

2.124 In respect of attempted murder, it is not entirely clear whether provocation is currently available as a defence to a charge of attempted murder. A number of cases have stated that the common law defence of provocation may be available where the accused is charged with attempted murder or with assault with intent to commit murder,[173] while other cases have ruled that it is not.[174] The High Court recently held that provocation is not available as a defence to attempted murder under the Tasmanian Criminal Code,[175] although it remains to be decided whether the same principle applies to the defence of provocation in New South Wales. Other law reform agencies have recommended that provocation should be available as a defence to a charge of attempted murder, based on the reasoning that it is illogical for a killing under provocation to amount to manslaughter while an

171. Law Society, *Submission* (28 October 1993) at para 1.3.4.
172. M L Sides, *Submission* (17 December 1993) at 6.
173. *R v Duvivier* (1982) 29 SASR 217; *R v Spartels* [1953] VLR 194.
174. *R v Farrar* (1991) 53 A Crim R 387 (Vic Supreme Court); *R v Falla* [1964] VR 78.
175. *McGhee v The Queen* (1995) 183 CLR 82.

attempted killing under the same circumstances should amount to attempted murder.[176]

2.125 If provocation were available as a defence to a charge of attempted murder, it is not clear of what offence the accused would subsequently be convicted. One view is that the defence of provocation would operate to reduce culpability from attempted murder to attempted manslaughter.[177] Another view is that a successful plea of provocation in relation to attempted murder would necessarily result in a complete acquittal, since there is no offence of attempted manslaughter.[178]

2.126 It is similarly unclear how a proposal to expand the scope of the defence of provocation to other offences involving violence would operate in practice. Criminal offences other than murder and manslaughter cannot be easily divided, under our current legal framework of offences, into categories reflecting degrees of blameworthiness. If provocation were to operate as a partial defence to offences involving violence, these offences would have to be restructured to allow for the provoked accused to be convicted of a lesser offence. Alternatively, we could adopt the approach taken in Queensland and Western Australia, where provocation is available as a complete defence to a charge of assault, resulting in an acquittal.[179]

2.127 The Commission has previously rejected a proposal to expand the scope of the partial defence of diminished responsibility to attempted murder and other offences.[180] For the same reasons, we conclude that the defence of provocation should not apply to attempted murder and other offences involving violence. First, while we concede that other offenders may also be

176. England and Wales, Criminal Law Revision Committee, *Offences Against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) at para 98; Law Reform Commissioner of Victoria, *Provocation and Diminished Responsibility as Defences to Murder* (Report 12, 1982) at paras 2.73-2.75.
177. See *McGhee v The Queen* (1995) 183 CLR 82 per Deane J at 93-96; England and Wales, Criminal Law Revision Committee, *Offences Against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) at para 98; Law Reform Commissioner of Victoria, *Provocation and Diminished Responsibility as Defences to Murder* (Report 12, 1982) at paras 2.73-2.75.
178. See *McGhee v The Queen* (1995) 183 CLR 82 per Toohey and Gaudron JJ (in the majority) at 105. See also Mitchell J in *R v Duvivier* (1982) 29 SASR 217 at 224.
179. *Criminal Code* (Qld) s 269; *Criminal Code* (WA) s 246.
180. See NSWLRC Report 82 at paras 3.75-3.78.

acting under provocation, these offences do not carry the same stigma as does a conviction for murder. Any mitigating circumstances might properly be reflected in a more lenient sentence for those offences. The community is more likely to accept a reduced sentence for offences other than murder. Secondly, it is unclear how provocation would operate as a defence to other offences, including attempted murder. In our view, it would be unduly lenient to permit the defence of provocation to excuse an accused completely from criminal responsibility for other offences. However, if provocation were to operate as a partial defence to charges of attempted murder and offences involving violence, a wide range of criminal offences would need to be redefined. Thirdly, as has been pointed out, conviction for "attempted manslaughter" would not result in a lesser maximum penalty than attempted murder.

THE COMMISSION'S REFORMULATION

RECOMMENDATION 2
Section 23 of the *Crimes Act 1900* (NSW) should be amended to read as follows:

1. A person who would otherwise be guilty of murder shall not be guilty of murder and shall be guilty of manslaughter if that person committed the act or omission causing death under provocation.

2. For the purpose of subsection (1), a person commits an act or omission causing death under provocation if:

(a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by:

(i) the conduct; or
(ii) a belief of the accused (based on reasonable grounds) as to the existence of the conduct;

of someone towards or affecting the accused, in circumstances where the accused kills:

(iii) the person who offered the provocation; or
(iv) the person believed on reasonable grounds to have offered the provocation; or
(v) a third party when attempting to kill or to injure the person who offered or was believed on reasonable grounds to have offered the provocation; and

(b) the accused, taking into account all of his or her characteristics and circumstances, should be excused for having so far lost self-control as to have formed an intent to kill or to inflict grievous bodily harm or to have acted with reckless indifference to human life as to warrant the reduction of murder to manslaughter.

(c) For the purpose of subsection 2(a), "conduct" includes grossly insulting words or gestures.

(3) For the purpose of determining whether an act or omission causing death was an act done or omitted under provocation as provided by subsection (2), there is no rule of law that provocation is negatived if:

(a) the conduct of the deceased or of any other person did not occur immediately before the act or omission causing death;
(b) the conduct of the deceased or of any other person did not occur in the presence of the accused;
(c) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased or of any other person that induced the act or omission;

(d) the act or omission causing death was not an act done or omitted suddenly;
(e) the act or omission causing death was an act done or omitted with any intent to take life or inflict grievous bodily harm; or
(f) the conduct of the deceased or of any other person was lawful.

(4) Where a person is intoxicated at the time of the act or omission causing death, and the intoxication is self-induced, loss of self-control caused by that intoxication or resulting from a mistaken belief occasioned by that intoxication is to be disregarded.

"Self-induced intoxication" in this subsection has the same meaning as it does in s 428A (of the *Crimes Act 1900*).

(5) For the purpose of subsection (1), a person does not commit an act or omission causing death under provocation if that person provoked the deceased or any other person with a premeditated intention to kill or to inflict grievous bodily harm or with foresight of the likelihood of killing any person in response to the expected retaliation of the deceased or of any other person.

(6) Where, on the trial of a person for murder, there is any evidence that the act causing death was an act done or omitted under provocation as provided by subsection (2), the onus is on the prosecution to prove beyond reasonable doubt that the act or omission causing death was not an act done or omitted under provocation.

(7) This section does not exclude or limit any defence to a charge of murder, with the exception that no claim to the defence of provocation shall lie other than as provided by this section.

2.128 It will be clear from the preceding discussion that, in reformulating s 23 of the *Crimes Act 1900* (NSW), the Commission sought to adhere to a consistent underlying principle which gives emphasis to loss of self-control as the primary consideration in defining provocation. This accords with our view of the defence as a partial excuse, rather than a partial justification. Our approach may have the potential of widening the ambit of the defence given the broader definition of what constitutes provocation. For example, our recommended reformulation expressly defines provocation to include conduct occurring outside the presence of the accused, and conduct not committed by the victim. We do not consider that this broader definition of provocation will result in the defence being applied inappropriately to reduce liability to manslaughter in undeserving cases. On the contrary, the success of the defence ultimately depends on the judgment of the jury as to whether or not the circumstances warrant a reduction of murder to manslaughter. This permits consideration of each individual case, while leaving ultimate control of assessing culpability with the community, as represented by the jury. Moreover, by reformulating the defence in a way which adheres to a uniform policy approach, the application and interpretation of s 23 should be made easier, less complex, and more consistent.

2.129 The recommended reformulation adopts the changes proposed by the Commission in respect of the matters discussed in the preceding sections, specifically:

Excision of the ordinary person test. Recommended s 23(2)(b) omits reference to the ordinary person test and requires instead that the jury be satisfied that the accused should be excused for having so far lost self-control as to have formed an intention to kill or inflict grievous bodily harm or to have acted with reckless indifference to human life as to warrant the reduction of murder to manslaughter.

Conduct occurring outside the accused's presence. Recommended s 23(3)(b) makes it clear that the accused is not precluded from raising the defence of provocation on the basis that the provocation occurred outside his or her presence.

Provocation not induced by the victim. Recommended s 23(2)(a) makes it clear that the defence of provocation may be available in cases where the victim did not commit the provocative conduct, namely where the accused kills the person whom the accused believes (on reasonable grounds) has

offered the provocation, or kills another person when attempting to kill or to injure the person who offered or was believed (on reasonable grounds) to have offered the provocation. This definition of provocation covers the three situations discussed in paragraphs 2.92-2.101: the situation of the innocent bystander who intervenes; the situation of mistaken belief; and the situation of misdirected retaliation or "transferred malice".

Lawful conduct. Recommended s 23(3)(f) makes it clear that the defence of provocation is not excluded on the basis that the provocative conduct was lawful.

Self-induced provocation. Recommended s 23(5) follows the Commission's conclusion regarding self-induced provocation as stated in paragraphs 2.109-2.110 by excluding from the defence an accused person who provokes another person with the premeditated intention to kill or to inflict grievous bodily harm on that or any other person or with foresight of the likelihood of killing that or any other person in response to any retaliation of the victim or of any other person.

2.130 The following changes to the defence under the recommended reformulation are also worth noting:

Reference to reckless indifference to human life. Recommended s 23(2)(b) requires the jury to consider whether the accused should be excused for having so far lost self-control as to have formed one of the three alternatives of the mental state required for murder,[181] that is "an intent to kill or to inflict grievous bodily harm or to have acted with reckless indifference to human life". This adopts the wording in the current formulation of s 23(2)(b),[182] which requires consideration of whether an ordinary person could have "so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm". However, the current wording of s 23(2)(b) does not make any

181. The fourth category of murder, commonly known as "constructive murder" or "felony murder", does not require any specific intention on the part of the accused, such as an intention to kill. Constructive murder is therefore an anomaly in the legal framework for unlawful homicide, the underlying general principle of which is to measure the seriousness of a particular killing according to the mental state of the killer. A number of people have recommended the abolition of the category of constructive murder: see generally NSWLRC Report 82 at para 2.8.

182. This follows a suggestion by Ms Latham, Crown Advocate: see M Latham, *Oral Submission* (6 August 1997).

reference to an ordinary person having so far lost self-control as to have acted with reckless indifference to human life. It seems to the Commission to be inconsistent and illogical to refer to the other mental states which may give rise to a charge of murder without referring to the situation where an accused acts with reckless indifference to human life as a result of a loss of self-control. For this reason, we have included in our recommended reformulation a reference to reckless indifference to cover situations where a person's loss of self-control in response to provocation results in that person acting with reckless indifference to human life (that is, acting with actual foresight of the probability that death will result from his or her actions).

