

Victorian
Law Reform
Commission

Defences to Homicide Issues Paper

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Please note that this Issues Paper contains a number of case studies, each of which is based on a real case. Where possible, given names, not family names, are used. Where the given name is not available, the family name is used. The case studies also contain details of the offences, where this is necessary to explain the issues involved. These may be disturbing to some readers.

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Preface

This Issues Paper is part of the Victorian Law Reform Commission's work on defences to homicide. It outlines the defences which a person who has killed another person can rely upon under Victorian law, and provides information on how the law is working at present.

The Issues Paper is based on a first draft prepared by Dr Bernadette McSherry of Monash University in her capacity as a consultant to the Commission. Jamie Walvisch played a central role in producing the final draft. Stephen Farrow was responsible for Chapter 9, which provides statistical information about the characteristics of offenders and victims of homicide and about use of the various defences. Trish Luker edited the Issues Paper.

Publication of the Paper is only the first stage of our work. It is intended that the information provided here should provide the basis for our community consultations on how the law should be changed. The Commission has also published an Occasional Paper, written by Jenny Morgan, which brings together a number of empirical studies of homicide in Australia and provides a factual context for assessment of law reform proposals. The Occasional Paper indicates that the majority of homicide offenders are men and that homicide often occurs in the context of family violence. The Occasional Paper provides the basis for Chapter 2 of this Issues Paper.

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Terms of Reference

1. To examine the law of homicide and consider whether:
 - it would be appropriate to reform, narrow or extend defences or partial excuses to homicide, including self-defence, provocation and diminished responsibility;
 - any related procedural reform is necessary or appropriate to ensure that a fair trial is accorded to persons accused of murder or manslaughter, where such a defence or partial excuse may be applicable; and
 - plea and sentencing practices are sufficiently flexible and fair to accommodate differences in culpability between offenders who are found guilty of, or plead guilty to, murder or manslaughter.

In reviewing these matters, the Victorian Law Reform Commission should have regard to relevant provisions of the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General's 1998 discussion paper on *Fatal Offences Against the Person*, along with developments and proposals in other jurisdictions.

2. To recommend actions, including the development of educational programs, which may be necessary to ensure the effectiveness of proposed legislative, administrative and procedural reforms.

Abbreviations

| | |
|----------|--|
| AC | Appeal Cases (United Kingdom) |
| A Crim R | Australian Criminal Reports |
| ACT | Australian Capital Territory |
| CCA Qld | County Court Appeals, Queensland |
| cf | compare with |
| cl | clause |
| Cl & Fin | Clark and Finnelly's Reports, House of Lords |
| CLR | Commonwealth Law Reports |
| Cmnd | Command Papers (United Kingdom) |
| Crim L J | Criminal Law Journal |
| CRNZ | Criminal Reports of New Zealand |
| Cth | Commonwealth |
| eg | for example |
| ER | English Reports |
| FLR | Federal Law Reports |
| Geo 3 | King George III |
| ibid | in the same place (as the previous footnote) |
| ie | that is |
| ILTR | Irish Law Times Reports |
| J | Justice (JJ pl) |
| James 1 | Nova Scotia Reports (James) |
| Law Com | Law Commission Report (United Kingdom) |
| n | footnote |
| NSW | New South Wales |
| NSWSC | New South Wales Supreme Court |
| NT | Northern Territory |
| para | paragraph |

| | |
|----------|--|
| QBD | Queen's Bench Division, Reports |
| Qd R | Queensland Reports |
| Qld | Queensland |
| s | section (ss pl) |
| SA | South Australia |
| SCR | Supreme Court Reports |
| St R Qd | Queensland State Reports |
| Syd LR | Sydney Law Reports |
| Tas | Tasmania |
| Ventris | Ventris' Reports |
| VLR | Victorian Law Reports |
| VR | Victorian Reports |
| VSC/VSCA | Supreme Court of Victoria/Supreme Court of Victoria—Court of Appeal |
| WA | Western Australia |



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Chapter 1

Introduction

WHAT IS HOMICIDE?

1.1 The term ‘homicide’ is used to describe the killing of one human being by another. In most circumstances, homicide is considered a crime. The context in which a homicide is committed will influence the nature of any criminal charges that may be laid against a person who is accused of killing. In Australia, an accused person may be charged with criminal offences ranging from murder to ‘culpable driving causing death’. All Australian States and Territories distinguish between different forms of unlawful killing.

1.2 While homicide may take place in a range of situations, it has often been noted that ‘violence in general, and homicide in particular, are masculine phenomena’.¹ For example, in her study of homicides over a 10 year period, Jenny Mouzas found that three out of five victims of homicide and about seven out of eight homicide offenders were male. Male-on-male homicides accounted for approximately 50% of all homicides and were most likely to occur at night on a Friday, Saturday or Sunday, as a result of an argument, and were usually alcohol precipitated.²

HOW DOES THE LAW DEAL WITH HOMICIDE?

1.3 Victorian law separates homicide into two main categories: murder and manslaughter. Murder is regarded as the most serious form of homicide. In order to be convicted of murder, the accused person must be found to have had an intention to kill or cause grievous bodily harm (serious injury),³ or to have had knowledge that death or grievous bodily harm was a probable consequence of the conduct.⁴

1 Jenny Mouzos, *Homicidal Encounters: A Study of Homicide in Australia 1989–1999*, Australian Institute of Criminology, Research and Public Policy Series, No 28 (2000) 103.

2 Ibid 114.

3 *Pemble v The Queen* (1971) 124 CLR 107.

4 *R v Crabbe* (1985) 156 CLR 464.

1.4 Manslaughter is a less serious category of homicide. It does not require the same level of intention (to kill or cause grievous bodily harm) or knowledge (that death or grievous bodily harm was a probable consequence of the conduct) as murder. Instead, a person can be convicted of manslaughter if they commit

a dangerous or negligent act that causes death. Alternatively, where a person does intentionally kill, they may be convicted of manslaughter rather than murder if there are certain mitigating circumstances, known as ‘partial excuses’. We discuss these partial excuses, and other defences to homicide, below.

Mitigating circumstances

Factors which may lead to a less severe penalty after conviction are called mitigating circumstances. These may include the fact that the offender had no previous criminal record or showed genuine remorse.

1.5 In Victoria, neither murder nor manslaughter is defined in legislation.⁵ Instead, these offences are governed by the common law. Most defences to homicide also come from the common law. By contrast, in a number of other Australian jurisdictions, parliament has passed legislation that sets out the precise definition of murder, stating the requirements that must be met before a judge or jury can convict a person.⁶ For example, in New South Wales, to be convicted

of murder, a person must have had either an intention to kill or inflict grievous bodily harm on another person, have acted with ‘reckless indifference’ to human life, or have been in the course of committing certain other crimes when the killing took place.⁷ One of the issues that the Commission will be examining in the course of this reference is whether it would be desirable to define the offences of murder and manslaughter, and their defences, in legislation.

Common law

Common law is a body of law which comes from cases decided by judges, rather than from laws made by parliament.

Jurisdiction

The term jurisdiction here refers to the area in which a particular law applies.

-
- 5 South Australia is the only other Australian jurisdiction which does not define either murder or manslaughter in legislation.
- 6 See, eg, *Crimes Act 1900* (ACT) s 12(1); *Crimes Act 1900* (NSW) s 18(1)(a); *Criminal Code* (NT) ss 161–2; *Criminal Code* (Qld) ss 291, 293, 300, 302; *Criminal Code* (Tas) ss 156–8; *Criminal Code* (WA) ss 268, 277–9. Each of these jurisdictions define manslaughter as an ‘unlawful’, ‘culpable’ or ‘punishable’ homicide that is not murder: *Crimes Act 1900* (ACT) s 15; *Crimes Act 1900* (NSW) s 18(1)(b); *Criminal Code* (NT) s 163; *Criminal Code* (Qld) s 303; *Criminal Code* (Tas) s 159; *Criminal Code* (WA) s 280. Western Australia draws a distinction between ‘murder’ and ‘wilful murder’: *Criminal Code* (WA) ss 278–9.
- 7 *Crimes Act 1900* (NSW) s 18(1)(a).

1.6 Although neither murder nor manslaughter is defined in Victorian legislation, there are a number of other homicide offences that also exist, some of which have been specified in the *Crimes Act 1958*. For example, if a woman causes the death of her child when it is under the age of twelve months, she may be charged with infanticide.⁸ If a person unintentionally causes the death of another while committing a violent crime, they may be charged with ‘unintentional killing in the course or furtherance of a crime of violence’.⁹ A person who kills someone by driving badly may be charged with ‘culpable driving causing death’.¹⁰

1.7 Each of these homicide offences has different requirements that must be satisfied before a person can be convicted, and the maximum penalties for the offences also vary. For example, the maximum penalty for murder is life imprisonment, whereas the maximum penalty for infanticide is five years imprisonment. The actual sentence received by an offender will depend on the circumstances of the case.¹¹ For example, a person who is convicted of murdering for financial reasons may receive a higher sentence than a person convicted of murdering out of fear. This scale of offences and penalties is based on the notion that a person who causes the death of another when there are mitigating circumstances or where, for example, there is no intention to kill, is less culpable than a person who intentionally kills another without justification or excuse.

DEFENCES AND PARTIAL EXCUSES TO HOMICIDE

1.8 This notion of a hierarchy of culpability, in which some killings are seen as less morally reprehensible than others, is also used when determining liability for homicide. In some cases it is argued that the circumstances were such that the killing was justified—that it was not wrong to kill in the particular

8 *Crimes Act 1958* s 6(1). It should be noted that infanticide also operates as a defence to a charge of murder. Instead of being charged with infanticide, a woman who is charged with murder may plead infanticide, and be found guilty of the lesser charge: *Crimes Act 1958* s 6(2). For a more detailed discussion of infanticide, see Chapter 7.

9 *Crimes Act 1958* s 3A. Note that mere bad driving would not be sufficient to lead to a charge of culpable driving causing death. A person must drive in a way which falls far below a reasonable standard of care.

10 *Crimes Act 1958* s 318.

11 The kinds of circumstances taken into account in determining sentences are discussed in Chapter 3.

The accused

When a person has been charged with a criminal offence, they are referred to as 'the accused'.

situation. In others, it is argued that while it may have been wrong to kill, the circumstances were such that the accused should not be held fully responsible and the behaviour should be excused.

1.9 Such justifications and excuses have led to the development of a number of defences and 'partial excuses' to homicide. Defences give rise to a complete acquittal of the accused. In different Australian jurisdictions, the defences to homicide that are currently recognised include self-defence, automatism,¹² mental impairment,¹³ duress and necessity.¹⁴ By contrast, 'partial excuses' do not lead to a complete acquittal of the accused. Instead, they act to reduce the conviction from murder to manslaughter. That is, if a person is charged with murder, and raises the partial excuse of provocation, if the prosecution cannot prove that they were not provoked, the jury may find the accused guilty of

Acquittal

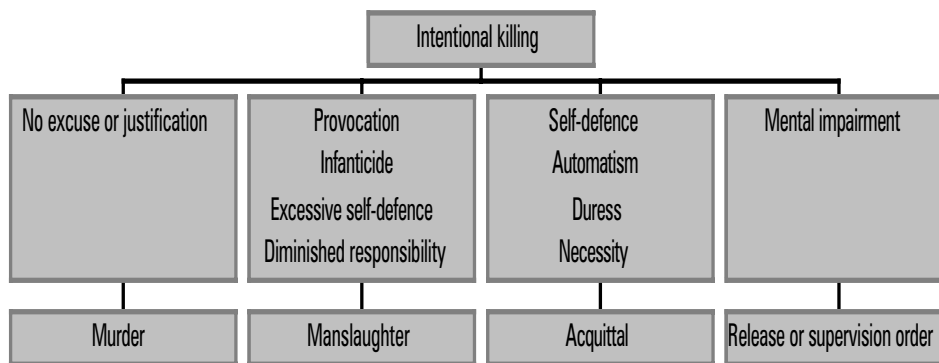
A verdict that a person charged with a criminal offence is not guilty.

manslaughter instead of murder (see Figure 1). Partial excuses which are currently recognised in Australian law include provocation, infanticide,¹⁵ excessive self-defence¹⁶ and diminished responsibility.¹⁷

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- 12 The 'defence' of automatism arises where behaviour is considered automatic or unwilling. It is not technically a defence, but instead negates one of the elements required for the offence to be proven—that the behaviour was voluntary. However, because the result of showing that the accused was acting in an automatic or unwilling fashion is the same as successfully using a true defence such as self-defence, namely, complete acquittal of the accused, we will be treating it as a 'defence' for the purposes of this Paper. For a more detailed discussion of automatism, see Chapter 7.
- 13 Unlike other defences which automatically result in an acquittal of the accused, a finding of not guilty because of mental impairment may result in the accused being released unconditionally, or may lead to a judge making a custodial or non-custodial supervision order: *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* ss 23(b), 26. For a more detailed discussion, see Chapter 7.
- 14 The law is unclear, however, it seems that currently duress and necessity are complete defences to any criminal offence except for murder and, possibly, attempted murder: *R v Harding* [1976] VR 129; *R v Gotts* [1992] 2 AC 412. For a more detailed discussion, see Chapter 8.
- 15 As noted above, infanticide is an offence as well as a defence: n 8.
- 16 Within Australia, the doctrine of excessive self-defence currently only exists in South Australia and New South Wales: *Criminal Law Consolidation Act 1935* (SA) s 15(2); *Crimes Act 1900* (NSW) s 421.
- 17 While the defence of diminished responsibility can act to reduce murder to manslaughter in the Australian Capital Territory, New South Wales, the Northern Territory and Queensland, it is not currently available in Victoria.

1.10 Although there is technically a difference between a partial excuse and a true defence, they are often all simply called ‘defences’. People will usually refer to the ‘defence’ of provocation, rather than the ‘partial excuse’ of provocation. Throughout this Paper, unless there is a specific need to discuss the difference between partial excuses and true defences, we will also refer to them all as ‘defences’.

FIGURE 1: POSSIBLE DEFENCES WHERE THERE IS AN INTENTION TO KILL



INTERACTION BETWEEN OFFENCES, DEFENCES AND SENTENCING

1.11 We can see from the discussion above that there are three ways in which the law differentiates between levels of culpability. Firstly, a person can be charged with different offences. If it appears that they intentionally killed, without any justification, it is most likely they will be charged with murder. If the killing appears to be unintentional, they may be charged with manslaughter. The seriousness and stigma attached to each of these offences varies, as does the possible maximum penalty.

1.12 Secondly, a person charged with murder can raise a defence during the course of the trial which may result in a jury finding them guilty of the less serious offence of manslaughter (or infanticide). For example, a person who intentionally kills may claim that they were provoked into the killing. The defence of provocation can act to reduce the offence from murder to manslaughter, again with consequences for the penalty faced by the offender.

1.13 Thirdly, the actual sentence given to an offender can vary, depending on the circumstances of the case. A person convicted of murder, who did so for financial gain, may receive a different sentence from a person convicted of murder who killed out of an unreasonable fear for their own safety.¹⁸ The sentence reflects the judge's view of the culpability of the offender.

1.14 One of the main issues the Commission will be examining throughout the course of this project is the way in which these three factors should interact. Some of the questions to be investigated include: when should a particular circumstance affect the offence a person is charged with, and when should it simply be left to the accused to raise as a defence? Which issues should be treated as defences, and left to the jury to decide, and which should be taken into account by the judge when sentencing? For example, should provocation be a matter for the jury to decide, or should it be left to the judge to take into account when sentencing? What is the appropriate role for juries in such cases?

WHY A REFERENCE ON DEFENCES TO HOMICIDE?

1.15 In announcing that the Government had requested the Commission to examine defences to homicide, the Victorian Attorney-General, the Honourable Rob Hulls MP, noted that 'defences and partial excuses to homicide raise difficult moral questions. Different members of the community are likely to have very different views on these issues... That is why any reforms to the law need to be carefully considered and a range of views need to be taken into account.'¹⁹

1.16 The Attorney-General continued by noting that:

Some people have argued that the laws of provocation and self-defence have not changed enough to keep up with changing social values. For example, the laws of provocation or self-defence have been criticised for excusing or condoning male patterns of aggression or of perpetuating stereotypes about a person's race, religion or sexual preference.²⁰

18 If the fear was reasonable, the person would be able to rely on self-defence: see Chapter 5.

19 Office of the Attorney-General, *Law Reform Commission to Review Provocation and Self-Defence Laws*, Media Release (23 September 2001), available from <http://www.dpc.vic.gov.au/domino/web_notesnewmedia.nsf>.

20 Ibid.

1.17 This concern about the relevance of current laws to modern society has been reflected in a number of judgments made by Australian courts. For example, Chief Justice Gleeson, in discussing the defence of provocation, noted that ‘considerable dissatisfaction’ with the state of the law in this area has developed:

One common criticism was that the law’s concession to human frailty was very much, in its practical application, a concession to male frailty... The law developed in days when men frequently wore arms, and fought duels, and when, at least between men, resort to sudden and serious violence in the heat of the moment was common. To extend the metaphor, the law’s concession seemed to be to the frailty of those whose blood was apt to boil, rather than those whose blood simmered, perhaps over a long period, and in circumstances at least as worthy of compassion.²¹

1.18 These criticisms of current Victorian defences to homicide have become part of community debate in recent years, particularly as a result of concerns about the law’s ability to adequately recognise the specific circumstances of women who kill men in the context of prolonged domestic violence and abuse. As noted above, the law has developed in recognition of the circumstances of male-on-male violence. It is argued that the defences which arise from this context are consequently incapable of providing a framework for cases which fall outside this model, such as those involving ‘battered women’.²²

1.19 These concerns have recently been highlighted in the case of Marjorie Heather Osland. Heather Osland was found guilty of murdering her husband in October 1996, and sentenced to 14 years imprisonment. At her trial, she pleaded both self-defence and provocation, on the basis that she was fearful for her life, due to a long-standing history of violence against both her and her son by her husband. Her conviction and sentence were unsuccessfully appealed firstly to the Court of Appeal,²³ and later to the High Court.²⁴ Critics of these decisions have argued that the law of self-defence and provocation is gender biased, and is incapable of taking into account the context of violence in which such killings occur.

21 *Chhay v R* (1994) 72 A Crim R 1, 11.

22 These issues are discussed in more detail in Chapter 6.

23 *R v Osland* [1998] 2 VR 636.

24 *Osland v The Queen* (1998) 197 CLR 316. A petition for mercy was submitted to the Victorian Attorney-General, but was also denied.

1.20 The Commission has been provided with this reference in an attempt to address these concerns:²⁵

Community confidence in the law requires that the laws be relevant and appropriate to the Victorian community. The law of provocation and self-defence has been developed by the courts over many years, out of different cases, but it is now timely to investigate how it should operate to best serve our community.²⁶

OTHER STUDIES

1.21 The difficulty in determining the best approach to take in this area is reflected in the number of studies that have been undertaken in the past. Some of these studies have focussed on the legal issues, recommending avenues for reform. These include reports by the former Law Reform Commission of Victoria in 1991²⁷ and the New South Wales Law Reform Commission in 1997.²⁸ In 1998, the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General also released a discussion paper, as part of its attempt to develop a national model criminal code for Australian jurisdictions, which included an examination of homicide and its defences.²⁹ While some of the recommendations in these reports have been adopted in certain jurisdictions,³⁰ others have yet to be implemented.

1.22 Other studies have explored the empirical data relating to homicide. These include specific studies of prosecutions³¹ and sentencing,³² as well as

25 Note that while the Commission will be addressing the kinds of concerns that were raised by Heather Osland's case, we will not be engaging in a review of that case, or an analysis of whether the existing law was correctly applied by the various courts.

26 Office of the Attorney-General, above n 19.

27 Law Reform Commission of Victoria, *Homicide*, Report No 40 (1991).

28 New South Wales Law Reform Commission, *Partial Defences to Murder: Diminished Responsibility*, Report 82 (1997) and *Partial Defences to Murder: Provocation and Infanticide*, Report 83 (1997).

29 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 5: Fatal Offences Against the Person*, Discussion Paper (1998).

30 See, eg, *Crimes Amendment (Self-Defence) Act 2001 (NSW)*, which was substantially derived from a model developed in the Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992), although with some modifications.

31 See, eg, Law Reform Commission of Victoria, *Homicide Prosecutions Study*, Appendix 6, Report No 40 (1991).

32 See, eg, Hugh Donnelly, Stephen Cumines and Ania Wilczynski, *Sentenced Homicides in New South Wales 1990–1993: A Legal and Sociological Study*, Judicial Commission of NSW, Monograph Series Number 10 (1995).

broader studies of homicide in general.³³ It is only by understanding the context in which homicides take place, and the ways in which they are dealt with by the legal system, that effective law reform can take place. The Commission's investigations will take place against the background of this data, both legal and empirical.

WHICH DEFENCES WILL WE BE EXAMINING?

1.23 Our terms of reference specify the three defences that will provide the main focus of our investigation: self-defence, provocation and diminished responsibility. In order to properly examine these areas, however, it will be necessary to also explore a number of defences that may be raised in cases involving these three defences. These include the defences of 'mental impairment', automatism and infanticide, all of which raise issues that clearly overlap with those we must consider when looking at our three main defences. We will also briefly be considering the defences of duress and necessity.

1.24 We will not be examining the possible defence of euthanasia. The issues involved in relation to euthanasia are quite separate from those involved in an analysis of the defences mentioned above. These issues are particularly complex, and cannot be properly considered in the course of a reference on defences to homicide in general. Any examination of the law concerning euthanasia would be more appropriately dealt with in a specific reference on that area. For similar reasons, we will also not be examining the defence of 'suicide pact', according to which the survivor of a suicide pact, who has killed another person as part of that pact, will be guilty of manslaughter rather than murder.³⁴

1.25 This reference will not include an examination of the issue of intoxication.³⁵ The use of intoxication to avoid liability for criminal responsibility is an issue that extends beyond the scope of homicide. It is potentially applicable in relation to all crimes that require an intention to commit the crime. As such, it would not be appropriate to consider intoxication

33 See, eg, Kenneth Polk, *When Men Kill: Scenarios of Masculine Violence* (1994); Jenny Mouzos, above n 1; Patricia Easteal, *Killing the Beloved: Homicide Between Adult Sexual Intimates* (1993).

34 *Crimes Act 1958* s 6B.

35 As with automatism, intoxication is not a true defence, but instead negates one of the elements required for an offence to be proven, namely, the intention to commit that offence.

exclusively within the context of homicide. In addition, the issue of whether a person should be liable for crimes committed while intoxicated has recently been investigated by a number of other law reform bodies, including the Victorian Law Reform Committee.³⁶

PURPOSE OF THIS PAPER

1.26 The issues involved in an analysis of defences to homicide are both broad and complex. This Paper is only the first stage in our examination of the area. It has a number of roles. These include outlining the relevant law, as well as presenting the empirical information that is available to us from existing studies. In doing so, we identify the areas that the Commission will be focussing on in the future, and raise some of the issues that we will be investigating. These will range from broad questions about the theoretical basis for defences to homicide, to specific questions about the precise way in which those defences should be framed.

1.27 It should be noted that this Paper is not intended to be exhaustive. Throughout the Paper we raise questions. We are not, at this stage, seeking answers to these questions. The questions raised simply indicate the types of issues which we have identified, and the types of questions we will need to ask ourselves. We will be raising more specific questions, and seeking feedback and submissions on those questions in our Discussion Paper. This will be published after we have undertaken more advanced research, engaged in preliminary consultations, and completed further empirical studies to update our knowledge about homicides in Victoria. The future stages of our project are outlined in more detail in Chapter 10.

STRUCTURE OF THIS PAPER

1.28 Chapter 2 of this Paper looks at the current state of research on homicide. It focuses on the empirical studies that have been undertaken in the area, presenting an overview of the circumstances in which homicide takes place.

36 Victorian Law Reform Committee, *Criminal Liability for Self-Induced Intoxication*, Report (1999).

1.29 In Chapter 3, we examine the way the legal system deals with homicides, starting from the discovery of a body, and moving through to the sentencing of an offender who is found guilty of a crime. This provides the necessary background for a consideration of the substantive law in this area.

1.30 Chapter 4 sets the stage for an investigation of the current law, by exploring the historical context in which defences to homicide have developed. This is followed by an examination of the defences themselves, and some of the issues raised by those defences. Chapter 5 focuses on self-defence, while Chapter 6 investigates provocation. Defences to homicides involving what is referred to as ‘impaired mental functioning’—automatism, mental impairment, diminished responsibility and infanticide—are the subject of Chapter 7. Chapter 8 considers possible defences to homicides involving external pressures: duress, necessity and marital coercion.

1.31 Chapter 9 aims to link the data presented in Chapter 2 to the legal framework explored in the following chapters, by examining what happens when we apply the current law to the incidence of homicide in Victoria. It does this by examining the data which is available on the prosecution of offenders. Other issues to be further investigated by the Commission are also presented in this chapter.

1.32 In Chapter 10 we summarise the main issues raised and outline the Commission’s process once this Issues Paper is published.



Chapter 2

An Overview of Homicide

INTRODUCTION

2.1 In this chapter we examine data drawn from a number of empirical studies in order to give an overview of homicide as a social phenomenon. We start by looking at what is known about homicides in Victoria, examining the number of homicides and the contexts in which they take place. We then focus on the three categories of homicide which are of greatest relevance to a discussion of defences: homicides in the context of sexual intimacy, homicides in the context of family intimacy and confrontational homicides.

2.2 In order for the law reform process to work most effectively, it should be informed by a clear understanding of the social problem that it is seeking to address. It is only by first understanding the context in which homicides take place, and then examining the ways in which they are currently dealt with by the legal system, that we will be able to make appropriate recommendations for legal reform.³⁷

2.3 Much of this chapter focuses on gender differences in homicide. This is because men commit disproportionately more homicides than women and because there are marked differences between the patterns of men killing other men, men killing women, women killing men and women killing women.

2.4 Other variables aside from gender, such as socio-economic status and ethnicity, also appear to be significant. For example, a study of all homicides in Australia between 1989–99 found that most offenders and the majority of victims were not in paid employment at the time of the homicide (75% of male offenders, 88% of female offenders, 60% of male victims and 70% of female victims)³⁸—figures that are far above the level of unemployment in the community as a whole. The number of homicides also appears to be

37 For further discussion of the empirical research available on the incidence and circumstances of homicide, see the Occasional Paper published by the Commission, written by Jenny Morgan, *Who Kills Whom and Why: Looking Beyond Legal Categories* (2002).

38 Jenny Mouzos, above n 1, 39–40, Figure 28, and 57–8, Figure 46.

disproportionately high amongst some ethnic groups.³⁹ This may be related to the question of socio-economic status, because some of those groups may have lower levels of employment than the general community.

2.5 In this chapter we have placed greater emphasis on gender than on these other variables because less data is available on them, or the data that is available is unreliable. In particular, data on ethnicity is imprecise because it is based on either country of birth (which is often not recorded, and when recorded does not necessarily reflect a person's racial or cultural origins)⁴⁰ or on an observational assessment by police of whether a person can be categorised as 'Caucasian', 'Indigenous', 'Asian' or 'Other'.⁴¹

2.6 At this stage, we have not carried out any data collection of our own. We do, however, intend to conduct a study of homicide prosecutions as part of this reference.

WHAT WE KNOW ABOUT HOMICIDES IN VICTORIA

2.7 Approximately 60 homicides occur each year in Victoria.⁴² As mentioned in Chapter 1, homicides occur in a wide range of circumstances. However, there are patterns which can be identified, particularly those based on the context in which the homicides take place. One framework for categorisation based on context was devised by Kenneth Polk, who studied files held by the the Office of State Coroner from 1985–9.⁴³

2.8 The categories in Graph 1 are taken from Polk's study. Some are self-explanatory, but others require the following clarification.

- 'Special cases' is a category that encompasses cases that reveal no common features or patterns.

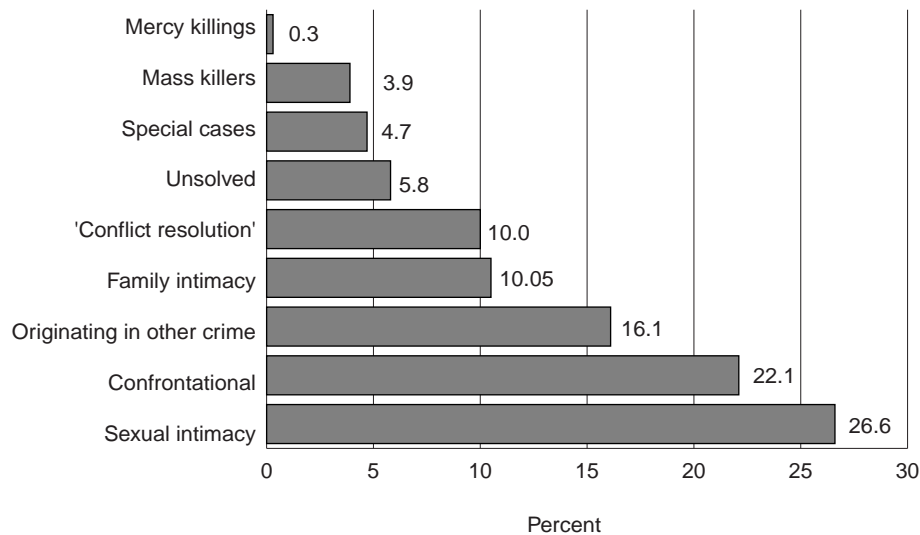
39 See, for example, Mouzos, above n 1, 55; Law Reform Commission of Victoria, Report No 40, above n 27, 25–6.