Exclusion of the common law defence. Recommended s 23(7) makes it clear that the defence of provocation as provided for in s 23 covers the field, to the exclusion of any claim to a defence of provocation at common law. Consequently, for example, any claim of provocation which may be available at common law as a defence to a charge other than murder would clearly not be available in New South Wales.

The ultimate issue

2.131 It is clear that under the Commission's recommended reformulation, expert witnesses will be excluded from giving opinions on the ultimate issue of whether the defence of provocation should succeed in a particular case.

2.132 The *Evidence Act 1995* (NSW) abolishes any rule of evidence in New South Wales which prevents a witness from giving an opinion on an "ultimate issue" of a case.[183] However, in relation to the defence of provocation as reformulated by the Commission, the ultimate issue of whether culpability should be reduced depends on whether or not the accused should be excused for losing self-control "as to warrant the reduction of murder to manslaughter". This formulation makes it clear that the ultimate issue for the jury to decide requires a judgment as to culpability and liability. Expert evidence is irrelevant to that question and will therefore be inadmissible on that ultimate issue. This is consistent with the Commission's reformulation of the defence of diminished responsibility, which excluded expert evidence on the ultimate issue of whether murder should be reduced to manslaughter by reason of diminished responsibility.[184]

183. *Evidence Act 1995* (NSW) s 80.
184. See NSWLRC Report 82 at paras 3.60-3.63.

Belief based on reasonable grounds

2.133 Recommended s 23(2)(a)(ii) provides that the defence of provocation may be available in circumstances where the accused's loss of self-control is induced by a belief in provocative conduct, where that belief is based on reasonable grounds. Consistent with our approach to the defence of provocation as a partial excuse for loss of self-control, the Commission's reformulation of provocation recognises that a person may be as strongly affected by a belief in provocative conduct as if that person personally witnessed the conduct. However, we have qualified the circumstances in which loss of control induced by belief may give rise to the defence by requiring that such belief be based on reasonable grounds.

2.134 A requirement that belief in provocation must be based on reasonable grounds partially re-introduces an objective standard to the defence of provocation. This qualifies the general principle underlying the Commission's reformulation that the accused be judged from his or her own subjective viewpoint, taking into account all of his or her personal circumstances and characteristics. The Commission has concluded that a requirement of belief on reasonable grounds should be adopted in this particular context for the following reasons.

2.135 When the defence of provocation is raised, the prosecution bears the burden of proving beyond reasonable doubt that the accused was *not* provoked into killing. In cases where the accused claims to have lost self-control as a result of a belief that some provocative conduct has occurred, it may be difficult for the prosecution to *disprove* such a claim beyond a reasonable doubt if the defence of provocation were to require no more than the assertion of a subjective belief, however unreasonable. By reformulating the defence of provocation to include loss of self-control induced by belief, the Commission has widened the ambit of the defence to give greater recognition to provocation as a partial excuse for loss of self-control. However, to allow the defence of provocation to succeed whenever the prosecution cannot disprove beyond reasonable doubt a claim of a belief in provocation may be to widen the defence too far. For public policy reasons, a requirement of belief based on reasonable grounds makes for a pragmatic compromise between the underlying conception of provocation as a partial excuse and the practical difficulties for the prosecution in disproving an accused's claim of belief in provocative conduct. It is important to note that

the objective requirement of reasonable grounds in our recommended reformulation is confined to *belief* based on reasonable grounds.

2.136 One possible alternative to introducing an objective element to overcome the practical disadvantages for the prosecution in a claim of belief in provocation may be to reverse the burden of proof in such cases. That is, where the accused claims to have lost self-control as a result of a belief in provocation, the accused would bear the burden of proving, on the balance of probabilities, that the killing was the result of a loss of self-control induced by that belief. In the Commission's view, it would give rise to undue complexity and confusion to impose differing burdens of proof for the defence of provocation according to the type of situation giving rise to the defence. For this reason, the Commission has rejected this approach in reformulating the defence of provocation.

Overlap with the defence of diminished responsibility

2.137 In one respect, the Commission's reformulation of provocation maintains a clear distinction between the defence of provocation and the defence of diminished responsibility. To the extent that the recommended reformulation of provocation requires belief based on reasonable grounds, as outlined above, then the defence continues to exclude people who lose self-control as a result of, for example, a delusional belief in provocation. However, one consequence of omitting the ordinary person test from the recommended reformulation of provocation is that there is greater potential for overlap with the defence of diminished responsibility. As we noted in paragraph 2.62, the ordinary person test in the defence of provocation presumes that the accused was mentally "normal". In this way, the defence of provocation may be distinguished from the mental illness defences, in particular the defence of diminished responsibility. Under the Commission's reformulation of provocation, any personal characteristics of the accused, including any mental impairment or mental disorder, may be considered in determining whether liability should be reduced to manslaughter. By making the defence of provocation subjective to that extent, the distinction between the defences of provocation and diminished responsibility is potentially less clear. For example, a person who suffers from a mental impairment which affects that person's power to control his or her actions may be able to rely on both the defence of provocation and the defence of diminished responsibility.

2.138 At one stage, the Commission gave consideration to combining the defence of provocation and the defence of diminished responsibility into one

defence of mental or emotional disturbance.[185] However, given that both these defences are long established and well-understood in our legal system, we ultimately concluded that there was merit in retaining a distinction between the two defences. While there is possibly a greater potential for overlap under the Commission's recommended reformulation of the defence of provocation, the two defences nevertheless remain conceptually distinct. The defence of provocation requires some external triggering conduct, or belief in some external triggering conduct, which brings about a loss of self-control. In contrast, the defence of diminished responsibility does not depend on any external factor, but is characterised by an internal impairment particular to the accused, which may, for example, reduce that person's capacity to control his or her actions.

2.139 While there remains a conceptual distinction between the two defences under the Commission's reformulation, we acknowledge the greater scope for overlap between the two in practice. For example, where an accused person kills his or her partner after that partner leaves the accused, the accused may seek to raise the defence of diminished responsibility on the basis that the partner's departure triggered a reactive depression in the accused, and may also seek to plead provocation on the basis of a loss of self-control due to the partner's leaving him or her.[186] However, given that the two defences do remain conceptually distinct, the difference between them should be made sufficiently clear to the jury, with the assistance of the trial judge's instructions, without giving rise to confusion or complexity.

Application to female offenders

2.140 There has been a significant amount of criticism directed against the current formulation of the defence of provocation in respect of a perceived

185. This would be similar, to some extent, to the American Law Institute's recommended reformulation of the defence of provocation, renamed the "defence of extreme emotional disturbance", which, it was anticipated, would be wide enough to cover some typical diminished responsibility cases: see American Law Institute, *Model Penal Code and Commentaries (Official Draft and Revised Comments)* (Philadelphia, 1980) article 210.3 and at 67-73.

186. This example was given by Ms Latham: see M Latham, *Oral Submission* (6 August 1997).

gender bias in its operation.[187] There is concern that the defence is not readily accessible to women who kill their assailant partners because it is not defined in terms which are appropriate to those women's experiences of domestic violence. This concern was reflected in a number of submissions which contended that, despite the amendments to the defence in 1982, some female offenders may continue to encounter difficulties when seeking to rely on the defence of provocation as a partial excuse for killing as a response to domestic violence.[188] In light of these concerns about the current formulation of the defence of provocation, the Commission has given special consideration to the impact of our recommended reformulation on battered women who kill their aggressors and who seek to rely on the defence.

Application of the current formulation to female offenders

2.141 The current formulation of the defence of provocation was introduced in 1982 and was intended to define the defence in a way more appropriate to women who kill after being subjected to domestic abuse.[189] It was generally considered that women who kill in these situations often do so under strong mitigating circumstances which should be recognised by the law as reducing their culpability. The previous statutory formulation of the defence of provocation had been criticised for requiring a sudden loss of self-control immediately following a provocative incident. This requirement was

187. See, for example, W Bacon and R Lansdowne, "Women Who Kill Husbands: the Battered Wife on Trial" in C O'Donnell and J Craney (eds), *Family Violence in Australia* (Longman Cheshire, Melbourne, 1982) chapter 4, especially at 88-91; S Bandalli, "Provocation: A Cautionary Note" (1995) 22 *Journal of Law and Society* 398; J Greene, "A Provocation Defence for Battered Women Who Kill?" (1989) *12 Adelaide Law Journal* 145; J Stubbs, "Provocation or Self-Defence for Battered Women Who Kill?" in S Yeo (ed), *Partial Excuses to Murder* (Federation Press, Sydney, 1990) at 61; Law Reform Commission of Victoria, *Homicide* (Report 40, 1991) at paras 192-195; *cf* I Leader-Elliott, "Battered But Not Beaten: Women Who Kill In Self Defence" (1993) 15 *Sydney Law Review* 403.

188. P Easteal, *Submission* (14 September 1993) at 1-2; Ministry for the Status and Advancement of Women, *Submission* (22 November 1993) at 1-2; Women's Legal Resources Centre, *Submission* (3 December 1993) at 2-3; Confidential, *Submission* (24 September 1993) at 4.

189. See New South Wales, Task Force on Domestic Violence, *Report of the New South Wales Task Force on Domestic Violence to the Honourable N K Wran QC, MP, Premier of New South Wales* (Government Printer, Sydney, 1981) at 67-70; New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 11 March 1982 at 2485-2486.

said to correspond more typically to male patterns of violence while excluding women who kill their violent partners. In this regard, an important aspect of the 1982 amendments was the removal of the requirement of suddenness from the defence of provocation and an express provision that the provocative conduct need not occur immediately before the killing. More recently, it has been held by the Court of Criminal Appeal that s 23 of the *Crimes Act 1900* (NSW) does not require a specific triggering incident of provocation.[190] This makes the defence even more flexible in recognising women's responses to domestic violence where the killing is not triggered by any particular isolated incident but is a response to a long period of abuse.

2.142 Since the 1982 amendments, the Judicial Commission has considered the application of the defence of provocation to female offenders, as part of its study on homicide offenders in New South Wales for the period 1990 to 1993.[191] The study found that five women raised the defence of provocation, and all five were successful in having their charge reduced from murder to manslaughter as a result. In contrast, 15 men raised the defence of provocation, 9 of whom were successful in relying on the defence to reduce their charge to manslaughter. The Judicial Commission concluded that there was no evidence to suggest that the defence of provocation operated in a gender biased fashion.[192] Of course, the Judicial Commission's study does not include those cases, if any, in which female offenders chose not to raise the defence of provocation because it was considered inadequate in meeting their particular situation.

2.143 A number of submissions contended that, despite the amendments in 1982, women in situations of domestic violence continue to be denied access to the defence of provocation as currently formulated.[193] Particular criticisms

190. See *R v Chhay* (1994) 72 A Crim R 1 (NSW CCA).
191. See H Donnelly, S Cumines and A Wilczynski, *Sentenced Homicides in New South Wales 1990-1993: A Legal and Sociological Study* (Judicial Commission of New South Wales, Monograph Series No 10, 1995) at 58-63.
192. The Law Reform Commission of Victoria reached a similar conclusion based on its study of all homicide prosecutions in Victoria between 1981 and 1987: see Law Reform Commission of Victoria, *Homicide* (Report 40, 1991) at paras 164-169; *Homicide Prosecutions Study* (Appendix to Report 40, 1991) at paras 148-160.
193. Women's Legal Resources Centre, *Submission* (3 December 1993) at 2-3; Confidential, *Submission* (24 September 1993) at 4; P Easteal, *Submission* (14 September 1993) at 1-2; Ministry for the Status and Advancement of Women, *Submission* (22 November 1993) at 1-2.

were directed against restrictions on hearsay provocation and the formulation of the ordinary person test, which ostensibly does not take gender into account but may be biased towards male standards of behaviour. Some submissions were also critical of alleged ignorance amongst members of the judiciary and the legal profession on issues relating to women's experiences of domestic violence.

Application of the recommended reformulation

2.144 In comparison with the existing formulation, we consider that the recommended reformulation looks more realistically at cases involving domestic violence, in particular, women who kill their assailant partners. For example, the reformulation makes it clear that hearsay provocation may be considered under the defence. This ensures that the defence of provocation is not automatically excluded from cases where a woman kills her partner following incidents of abuse by that partner which are not witnessed personally by the woman, such as sexual and physical assaults on her children.[194] In addition, the abolition of the ordinary person test has the result that women whose power to exercise self-control has been impaired by reason of a long history of abuse are not excluded from the defence through the imposition of some objective standard which does not take that factor into account in determining "ordinary" powers of self-control. Under our reformulation, all factors which may affect a woman's power of self-control, including a long history of being abused, are to be considered by the jury in arriving at their verdict.

2.145 One difficulty which some female offenders may continue to face when seeking to raise the defence of provocation under the recommended reformulation is the requirement of a loss of self-control, which remains central to the defence. While some women may kill their aggressors as a result of losing self-control, others may not. Some women may kill in cold blood, but in an attempt at self-preservation or in order to save their children from further abuse. If a woman cannot show that she killed as a result of a loss of self-control, then she will be excluded from the defence of provocation.

2.146 While the Commission acknowledges that the requirement of a loss of self-control may continue to preclude some women from gaining access to the defence of provocation, we do not consider that this is an issue which can

194. Women's Legal Resources Centre, *Submission* (3 December 1993) at 4.

be addressed unless the defence of provocation is changed beyond recognition. The primary feature of, and rationale for, the defence of provocation is loss of self-control. In our view, the nature of the defence should not be altered to the extent that loss of self-control ceases to be an element.

2.147 An alternative defence for battered women who kill but who cannot show a loss of self-control may be the defence of diminished responsibility. This defence, as reformulated according to the Commission's recommendation, would focus on whether or not the accused woman suffered from an abnormality of mental functioning at the time of the killing. However, in so far as it requires some kind of mental disorder or impairment, the defence of diminished responsibility may not always be appropriate, and might be considered in some instances to divert attention away from the factors leading to a woman's disturbed state. It has been suggested that the defence of self-defence may often be the most appropriate defence for women who kill following a history of domestic violence, since self-defence recognises that many of these women are essentially acting in self-preservation rather than as a result of loss of self-control or a disturbed mind.[195] Moreover, a successful plea of self-defence results in a complete acquittal, whereas a successful plea of provocation results in a conviction for manslaughter. Sentences for manslaughter on the basis of provocation may be relatively harsh, with non-custodial sentences in domestic provocation cases imposed only in exceptional circumstances.[196] The courts have stated that, in general, provocation cases stand well above the lower limit of culpability for manslaughter, and that it would be wrong for the law to

195. See J Stubbs, "Provocation or Self-Defence for Battered Women Who Kill?" in S Yeo (ed), *Partial Excuses to Murder* (Federation Press, Sydney, 1990) at 63-64. See also, Ministry for the Status and Advancement of Women, *Submission* (22 November 1993) at 1-2; Women's Legal Resources Centre, *Submission* (3 December 1993) at 3.

196. This does not mean that a non-custodial sentence will never be imposed for manslaughter on the basis of provocation. Such a sentence may be imposed where, for example, the accused has been subjected to mental and physical dominance by the victim over a substantial period of time, as may often be the case for women who kill their abusive partners: see *R v Alexander* (1994) 78 A Crim R 141 (NSW Supreme Court). See also, for example, *R v Pavia* (Court of Criminal Appeal, NSW, 9 December 1994, CCA 60744/93, unreported) at 33; *R v Woolsey* (Supreme Court, NSW, Newman J, 19 August 1993, unreported) at 12.

approach a case on the basis that the victim was deserving of death, or that the killing was an acceptable response, except where self-defence arises.[197]

2.148 At present, women may have difficulty in successfully pleading the defence of self-defence.[198] However, a review of the law of self-defence and its ability to meet these women's experiences lies outside the Commission's present terms of reference.

Self-induced intoxication

2.149 For the purpose of determining whether an accused acted under provocation as defined under the defence of provocation, recommended s 23(4) stipulates that loss of self-control caused by intoxication or resulting from a mistaken belief occasioned by that intoxication is to be disregarded, where the accused is intoxicated at the time of the killing and that intoxication is self-induced.

2.150 Both at common law and under the existing provisions of s 23 of the *Crimes Act 1900* (NSW), the ordinary person test has traditionally precluded the jury from considering an accused's intoxicated state when assessing his or her plea of provocation. The ordinary person in the defence of provocation is deemed to have the powers of self-control of an ordinary sober person. Consequently, if the accused is intoxicated at the time of killing, that intoxication is not a relevant matter to be considered when evaluating whether the provocation could cause an ordinary person to lose self-control.[199] That situation must be distinguished, however, from the situation where a person's addiction to a particular substance is relevant to assessing the gravity of the provocation directed towards that person. For example, where an alcoholic is teased about his or her alcoholism, that addiction may be considered by the jury in determining the gravity of the provocation.[200] It is also perhaps possible that where intoxication leads an accused to form a mistaken belief in facts which, if true, could amount to provocation so as to

197. *R v Morabito* (1992) 62 A Crim R 82 (NSW CCA) per Wood J at 85-86.
198. *Cf* I Leader-Elliott, "Battered But Not Beaten: Women Who Kill in Self-Defence" (1993) 15 *Sydney Law Review* 403.
199. See *R v Newell* (1980) 71 Cr App R 331; *R v Croft* [1981] 1 NSWLR 126.
200. See *R v Morhall* [1995] 2 All ER 659.

cause an ordinary (sober) person to lose self-control, that intoxication may be considered in order to explain the mistaken belief.[201]

2.151 In August 1996, amendments to the *Crimes Act 1900* (NSW) were enacted[202] 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, such as murder.[203] In addition, s 428F of the *Crimes Act* provides that where, for the purposes of determining whether a person is guilty of an offence, it is necessary to compare that person's state of mind with that of a reasonable person, a "reasonable person" is taken to be someone who is not intoxicated. These amendments relating to intoxication do not appear to apply to the defence of provocation, since they relate primarily to the question of an accused's "mens rea" or intention in committing an offence, rather than the impact of intoxication on the accused's self-control. The reference to the "reasonable person" in s 428F of the *Crimes Act* does not appear to apply to the "ordinary person" test in the defence of provocation, but instead to offences for which the mental element is defined according to the state of mind of a reasonable person, such as manslaughter by criminal negligence.[204]

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201. See *R v Croft* [1981] 1 NSWLR 126 per O'Brien CJ of Cr D at 148-149, 158; *R v Voukelatos* [1990] VR 1 per Murphy J at 11-12. However, it remains uncertain whether, both at common law and under s 23 of the *Crimes Act 1900* (NSW), the defence of provocation recognises conduct which does not emanate from the victim, such as where the accused has a mistaken or delusional belief: see para 2.95.
202. See *Crimes Act 1900* (NSW) Part 11A, introduced by the *Criminal Legislation Amendment Act 1996* (NSW) Sch 1[10].
203. See *Crimes Act 1900* (NSW) s 428B, 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.
204. Section 428F of the *Crimes Act 1900* (NSW) appears to be modelled on the recommendations of the Review Committee in the Review of Commonwealth Criminal Law. That committee recommended that consolidating law contain a provision requiring that where an offence is defined by express or implied reference to the state of mind of a reasonable person, such a person should be understood to be a person who is not intoxicated: see Australia, Attorney General's Department, Review Committee of Commonwealth Criminal Law, *Review of Commonwealth Criminal Law: Interim Report: Principles of*

2.152 The excision of the ordinary person test under the recommended reformulation of the defence of provocation means that the accused is not measured according to the standard of self-control of an ordinary, sober person. This potentially widens the scope of the defence to apply to people whose power to exercise self-control is weakened by the effects of intoxication. To preclude this, and thereby achieve consistency with the legislative policy under s 428F of the *Crimes Act 1900* (NSW), the Commission has included a specific provision, recommended s 23(4), which stipulates that any loss of self-control on the part of the accused which is the result of self-induced intoxication is to be disregarded for the purpose of assessing the accused's claim of provocation. In addition, loss of self-control which is induced by a mistaken belief that some provocative conduct has occurred, where that mistaken belief results from a state of self-induced intoxication, must also be disregarded. This reinforces the requirement under recommended s 23(2)(a) that a belief must be based on reasonable grounds in order to give rise to a claim of provocation. "Self-induced intoxication" in the recommended reformulation of the defence of provocation is to have the same meaning as in s 428A of the *Crimes Act 1900* (NSW).

2.153 The Commission's approach in precluding self-induced intoxication from consideration in relation to the defence of provocation is consistent with our recommended reformulation of the defence of diminished responsibility. That recommended reformulation similarly excludes self-induced intoxication as a ground giving rise to the defence of diminished responsibility.[205] Our reason for expressly excluding self-induced intoxication from consideration in relation to the partial defences is, essentially, to be consistent with existing legislative policy on the admissibility of evidence of intoxication in relation to criminal offences, as outlined above. 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 become intoxicated should be held responsible for their actions.[206]

2.154 One submission opposed the proposal to exclude the effects of intoxication from being considered in relation to the defence of

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Criminal Responsibility and Other Matters (AGPS, Canberra, 1990) at para 10.28.