40 For example, Law Reform Commission of Victoria, Report No 40, above n 27, 23–6.

41 For example, Mouzos, above n 1, 34 (footnote 20), 55.

42 There were 580 homicides in Victoria between 1989–99: Mouzos, above n 1, 17, Table 1. This gives an annual (mean) average of 58.

43 Polk, above n 33. For a discussion of other empirical studies of homicide, see Morgan, above n 37.

GRAPH 1: HOMICIDE BY TYPE ⁴⁴

- 'Conflict resolution' homicides occur when 'the killing resulted from the planned and rational intention to employ violence to resolve some form of interpersonal dispute, over issues such as debts, shared resources or the like between victim and offender'.⁴⁵
- 'Family intimacy' describes the killing of family members, other than when the victim is the spouse or de-facto spouse of the offender.⁴⁶ This includes a parent killing his or her child or step-child, or a sibling killing another sibling.
- 'Originating in other crime' includes situations such as where the killing occurs in the context of an armed robbery. It also includes situations where police are killed or where police kill a person in the course of law enforcement.
- 'Confrontational' homicides include altercations between strangers as well as between friends or acquaintances.

⁴⁴ Based on data from Polk, above n 33, 23, Table 1.

⁴⁵ Ibid 24.

⁴⁶ Spousal homicides fall within the category of 'sexual intimacy'.

- ‘Sexual intimacy’ involves situations in which a person kills either the person with whom they are in a sexually intimate relationship, or a sexual rival. The category of sexually intimate relationships includes heterosexual and homosexual couples.

2.9 Graph 1 demonstrates that the highest proportion of homicides occur in the context of sexually intimate relationships. The second largest category is confrontational homicides. Homicides in the context of sexually intimate relationships and confrontational homicides are highly relevant for the purposes of this reference, because defences such as self-defence and provocation arise in many of the cases in these categories.

2.10 The other main category which is of relevance to a discussion of defences to homicide is homicides occurring in the context of family intimacy. This is because a large proportion of these homicides involve parents killing children. Some of these cases fall within the scope of the defence of infanticide, which is discussed in Chapter 7.

2.11 Defences such as self-defence and provocation are much less relevant to other categories of homicide, such as homicides originating in other crimes, conflict resolution homicides and mass killers. The only circumstance in which self-defence is likely to arise is when a conflict resolution homicide or a homicide by a mass or serial killer ‘goes wrong’, and the person intending to carry out the killing is killed by the intended victim. The use of self-defence in such cases does not appear to raise complex policy issues. As a consequence, we will not examine these categories in any depth.

2.12 We note that although homicide in the context of sexual intimacy is the largest category of homicide that is committed, it is not necessarily the largest category of homicide that is dealt with by the criminal justice system. That is, while on Polk’s analysis more people are killed in this context than in any other, it is not necessarily the case that more people are prosecuted for homicides committed in the context of sexual intimacy than for homicides committed in other contexts. It appears, in fact, that more ‘confrontational’

homicides are prosecuted than homicides in the context of sexual intimacy.⁴⁷ The main reason for this seems to be that in a significant number of homicides in the context of sexual intimacy, the perpetrator commits suicide and is not prosecuted.⁴⁸

HOMICIDES IN THE CONTEXT OF SEXUAL INTIMACY

Reasons or Motives for Homicide

2.13 It is possible to identify three common themes amongst the reasons or motives for homicide in the context of sexual intimacy.⁴⁹

JEALOUSY/CONTROL

2.14 These cases involve an obsessional or extreme desire by one partner to control the other partner. Typically, a female partner is killed in order to prevent her from pursuing a sexual relationship with someone else or in revenge for having done so. Many of these cases appeared to be premeditated, and some involved elaborate planning, such as a man engaging a private detective to locate his estranged wife.⁵⁰ In some cases the accused person's perceptions of the partner's infidelity appeared to be delusional.⁵¹

47 The former Law Reform Commission of Victoria (LRCV) conducted a study of 319 homicide prosecutions. Fifty-four of these homicides involved spouses, former spouses, sexual partners and former sexual partners and seven involved sexual rivals. This means that 19.1% of homicides in the study fell within Polk's 'sexual intimacy' category. By contrast, 98 (or 30.7%) of the homicides in the LRCV study were classified as 'argument', which appears to equate with Polk's 'confrontational' category. While the methods of classification used by Polk and the LRCV differ, these figures suggest that more confrontational homicides are prosecuted than homicides in the context of sexual intimacy: see Law Reform Commission of Victoria, Appendix 6, Report No 40, above n 31, 48–50, Tables 34, 35.

48 Ibid 48, para 93.

49 This categorisation is based on Polk's study of Victorian homicides. Polk in fact divided homicides in the context of sexual intimacy into four categories: male–male, male–female, female–male and female–female. He then divided each of these categories into sub-categories: jealousy/control, sexual rivals, control/other, homosexual killing, response to violence and depression/suicide: Polk, above n 33, 23, Table 1. We have combined his sub-categories of jealousy/control, sexual rivals, control/other and homosexual killing into the broader category of jealousy/control.

50 Polk, above n 33, 29.

51 Ibid 33.

DEPRESSION/SUICIDE

2.15 This category does not include all homicides in the context of sexual intimacy where the killer subsequently commits suicide. For instance, in some of the cases which Polk categorised as jealousy/control cases, the killers subsequently committed suicide. Polk treats as depression/suicide cases those in which the events revolve around the killer's decision to commit suicide and the killing of the person's partner is a secondary consequence of that decision.⁵² Unlike jealousy/control cases, the killing is not motivated by anger towards the partner. The cases usually involve people with poor or deteriorating health or economic circumstances. There is some similarity with cases involving a suicide pact, except that in depression/suicide cases the male partner's view that they should die together is not shared by the female partner. It is this feature of control by one over the other partner's life that is common to both jealousy/control cases and depression/suicide cases.⁵³

RESPONSE TO VIOLENCE

2.16 This category is not discussed in detail in Polk's study, as the focus of his study was on masculine forms of violence and all of the cases in this category involved killings by women.

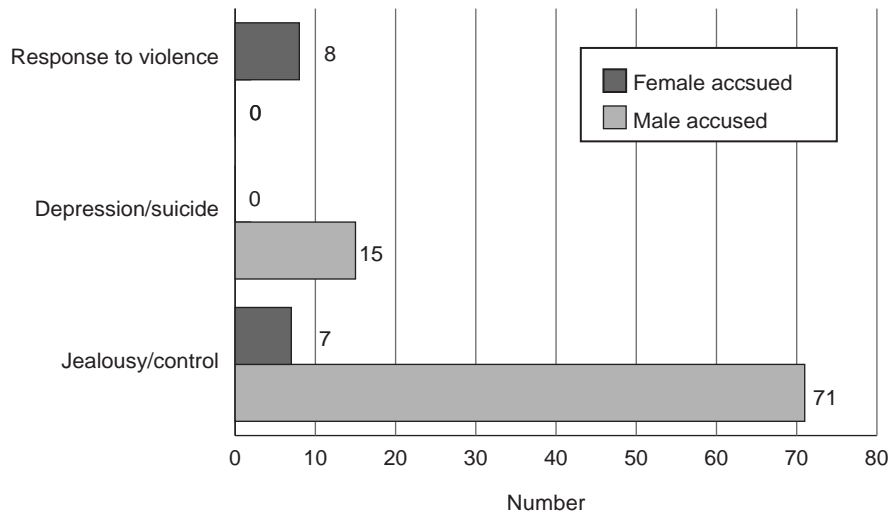
2.17 Graph 2 sets out each of these themes according to the gender of the person accused of the killing.

2.18 We can see from Graph 2 that:

- the overwhelming majority of homicides in the context of sexual intimacy are committed by men;
- the most common reason for men to kill in the context of sexual intimacy is jealousy and a desire to control their partners; and
- just over half of the women who committed homicides in the context of sexual intimacy did so in response to violence.

52 Ibid 44.

53 Ibid 45.

GRAPH 2: HOMICIDES IN THE CONTEXT OF SEXUAL INTIMACY, BY THEME ⁵⁴

2.19 These conclusions are based on Polk's examination of material in coroners' files. They are consistent with the findings of other Australian studies. For example, in a detailed analysis of police files concerning homicides in New South Wales between 1968–81, Alison Wallace stated that:

Women...rarely killed husbands from whom they were separated and almost never killed over sexual jealousy or termination of a relationship. Most notable was the high prevalence and degree of prior domestic violence suffered by these women at the hands of their husbands. The immediate precipitating events in husband killings reflected the history of this maltreatment: the majority of women killed in response to violence or threat of violence perpetrated on them by the victim, their husband.⁵⁵

⁵⁴ Based on data from Polk, above n 33, Table 1.

⁵⁵ Alison Wallace, *Homicide: The Social Reality* (1986) 103.

2.20 Similarly, a more recent study of New South Wales homicide prosecutions concluded that:

Women tend to kill their sexual partners in response to sustained physical and emotional abuse by the victim, while men tend to kill their partners as a desperate method of asserting control over their victim.⁵⁶

2.21 It is necessary to take patterns like this into account when examining defences to homicide. For example, if a defence has developed in response to a particular type of homicide, such as those involving issues of jealousy or control, but is incapable of dealing with other types of homicide, such as those which occur in response to violence, is there a need to change it? Would such a defence be open to the charge of gender bias, if it only applies to the types of homicide that are mostly committed by men, and excludes from its scope the types of homicide committed by women? These are some of the issues the Commission will be examining in the course of this project.

History of Violence

2.22 A slightly more complex picture of prior violence emerges from the homicide prosecutions study conducted by the former Law Reform Commission of Victoria (LRCV). The LRCV studied 259 homicides⁵⁷ between 1981–7. The study was based on material contained in files compiled by the office of the Victorian Director of Public Prosecutions (DPP). These files contained police documentation, coronial documents, trial transcripts, records of interviews, correspondence, prosecution documents, forensic reports and exhibits.⁵⁸

2.23 The LRCV study included an examination of prior violence in cases categorised as domestic homicide. Some of the results of that study are presented in Graph 3.

56 Donnelly et al, above n 32, 41. See also Wallace, above n 55, 103; Polk, above n 33, 56; Morgan, above n 37.

57 The study examined cases involving 259 victims and 302 accused persons (a total of 319 victim-accused pairs): Law Reform Commission of Victoria, Appendix 6, Report No 40, above n 31, 3–4.

58 Ibid 2.

2.24 Before looking at the results, it is important to point out some limitations of the LRCV study:

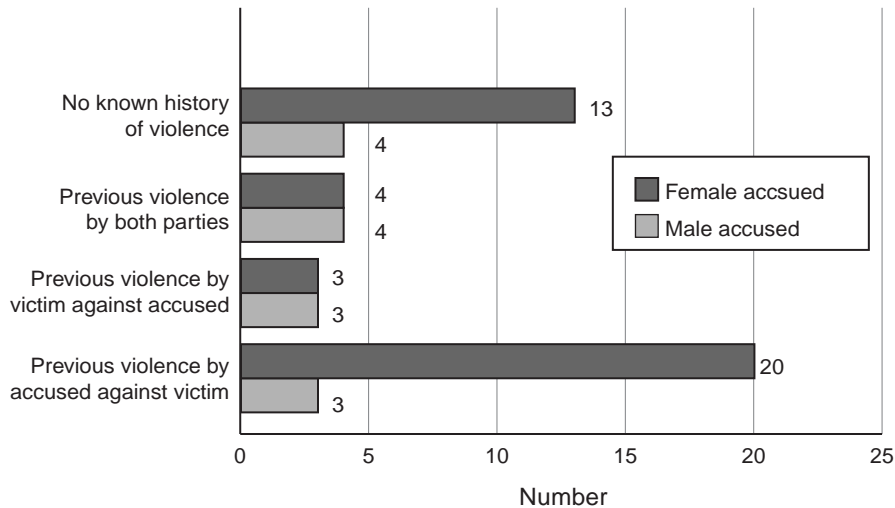
- The LRCV study included threats of violence, but it did not define ‘violence’ and did not address the possibility of different views as to what might constitute violence. If the implicit definition of violence was limited to the application of physical force, it would not cover the emotional abuse mentioned above.⁵⁹
- The number of cases (particularly those in which a woman killed a man) was relatively small, so the patterns identified may have been influenced by random variation.
- The study relied on data from DPP files. These files would only disclose a history of violence in cases where the police, the prosecutors, the accused persons or their lawyers considered the previous violence to have been relevant.

2.25 The LRCV suggested that, due to this last point, its study may have understated the number of cases in which there was a history of violence.⁶⁰ This is most likely to have occurred in cases where the person accused of homicide had previously been violent towards the deceased.

2.26 In the opposite cases—where it was the deceased who had previously been violent towards the person accused of the homicide—the LRCV study may in fact have overstated the number. This is because the accused persons could assert in their interviews with the police that the deceased had previously been violent towards them. This assertion would then appear in the record of interview on the DPP file. The deceased would of course have no opportunity to directly respond to the assertion, or to assert previous violence by the accused.

59 See above paragraph 2.19.

60 Law Reform Commission of Victoria, Appendix 6, Report No 40, above n 31, 54.

GRAPH 3: HISTORY OF VIOLENCE, BY GENDER OF ACCUSED⁶¹

2.27 Graph 3 shows that there were 14 cases in which a woman was accused of killing her sexually intimate partner and 40 cases in which a man was accused of killing his sexually intimate partner in Victoria in the period studied.

Female Accused

2.28 In the cases where a woman was accused of killing her sexually intimate partner, there was no clear pattern regarding previous violence in the relationship.

2.29 The cases were fairly evenly divided between each of the four categories; however, the limitation mentioned above⁶² suggests that the first and last categories (no known history of violence, and previous violence by the accused) may be understated, and the second and third categories (previous violence by both parties and previous violence by the deceased) may be overstated.

2.30 The number of cases is so small that it is impossible to draw sound conclusions from them about previous violence in relation to women accused of murdering their sexually intimate partners.

⁶² See above paras 2.25.

Male Accused

2.28 In the cases where a man was accused of killing his sexually intimate partner, Graph 3 shows a clearer pattern of previous violence.

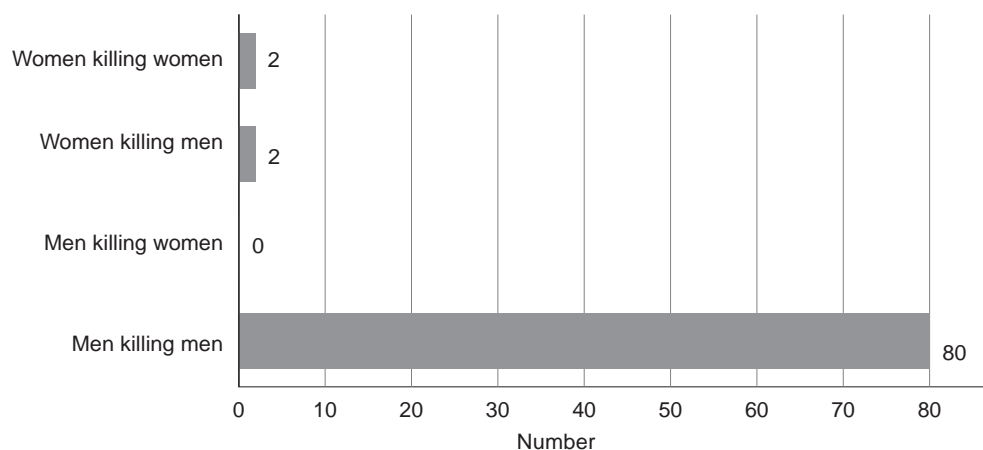
2.29 In a high proportion (20 out of 40) of these cases, the file disclosed previous violence by the man towards his partner. For the reasons given above, this number is likely to be understated.

2.30 In a significant proportion of cases in which men killed their sexually intimate partner (13 out of 40) there was no known history of violence; however, again this is likely to be understated.

2.31 It was relatively rare (3 out of 40 cases) for men to kill in response to violence from their sexually intimate partner, although in a number of cases (4 out of 40), both parties were recorded as having previously been violent towards each other. To the extent that these numbers do not reflect the true incidence of previous violence, they are likely to overstate rather than understate the number of cases.

CONFRONTATIONAL HOMICIDES

GRAPH 4: CONFRONTATIONAL HOMICIDES, BY GENDER⁶³



63 Based on data from Polk, above n 33, 24.

2.35 Graph 4 shows that confrontational homicides are overwhelmingly homicides that are committed by men against men.

2.36 The relationship between the victim and offender in these cases divides fairly evenly between strangers and friends/acquaintances. Polk argues that the dynamics of the circumstances in these cases is very similar, regardless of whether they are strangers, acquaintances or friends. In almost all of the cases, one or more of the parties had been drinking or taking drugs.⁶⁴ Most of the cases started with a relatively trivial incident, often involving an insult or a non-verbal gesture, which quickly escalated into violence.⁶⁵

2.37 Polk notes that:

What is fundamental about the confrontation scenario is that it is the altercation itself which defines the relationship between the parties... Whether they are friends, acquaintances or strangers, the dynamics of male confrontation are played out within a set of mutually recognised expectations regarding how the encounter is to proceed. In these accounts (except those few where the ultimate victim truly was an innocent bystander) the victim as well as the offender was actively involved in the encounter. In many the victim actually initiated the violence. In most of the remainder, the victim was a willing participant in the encounter.⁶⁶

2.38 Many of the current defences to homicide developed in relation to confrontational homicides.⁶⁷ As confrontational homicide is still one of the largest categories of homicide that is committed, and perhaps the largest that is prosecuted, it is vital to understand the dynamics of such homicides in order to be able to properly frame any possible defences.

CHILD VICTIMS OF HOMICIDE

2.39 Graph 1⁶⁸ indicates that homicide in the context of family intimacy (excluding killings between spouses) accounts for approximately 10% of homicides in Victoria. Most of these killings involve parents killing their children (or step-children).

64 Ibid 68.

65 Ibid 59–68.

66 Ibid 90.

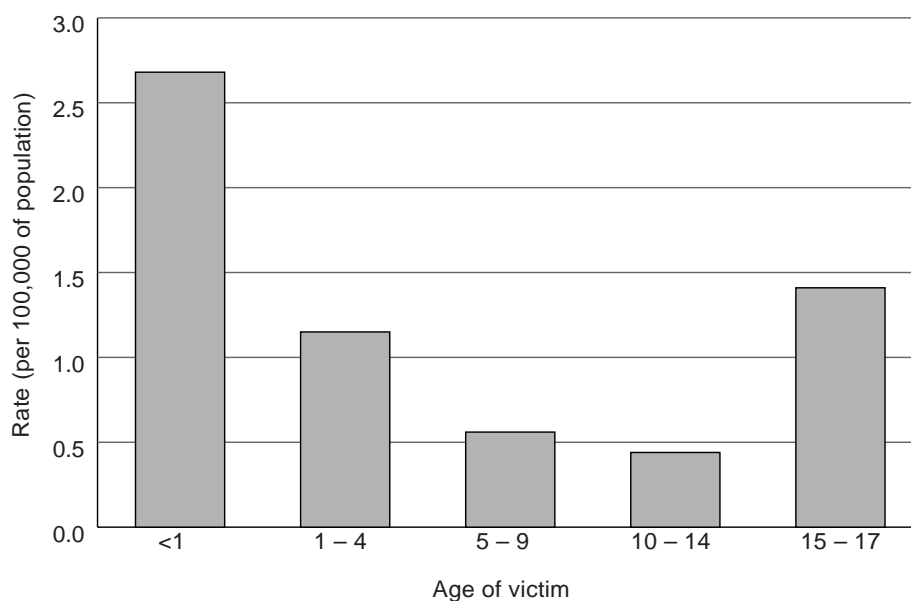
67 See Chapter 4.

68 See above para 2.8.

2.40 The most detailed study of child homicides available was conducted by Christine Alder and Kenneth Polk.⁶⁹ They examined all homicides involving a victim under the age of 18 reported to the Victorian State Coroner between 1985–95. There were 90 homicides in their study.

2.41 Alder and Polk's study indicates three distinct patterns. One is that the highest risk of homicide for children is when they are under one year of age. The risk falls sharply and then tapers off as children reach early adolescence. The risk then rises again as children reach adulthood. This is demonstrated in Graph 5 below.

GRAPH 5: HOMICIDE RATES, AUSTRALIA 1989–99, BY AGE OF VICTIM⁷⁰



2.42 The second pattern identified in Alder and Polk's study is that women are commonly the offenders where the child victim is under six, but that as victims approach teenage years, men are almost exclusively the offenders.⁷¹

69 Christine Alder and Kenneth Polk, *Child Victims of Homicide* (2001).

70 Based on data from Mouzos, above n 1, 32, Table 3.

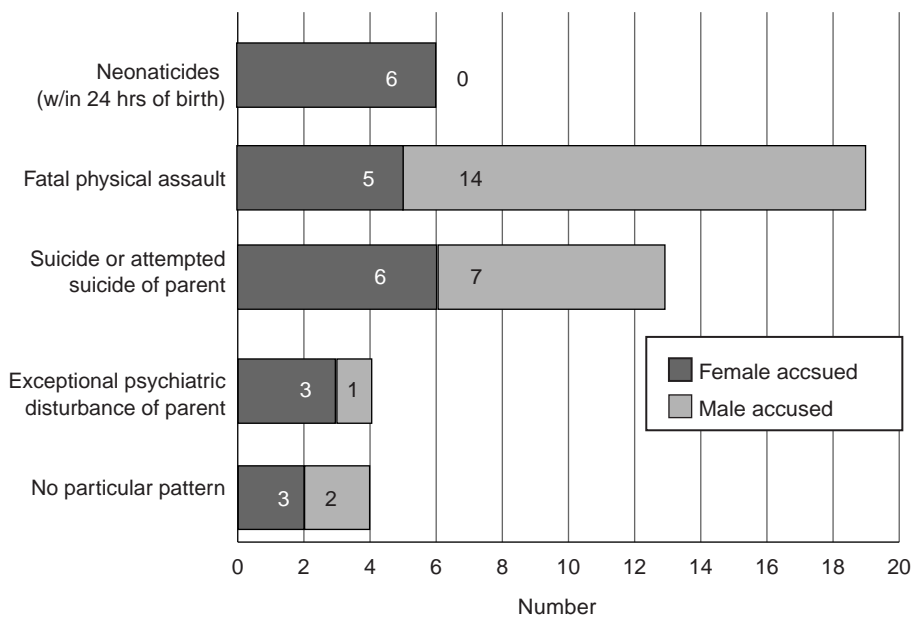
71 Alder and Polk, above n 69, 16.

2.40 The third pattern is that, in all of the cases in which the accused was a woman, she was the child's natural mother; whereas in over half of the cases in which the accused was a man, he was the de-facto spouse of the child's mother.⁷⁰

2.41 Each of these patterns becomes important when we consider the scope of the possible defence of infanticide.⁷³

2.42 Graph 6 shows 46 child homicides that were analysed by Alder and Polk. The cases have been sorted into different categories and arranged according to the gender of the accused person.

GRAPH 6: CHILD HOMICIDES, BY CATEGORY AND GENDER OF ACCUSED ⁷⁴



73 See below paras 7.39–43.

74 Based on data from Alder and Polk, above n 69, 124, Table 7.3.

Neonaticide

2.46 Neonaticide involves the killing of a child by a parent within 24 hours of birth. There were six of these cases in the Alder and Polk study. Cases of neonaticide almost invariably involve an unwanted pregnancy. They often come to light only accidentally. It is likely that there are some instances of neonaticide that did not come to the attention of the State Coroner and so are not included in Alder and Polk's statistics.⁷⁵

2.47 None of the known offenders in this category was male (although in one case a brother of the child's mother was charged with concealing a birth). This is consistent with the finding of an earlier New South Wales study.⁷⁶

2.48 Alder and Polk summarised the perpetrators of the neonaticide cases examined by them by noting that:

In general they are women trapped in a web of circumstances whereby they are unable to face the consequences of the unwanted pregnancy. The woman, even to herself, acknowledges neither the pregnancy nor the birth. Unprepared for the birth, the mother kills the newborn infant or it dies from neglect. In general, these scenarios reveal the burden of responsibility for contraception that is borne by women in our society, and the continuing negative consequences for women of unplanned, single parenthood.⁷⁷

Filicide-suicide

2.46 Filicide-suicide cases involve a parent killing one or more of their children and then committing (or attempting to commit) suicide. Graph 6 shows that in Alder and Polk's study these cases are evenly divided between those in which the alleged offender is a woman and those in which the alleged offender is a man. Cases perpetrated by either sex are similar, in that the perpetrator commonly believes that the child (or children) will be better off dead if the perpetrator commits suicide.⁷⁸

75 Ibid 44.

76 Wallace, above n 55, 117, quoted in *ibid*, 45.

77 Alder and Polk, above n 69, 45.

78 *Ibid* 78.

2.50 Alder and Polk note that cases in which the alleged offender is a man often occur in the context of a dispute over the custody of the child (or children).⁷⁹ They suggest that in those cases suicide might not be the primary motive for men, because men carried through with suicide less often.⁸⁰

Fatal Assault

2.51 Fatal assault cases are those in which the child is killed by some kind of physical blow by a parent. Alder and Polk note that the parent does not usually intend to kill the child, but that the death is the result of a blow following a build-up of frustration in reaction to continual crying.⁸¹

2.52 Most cases of fatal assault involve young, inexperienced and socially disadvantaged parents of either sex who are unable to cope with the stresses of caring for an infant. The average age of the victim in these cases is under two years.⁸² The killing is commonly preceded by a history of physical abuse of the child.

2.53 Whilst there are similarities in those cases involving men and those which involve women, Alder and Polk suggest that they reflect different patterns. They argue that mothers who kill their children do so as a consequence of frustration in their efforts to meet expectations of being a 'good mother' and meeting the competing demands of their child and their spouse or partner. They note that the examples in their study:

could be depicted as extremely disadvantaged and perhaps 'damaged' women... these women used violence as a means of coping with their situation; these were violent women, and their violence was directed towards their children over long periods.⁸³

80 Ibid 81.

81 Ibid 157.

82 Ibid 65.

83 Ibid 57.

2.54 None of the men in this category of Alder and Polk's study were the natural father of the victim—all were the de facto partner of the victim's mother.⁸⁴ Alder and Polk suggest that these men commonly killed because of frustration at not getting enough attention from their partners. Their frustration is the result of jealousy, because their partner's attention is divided between them and the child, and the child does not show them the same affection as it does to the mother. In addition, Alder and Polk argue that the child threatens the men's masculine identity by not respecting their authority.⁸⁵

Extreme Psychiatric Disturbance

2.52 These cases include killings where the offender was 'hearing voices' or believed that other 'forces' directed them to kill the child. Many of these offenders had a history of psychiatric treatment.

Other Cases

2.53 These cases include situations of well-intentioned but seriously misguided actions by parents, such as fasting an infant in the belief that this will cure an illness. These cases also include post-natal depression. This was explicitly identified as a significant factor in only one case in the study. In that case the depression was a consequence of factors including the stress of coping with an unwanted baby, lack of financial and personal support, and anxiety about being able to cope with the child-rearing.⁸⁶

84 The reason for this may simply be that children who become victims of fatal physical assault are likely to come from 'broken homes' and that when the child's natural parents separate the child is more likely to remain with the natural mother rather than the natural father.

85 Alder and Polk, above n 69, 159.

86 Ibid 62-3.



Chapter 3

The Legal Process

HOW ARE HOMICIDES PROCESSED IN THE CRIMINAL JUSTICE SYSTEM?

3.1 In Chapter 2 we looked at the research which is currently available about homicides that occur in Victoria. In this chapter we examine the way the legal system deals with such homicides. We begin by looking at the processes that are in place, starting from the discovery of a body, and moving through to the sentencing of an offender who is found guilty of a crime.

* CASE STUDY 1.1

Michael and Sandra were engaged to get married. Their relationship had, however, been quite volatile. They had broken up on several occasions, but had later resumed their relationship. Michael lived with his parents. One night Sandra came to stay at Michael's house. She went to bed early, and Michael followed about 30 minutes later. About five minutes after Michael went to bed, his family heard Sandra scream. They ran to the bedroom, where they found Sandra with a knife sticking out of her body. She had been stabbed 25 times. Michael was covered in Sandra's blood. Sandra died later that night.⁸⁷

The Coronial Inquest

3.2 When a corpse is discovered or a person disappears in suspicious circumstances, it is usually reported to the police, who will make an investigation. If the death appears to have been violent or the result of injury, it must be reported to the State Coroner, who will direct an investigation. It is clear that this would take place in the above case study.

⁸⁷ We include a number of case studies in this Paper, each of which is based on a real case. This case study is based on the case of *R v Leonboyer* [2001] VSCA 149.

3.3 The purpose of the coroner’s investigation is to find, if possible, the identity of the deceased, how the death occurred, the cause of death and the identity of any person who contributed to the cause of death. The coroner can direct forensic medical specialists to examine the body to determine the cause of death. For example, in Case Study 1.1, the forensic pathologist may have found that Sandra’s death was caused by blood loss, due to stabbing, and that the wounds were not consistent with someone who was trying to defend herself. Having found the knife, they may link the stabbing to Michael.