205. See NSWLRC Report 82 recommendation 4 and at paras 3.67-3.74.

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

provocation.[207] It was submitted that intoxication may be a highly relevant factor for some people responding to provocation, and should be considered as part of the concession to human frailty which is offered by the defence of provocation. However, to permit consideration of self-induced intoxication in relation to the defence of provocation would be out of step with the general legislative approach to intoxication in relation to assessing guilt, as dictated by the legislative policy underlying Part 11A of the *Crimes Act* 1900 (NSW). For the purpose of maintaining uniformity, therefore, we recommend the provision outlined above which expressly excludes the effects of self-induced intoxication from consideration when assessing a person's loss of self-control for the defence of provocation. It should be noted, however, that the Commission's recommended reformulation does not preclude consideration of self-induced intoxication where that intoxication forms the basis of the provocation, as where a person's intoxication or addiction to a particular substance forms the subject of provocative taunts directed towards that person. In this respect, the recommended reformulation follows the existing position at common law which permits consideration of intoxication for the purpose of assessing the gravity of provocative conduct.

2.155 The Commission acknowledges that some complications and confusion may arise from expressly excluding self-induced intoxication when assessing loss of self-control under the defence of provocation. For example, a jury may be required to take into account a person's intoxication where that intoxication is the subject of taunts which form the basis of the alleged provocation, but may then be asked to ignore the effects of that intoxication for the purpose of assessing the accused's loss of self-control. Similarly, a jury may be asked to consider the effects of intoxication where it is relevant to the question of whether a person had the requisite intention for murder (being an offence of so-called specific intent), but then to ignore evidence of intoxication when considering the question of provocation, where provocation is raised as a defence to murder. While we acknowledge that such a provision may cause some difficulties in practice, we do not consider that it will give rise to any more complexity than already exists under the existing legislative provisions relating to self-induced intoxication in Part 11A of the *Crimes Act 1900* (NSW). That complexity cannot be redressed without reconsidering the entire legal framework with respect to self-induced intoxication, a task outside our terms of reference.

207. See M L Sides, *Submission* (31 July 1997) at 1-2.

PROCEDURAL ISSUES

2.156 The Commission has given consideration to two procedural issues in relation to the defence of provocation, namely:

- compulsory defence disclosure; and
- questioning the jury on the basis of a manslaughter verdict.

Compulsory defence disclosure

2.157 There is no legal requirement that an accused person disclose in advance an intention to plead the defence of provocation at trial. This reflects the general principle that an accused has the right to remain silent, being presumed innocent until the prosecution proves guilt.

2.158 The Commission has previously considered the issue of compulsory defence disclosure in respect of the defence of diminished responsibility. In Report 82,[208] we noted that, although there is generally no requirement for defence disclosure in criminal proceedings, there is provision for compulsory disclosure in respect of alibi evidence led by the accused[209] and in respect of evidence of tendency or coincidence and hearsay evidence admitted under the *Evidence Act 1995* (NSW).[210] We concluded that there were special considerations in respect of the defence of diminished responsibility which supported a requirement for compulsory disclosure of an intention to plead that defence.

2.159 Many of the considerations in favour of compulsory disclosure for the defence of diminished responsibility apply equally to the defence of provocation. First, evidence of provocation will often be a matter wholly within the accused's knowledge. Secondly, it may be argued that, in cases where the defence of provocation is raised, the accused's right to silence and presumption of innocence are not infringed by a requirement for defence disclosure, since admission of having committed the act in question is implicit in reliance on the defence. Lastly, it may be necessary to balance the interests of the accused with the interests of the general community in

208. NSWLRC Report 82 at paras 3.96-3.98 and at paras 3.101-3.102.
209. *Crimes Act 1900* (NSW) s 405A(1).
210. *Evidence Act 1995* (NSW) s 67, 97 and 98.

ensuring that adequate time is allowed for the accused's case to be properly tested by the prosecution.

2.160 While we consider that there are strong arguments in favour of compulsory defence disclosure in respect of the defence of provocation, this issue is part of a larger question relating to the extent to which our criminal justice system should recognise an accused's right to silence. This question is currently the subject of a separate review by the Commission. For this reason, we make no recommendation in this Report for compulsory disclosure of an intention to plead provocation.

Questioning the jury on the basis of a manslaughter verdict

2.161 The Commission has given consideration to certain problems which may arise in sentencing a person for manslaughter where the defences of provocation and diminished responsibility are both raised at trial.

2.162 When sentencing, a judge must determine what are the facts of a case which are relevant to the exercise of his or her discretion in imposing an appropriate penalty. The view of the facts adopted by the sentencing judge for that purpose must be consistent with the jury's verdict at trial.[211] A difficulty may arise in sentencing if, at trial, the jury returns a verdict of manslaughter, where manslaughter has been left for them to decide on two alternate bases, such as manslaughter on the basis of provocation and manslaughter on the basis of diminished responsibility. Where alternative grounds for a verdict are left to the jury to consider, it may be difficult for the sentencing judge later to ensure that the factual findings for sentencing do not conflict with the jury's verdict. In such circumstances, the judge has the power in New South Wales to question the jury about the basis on which they decided on a verdict of manslaughter.[212] However, the NSW Court of Criminal Appeal recently held in the case of *R v Isaacs*[213] that a trial judge should refrain from asking a jury the basis of their verdict except in exceptional cases.

211. See *R v Martin* [1981] 2 NSWLR 640 at 642; *R v Smith* (1993) 69 A Crim R 47 at 48; *R v Harris* [1961] VR 236 at 237.
212. See *R v Isaacs* (Court of Criminal Appeal, NSW, 9 April 1997, CCA 60408/96, unreported); *R v Low* (1991) 57 A Crim R 8 at 16.
213. See *R v Isaacs* (Court of Criminal Appeal, NSW, 9 April 1997, CCA 60408/96, unreported).

2.163 In DP 31, the Commission considered a proposal that legislation expressly require juries to specify the grounds on which they have returned a manslaughter verdict where the defences of diminished responsibility and provocation are both raised at trial.[214] The object of this proposal would be to ensure that the sentence imposed is consistent with the jury's finding of either provocation or diminished responsibility. The proposal was considered in one submission, which opposed it.[215]

2.164 The Commission concludes that legislation should not require juries to specify the basis for their verdict where the defences of diminished responsibility and provocation are both raised at trial. We support the reasons given in *R v Isaacs* for generally refraining from questioning a jury, and can see no justification for departing from the law as stated in that case. Juries may not always be unanimous in their reasons for returning a manslaughter verdict: some jurors may have decided on the basis of diminished responsibility, and others on the basis of provocation. If the jury is informed that they will be required to specify the reason for their verdict, they may be distracted from their primary task of achieving unanimity on a general verdict.

214. NSWLRC DP 31 at 104.
215. M L Sides, *Submission* (17 December 1993) at 6.

3. Infanticide

- Overview
- The course of the reference
- Summary of Report 82
- Legislative action since Report 82
- Outline of this Report

INTRODUCTION

3.1 In New South Wales, legislation provides for infanticide as both a substantive criminal offence and as a partial defence to murder. Briefly, a woman may be convicted of infanticide instead of murder if she kills her baby aged less than 12 months while suffering from a mental disturbance which results from giving birth or breast-feeding. Legislation dealing with infanticide also exists in Tasmania, Victoria and Western Australia, as well as in New Zealand, Canada, and the United Kingdom.[1] New South Wales is the only Australian jurisdiction which has both a defence of diminished responsibility and an offence/defence of infanticide.[2]

3.2 The legislative provisions for infanticide in both New South Wales and elsewhere are based on the United Kingdom's *Infanticide Act 1938*.[3] That Act was introduced after a number of attempts in the 19th century to find an appropriate legal means for dealing with women who killed their babies. At that time, such incidents were said to be reasonably frequent, due in part to the oppressive social and economic conditions which unmarried mothers commonly faced, such as the stigma of illegitimacy, poverty, loss of employment, and desertion by their parents and by the child's father.

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1. See *Crimes Act 1958* (Vic) s 6; *Crimes Act 1961* (NZ) s 178; *Criminal Code* (Canada) s 233, 237, 663; *Infanticide Act 1938* (UK) s 1. In Tasmania and Western Australia, legislation provides for infanticide as an alternative offence to murder, but does not make it available as a defence to murder: see *Criminal Code* (Tas) s 165A; *Criminal Code* (WA) 281A.
2. See *Crimes Act 1900* (NSW) s 22A, 23A. Overseas, the United Kingdom also has both a defence of diminished responsibility and an offence/defence of infanticide: see *Homicide Act 1957* (UK) s 2; *Infanticide Act 1938* (UK) s 1.
3. For a more detailed history of infanticide, see, for example, N Walker, *Crime and Insanity in England* (University Press, Edinburgh, 1968) chapter 7; L Radzinowicz, *A History of English Criminal Law and Its Administration from 1750* (Stevens and Sons Limited, London, 4 volumes, 1948) volume 1 at 430-436; volume 4 at 337; J Allen, "Octavius Beale Re-Considered: Infanticide, Babyfarming and Abortion in NSW 1880-1939" in Sydney Labour History Group (ed), *What Rough Beast? The State and Social Order in Australian History* (Allen and Unwin, Sydney, 1982) chapter 5; R Lansdowne, "Infanticide: Psychiatrists in the Plea Bargaining Process" (1990) 16 *Monash University Law Review* 41 at 43-47; D Seaborne Davies, "Child-Killing in English Law" [1937] *Modern Law Review* 203; A Wilczynski, *Child Homicide* (Greenwich Medical Media Ltd, London, 1997) chapter 6.

3.3 In theory, child killing at that time amounted to murder, for which the mandatory penalty was death. In practice, however, there was a marked reluctance on the part of the police to prosecute women who killed their babies, as well as on the part of juries to convict these women of murder.[4] Even where a murder conviction was returned, both the jury and the judge were likely to recommend mercy, which usually meant that the death penalty was commuted. This lenient attitude on the part of both law enforcers and the general community was said to be due in part to sympathy for the social and economic conditions which unmarried mothers faced, as well as a perception that these women did not pose a threat to the general public, since their crime was confined to the killing of their own children.

3.4 By the end of the 19th century, there had been a number of attempts to formulate a means of avoiding the death penalty in cases of child killing without requiring the prosecution, judges and juries to circumvent the law in order to exercise mercy. Judges in particular objected to having to pronounce the death penalty in such cases, knowing that mercy would almost invariably be exercised. As a consequence of these attempts at reform, an *Infanticide Act* was introduced in 1922, which was the predecessor of the 1938 Act. The *Infanticide Act 1922* (UK) applied to cases where a woman killed her "new-born child" and provided a partial excuse for such offenders based on the notion that they suffered from puerperal psychosis, the most severe form of mental disorder associated with childbirth. This medical model of child killing did not allow overt consideration of the socio-economic factors leading to infanticide. A woman convicted of infanticide was sentenced as if for manslaughter. The *Infanticide Act 1922* (UK) was repealed and replaced by the *Infanticide Act 1938* (UK), which featured two key changes, namely an amendment in the reference to the victim from a "new-born child" to a child less than 12 months old, and the addition of "lactation" as a ground of mental disturbance, thus allowing the medical basis for excusing infanticide to extend beyond the first few weeks of the child's life.