3.4 If the coroner suspects that the death was homicide, he or she must conduct a formal public hearing called an inquest. The coroner has the power to summon witnesses to appear at the inquest and to order them to answer questions.⁸⁸

The Committal Hearing

3.5 The police may charge a person who they suspect committed murder or manslaughter at any stage before, during or after the coroner’s investigation. Given the circumstances of the above case study, in which it seems clear that it

Committal

Before someone charged with an indictable (serious) criminal offence can be put on trial, a committal hearing must be held to determine whether there is sufficient evidence.

was Michael who killed Sandra, it is likely that Michael would be charged before the completion of the coronial investigation. Once the police have filed a charge against the person, the Magistrates’ Court must conduct a hearing, called a committal hearing, to determine whether there is sufficient evidence to put that person on trial.

3.6 If the magistrate conducting the committal proceeding decides that there is sufficient evidence, the accused person will be required to stand trial before a judge and jury.⁸⁹ In Victoria trials for murder and attempted murder

88 A person cannot be required to answer a question if it would incriminate him or her in an offence: *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Sorby v The Commonwealth* (1983) 152 CLR 281.

89 The magistrate who conducts the committal proceeding is also likely to be a coroner. If, in a particular case, the committal proceedings end before the coronial inquest has been completed, the magistrate is able to turn the committal proceedings into a coronial inquest (having already either committed the accused to trial or released them), and to adopt the evidence given at the committal for the purposes of making the relevant coronial findings: Richard Fox, *Victorian Criminal Procedure* (2000)141.

must be conducted in the Supreme Court.⁹⁰ Other homicides, such as manslaughter, infanticide and culpable driving causing death may be tried in the County Court. All of these offences must be heard by a judge and jury—it is not possible to have the matter heard by a judge alone.

The Trial

* CASE STUDY 1.2

Michael was tried for murder. At his trial Michael chose to give evidence. He claimed that on the night of the killing, Sandra told him she had been seeing someone else. He said that he asked her if she was having sex with the other person, and that she angrily told him that she could ‘fuck anyone she wanted to fuck. She’d been fucking someone else and that...he did it better than what you did’. Michael claimed that he did not remember what had happened after that—that everything was distorted and unreal. His lawyer called psychiatrists who gave evidence that Michael was acting in an ‘automatic state’ when he killed Sandra—that his actions were unconscious and involuntary.

3.7 At the trial the role of the prosecutor is to prove to the jury, beyond reasonable doubt, every element of the offence. For example, at Michael’s murder trial the prosecutor would have to prove that Michael was the one who killed Sandra, and that he had an intention to kill her or cause her grievous bodily harm,⁹¹ or had knowledge that death or grievous bodily harm was a probable consequence of his conduct.⁹² The prosecutor can call on witnesses to appear in court and can question them. In the above case study, it is likely that the prosecutor called on Michael’s family, as they were witnesses to some of the events leading to Sandra’s death.

Prosecutor

In a criminal trial, the prosecutor is the person who acts on behalf of the state.

90 *County Court Act 1958* s 36A(1).

91 *Pemble v The Queen* (1971) 124 CLR 107.

92 *R v Crabbe* (1985) 156 CLR 464.

3.8 The defendant cannot be required to give evidence or to answer questions, although he or she may chose to do so. The defendant's lawyer can call witnesses and can cross-examine witnesses called by the prosecutor. The defendant's lawyer can seek to raise doubts about the proof of an element of the offence. For example, in Michael's trial it was claimed that he did not kill Sandra intentionally or recklessly—that it was an unconscious or involuntary act.

Defendant

The defendant, also referred to as the accused, is the person charged with the crime.

3.9 Even if the prosecutor can prove the elements of the offence, the defendant's lawyer can seek to raise evidence of a particular defence, such as self-defence or provocation. If there is evidence of a defence, the prosecutor must disprove it beyond reasonable doubt. For example, based on the above facts, Michael's lawyer may claim that Sandra provoked the killing, by telling Michael that she was having sex with another man. The prosecutor would then have to prove beyond reasonable doubt that Michael was not provoked into killing Sandra.⁹³

The Role of the Judge and Jury

3.10 In the Supreme Court, the role of the judge is to ensure that the trial is conducted properly. For example, the judge must prevent evidence which the law does not treat as relevant from being placed before the jury. He or she should also stop lawyers from insulting or oppressing witnesses when questioning them.

3.11 After all the evidence has been put before the jury, the prosecutor and the defendant's lawyer each give a final address to the jury in which they sum up their case. The judge then addresses the jury, summarising the evidence and the prosecution and defence cases, explaining the relevant laws (for example, explaining what the jury would need to find to convict Michael of murder), and applying those laws to the evidence that has been put to the jury.

3.12 The jury then goes to the jury room to consider its verdict in private. If the charge is murder, the jury can return with a verdict of guilty or not guilty to murder, or one of a number of alternative verdicts. Depending on the

93 See Chapter 6 for an explanation of the defence of provocation.

circumstances, these include: manslaughter, infanticide, attempted murder or being an accessory to murder. In the above case, the jury could either find Michael guilty of murder, guilty of manslaughter on the basis of provocation, or not guilty (for example, because the members of the jury believe he was acting involuntarily when he killed Sandra).⁹⁴

The Sentencing Hearing

* CASE STUDY 1.3

Michael was found guilty of murder. At the sentencing hearing, his lawyer argued that Michael's sentence should be reduced on the basis that, although the jury had found he had acted voluntarily, Michael had been in a severe state of 'dissociation' when he killed Sandra. The sentencing judge disagreed. He found that Michael knew what he was doing when he killed Sandra. He found the fact that the crime was committed in Michael's home, where Sandra had been invited believing it to be a place of safety, was an aggravating circumstance. On the other hand, the fact that this was a crime committed in a state of emotion, rather than a planned crime, was a mitigating circumstance. Weighing all these factors up, the judge sentenced Michael to 18 years' imprisonment, with a minimum of 14 years before becoming eligible for parole.⁹⁵

Aggravating circumstances

Factors which make an offence more serious, and may lead to a more severe penalty, are called aggravating circumstances. These may include the fact that the offender abused a position of trust, or committed the offence in a particularly brutal fashion.⁹⁶

3.13 Once the jury has given its verdict the members of the jury are free to leave. If the accused person has been found guilty, a sentencing hearing will then take place.

3.14 The sentencing hearing takes place before the judge alone. The prosecutor provides information such as whether the offender has any prior convictions and whether there were any aggravating circumstances surrounding the

94 A jury does not need a reason to find someone not guilty—it can return a verdict of not guilty in any case, for any reason, even if the evidence seems to 'prove' guilt.

95 See *R v Leonboyer* [1999] VSC 422.

96 See above para 1.4 for an explanation of the term mitigating circumstances.

offence. The offender's lawyer then directs the judge's attention to any mitigating factors. In Michael's case, his lawyer claimed that he should be treated more leniently because he was in a 'dissociative' state when he killed Sandra. The judge did not agree with this argument.

3.15 The maximum penalties for the various homicide offences are set out in the *Crimes Act 1958*.

TABLE 1: MAXIMUM PENALTIES FOR HOMICIDE IN VICTORIA⁹⁷

| Offence | Maximum Penalty |
|--------------|-----------------------|
| Murder | Life imprisonment |
| Manslaughter | 20 years imprisonment |
| Infanticide | 5 years imprisonment |

3.16 The maximum penalty serves three functions. First, it provides sentencers (judges and magistrates) and the public with a guide to the relative seriousness of the offence. Secondly, it sets a limit on the sentencer's discretion when punishing a person for that offence. Thirdly, it warns potential offenders of the maximum 'price' that they will pay if they commit that offence.

3.17 Although the *Crimes Act 1958* sets the maximum penalty only in terms of imprisonment, a range of other sentencing options are also available. These include sentences that are served under supervision in the community, such as the intensive correction order and the community based order. These other sentencing options are rarely if ever used for sentencing a person convicted of murder; however, they are occasionally used when sentencing a person convicted of manslaughter.

3.18 When deciding what sentence to impose on an offender, the sentencer must consider:

- the offence generally (eg the maximum penalty for the offence);

⁹⁷ *Crimes Act 1958* ss 3, 5-6.

- the circumstances in which the particular offence was committed (eg whether the offence was carefully planned in advance or was spontaneous, the apparent motive for the offence); and
- the individual offender (eg his or her mental health, character, social history, degree of remorse for the offence and/or prospects of rehabilitation).

3.19 When considering these factors, the sentencer must have regard to the general aims of punishment, which are listed in the *Sentencing Act 1991* as:

- to punish the offender;
- to deter the offender or others from offending;
- to assist in the rehabilitation of the offender;
- to denounce the offender's conduct; or
- to protect the community from the offender.

3.20 In each case the sentencer must formulate a sentence that takes into account these factors. Although the metaphor of 'balancing' is sometimes used to describe this process, Victorian courts have long emphasised that the formulation of a sentence is not simply a mechanical or arithmetic process of separating out various factors, giving each a particular weight and then counting off the result. Instead, it is seen to be an instinctive or intuitive synthesis of all the relevant circumstances. In the case study above, the judge had to take into account mitigating factors such as the fact that Michael had not planned the murder, that he had significant prospects for rehabilitation and that he had no prior convictions. These were weighed against aggravating circumstances—such as the fact that the crime was committed in his home—in arriving at the sentence of 18 years imprisonment.

3.21 One of the issues the Commission will be investigating is whether current sentencing practices are sufficiently flexible and fair to take each of the abovementioned factors into account. Do they allow a coherent distinction to be drawn between those cases in which people are found guilty of murder as opposed to manslaughter? Does any such distinction adequately reflect the differing levels of culpability of those found guilty? How are different aggravating and mitigating circumstances being used? How does this relate to partial excuses such as provocation, which could also be seen as a mitigating circumstance? In answering these questions, it will be necessary to more closely examine the way in which sentencing is working in practice.



Chapter 4

The Historical Context

INTRODUCTION

4.1 We saw in Chapter 3 that during a trial for murder it may be possible for the accused to raise certain defences.⁹⁸ The types of defence that can be argued, however, are limited; it is not, for example, a defence to claim that the killing was justified because the deceased person deserved to die.⁹⁹ In order to successfully raise a particular defence or excuse, it is necessary to satisfy certain requirements. In Chapters 5–8 we look at the kinds of defences that can be raised, the current requirements for succeeding in using those defences, and the issues that are raised by the existing law.

4.2 In order to understand the nature of the current defences, however, it is first necessary to look at the way in which those defences have developed. In this chapter we focus on the historical context.

MANDATORY DEATH SENTENCE

4.3 The most important factor to keep in mind in a discussion of defences to homicide is the fact that each of the current defences developed against a background of capital punishment. Until relatively recently, anyone convicted of murder in Victoria faced a mandatory death sentence. In 1975, the Victorian Parliament changed the penalty for murder to mandatory life imprisonment. This was changed again in 1986, to make sentencing for murder

98 It is also possible to raise defences to other homicide-related charges, such as manslaughter or infanticide. It is not possible, however, to raise partial excuses in these cases, as partial excuses only operate to reduce a charge of murder to manslaughter.

99 While this is not a legal defence, it is always possible for a jury to acquit a person of charges, even if no technical legal defence is available.

discretionary.¹⁰⁰ It is now possible for a person convicted of murder to be sentenced to less than life imprisonment.¹⁰¹

JUSTIFIABLE HOMICIDES

Self-defence

4.4 As the punishment for murder was traditionally a mandatory death sentence, the courts began to differentiate between the types of killings considered to be deserving of such a penalty, and those which should be treated in a more lenient fashion. Killings which were seen to be ‘justified’¹⁰² were treated differently from premeditated killings. Homicides committed in self-defence were seen to be one such type of justified killing.

4.5 The defence of self-defence arose out of the regulation of duels and other forms of combat. It developed in the context of fights between two men, the traditional scenario being a bar-room brawl or one-off duel.¹⁰³ When a man was challenged to a fight, it was felt that he had no choice but to defend himself. A violent response was considered justifiable, and the perpetrator should not be held responsible for the outcome of his actions. As a result, if self-defence was not disproved by the prosecution, it would result in a complete acquittal.¹⁰⁴

100 *Crimes Act 1958* s 3. Although sentencing is now discretionary, a maximum statutory penalty of life imprisonment has been set. A sentencing judge must bear in mind the seriousness of the crime, and the possible maximum penalty, when sentencing a convicted offender: see above paras 3.14-20.

101 For more detailed information about sentencing, see above paras 3.14-20.

102 A ‘justified’ act is one which, in the circumstances, is not wrong. In the case of homicide, the context in which the killing took place would be examined when determining whether it was justified, to see whether it was wrong to kill in that situation. The focus would be on whether the *act* was wrong. This is to be contrasted with an ‘excusable’ act, in which the act is a wrongful one, but the person who performed the act is not responsible for the act, due to some special circumstances. So in the case of homicide, to see if a killing was excusable, the person who killed would be the focus of investigation, rather than the circumstances of the act. While it may have been wrong to kill in those circumstances, something must have been affecting the person who killed in such a way that they should not be held fully responsible for their actions. The focus is on the *actor* and not the act: see Eric D’Arcy, *Human Acts* (1963) 85, cited in Suzanne Uniacke, ‘What are Partial Excuses to Murder?’ in Stanley Yeo (ed), *Partial Excuses to Murder* (1991).

103 Ian Leader-Elliott, ‘Battered But Not Beaten: Women Who Kill in Self-Defence’ (1993) 15 *Sydney Law Review* 403, 405.

104 We note that self-defence operates more broadly than in the context of homicide. For example, it is also a defence to a charge of assault.

4.6 As self-defence developed in such a context, it had quite specific requirements. For example, traditionally, there had to be an immediate response to an imminent threat. Such requirements have made it difficult for those who have tried to use the defence in other contexts. In particular, women who kill after being subjected to prolonged and repeated abuse have had trouble using the defence of self-defence. This has led to some development of the requirements for self-defence over time. This is discussed in more detail in Chapter 5.

Provocation

4.7 The defence of provocation also arose against the background of capital punishment.¹⁰⁵ The development of provocation can be traced back to seventeenth century England when drunken brawls and fights arising from ‘breaches of honour’ were commonplace. A major ‘breach of honour’ occurred, for example, on seeing a wife committing adultery.¹⁰⁶ During that time, the law began to distinguish between what were regarded at the time as the most serious types of killing, which required proof of planned malice, and killings that were unpremeditated and occurred on the spur of the moment in response to an act of provocation.¹⁰⁷ The latter kind of killing was seen as justified, in light of the provocative conduct of the victim, and deserving of lesser punishment. Unlike self-defence, however, which was completely justifiable in the circumstances (leading to a complete acquittal), acting under provocation was only seen as partially justifiable, and so only reduced a charge of murder to manslaughter. As with self-defence, provocation has also developed over time to deal with killings that take place in other contexts.¹⁰⁸

105 Graham 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.

106 *R v Maddy* (1672) 1 Ventris 158; 86 ER 108.

107 Bernard Brown, ‘The Demise of Chance Medley and the Recognition of Provocation as a Defence to Murder in English Law’ (1963) 7 *American Journal of Legal History* 310; Jeremy Horder, *Provocation and Responsibility* (1992).

108 For further discussion of the law of provocation, see Chapter 6.

Duress and Necessity

4.8 The historical acceptance of self-defence and provocation as ‘justifying’ certain homicides should be contrasted with the defences of duress and necessity. In relation to most crimes, it is a defence to claim that the crime was committed under a threat of physical harm if the accused refused to comply with the threatener’s command (duress). Similarly, it is a defence for the accused to claim that they were compelled to do what they did by reason of some extraordinary emergency (necessity). In both of these cases, the circumstances under which the crime is committed are held to justify the commission of the crime.

4.9 Such defences have not, however, been accepted by the courts to apply to murder. It has been held that no form of duress or necessity could ever justify the killing of an innocent person.¹⁰⁹ The reasoning behind this proposition is that an ordinary person would always choose to sacrifice their own life rather than kill an ‘innocent’ person.¹¹⁰ This contrasts with the defences of self-defence or provocation, where the person who is killed either attacked the accused first or provoked an attack, and so is not seen to be ‘innocent’.

MOVE FROM JUSTIFICATION TO EXCUSE

4.10 Although each of these defences were initially framed in terms of a ‘justified’ killing, over time they have begun to be seen more as ‘excusable’ killings.¹¹¹ Rather than focussing on the actual act that was committed (and which could be justified), there is now a greater emphasis on what the accused believed at the time of the killing.

4.11 In self-defence, this can be seen in the current requirement that the accused believed upon reasonable grounds that it was necessary to do what they did.¹¹² Instead of focussing on the fact of the prior attack, there is an emphasis on the belief of the accused. This shift from justification to excuse, with its focus on the belief of the accused, culminated in the creation of the defence of ‘excessive self-defence’ in the latter half of the twentieth century.

109 See, eg, *Abbott* (1977) AC 755, 764–5 (Lord Salmon).

110 Kenneth J Arenson, ‘Expanding the Defences to Murder: A More Fair and Logical Approach’ (2001) *Flinders Journal of Law Reform* 129.

111 On the difference between ‘justifiable’ and ‘excusable’ acts, see above n 102.

112 *Zecevic v DPP (Vic)* (1987) 167 CLR 645.

Such a defence reduced murder to manslaughter where the accused believed it was necessary to act in the way that they did, but actually used disproportionate force. Excessive self-defence was abolished by the High Court in 1987.¹¹³

4.12 The move from justification to excuse is more clearly seen in relation to provocation. The focus of the defence of provocation has now become the accused's loss of self-control, rather than justifiable retribution. Due to the circumstances in which the crime was committed, a temporary loss of control by the accused is seen as excusable.¹¹⁴ The defence is now generally seen to be a 'concession to human frailty', rather than an appropriate response to a breach of honour.

EXCUSABLE HOMICIDES

Mental Impairment

4.13 We have seen above that those defences which were originally based on the idea of 'justified killings' have moved more towards the concept of 'excusable killings'. The idea of an 'excusable' killing is not new. The defence of 'mental impairment' (formerly 'insanity') was an early example of a defence that focused on the state of mind of the accused rather than the act itself. It is based on the general principle that a person whose ability to reason is affected by mental impairment should be excused from full criminal responsibility.

4.14 The idea that those with mental disorders lack the ability to reason has long been found in laws excusing them from responsibility for criminal acts. For example, it can be found in a sixth century Roman law that stated that 'a madman who kills a man is not liable...by the misfortune of his condition'.¹¹⁵

4.15 In 1843, English judges agreed on the elements of the modern defence of insanity. These elements became known as the *M'Naghten Rules*.¹¹⁶ Under

113 *Zecevic v DPP (Vic)* (1987) 167 CLR 645. Although excessive self-defence was abolished, self-defence still remains a defence. Excessive self-defence has subsequently been reintroduced as a defence in South Australia and New South Wales: *Criminal Law Consolidation Act 1935* (SA) s 15(2); *Crimes Act 1900* (NSW) s 421.

114 Alex Reilly, 'Loss of Self-Control in Provocation' (1997) 21 *Criminal Law Journal* 320, 320.

115 *The Digest of Justinian* edited and translated by Theodor Mommsen, Paul Krueger and Alan Watson (1985) Book Forty-Eight, para 8.12.

116 (1843) 10 Cl and Fin 200, 210; 8 ER 718, 722.

these Rules, it had to be shown that the accused had a ‘defect of reason’ caused by a ‘disease of the mind’. This defect must have led to the accused not knowing the nature and quality of what they were doing or not knowing that what they were doing was wrong. These Rules formed the defence of ‘insanity’ in Victoria until 1997, when they were replaced by the current defence of ‘mental impairment’.¹¹⁷

Diminished Responsibility

4.16 The requirements of the *M’Naghten Rules* were quite difficult to fulfil. As a result, there was a risk that those with some kind of mental impairment, which fell short of insanity as defined by the Rules, would be sentenced to death if they killed another person. In the mid-eighteenth century, the Scottish courts felt that a person who had a serious mental impairment at the time of killing another person should be excused from full criminal responsibility, even if they were not technically ‘insane’. As a result, they developed the concept of diminished responsibility. In 1957 this became a partial defence to murder in the United Kingdom, reducing the crime to manslaughter. It was adopted in New South Wales in 1974, as a way of avoiding a mandatory life sentence for murder.¹¹⁸ It is not, however, a defence in Victoria.

Automatism

4.17 Automatism developed in a similar fashion to diminished responsibility. In response to the narrowness of the insanity defence, as well as the possibility of indefinite detention if one was found to be insane, lawyers shifted their focus to the voluntariness of the conduct.¹¹⁹ It was argued that a killing should be excused if the accused was in such a state of impaired consciousness that their behaviour was automatic or unwilling.¹²⁰ For example, a person who kills another person while sleepwalking should not be held responsible for their

117 *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*.

118 *Crimes Act 1900* (NSW) s 23A as introduced by the *Crimes and Other Acts (Amendment) Act 1974* (NSW) s 5(b).

119 C R Williams, ‘Development and Change in Insanity and Related Defences’ (2000) 24(3) *Melbourne University Law Review* 711–36, 717–18.

120 Robert F Schopp, *Automatism, Insanity, and the Psychology of Criminal Responsibility* (1991) 137.

actions. Because the accused was not acting voluntarily, they should be completely acquitted of any crime. This was first accepted by the English courts in the 1950s, and forms part of current Victorian law.

Infanticide

4.18 A final defence that has developed over time is that of infanticide: a mother's killing of her young child. The practice of infanticide has had a long and controversial history. In the time of Plato and Aristotle, the exposure of weak and deformed infants to the natural elements was generally accepted and occasionally encouraged.¹²¹ The general acceptance of infanticide in many different cultures appears to be related to the lack of availability or ineffectiveness of contraception, and some anthropologists have viewed it as a widely used method of population control.¹²²

4.19 It was not until the seventeenth century that an Act was passed in England making it an offence to conceal the death of an illegitimate child.¹²³ This was repealed in 1803,¹²⁴ and infanticide was put on the same grounds as murder, to the extent that the prosecution had to prove that the child had been born alive and that someone, usually the mother, had killed it.

4.20 The killing of young children had become a major social issue by the mid-nineteenth century, due largely to attitudes towards illegitimacy. For many women, unwanted pregnancies were a social and economic disaster. This led to the killing of infants in a wide variety of circumstances. As infanticide was treated like murder, the penalty for guilt was death. Public sympathy for the mothers, however, was such that it was very difficult to procure a conviction, and death sentences were often commuted to imprisonment.¹²⁵

121 Michael Tooley, *Abortion and Infanticide* (1983) 316; Laila Williamson, 'Infanticide: An Anthropological Analysis' in Marvin Kohl (ed) *Infanticide and the Value of Life* (1978) 61.

122 Susan Scrimshaw, 'Infanticide in Human Populations: Societal and Individual Concerns' in Glenn Hausfater and Sarah Hardy (eds) *Infanticide: Comparative and Evolutionary Perspectives* (1984) 440.

123 *An Act to Prevent the Destroying and Murthering of Bastard Children* 21 James 1 c 27 (1624).

124 *Lord Ellenborough's Act* 42 Geo 3 c 58 (1803).

125 For a more detailed history of infanticide, see New South Wales Law Reform Commission, *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper 31 (1993), Chapter 5.

4.21 It was against this background that the current defence of infanticide was created in 1922. Although the underlying motivations for changing the law were widely varied—from a concern about the social and economic conditions of unmarried mothers, to the fact that infanticide did not create public alarm like other homicides and so was not deserving of the death penalty¹²⁶—the model adopted was a medical one.¹²⁷ Accused persons could reduce a charge of murder to manslaughter if they could prove that they had killed their newly born child while in a disturbed mental state due to the effects of childbirth. This was later extended from ‘newly born’ children, to children killed within one year of birth. To make this longer period plausible on medical grounds, lactation was added to the ‘effects of childbirth’ as a valid reason for the disturbance of the mind.¹²⁸ This medical model reflects the general principle that a person suffering from some form of serious mental impairment at the time of killing another person should be excused from full criminal responsibility. It still forms the basis of the defence of infanticide in Victoria today.

126 Ibid. Other factors mentioned were that the victims were children, so their loss was considered to be inestimable and therefore less; there were generally high infant mortality rates, the death of children was not uncommon, and so killing them may have been more acceptable; infanticide was not easy to prove, as it was difficult to prove if the child had been born alive or if the death had been accidental; and a concern by judges about the mockery of imposing a death sentence which everyone knew was not going to be carried out: paras 5.9–10.

127 O’Donovan argues that ‘medical theory provided a convenient reason for changing the law’: Katherine O’Donovan, ‘The Medicalisation of Infanticide’ [1984] *Criminal Law Review* 259, 261.

128 New South Wales Law Reform Commission, above n 125, para 5.11.

Chapter 5

Self-defence

CONFRONTATIONAL HOMICIDES

* CASE STUDY 2

Hasan, Izzet, Veli and Niyazi were playing cards one afternoon in a coffee lounge. After several hours an argument commenced over which suit was trumps. The argument culminated in Izzet throwing his cards in Hasan's face and punching him. Izzet also insulted Hasan. Hasan and Izzet were separated by other patrons of the coffee shop, and Hasan was taken outside. Izzet continued to shout insults at Hasan from inside the shop. Hasan then directed a particularly offensive insult at Izzet. Izzet ran out of the shop, into the street, and started wrestling with Hasan. In the course of the wrestling, Hasan stabbed Izzet three times with a large folding knife, which he had taken from his pocket and opened when Izzet rushed at him. Izzet died soon after.¹²⁹

5.1 In Polk's categorisation of homicides outlined in Chapter 2, those that are defined by a confrontation between the parties make up 22.1%—the second largest category of homicides in Victoria.¹³⁰ Polk noted that such homicides are overwhelmingly committed by men against men, and take place in very similar circumstances. Usually there is a relatively trivial incident, involving an insult, which escalates into violence. This was clearly the case in Case Study 2, where a fight over a game of cards led to Izzet's death.

5.2 Often the circumstances of such fights do not raise difficult legal issues. If a person kills someone over a trivial insult, they are unlikely to be successful in raising a legal defence. However, sometimes confrontational homicides raise the issues of self-defence and/or provocation. As noted in Chapter 4, both of

129 The facts of this case study are based on *R v Deniz* [2001] VSC 36.

130 See above para 2.8. The largest category is homicide in the context of sexual intimacy. We discuss self-defence as it relates to such homicides below.

these defences developed historically in the context of fights between men, for example, drunken brawls or duels over breaches of honour. As confrontational killings still take place in similar circumstances (as seen in Case Study 2) the same defences are clearly applicable, although the elements may have changed somewhat over time.

Elements of the Defence

5.3 There are not many rules limiting the scope of the defence of self-defence—it is largely a matter for the jury to decide on the basis of the evidence presented.¹³¹ The High Court has defined the test for self-defence¹³² as follows:

The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary to do what he or she did.¹³³

5.4 It can be seen from this test that self-defence contains an assessment of what the accused believed at the time of the killing (referred to as the subjective element), as well as a consideration of whether that belief was based upon reasonable grounds (referred to as the objective element). Once self-defence has been raised as a defence, it is up to the prosecution to prove beyond reasonable doubt that the elements of self-defence did not exist.

The Subjective Element

5.5 In most confrontational homicides, like that in Case Study 2, the issues surrounding the subjective element are not complex. The jury will simply have to determine whether the accused (eg Hasan) believed it was necessary to kill the deceased (eg Izzet).¹³⁴ When two people are involved in a fight, the answer to this question will usually involve a consideration of the level of violence and the threat faced by the accused. If there was a ‘reasonable

131 *DPP Reference (No 1 of 1991)* (1992) 60 A Crim R 43, 46.

132 Although we discuss ‘self’-defence in this chapter, a defence may also be available if a person is protecting another person, or property, from harm. The test to be applied in such cases is similar: did the accused believe upon reasonable grounds that it was necessary to do what he or she did?

133 *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 661 (Wilson, Dawson and Toohey JJ).

134 This question is more complex in the case of women who kill in response to violence: see below paras 5.17–27.

apprehension on the part of [the accused] of death or serious bodily harm',¹³⁵ a jury may find that the accused believed a fatal response was necessary. In the absence of an apprehension of serious bodily harm, it would be unusual to find that the accused believed their actions were necessary.

The Objective Element

5.6 The objective element poses slightly more complicated issues in relation to confrontational homicides. Although the jury may have decided that the accused believed it was necessary to kill the deceased, it must also determine whether that belief was based on reasonable grounds. In making this assessment, the jury must examine what the accused might reasonably have believed in all the circumstances.¹³⁶ The jury may take into account all of the facts within the accused's knowledge,¹³⁷ the prior conduct of the victim,¹³⁸ the relationships between the parties involved,¹³⁹ and any excitement, affront or distress experienced by the accused.¹⁴⁰

5.7 Thus, in Case Study 2, the jury could consider any pre-existing history between Hasan and Izzet. Although, in ordinary circumstances, it may not seem reasonable for Hasan to have killed Izzet while they were wrestling on the street, Izzet may have had a history of prior violence, and may have been known to carry a gun. This may result in the jury being convinced that Hasan's belief that it was necessary to kill Izzet was reasonable. Alternatively, although the jury may believe that Hasan genuinely feared serious injury from Izzet, if Hasan was significantly physically stronger than Izzet, or better trained at fighting, and if Izzet carried no weapons, the jury may find that Hasan's belief was unreasonable.

135 *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 662.

136 *Viro v The Queen* (1978) 141 CLR 88, 146 (Mason J); *Helmbout v The Queen* (1980) 49 FLR 1; *Conlon* (1993) 69 A Crim R 92 (SC NSW). A determination of what the accused might reasonably have believed in the circumstances is to be contrasted with what the 'ordinary person' in those circumstances would have believed. The generalised 'ordinary person' may be very different from the particular accused, and may not have reasonably believed it was necessary to defend him or herself. When the characteristics of the accused are taken into account, however, the belief may become more reasonable.