3.5 The New South Wales provisions dealing with infanticide were introduced in 1951 and were modelled on the *Infanticide Act 1938* (UK).[5] At that time in New South Wales, there was a mandatory sentence for murder. Conviction for infanticide allowed the judge to sentence a woman as if for

4. For example, the jury might adopt the view that the child had been still born, or had died in the course of childbirth, or had been killed accidentally.
5. See *Crimes Act 1900* (NSW) s 22A, introduced by the *Crimes (Amendment) Act 1951* (NSW) s 2(d).

manslaughter, which carried with it a discretionary sentence. The infanticide provisions were therefore said to offer a humane means of dealing with women who became "temporarily deranged" as a result of the after-effects of childbirth.[6]

3.6 In practice, the offence/defence of infanticide may provide a partial excuse for child killing in a range of different types of cases: for example, where a young single woman conceals her pregnancy and kills her baby within hours of giving birth; where a woman, suffering from post-natal depression or some other mental illness which may or may not have been apparent before her pregnancy, kills her baby shortly after the birth; or where a woman, faced with severe social and economic stresses, kills her baby several months after the birth.[7] In some of these cases, it may not be immediately apparent that the offender suffered from a mental disturbance directly attributable to giving birth or to the effects of lactation.

3.7 The infanticide provisions in New South Wales are now very rarely used. For the period 1990 to 1996, only two convictions for infanticide were recorded.[8] Its infrequent use, together with more fundamental criticisms of its underlying ideological and medical rationales, have led several to question

6. See New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 26 September 1951, at 3225.
7. See, for example, *R v Hutty* [1953] VLR 338, and cases discussed in the following infanticide studies: R D Mackay, "The Consequences of Killing Very Young Children" [1993] *Criminal Law Review* 21; A Wilczynski, "A Socio-Legal Study of Parents Who Kill Their Children in England and Wales" (Dissertation submitted for the Degree of Doctor of Philosophy in Criminology, University of Cambridge, 1993) at 190-191; R Bluglass, "Infanticide and Filicide" in R Bluglass and P Bowden (eds), *Principles and Practice of Forensic Psychiatry* (Churchill Livingstone, Edinburgh, 1990) at 523-529. Child homicide may be broadly classified into two types: the killing of a new born child within the first few hours of life; and the killing of a child who is more than one day old. These categories are commonly referred to as "neonaticide" and "filicide" respectively. Filicide may be subcategorised into five groups: parents who kill an unwanted child; mercy killing; aggression attributable to gross mental pathology; stimulus arising outside the victim; stimulus arising from the victim. Each group tends to display distinct offender characteristics: see R Bluglass, "Infanticide and Filicide" in R Bluglass and P Bowden (eds), *Principles and Practice of Forensic Psychiatry* (Churchill Livingstone, Edinburgh, 1990) at 525.
8. Figures taken from the Judicial Commission's Judicial Information Research System.

whether the offence/defence of infanticide should be retained. In this chapter, the Commission discusses the arguments for and against retaining infanticide and recommends that infanticide be abolished in New South Wales. We anticipate that the defence of diminished responsibility will apply to those child killings currently falling within the legal definition of infanticide.

CURRENT OPERATION OF INFANTICIDE

3.8 As we noted in paragraph 3.1, infanticide operates as both an offence and as a partial defence to murder in New South Wales. Where a woman kills her baby, the prosecution may charge her with the offence of infanticide. If she is convicted of that offence, she is sentenced as if she had been found guilty of manslaughter. Alternatively, the prosecution may charge the woman with murder, in which case infanticide may be raised as a partial defence. If successful, the defence will result in a verdict of infanticide. Again, the woman is then sentenced as if she had been found guilty of manslaughter. The maximum penalty for manslaughter is penal servitude for 25 years.[9]

3.9 The law relating to infanticide is contained in s 22A of the *Crimes Act 1900* (NSW). That section reads:

> (1) Where a woman by any wilful act or omission causes the death of her child, being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for this section the offence would have amounted to murder, she shall be guilty of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of such child.
>
> (2) Where upon the trial of a woman for the murder of her child, being a child under the age of twelve months, the jury are of opinion that she by any wilful act or omission caused its death, but that at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to such child or by reason of the effect of lactation consequent upon the birth of the child, then the jury may, notwithstanding that the circumstances were such that but for the provisions of this section they might have returned a verdict of murder, return in lieu thereof a verdict of infanticide, and the woman may be dealt with and punished as if she had been guilty of the offence of manslaughter of the said child.
>
> (3) Nothing in this section shall affect the power of the jury upon an indictment for the murder of a child to return a verdict of

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

manslaughter or a verdict of not guilty on the ground of insanity, or a verdict of concealment of birth.

3.10 The elements of infanticide may therefore be summarised as follows:

- the accused must be the natural mother of the victim;
- the victim must be less than twelve months old; and
- at the time of the killing, the accused must have been suffering from a mental disturbance which resulted from her not having recovered from giving birth to the victim or from the effect of lactation consequent upon the victim's birth.

3.11 Where infanticide is raised as a partial defence to a charge of murder, all of the elements of murder must be established, including an intention to kill or cause grievous bodily harm, or a reckless indifference to human life. In contrast, where infanticide is used as a substantive offence, it is not clear whether the prosecution is required to prove any specific intent on the part of the accused in causing the victim's death, such as an intention to kill. Section 22A(1) does not refer to any such requirement, although it seems likely that some form of "mens rea" or intention would be presumed by law to be an element of the offence.[10]

3.12 Where a woman is charged with the offence of infanticide, the burden of proof rests with the prosecution to prove beyond a reasonable doubt that all the elements of the offence are established. In contrast, where infanticide is raised by the accused as a defence to murder, the legislation does not specify whether it is the prosecution who must disprove, or the accused who must prove, that the defence of infanticide is established.[11]

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10. See *He Kaw Teh v The Queen* (1985) 157 CLR 523.
11. It would seem consistent with the defences of mental illness and diminished responsibility, and with the underlying presumption of sanity, if the burden of proof for the defence of infanticide rested on the accused. There are, however, no cases in New South Wales which address this issue, while two cases in Papua New Guinea have stated that the burden of disproving the defence of infanticide lies with the prosecution: see the decisions of the Supreme Court of Papua New Guinea in *R v Yiwagi and Aku* [1963] PNGLR 40; *R v Brigitta Asamakan* [1964] PNGLR 193. Similarly, the Law Reform Commission of Victoria recommended that the burden of disproving the defence of infanticide should rest on the prosecution: see Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility* (Report 34, 1990) recommendation 28.

3.13 Although infanticide may be raised as a substantive offence, it appears that, in practice, it tends to operate more as a defence to a charge of murder.[12] Convictions for infanticide are generally obtained by way of the prosecution's acceptance of a plea of guilty to infanticide following an indictment for murder, rather than by a jury's verdict following a trial.[13] In his submission to the Commission, it was suggested by the (then) Director of Public Prosecutions that one reason why infanticide is not used as a substantive offence is because the prosecution would then be required to prove as part of its case that the accused suffered from a disturbance of the mind.[14] Presumably, if that element was not established, the accused would be acquitted.

ABOLITION OF INFANTICIDE

Recommendation 3
Section 22A of the *Crimes Act 1900* (NSW) should be repealed. This recommendation is conditional on there being a defence of diminished responsibility in some form in New South Wales, as formulated in terms similar to those recommended by the Commission in Recommendation 4 of Report 82.

3.14 In DP 31, the Commission considered a proposal to abolish the offence/defence of infanticide in New South Wales.[15] While the majority of submissions did not support this proposal,[16] we conclude that infanticide

12. This practice runs contrary to the recommendation made in one case that infanticide be used as a substantive offence where this is appropriate in light of the evidence of the particular case: see *R v Hutty* [1953] VLR 338.
13. See R Lansdowne, "Child Killing and the Offence of Infanticide: The Development of the Offence and its Operation in New South Wales 1976-1980" (Thesis submitted for the Degree of Masters of Laws, University of New South Wales, 1987) at 96.
14. See R Blanch, *Submission* (7 September 1993) at 1.
15. New South Wales Law Reform Commission, *Provocation, Diminished Responsibility and Infanticide* (DP 31, 1993) at 129-132.
16. Only one submission was in favour of abolishing infanticide: see I H Pike, *Submission* (3 November 1993) at 4. Those submissions which supported the retention of infanticide were: M L Sides, *Submission* (17 December 1993) at

should be abolished and recommend accordingly, for the reasons that follow. It is important to note that we base our recommendation on the assumption that the defence of diminished responsibility is retained and reformulated in terms similar to those recommended by the Commission in its reformulation of that defence.[17]

3.15 The Commission considers that women who kill their children in states of significant mental disturbance should not be convicted of murder. It is appropriate that, given the usually tragic circumstances which characterise infanticide cases, the law should treat such women with leniency. This leniency should not be reflected simply in a reduced sentence for murder, but in conviction for a lesser offence which conveys a lesser degree of culpability.

3.16 Despite our view that women who kill their children in states of severe mental distress should not be convicted of murder, we recommend that the offence/defence of infanticide be abolished. Our reasons for this may be summarised as follows. Essentially, we consider that infanticide is no longer necessary as a means of mitigating culpability because the defence of diminished responsibility is now available as a partial defence to reduce murder to manslaughter where an offender kills in a state of significant mental impairment. We consider that the defence of diminished responsibility is a more appropriate means of reducing culpability than infanticide, because infanticide is based on unsound and outmoded notions of mental disturbance, reflects an anachronistic view of women, and is arbitrarily restrictive. The social, medical and legal bases on which the infanticide provisions were originally modelled have all been called into question in recent times. The more general defence of diminished responsibility is now available for women whose responsibility for killing their children is reduced by reason of mental impairment.

4; A Wilczynski, *Submission* (23 September 1993) at 1; Women's Legal Resources Centre, *Submission* (3 December 1993) at 5-6; S Yeo and S Odgers, *Submission* (29 October 1993) at 7-8; P Easteal, *Submission* (14 September 1993) at 3; Law Society, *Submission* (28 October 1993) at para 2.2; Legal Aid Commission, *Submission* (2 February 1994) at 2; R Blanch, *Submission* (7 September 1993) at 1. While these submissions considered that infanticide should be retained, they proposed that it be reformulated.