137 *R v Wills* [1983] 2 VR 201, 210 (Lush J).

138 *R v Keith* [1935] St R Qd 155, 177 (Webb J) (CCA Qld); adopted in *R v Muratovic* [1967] Qd R 15, 30 (Hart J) (CCA Qld).

139 *R v Hector* [1953] VLR 543.

140 *R v Wills* [1983] 2 VR 201, 211 (Lush J).

5.8 The requirement for such an objective element makes it possible for a person who believes that it was necessary to do what they did, but whose belief is unreasonable, to be found guilty of murder. This raises the issue of whether a person who makes a mistake about the necessity for self-defence should be held responsible for murder. Should we convict people of murder on the basis of a mistake?¹⁴¹ If Hasan genuinely feared that Izzet carried a knife, but such a fear was unreasonable, should Hasan be liable for murder, or for some lesser crime of, for example, ‘culpable homicide’?¹⁴² If we reduce Hasan’s liability in such a case, are we opening the door for excessively fearful or apprehensive people to react violently towards others with impunity? In light of the fact that confrontational homicides form such a significant proportion of all homicides, where is it most appropriate to apportion criminal responsibility? This will be one of the issues we will discuss in the next stage of our project.

Excessive Self-Defence

5.9 A similar issue is raised by the prospect of a disproportionate response to a threat. Should a person be found guilty of murder if they genuinely fear harm, but react excessively by killing rather than taking a less extreme action? We saw in Chapter 4 that, in the past, a jury could return a verdict of manslaughter in such a case, on the basis of excessive self-defence.¹⁴³ This defence was abolished in 1987. One of the issues the Commission will be examining is whether this defence should be reintroduced.¹⁴⁴

5.10 In considering this issue, it is necessary to determine whether a distinction should be drawn between intentional killings and killings based on

141 We note that the former Law Reform Commission of Victoria recommended that self-defence be made a fully subjective defence: Law Reform Commission of Victoria, Report No 40, above n 27, 98, Recommendation 28. In 2001, the law in New South Wales was changed, removing the objective element of the test: *Crimes Act 1900* (NSW) s 418.

142 The former Law Reform Commission of Victoria recommended creating a separate offence of culpable homicide, to apply when a person kills on the basis of a belief that was grossly unreasonable, either in relation to the need for force or the degree of force that was necessary: Law Reform Commission of Victoria, Report No 40, above n 27, 97, para 222.

143 See, eg, *R v Howe* (1958) 100 CLR 448; *Viro v The Queen* (1978) 141 CLR 88.

144 In 1991, South Australia reintroduced the defence of excessive self-defence, to be applicable in those situations where the accused’s belief as to the nature or extent of the necessary force used was grossly unreasonable and was accompanied by criminal negligence. This test of excessive self-defence was amended in 1997 to a partly objective one: *Criminal Law Consolidation Act 1935* (SA) s 15. Excessive self-defence was also reintroduced in New South Wales in 2001: *Crimes Act 1900* (NSW) s 421.

an error of judgment. Under the current law, if a jury found that Hasan had a right to protect himself from Izzet's attack, but should not have stabbed him three times, it would be required to convict him of murder. Is this the most appropriate result? Should an alternative be available, under which a jury could instead convict Hasan of manslaughter? If so, how should such a test be defined? Should it be a separate criminal offence (eg culpable homicide), or should it act to reduce murder to manslaughter? Alternatively, should the accused still be convicted of murder, but the fact that they acted on the basis of an error of judgment be taken into account by the judge when determining a sentence? Is this a matter more appropriately decided by a judge or by a jury?

Relationship with Other Defences

5.11 It is important to note that in many cases where a particular defence such as self-defence is raised, it will often be raised in conjunction with other defences such as provocation, diminished responsibility or mental impairment. Similarly, lawyers for the defendant may argue that there was no intention to kill in the circumstances. If the jury does not believe that there was such an intention, and also does not find that the accused knew that death or grievous bodily harm was the probable consequence of the conduct, it may either acquit the accused, or find him or her guilty of manslaughter instead. As we will see in Chapter 9, a large number of confrontational homicides result in a conviction for unlawful and dangerous act manslaughter rather than murder.¹⁴⁵

5.12 This interrelationship between defences can be clearly seen in Case Study 2. In addition to claiming that he acted in self-defence, Hasan could also claim that the killing had been provoked by Izzet's insults and actions. Alternatively, Hasan could argue that he did not have an intention to kill Izzet—that he was simply engaged in the unlawful and dangerous act of brandishing a knife, or attempting to wound Izzet, which happened to result in his death. Having heard each of these possible arguments, it would be up to the jury to decide whether to find Hasan guilty of murder or manslaughter, or to acquit him.

145 Unlawful and dangerous act manslaughter is a form of involuntary manslaughter—it does not require that there was an intention to kill, even though death was the result of the actions of the accused. It simply requires the accused to have performed an unlawful act that was so dangerous as to create an 'appreciable risk of serious injury': *R v Wilson* (1992) 61 A Crim R 63.

5.13 A particular problem can be created by this interrelationship in situations where juries return with a verdict of manslaughter. If the case has been argued on a number of different grounds, it will be difficult for the judge to know on what basis the jury has made its decision. There is no requirement for a jury to explain its decision to the judge, nor for all members of the jury to have made their decision based on the same reasoning.¹⁴⁶ Therefore, in Case Study 2, if the jury convicted Hasan of manslaughter, it may not be possible to tell whether this was because the jury believed he was provoked, or because the members did not think he had an intention to kill Izzet, or a combination of both.

5.14 This distinction becomes important when the judge sentences the accused. In cases in which provocation has been successfully argued, the accused must have been found to have had a murderous intention, although the jury must also have found that the penalty should be lessened due to the provoking act. In the case of unlawful and dangerous act manslaughter, there is not actually an intention to kill, so the accused may be seen as less culpable than a person who did intend to kill, but who did so under provocation. One of the issues the Commission will be considering is how this type of interrelationship should be treated. Should juries be required to tell judges the reason for their decisions? If so, would it be necessary for the jurors to agree on that reason? What if some jurors convicted the accused on the basis of one defence, and others on the grounds of another? Should judges give the accused the ‘benefit of the doubt’, and sentence as if the accused had no intention to kill?

HOMICIDES IN THE CONTEXT OF SEXUAL INTIMACY

5.15 The largest category of homicides in Polk’s analysis are those committed in the context of sexual intimacy.¹⁴⁷ As with confrontational homicides, these are largely committed by men. Polk suggested that the reason for the vast majority of these homicides is ‘jealousy or control’. That is, men kill their spouses, de facto partners, girlfriends or ex-partners when they believe they are having an affair or when they threaten to leave the relationship. Alternatively, they may kill their ‘sexual rivals’—those who they believe are having affairs with their partners. Given the circumstances of these killings, self-defence is

146 That is, some may convict a particular accused of manslaughter on the basis of provocation, while others may convict on the basis of having committed an unlawful and dangerous act.

147 See above para 2.8.

unlikely to be raised as a defence. Where it is raised (for example, in the context of a jealous row, where the other party attacks first), the issues are unlikely to be different from those raised in the context of confrontational homicides.

5.16 Polk does, however, identify another type of homicide in the context of sexual intimacy which raises important issues in terms of self-defence. These are homicides committed by women in response to violence. On Polk's analysis, these comprise over 50% of the homicides in the context of sexual intimacy that are committed by women.

Women who Kill in Response to Violence

* CASE STUDY 3

Helen was in a de-facto relationship with Darren for 11 years. After three years the relationship deteriorated, and Darren began to verbally, mentally and physically abuse Helen and their two children. At one stage Helen took the children and moved to a women's refuge for a week. She obtained a restraining order against Darren, requiring him to move out of the house. She and the children moved back into the house. After about a week Darren began to visit the house again and eventually he moved back in permanently. One night Darren went out with friends. He came home drunk and began to swear at Helen. At one point he yelled: 'I'll blow your fucking head off'. Darren kept a shotgun in the car. Darren then fell asleep. An hour later, while Darren was sleeping, Helen went to the car, got the shotgun, went back inside and shot him.¹⁴⁸

5.17 We saw in Chapter 4 that the defence of self-defence developed in the context of fights between men. This led to the development of a test which regards lethal force as only being justified where the accused was responding to an imminent life-threatening attack. This has caused problems for women who have killed in response to violence. One problem is that sometimes such killings do not occur in response to what would usually be considered a 'life-threatening' attack—the provocation might be something which could, when

148 The facts of this case study are based on *R v Secretary* (1996) 86 A Crim R 119.

considered separately from the ongoing context of violence, be regarded as quite trivial. For example, in Case Study 3, it could be argued that although Darren threatened to kill Helen, since he then fell asleep, Helen should not have taken his threat seriously. It might be argued that since Helen was not in any imminent danger, she couldn't have believed it was necessary to kill Darren in such circumstances, and so should not be acquitted on the basis of self-defence.

5.18 Another problem is that often such killings will not be an 'immediate' response to a life-threatening attack—they may occur after some kind of delay. In Case Study 3, Helen did not kill Darren as soon as he threatened her—she killed him an hour later, while he was asleep. In such circumstances, it has often been difficult for women to prove that they believed that there was no other way to prevent themselves being killed or seriously injured other than to kill their abuser. It can be argued, for example, that instead of killing their abuser in such situations, they should simply have left the relationship. For example, it might be claimed that Helen did not believe it was necessary to kill Darren in the circumstances, as she could have left while he was asleep, removing any potential danger to herself, and so the homicide should fall beyond the scope of self-defence.

5.19 Over time, the law has developed so that it can, to some extent, recognise these issues. This has resulted, for example, in a reduction of emphasis on the need for there to be an 'immediate' or 'instantaneous' response to a threat.¹⁴⁹ Without this change, Helen could not have argued self-defence, because she did not instantly kill Darren when he threatened her, but waited until he fell asleep. The law now allows a focus on the whole context in which the killing takes place, making it possible for Helen's lawyers to argue that despite this delay, Helen still felt under threat when she killed Darren, and so should be able to rely on a plea of self-defence.

5.20 Despite these changes, which allow juries to take into account the entire context of the homicide in determining whether the accused believed, on reasonable grounds, that it was necessary to kill in the circumstances, a woman who kills in response to violence may still face difficulties arguing her case. In particular, juries may have difficulty properly understanding the context in which the homicide occurred, as they may be unaware of typical patterns of

149 See Simon Bronitt and Bernadette Mc Sherry, *Principles of Criminal Law* (2001) 297–8.

domestic violence, and how people act in such situations. Even if they know that there was a prolonged history of abuse, if they do not understand what it means to be subjected to such abuse, and do not know how someone is likely to react to such abuse, they may not believe that the woman who killed felt it necessary to do so in those circumstances. For example, in Case Study 3, although the homicide can be placed within the context of Darren's abuse of Helen, the members of the jury may still not believe that Helen would have felt it necessary to kill Darren in those circumstances, as they may not understand the difficulties women face when they attempt to leave violent relationships.

5.21 One way in which this problem could be addressed would be to allow expert evidence to be presented to the jury which examines the ways in which women typically react to domestic violence. For example, such evidence could inform the jury of the effect long-standing violence may have on the victim of the violence and the reasons why a woman subjected to prolonged and repeated abuse may feel that she has no alternative but to remain in a relationship. The evidence could also inform the jury that survivors of domestic violence may be aware that they are at a very high risk of being killed by their partner when they are in the process of separating from them.¹⁵⁰ Evidence of this kind, combined with evidence about the nature and extent of the violence to which the accused was subjected during the relationship, might assist the jury in deciding whether the accused believed on reasonable grounds that there was no other way to preserve herself from death or grievous bodily harm than by killing the abuser.

5.22 As a general principle, a judge must not allow expert evidence to be presented in court if it relates only to matters about which ordinary people are able to form a sound judgment, without needing the assistance of a person who has specialist knowledge and experience in the relevant area.¹⁵¹ In other words, experts cannot be called on to provide evidence about 'common' matters which the jury should already know about. In the past, this has meant that there have been doubts as to whether expert evidence about the typical patterns of domestic violence should be allowed to be presented to the jury, because it has been assumed that this is a matter about which jury members are sufficiently informed to make a sound judgment.

150 See for example *R v Lavellee* [1990]1 SCR 852, 871-2 (Wilson J).

151 *Clark v Ryan* (1960) 103 CLR 486, 491 (Dixon CJ).

5.23 Partly in an attempt to overcome this restriction, defence lawyers have attempted to use expert psychiatric evidence that women who have killed their violent partners are suffering from a psychiatric condition known as ‘battered woman syndrome’.¹⁵² This evidence has been introduced in some criminal trials¹⁵³ to help explain why a woman who has been involved in a ‘cycle of violence’¹⁵⁴ might believe, on reasonable grounds, that it was necessary to kill her abusive partner, even in cases where there was no ‘immediate’ threat of violence or an instantaneous response to such a threat. For example, in *Osland v R*, psychological evidence was given as to characteristic patterns of behaviour in relationships involving abuse.¹⁵⁵ A psychologist called by the defence gave evidence that Heather Osland’s evidence of her relationship with her husband was consistent with it having been a battering relationship, and expressed the opinion that she ‘fitted within the battered wife syndrome’.¹⁵⁶

152 We note that this syndrome is sometimes referred to as ‘battered wife syndrome’. We prefer to use the term ‘battered woman syndrome’ to reflect the fact that those women who are subjected to prolonged violence are not always married.

153 *R v Kontinnen* (1992) 16 Crim LJ 360; *R v Hickey* (1992) 16 Crim LJ 272-3.

154 The term ‘battered woman syndrome’ was first used in 1979 by American psychologist Dr Lenore Walker, *The Battered Woman* (1979). In a later study, Dr Walker stated that a ‘cycle of violence’ was characterised by three stages: tension building, the acute battering incident and loving contrition. She defined a ‘battered woman’ as one who had gone through the cycle at least twice. Walker emphasised that a battered woman finds it difficult to break out of the cycle of violence because of ‘learned helplessness’: *The Battered Woman Syndrome* (1984).

In *Osland v The Queen*, Dr Kenneth Byrne, Clinical Psychologist, gave evidence which outlined the following other characteristics said to be a manifestation of the syndrome including:

- a sense of shame and fear of telling others about the violence;
- reliving the experiences of violence, which may result in confused thinking when a woman is frightened;
- increased ‘arousal’, which makes a woman acutely aware of any signal from her partner;
- remaining in an abusive relationship, because a woman believes that if she leaves, the abuser will find her or other family members and take revenge.

In severe cases, a woman may live in the perpetual belief that she will one day be killed by the other person: (1998) 197 CLR 316, 335-6 (Gaudron and Gummow JJ).