17. See New South Wales Law Reform Commission, *Partial Defences to Murder: Diminished Responsibility* (Report 82, 1997) recommendation 4.

3.17 In the section which follows, the Commission discusses in more detail the reasons why we consider that infanticide should be abolished. We then address the main objections to abolishing infanticide and give our reasons why we do not find these objections sufficiently compelling to warrant retaining the offence/defence of infanticide.

Arguments for abolishing infanticide

Availability of the defence of diminished responsibility

3.18 The Commission considers that the defence of diminished responsibility is sufficient to meet all deserving cases currently coming within the legislative provisions for infanticide. If this view is accepted, then the offence/defence of infanticide is unnecessary for the purpose of reducing culpability from murder in cases where a woman's responsibility for killing her child is impaired by reason of a disturbed mental state.

3.19 The legislative formulation of infanticide requires that a woman killed her child while "the balance of her mind was disturbed" by reason of her not having fully recovered from the effect of giving birth or by reason of the effect of lactation. In contrast, the defence of diminished responsibility, as it is currently formulated, requires the accused to have suffered from an "abnormality of mind" which substantially impaired his or her mental responsibility for the killing. The abnormality of mind must be caused by either a condition of arrested or retarded development of mind, or any inherent causes, or induced by disease or injury.[18] Under the Commission's recommended reformulation of the defence of diminished responsibility, an accused would be required to prove that he or she suffered from an "abnormality of mental functioning arising from an underlying condition". It would need to be established that the abnormality of mental functioning substantially impaired the accused's capacity either to understand events, or to judge whether his or her actions were right or wrong, or to control himself or herself.[19]

3.20 Following the Commission's recommended reformulation of diminished responsibility, an accused woman who, for example, kills her child in a severely depressed state would be required to show that her mental processes at the time of the killing were disturbed as a result of that depression in a way which affected her capacity to judge, to understand, or to control herself. She would not be precluded from pleading the defence of diminished responsibility simply because, for example, her depression was not permanent, or did not result directly from the effects of childbirth.

18. See *Crimes Act 1900* (NSW) s 23A(1); NSWLRC Report 82 at paras 3.5-3.9, 3.31-3.43.
19. NSWLRC Report 82 recommendation 4.

3.21 Despite the apparent flexibility of the defence of diminished responsibility to accommodate infanticide cases, a number of concerns have been expressed in the past in response to a similar proposal in the United Kingdom to abolish infanticide.[20] Some commentators have suggested that the defence of diminished responsibility would not be wide enough to cover all infanticide cases and, in particular, that the mental disturbance required under the offence/defence of infanticide is of a less severe degree than that required by an "abnormality of mind" under the defence of diminished responsibility as it is currently formulated.[21]

3.22 In part, some of these concerns appear to be based on a misconception of the requirements of the defence of diminished responsibility.[22] Moreover,

20. England and Wales, Committee on Mentally Abnormal Offenders, *Report of the Committee on Mentally Abnormal Offenders* (HMSO, London, Cmnd 6244, 1975) at para 19.22.

21. See England and Wales, Criminal Law Revision Committee, *Offences Against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) at paras 102-103; P T d'Orban, "Women Who Kill Their Children" (1979) 134 *British Journal of Psychiatry* 560 at 570; R D Mackay, "The Consequences of Killing Very Young Children" [1993] *Criminal Law Review* 21 at 29; A Wilczynski, "A Socio-Legal Study of Parents Who Kill Their Children in England and Wales" (Dissertation submitted for the Degree of Doctor of Philosophy in Criminology, University of Cambridge, 1993) at 187-188.

22. For example, it has been argued that some women convicted of infanticide would not be able to meet the definition of "mental disorder" in the *Mental Health Act 1983* (UK) s 1 (or similarly, in its predecessor, the now repealed s 4, *Mental Health Act 1959* (UK)). It is contended that an accused person must be able to satisfy this definition in order to rely on the defence of diminished responsibility, and that consequently some women relying on the infanticide provisions would be excluded from pleading diminished responsibility: see A Wilczynski, "A Socio-Legal Study of Parents Who Kill Their Children in England and Wales" (Dissertation submitted for the Degree of Doctor of Philosophy in Criminology, University of Cambridge, 1993) at 187; A Wilczynski, *Child Homicide* (Greenwich Medical Media Ltd, London, 1997) at 157; Submission of the Royal College of Psychiatrists to the Criminal Law Revision Committee (England and Wales) in its report, *Offences Against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) at paras 105. In fact, the defence of diminished responsibility as provided for in s 2 of the *Homicide Act 1957* (UK) does not require the accused to prove a mental disorder as defined in the *Mental Health Act 1959* (UK) or the *Mental Health Act 1983* (UK). There was a proposal in England and Wales in 1975 that the defence of diminished responsibility be reformulated to require proof of a mental disorder as defined in s 4 of the *Mental Health Act 1959* (UK)

one study suggests that, whatever the situation in the United Kingdom, the defence of diminished responsibility as it operates in New South Wales should be adequate to accommodate infanticide cases. That study revealed that, based on psychiatric evidence, the infanticide cases in New South Wales recorded between 1976 and 1980 could also have been dealt with by way of the defence of diminished responsibility. It is suggested in that study that the defence of diminished responsibility may be interpreted more liberally in New South Wales than it is in the United Kingdom.[23]

3.23 It is evident that, in most respects, the defence of diminished responsibility as it operates in New South Wales is much broader than the offence/defence of infanticide. For example, the defence of diminished responsibility is not restricted to a specific group of offenders or victims, or to a certain type of mental impairment, as is the offence/defence of infanticide. This means that the defence of diminished responsibility is available to a wider range of offenders than is the offence/defence of infanticide. Moreover, providing the Commission's recommended reformulation of diminished responsibility is adopted into legislation, an accused person will not be required to identify a specific cause of his or her mental impairment, namely that the impairment arose as a result of an arrested or retarded development of mind, an inherent cause, or a disease or injury. Therefore, women who kill their children in states of mental distress would not need to establish a specific diagnosis of their condition in order to meet the statutory requirements of the defence of diminished responsibility.

3.24 Despite the generally wider availability of the defence of diminished responsibility, some commentators have suggested that the offence/defence of infanticide is more accessible to women who kill their children because it is not generally interpreted by the courts and by medical experts as requiring proof of a severe psychiatric disorder.[24] Indeed, some women seemed to have

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(now repealed and replaced by s 1 of the *Mental Health Act 1983* (UK)): see England and Wales, Committee on Mentally Abnormal Offenders, *Report of the Committee on Mentally Abnormal Offenders* (HMSO, London, Cmnd 6244, 1975) at para 19.17. That proposal has not been adopted into legislation.

23. See R Lansdowne, "Child Killing and the Offence of Infanticide: The Development of the Offence and its Operation in New South Wales 1976-1980", (Thesis submitted for the degree of Masters of Laws, University of New South Wales, 1987) at 24-25, 29.

24. R D Mackay, "The Consequences of Killing Very Young Children" [1993] *Criminal Law Review* 21 at 29; P T d'Orban, "Women Who Kill Their Children" (1979) *British Journal of Psychiatry* 560 at 570.

received the benefit of an infanticide conviction where there has been no evidence of any persisting psychiatric disturbance.[25]

3.25 The defence of diminished responsibility does not necessarily require a severe or permanent psychiatric disorder. It may apply to a temporary and curable condition, provided that condition is not merely a transitory state of, for example, heightened emotions. However, it has been argued that the defence of diminished responsibility may potentially be narrower than the offence/defence of infanticide in one respect, namely that it requires a causal connection between the accused's mental impairment and the killing of the victim, in so far as it must be shown that the mental impairment substantially impaired the accused's responsibility for his or her actions. In contrast, under the existing formulation of infanticide, there is no express requirement to show that the accused's mental disturbance actually caused her to kill her child. It simply requires that the accused killed while "the balance of her mind was disturbed". The absence of any express causal requirement is said to give the offence/defence of infanticide considerable flexibility.[26]

3.26 While the defence of diminished responsibility may be more restrictive than infanticide in so far as it requires proof of a substantial causal connection, the Commission does not consider that this places too heavy a burden on female offenders who seek to be partially excused for killing their children. It is central to notions of individual responsibility in our criminal law that culpability for serious offences be reduced according to whether that culpability was impaired by reason of, for example, mental illness or mental impairment. If a woman kills her child while suffering from a significant mental impairment, she should be able to rely on the defence of diminished responsibility to be partially excused. If she is unable to show that her responsibility for her actions was substantially impaired by reason of mental impairment, then the law should not apply a lower standard to measure her culpability by allowing her to be excused under the offence/defence of infanticide. While it is important that the law continue to recognise those cases of child killing which occur in tragic circumstances and which invoke our sympathy for the offender, that can be done more appropriately through

25. See, for example, the case studies in R Bluglass, "Infanticide and Filicide" in R Bluglass and P Bowden (eds), *Principles and Practice of Forensic Psychiatry* (Churchill Livingstone, Edinburgh, 1990) at 525-526.
26. See Bluglass (1990) at 527; A Wilczynski, *Child Homicide* (Greenwich Medical Media Ltd, London, 1997) at 165.

the application of uniform standards by way of the defence of diminished responsibility.

Unsoundness of medical basis

3.27 In addition to the availability of the defence of diminished responsibility, there are inherent difficulties in the offence/defence of infanticide itself which justify its abolition. These difficulties arise, in part, from the unsoundness of the medical principles on which infanticide is based. The offence/defence of infanticide requires the existence of mental disturbance resulting from the effects of lactation or the effects of giving birth. The validity of these medical principles has been widely questioned.

3.28 In relation to the first ground of mental disturbance, it seems now to be generally doubted that there is any medical basis for the notion of "lactational insanity".[27] Inclusion of lactation as a ground of mental disturbance within the infanticide provisions appears to have been based primarily on a desire to provide a medical justification for extending infanticide beyond the first few weeks of birth.[28] Other jurisdictions have since proposed a reformulation of infanticide which omits any reference to lactation as a ground for mental disturbance, on the basis that such a notion is of dubious validity.[29]

3.29 In relation to the second ground of mental disturbance, it has been suggested that, in reality, the offence/defence of infanticide is applied to very few women suffering from post-puerperal psychosis, which is the mental illness resulting from the effects of giving birth. It is argued that the infanticide provisions more often apply to women suffering conditions which

27. See, for example, the evidence of the Working Party of the Royal College of Psychiatrists in England and Wales, Criminal Law Revision Committee, *Offences Against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) at para 105; R Lansdowne, "Infanticide: Psychiatrists in the Plea Bargaining Process" (1990) 16 *Monash University Law Review* 41 at 52.
28. See N Walker, *Crime and Insanity in England* (University Press, Edinburgh, 1968) at 132.
29. See England and Wales, Criminal Law Revision Committee, *Offences Against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) at 47; Law Commission of England and Wales, *Criminal Code for England and Wales* (Law Com 177, 1989) cl 64(1); Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility* (Report 34, 1990) recommendation 28 and at para 166. The Tasmanian provision dealing with infanticide makes no reference to lactation: see *Criminal Code* (Tas) s 165A.

result from the psychological and social stresses of childbirth and child-raising, or from pre-existing mental conditions.[30] For example, for a number of women who suffer depression after giving birth, it may be arguable whether their depression is aggravated rather than caused by the birth, and may be induced by or equally attributable to other factors such as marital discord, lack of support, or financial worries. It has been suggested that as a result of the restrictions on the types of mental disturbance giving rise to the offence/defence of infanticide, medical experts are often forced to distort their diagnoses in order to conform with the requirements of the legislation.[31]

3.30 If infanticide were subsumed into the general defence of diminished responsibility, this would have the advantage of not limiting the type of mental disturbance which might give rise to the defence. For example, if a woman killed her child while in a state of severe depression, the success of raising the defence of diminished responsibility would not depend on whether or not that condition could be said to be the direct result of the effects of giving birth. In this way, the defence of diminished responsibility should be more widely accessible to women who kill their children in states of mental distress than is the offence/defence of infanticide. Moreover, the defence of diminished responsibility would not require medical experts to distort their diagnoses in order to reflect what are essentially outmoded notions of mental illness in childbirth.

Unsoundness of ideological basis

30. See, for example, P T d'Orban, "Women Who Kill Their Children" (1979) 134 *British Journal of Psychiatry* 562; A Wilczynski, "A Socio-Legal Study of Parents Who Kill Their Children in England and Wales" (Dissertation submitted for the Degree of Doctor of Philosophy in Criminology, University of Cambridge, 1993) at 187; England and Wales, Criminal Law Revision Committee, *Offences Against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) at paras 102-105; England and Wales, Committee on Mentally Abnormal Offenders, *Report of the Committee on Mentally Abnormal Offenders* (HMSO, London, Cmnd 6244, 1975) at paras 19.23-19.24; R Lansdowne, "Infanticide: Psychiatrists in the Plea Bargaining Process" (1990) 16 *Monash University Law Review* 41 at 51-59; R D Mackay, "The Consequences of Killing Very Young Children" [1993] *Criminal Law Review* 21 at 29-30.

31. R Lansdowne, "Infanticide: Psychiatrists in the Plea Bargaining Process" (1990) 16 *Monash University Law Review* 41 at 54.

3.31 A second ground for contending that infanticide is no longer an appropriate means of dealing with women who kill their children relates to the unsoundness of its ideological basis. The offence/defence of infanticide may be seen to reflect an anachronistic and paternalistic view of women. As we have already noted, the current legislative provisions are based on a medical model of infanticide which explains child killing by women in terms of mental disturbance resulting directly from reproduction. Women are given special treatment by way of a gender-specific law based on the notion that they are naturally susceptible to mental instability as a result of giving birth. Arguably, this conveys a conception of women as inherently unstable because of their biology.[32] This special treatment may be seen to reinforce an image of women as essentially weak, pitiable, and not responsible for their actions. For example, the introduction of the infanticide legislation in New South Wales was described at the time as recognising that:

> [w]omen are, by ordinance of nature, subject to certain fundamental disabilities. The Attorney-General, in creating this new offence ... has done something for the status of women in this country.[33]

3.32 While special treatment in the criminal justice system may benefit individual female offenders, we must question the wider consequences of a law which makes specific concessions to women based on a notion of inherent "disabilities". There is also concern that female offenders who do not fit easily into the stereotype of women as weak and frail victims of their

32. See, for example, R Lansdowne, "Infanticide: Psychiatrists in the Plea Bargaining Process" (1990) 16 *Monash University Law Review* 41 at 41; A Morris and A Wilczynski, "Parents who kill their Children" [1993] *Criminal Law Review* 31 at 35; K Laster, "Infanticide and Feminist Criminology: 'Strong' or 'Weak' Women?" (1990) 2 *Criminology Australia* 14 at 15 & 18; K O'Donovan, "The Medicalisation of Infanticide" [1984] *Criminal Law Review* 259; A Wilczynski, "A Socio-Legal Study of Parents Who Kill Their Children in England and Wales" (Dissertation submitted for the Degree of Doctor of Philosophy in Criminology, University of Cambridge, 1993) at 207-214. This argument contrasts with the view taken in one submission, which suggested that if a woman suffers from post-natal depression, this is a real medical entity and should be recognised as such by the court: see P Easteal, *Submission* (14 September 1993) at 3. The Commission does not dispute the fact that some women suffer from post-natal depression. However, we consider that it is more appropriate if illnesses such as post-natal depression be recognised by way of the defence of diminished responsibility.

33. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 27 September 1951, at 3275.

biology may be condemned as "bad mothers" and punished much more severely.[34]

3.33 Arguably, the law should not seek to perpetuate the image of women which is inherent in the offence/defence of infanticide. If there were no legal alternative for dealing with women who kill their children in mentally disturbed states, then it might be necessary to retain infanticide despite its unsound ideological basis. However, the defence of diminished responsibility is now available to women who kill their children in states of mental distress, whether as a result of giving birth or whether as a result of other factors and stresses. The defence of diminished responsibility does not single out women on the basis of any notion of their particular vulnerability to mental illness due to their biology.

34. See K Laster, "Infanticide and Feminist Criminology: 'Strong' or 'Weak' Women?" (1990) 2 *Criminology Australia* 14 at 15 & 18; A Wilczynski, "A Socio-Legal Study of Parents Who Kill Their Children in England and Wales" (Dissertation submitted for the Degree of Doctor of Philosophy in Criminology, University of Cambridge, 1993) at 208-209.

The restrictive nature of the infanticide provisions

3.34 A third inherent difficulty with infanticide relates to the restrictive nature of the infanticide provisions, which can arguably lead to arbitrary results.

3.35 The offence/defence of infanticide applies only to women, and only to those killings where the offender is the natural mother of the victim aged less than 12 months. These restrictions reflect the medical principles on which infanticide is based, namely that women who have recently given birth may suffer mental disturbance as a result. However, as discussed in the previous section, there now seems to be a large body of evidence suggesting that mental disturbance following childbirth may often be the result of a pre-existing illness or of the social and psychological stresses of child-caring, rather than necessarily always the direct result of the effects of giving birth. It may therefore be argued that there are other groups of offenders who may be equally susceptible to the same stresses and illnesses and who should not be excluded from the offence/defence of infanticide, such as, for example, women who kill their children aged more than 12 months,[35] adoptive parents or other people who are the primary carers of children, and male offenders.[36] Restricting the availability of the offence/defence of infanticide may arguably lead to some illogical and arbitrary results. For example, in the case of a

35. *Cf Crimes Act 1961* (NZ) s 178(1) & (2), which extends the offence/defence of infanticide in certain circumstances to women who kill their children aged under 10 years.

36. Empirical studies indicate that child homicide in Australia is committed to at least an equal extent by men: see for example H Strang, "Children as Victims of Homicide" (Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice, number 53, 1996) (study based on police records across Australia for the period July 1989 to December 1993); A Wallace, *Homicide: The Social Reality* (NSW Bureau of Crime Statistics and Research, Research study number 5, 1986) chapter 9 (study based on NSW police files for the period 1968-1981). The Judicial Commission's study on homicide offenders in New South Wales between 1990 and 1993 reported that 84% of child homicide offenders were male, where "child" is defined as a person under 18 years of age: Donnelly, Cumines and Wilczynski (1995) at 25. However, several studies have suggested that there are qualitative differences in child killings by men as opposed to women: men are said typically to commit abuse-type killings, in the course of discipline and out of anger or jealousy, whereas women are more likely to kill in a mentally disturbed and depressed state: see Strang (1996); A Wilczynski, "Why Do Parents Kill Their Children?" (1994) 5 *Criminology Australia* 12; A Wilczynski and A Morris, "Parents Who Kill Their Children" [1993] *Criminal Law Review* 31.

woman who is suffering from severe depression and kills her two children, one aged less than 12 months and the other aged more than 12 months, the offence/defence of infanticide may apply to the killing of the first child, but not to the second, despite the fact that both killings were committed in a state of significant mental disturbance.

3.36 The justification for the present restrictions on the availability of infanticide depends on the view that mental illness amongst women who kill their children must necessarily result from childbirth. As we have discussed, however, that view has been questioned on both medical and ideological bases. Some of the submissions which supported the retention of specific infanticide legislation accepted that the restrictions in the current infanticide provisions may potentially be arbitrary and illogical. However, instead of abolition, they propose that infanticide be reformulated to widen its application to, for example, women who kill their children aged more than 12 months.[37] The Commission does not support this proposal. In our view, to extend the offence/defence of infanticide to other groups of offenders or victims would be to remove infanticide from the biological connection on which it is currently based. If that connection is removed, then it may be argued that any restrictions which are imposed on the availability of infanticide must potentially be arbitrary and discriminatory, since in theory any person may be susceptible to mental disturbance attributable to factors such as severe stress. Given that the biological connection on which infanticide is based appears now to be one of a number of possible factors which lead some women to kill their babies, it seems preferable, in our view, to allow all cases of child-killing in which the question of mental disturbance is raised to rely on the defence of diminished responsibility or, in exceptional cases, on the defence of mental illness.[38] These defences impose no

37. M L Sides, *Submission* (17 December 1993) at 7; P Easteal, *Submission* (14 September 1993) at 3; Legal Aid Commission, *Submission* (2 February 1994) at 2. In contrast, two submissions in favour of specific infanticide legislation opposed the proposal to extend such legislation to children aged more than 12 months: see S Yeo and S Odgers, *Submission* (29 October 1993) at 8; Law Society, *Submission* (28 October 1993) at para 2.4.1.

38. The defence of mental illness may be an inappropriate means of dealing with women who kill their children in states of temporary mental disturbance, largely because of the consequences of being "acquitted" by reason of the defence of mental illness. In reality, an "acquittal" usually means being placed in custody in prison or hospital as a forensic patient: see *Mental Health Act 1990* (NSW) s 81(2)(b) and 82, with recent amendments under the *Mental Health Legislation Amendment Act 1997* (NSW) Sch 1.2[1], [2] and Sch 2.

restrictions on eligible offenders or victims, but instead allow proper consideration of the impact of mental impairment on each individual offender's culpability.

Arguments for retention

3.37 Despite the criticisms discussed above, the majority of submissions which the Commission received did not support the abolition of infanticide. This accords with the view taken in a number of jurisdictions which have favoured retaining specific infanticide legislation.[39] It is worth noting, however, that in a number of those jurisdictions, the defence of diminished responsibility is not available. One argument against abolishing infanticide is a perception that the defence of diminished responsibility would not be adequate to accommodate all infanticide cases. The Commission has already addressed this objection at paragraphs 3.18-3.26. The following arguments are also commonly advanced to support the retention of the offence/defence of infanticide:

- advantages in recognising women's experiences by way of a specific criminal offence/defence;
- procedural advantages of retaining a separate offence/defence; and
- sentencing disparities between infanticide and manslaughter.

Advantages of retaining a gender-specific offence/defence

3.38 It may be asserted that, even if the defence of diminished responsibility is adequate to accommodate cases currently falling within the infanticide provisions, it is important to retain a separate criminal offence/defence which recognises the particular experiences and difficulties which women commonly face following childbirth and in child-raising. "Infanticide" is a term which may be used to acknowledge these experiences.[40]

3.39 Arguably, whatever the cause, women do commonly suffer depression following childbirth and are particularly susceptible to a range of external

39. England and Wales, Criminal Law Revision Committee, *Offences Against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) at para 107; Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility* (Report 34, 1990) recommendation 27.
40. S Yeo and S Odgers, *Submission* (29 October 1993) at 7.

stresses relating to motherhood, such as poverty, isolation, and lack of support.[41] Although the legislation explains infanticide in medical terms, in reality, these external stresses are taken into account in assessing the offender's mental disturbance. It has been proposed by some that the legislation should be widened so that these stresses might be openly considered.[42] Indeed, one submission suggested that the offence/defence of infanticide should be widened to the extent that women's actions are taken out of the category of mental illness and are instead viewed as valid responses to what, for some mothers, are intolerable social and economic conditions.[43]

3.40 If infanticide were subsumed into the defence of diminished responsibility, the special problems faced by women with children would cease to be recognised by way of a separate offence/defence. The defence of diminished responsibility would focus attention on individual women's mental states rather than on the special pressures commonly experienced by women which may have led to that state.[44]

3.41 The Commission recognises that, to an extent, reliance on a general defence of diminished responsibility focuses attention on the individual's mental state rather than on the special problems, including social stresses, which women may face when raising children. However, this does not mean that the stresses commonly associated with motherhood cannot be considered within the defence of diminished responsibility, particularly as reformulated according to the Commission's recommendation, if these stresses can be

41. See S Yeo and S Odgers, *Submission* (29 October 1993) at 7; M L Sides, *Submission* (17 December 1993) at 4. See also, for example, L Reece, "Mothers Who Kill: Postpartum Disorders and Criminal Infanticide" (1991) 38 *UCLA Law Review* 699 at 754-757; K Laster, "Infanticide and Feminist Criminology: 'Strong' or 'Weak' Women?" (1990) 2 *Criminology Australia* 14 at 15.
42. See Women's Legal Resources Centre, *Submission* (3 December 1993) at 5-6. See also England and Wales, Criminal Law Revision Committee, *Offences Against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) recommendation 114 and at paras 105-106; Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility* (Report 34, 1990) recommendation 28.
43. Women's Legal Resources Centre, *Submission* (3 December 1993) at 5-6.
44. See A Wilczynski, "A Socio-Legal Study of Parents Who Kill Their Children in England and Wales" (Dissertation submitted for the Degree of Doctor of Philosophy in Criminology, University of Cambridge, 1993) at 208.

shown to give rise to an "abnormality of mental functioning". It is true that, by abolishing a specific defence which relates solely to women, particular attention to the special problems which women face is reduced and the individual's mental state is emphasised, rather than the social factors which contributed to that state. However, the alternative, which is to retain a separate offence/defence of infanticide, is a less favourable option. As it is currently formulated, infanticide offers some women special treatment in a way which simply perpetuates a paternalistic view of women as victims of their own biology. As we discussed in paragraphs 3.31-3.33, we do not consider it desirable that the law reinforce this conception of women in contemporary society. If infanticide were reformulated according to a socio-economic model, rather than a medical model, then it would run contrary to ordinary principles of individual responsibility which underlie the criminal law to allow social or economic factors in themselves to be used as a defence to killing. No other crime is excused on the basis of social or economic necessity or adversity alone. To permit an exception to this general principle for women may benefit certain individuals but ultimately reinforces a view of women as especially weak and vulnerable because of their sex.

Procedural advantages

3.42 In theory, there may presently be procedural advantages for the accused in retaining a specific offence/defence of infanticide. Women who kill their babies may be charged with the substantive offence of infanticide, rather than murder. An important advantage of this is that it permits the accused to avoid the trauma of a murder charge and the prospect of standing trial for murder, and also leaves the burden of proving the elements of the offence of infanticide with the prosecution. In contrast, diminished responsibility may only be raised as a defence to a charge of murder, which means that if a woman kills her child in a state of substantial mental disturbance, she may potentially be charged with murder, and may then have to face the prospect of a murder trial in which she bears the burden of proving that the defence of diminished responsibility is established.[45] These may appear to be significant disadvantages in abolishing the offence/defence of infanticide.

45. The Commission considered the question of whether legislation should permit indictments to be laid for manslaughter on the basis of diminished responsibility, but concluded that such a provision would be unnecessary: see NSWLRC Report 82 at paras 3.103-3.105.

3.43 In practice, however, as we discussed in paragraph 3.13, it appears that infanticide is almost never used as a substantive offence, with most accused being charged with murder and then having a plea of guilty to infanticide accepted by the prosecution. The prosecution has a similar power to accept a plea of guilty to manslaughter where a woman is charged with murder and there is clear evidence of mental disturbance.[46] In addition, the prosecution may choose to exercise its discretion by laying an indictment for manslaughter, instead of murder, where it is clear that the accused suffered from an impaired mental capacity. Given the prosecution's power to accept pleas and the prosecutorial discretion in laying indictments, female offenders would not be disadvantaged as a result of the procedural consequences of abolishing the offence/defence of infanticide.

Sentencing disparities

3.44 It has been argued that infanticide should be retained if only for the pragmatic reason that, if it were abolished, sentences imposed on women who kill their children may increase.[47] This argument is based on a perceived disparity in sentences for infanticide as opposed to manslaughter.

3.45 While the same maximum statutory penalty applies to both manslaughter and infanticide, there is empirical evidence to suggest that conviction for infanticide ensures the imposition of a more lenient sentence. For example, in New South Wales between 1990 and 1996, there were two convictions recorded for infanticide and both led to the imposition of non-custodial sentences.[48] This result is consistent with sentencing patterns in other jurisdictions.[49] In contrast, conviction for manslaughter in New South

46. See *Crimes Act 1900* (NSW) s 394A.
47. See, for example, R Lansdowne, "Infanticide: Psychiatrists in the Plea Bargaining Process" (1990) 16 *Monash University Law Review* 41; D Maier-Katkin and R Ogle, "A Rationale for Infanticide Laws" [1993] *Criminal Law Review* 903; A Wilczynski, *A Socio-Legal Study of Parents Who Kill Their Children in England and Wales* (Dissertation submitted for the degree of Doctor of Philosophy in Criminology, University of Cambridge, 1993).
48. Information taken from the Judicial Commission's Judicial Information Research System.
49. See, for example, A Wilczynski and A Morris, "Parents Who Kill their Children" [1993] *Criminal Law Review* 31 and D Maier-Katkin and R Ogle, "A Rationale for Infanticide Laws" [1993] *Criminal Law Review* 903, which examine child homicide statistics in England and Wales for the periods 1982-1989 and 1982-1988 respectively. See also R Lansdowne, "Infanticide:

Wales for the same period did not necessarily result in the imposition of a non-custodial sentence, sentences instead ranging from good behaviour bonds to more than 20 years' penal servitude.[50] Moreover, in two manslaughter cases involving child killing in New South Wales, judges have noted that sentencing may differ depending on whether an offender is convicted of manslaughter or infanticide.[51] However, these comments need to be considered in the context of the particular facts involved, since neither case involved manslaughter on the basis of diminished responsibility, and in both cases the level of culpability was arguably quite high.

3.46 It may be contended that women who kill their young children often do so in tragic circumstances as a result of a condition such as severe depression, and should be treated with leniency by the law. If infanticide were abolished, then based on past sentencing patterns, it may be suggested that the leniency currently afforded to these women could not be guaranteed.

3.47 The Commission is not convinced that sentences currently imposed for infanticide would necessarily increase if those same women were convicted of manslaughter. Manslaughter generally attracts a wide range of sentences reflecting both a high level and a low level of culpability. Consequently, existing sentencing statistics can only be of limited assistance in providing guidance for sentences for manslaughter.[52] Certainly, courts have a wide discretion to impose a non-custodial sentence for manslaughter where this is appropriate in the circumstances of the individual case, including manslaughter on the basis of diminished responsibility. One factor which may influence a decision not to impose a reduced sentence for manslaughter on the basis of diminished responsibility is if an offender's mental disorder makes him or her a continuing danger to the general community. This consideration is likely to be of less relevance in cases where a woman has killed her infant owing to a condition such as post-natal depression. The

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Psychiatrists in the Plea Bargaining Process" (1990) 16 *Monash University Law Review* 41, which examines cases of child killings by female offenders in New South Wales between 1976 and 1980.

50. See the Judicial Commission's Judicial Information Research System.

51. See *R v Sempel* (Court of Criminal Appeal, NSW, 31 March 1994, CCA 60126/93, unreported); *R v Grierson* (Court of Criminal Appeal, NSW, 28 October 1996, CCA 60276/96, unreported).

52. See *R v Withers* (1925) 25 SR (NSW) 382; *R v Hill* (1981) 3 A Crim R 397; *R v Schelberger* (Court of Criminal Appeal, NSW, 2 June 1988, CCA 254/87, unreported); *R v Troja* (Court of Criminal Appeal, NSW, 16 July 1991, CCA 606394/90, unreported); *R v Morabito* (1992) 62 A Crim R 82.

largely varying nature of cases falling within the single offence of manslaughter, together with the wide sentencing discretion inherent in the sentencing process for manslaughter, means that it is difficult to make accurate estimations or comparisons of sentences imposed for manslaughter cases. Courts would assess the facts of cases currently falling within the infanticide provisions and would have the discretion to impose the most appropriate sentence in light of the special mitigating factors of those cases. Where the offender's culpability is significantly reduced by reason of mental disturbance, there is certainly scope under sentencing principles for manslaughter to impose a substantially reduced sentence, including a non-custodial sentence.

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
21. Mr P Berman (Crown Prosecutor), 28 July 1997
22. Judge M L Sides QC (Judge, District Court), 31 July 1997
23. Ms M Latham (Crown Advocate), (oral) 6 August 1997

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