155 *Osland v The Queen* (1998) 197 CLR 316, 335 (Gaudron and Gummow JJ).

156 *Ibid.*

5.24 The High Court of Australia has made it clear that the fact that a woman has been subjected to ongoing violence can be presented to the jury to help explain the accused's behaviour, but that there is no special defence of 'battered woman syndrome'.¹⁵⁷ That is, it is not possible simply to show that a woman who killed her abuser was suffering from 'battered woman syndrome', and should therefore be acquitted. Instead, evidence of the abuse can be used as a means of explaining to the jury the reasons why the accused acted in the way she did, and why she may have reasonably believed it was necessary to kill her partner in the circumstances. Having been presented with this evidence, the jury must then decide, as in all self-defence cases, whether the accused did believe, upon reasonable grounds, that it was necessary to act in the way that she did.

5.25 In Case Study 3 evidence (including expert evidence about battered woman syndrome) could be presented to the jury to show that Helen had suffered from ongoing abuse, and that women in such situations often find it difficult to leave relationships, and may fear being killed if they attempt to do so. This evidence could help to explain why Helen had stayed with Darren for eight years after the violence started, rather than leaving. It could also help to explain why Helen found it necessary to kill Darren in those circumstances. Without this evidence, although the jury members may know that Helen had been subjected to prolonged abuse, they may not understand why she didn't just leave Darren. It is only when patterns of domestic violence are taken into account that the jury may understand that Helen's belief that there was no other way to preserve herself from death or serious injury, other than to kill Darren, was reasonable.

5.26 The approaches described above have resulted in the acquittal of some women who have killed abusive partners. For example, in the case on which Case Study 3 was based, although the trial judge originally ruled that the issue of self-defence did not arise and could not be put to the jury, on appeal the court held that self-defence should have been left to the jury, because there was a threatened assault still in existence when Helen killed her husband. Darren's acts and words were enough to create a reasonable apprehension in

157 *Osland v The Queen* (1998) 197 CLR 316, 377–8 (Kirby J), 408 (Callinan J). Kirby J was critical of some aspects of the notion of a syndrome, but supported the admission of expert evidence on the general dynamics of abusive relationships. Gummow and Gaudron JJ said that 'battered woman syndrome' was a proper matter for expert evidence.

Helen's mind of death or serious bodily harm. A re-trial was ordered and Helen was acquitted at her second trial on the basis of self-defence.¹⁵⁸ However, there have also been cases where women who have killed their abusers have not been acquitted on the basis of self-defence.¹⁵⁹

5.27 One of the issues the Commission will be looking at is the way in which the law should deal with homicides in this context. In the course of doing so, we will need to tackle a number of difficult questions. Are such homicides completely justifiable or excusable, so that they should lead to a complete acquittal of the accused, or should the circumstances only act to reduce the crime from murder to manslaughter? In what circumstances do we believe women who kill their abusers should be held criminally responsible for their actions? If such homicides are seen to be completely excusable, is it appropriate that they fall within the scope of self-defence, or should there be a separate defence for women who kill their abusers?¹⁶⁰ What of others in abusive relationships, for example children or same-sex partners?¹⁶¹ Is there even a need for change to the current situation, or are the changes to the self-defence test, which overcome the requirement for an immediate response to a life-threatening attack, sufficient? Should the test be reformulated to ensure that such homicides fall within its scope? Would it be sufficient to simply make the self-defence test a purely subjective one?¹⁶² What is the appropriate role for expert evidence in such cases? If a new defence were to be created, how would such a defence be formulated? In light of the existing data that shows that such homicides seem to be solely committed by women, should any new defence be gender specific? It is only by examining such questions that we will be able to recommend a coherent approach to this area.

158 *R v Secretary* (1997) 18(2) *The Legal Reporter: Criminal Law* 7.

159 See eg, *Osland v The Queen* (1998) 197 CLR 316, 370–2.

160 The New Zealand Law Commission recently considered introducing a special defence for 'battered defendants'. They ultimately rejected the idea, in favour of amending the law of self-defence to make it clear that it can include the use of force in self-defence against violence that may not be imminent, but which is necessary to save 'life or limb'. In addition, they recommended providing judges with a sentencing discretion for murder, which currently carries mandatory life imprisonment in New Zealand: *Some Criminal Defences with Particular Reference to Battered Defendants*, Report 73, 27–30, 49–59.

161 See the comments of Kirby J in *Osland v The Queen* (1998) 197 CLR 316, 370–2.

162 See above para 5.5.

Chapter 6

Provocation

HOMICIDES IN THE CONTEXT OF SEXUAL INTIMACY

* CASE STUDY 4

Bert, who was 50 years old, stabbed his third wife, Donna, 47 times with a hunting knife after an argument. Bert claimed that Donna told him that she was going to get a court order preventing him from being on their property and that he would have to pay her alimony and child support. He also claimed she told him she felt sick every time he touched her, that he had a little penis and that he was lousy in bed. Bert said that Donna's voice began to fade away and he felt a 'whoosh' sensation washing over him from his feet to his head. When he came to, Donna was dead. Bert hid his wife's body in a toolbox in the back of his truck, fled to another country, but then gave himself up six weeks later. The jury found him guilty of manslaughter on the basis of provocation.¹⁶³

6.1 In Polk's study, the largest category of homicides (26%) occurred in the context of sexual intimacy. According to his categorisation, over 70% of these homicides involved men killing their female partners or sexual rivals, either for reasons of jealousy or out of a desire to control the victim.¹⁶⁴ Polk points out that in most of these killings, there is planning involved rather than 'a swift upswelling of passionate rage'.¹⁶⁵ Where such a killing is planned, it will usually be difficult to successfully argue that it was provoked or was committed in self-defence. In a number of cases, however, such killings may be an instant response to a particular act, such as Donna allegedly telling Bert

163 The facts of this case study are based on *R v Stone* [1999] 2 SCR 290.

164 Of the 15 women who killed in the context of sexual intimacy (cf 86 men), Polk notes that just under half (7) also killed for reasons of jealousy or control. The other eight women killed in response to violence: see above paras 2.13–16.

165 Polk, above n 33, 31.

that he had a little penis and that he was lousy in bed.¹⁶⁶ In such circumstances, the accused may argue that they lost self-control because they were provoked. If the jury believes the accused's claims, and finds that the legal test for provocation has been met,¹⁶⁷ it may convict the accused of manslaughter rather than murder.

6.2 We saw in Chapter 4 that the justification for this defence has changed over time. Although the basis of the defence is still very similar—that the victim has said or done something that has contributed to the homicide, thus reducing the culpability of the accused—the reasoning behind the reduction of culpability has changed. Rather than being a question of a 'justifiable' killing in the circumstances, the focus is now on an 'excusable' loss of self-control by the accused.¹⁶⁸ While this has led to a slight modification of the elements of the test—such as the introduction of an objective 'ordinary person' test, and the removal of the requirement for the response to be a sudden reaction to a particular 'triggering' incident¹⁶⁹—the defence of provocation is still widely used in similar circumstances to those from which it developed. Thus, instead of seeing the killing of an 'adulterous wife' as being justifiable, due to a 'breach of honour', it is often now seen as excusable where there has been a loss of self-control by an accused such as Bert. The result is still the same: a reduction of any conviction from murder to manslaughter.

166 Throughout this chapter, we use the term 'alleged' by the accused when discussing Donna's taunting of Bert. We do so to highlight the fact that, in such cases, as the person responsible for the provocative conduct is dead, and there are usually no witnesses to the provocative conduct, we often only have the evidence of the accused to rely on in determining whether such conduct actually occurred. It will be up to the members of the jury to assess whether they believe such provocation actually took place.

167 In fact, once the accused has raised the possibility of provocation, it is up to the prosecution to prove, beyond reasonable doubt, that the accused was not provoked.

168 Reilly, above n 114, 320. We note that while there has been a shift in the justification behind the provocation defence, the cases in this area are not entirely coherent. At times it appears that the former basis of the defence is still in operation. One of the issues we will be examining will be: what is the most appropriate basis for any such defence and what is the best way to reflect that justification in the law?

169 See below para 6.4–5.

Elements of the Defence

6.3 Before the jury can reduce a charge of murder to manslaughter on the grounds of provocation, it must be satisfied that the following three requirements have been met:¹⁷⁰

- There must be sufficient evidence of provocative conduct.
- The accused must have lost self-control as a result of the provocation.
- The provocation must be such that it was capable of causing an ordinary person to lose self-control and act in a manner which would encompass the accused's actions. It must be such as could cause an ordinary person to form an intention to inflict grievous bodily harm or death.

PROVOCATIVE CONDUCT

6.4 Traditionally, there has been a requirement that there be an identifiable 'triggering' incident or series of incidents that caused the accused to lose self-control.¹⁷¹ In the seventeenth century, the classical triggering incident was seeing a wife committing adultery.¹⁷² In Case Study 4, Donna's alleged insults and threats could be regarded as the relevant triggering incident.

6.5 The requirement of a triggering incident has been reduced to some degree in recent years with the emphasis being placed on the cumulative effect of all the circumstances leading up to the accused's loss of control. This includes the background and history of the relationship between the accused and the victim. It is now possible for a jury to find that an incident that seems inoffensive on its own was in fact provocative, due, for example, to an ongoing abusive relationship between the parties.¹⁷³

LOSS OF SELF-CONTROL

6.6 The second requirement of the test is that the accused must have lost self-control as a result of the provocative conduct. This loss of self-control may be the result of anger, fear or panic.¹⁷⁴ Historically, it was necessary for the

170 *Masciantonio v The Queen* (1995) 183 CLR 58, 66.

171 *R v Croft* [1981] 1 NSWLR 126, 140 (O'Brien J).

172 *R v Maddy* (1672) 1 Ventris 158; 86 ER 108.

173 *R v R* (1981) 28 SASR 321.

174 *Van den Hoek v The Queen* (1986) 161 CLR 158, 168 (Mason J).

killing to occur suddenly or immediately after the provocative conduct, in order to show such a loss of self-control. This is no longer the case.¹⁷⁵ However, evidence of a ‘cooling-off period’ between the provocative conduct and the homicide will be a factor that the jury can consider in determining whether there really was a loss of self-control, or whether the killing was planned.

THE ORDINARY PERSON TEST

6.7 The final element of the test is considered an objective one: was the provocation such that it was capable of causing an ‘ordinary person’ to lose self-control and act in a manner which would encompass the accused’s actions?¹⁷⁶ There are two aspects to this test:

- What was the gravity of the provocation?
- Was the provocation of such gravity that it could cause an ordinary person to lose self-control and act like the accused?

6.8 In assessing the gravity of the provocation, the jury must consider what would be the ‘ordinary person’s’ perception of the gravity of the provocative conduct. For the purpose of determining this, the ‘ordinary person’ is regarded as having any relevant personal characteristics of the accused.¹⁷⁷ Relevant characteristics may include age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history.¹⁷⁸ It does not include ‘exceptional excitability or pugnacity or ill-temper’,¹⁷⁹ but may include ‘mental instability or weakness’.¹⁸⁰ So in Case Study 4, the jury would need to determine how grave an ‘ordinary’ 50-year-old man, who had undergone two previous divorces, would have found Donna’s alleged comments to be.

6.9 Having assessed the gravity of the provocation, the jury must then assess whether provocation of that level of gravity could have caused an ‘ordinary person’ to lose self-control to such an extent that they act in a manner like the accused. Could an ‘ordinary person’ form an intention to inflict grievous bodily harm or death in those circumstances?¹⁸¹ Unlike the question of gravity—for

175 *Parker v The Queen* (1964) 111 CLR 665, 679.

176 *Masciantonio v The Queen* (1995) 183 CLR 58, 66; *Stingel v The Queen* (1990) 171 CLR 312, 325–7.

177 *Stingel v The Queen* (1990) 171 CLR 312.

178 *Masciantonio v The Queen* (1995) 183 CLR 58, 67.

179 *DPP v Camplin* [1978] AC 705, 726 (Lord Simon).

180 *Stingel v The Queen* (1990) 171 CLR 312, 326.

181 *Masciantonio v The Queen* [1995] 183 CLR 58, 66.

which the ‘ordinary person’ can have all of the relevant characteristics of the accused—in answering this question no personal characteristic may be taken into account, apart from age.¹⁸² So in determining whether an ‘ordinary person’ could have formed an intention to kill when provoked by insults with the gravity of those Bert claimed Donna had made, the jury are not to take into account the fact that Bert was male or had been divorced on two prior occasions. They must simply ask whether the ordinary adult could have reacted in such a way to provocation of that gravity.

Gender Bias

* CASE STUDY 5

June was a 54-year-old grandmother who had lived with her physically and emotionally abusive husband for 34 years. She arranged for her co-accused, John, to shoot her husband shortly after discovering he was having an affair with the wife of a deceased neighbour, and after finding him in their bed with a prostitute. There was evidence that she was suffering from a significant depressive illness at the time of the killing and was a victim of battered woman syndrome. She was convicted of murder.¹⁸³

6.10 The main criticism made of the partial excuse of provocation is that it operates predominantly to excuse male anger and violence toward women.¹⁸⁴ There are two main elements to this critique. Firstly, as seen above, it is mostly men who avail themselves of this defence,¹⁸⁵ very often in the context of killing their wives, de facto partners, ex-wives or ex-partners in circumstances of jealousy or in a desire to retain control. In such a context, it is argued that the mere existence of a defence which may reduce culpability for those who kill their sexual intimates allows men to kill with relative impunity. This is seen to disadvantage women.

182 *Stingel v The Queen* (1990) 171 CLR 312, 330–3.

183 The facts of this case study are based on *R v Gordon* (1993) 10 CRNZ 430.

184 See, eg, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, above n 29, 89.

185 This is not to say that women do not use the defence of provocation. In fact, the proportion of women who successfully use the defence is higher than the proportion of men who successfully use it. However, as the vast majority of homicides are committed by men, as an absolute number more men use the defence than women: see below para 6.14.

6.11 Secondly, the requirements of the test, which have developed in the context of men killing both other men and women, are said to be based on male aggressive responses to provocative conduct. A sudden violent loss of self-control in response to a particular triggering act is seen to be the archetypal male action to provocative conduct. It is argued that a test which has been historically framed in this way is very difficult for women to use, despite changes that have been made over time.¹⁸⁶ Thus, a woman who finds out that her husband is having an affair, but does not instantly react violently, instead killing him (or arranging for his death) at a later time, may find it difficult to avail herself of the defence. This is what happened to June in Case Study 5. Alternatively, a woman who has faced years of abuse, who finally kills her husband after a relatively 'trivial' issue, may find it difficult to show that she was provoked.

6.12 Much of this debate centres around the question of the 'ordinary person'. It is argued that as provocation arose in the context of drunken brawls and breaches of honour between men, the sexless 'ordinary person' is in fact a male.¹⁸⁷ It has been argued that the 'ordinary person' that the jury has to consider in determining how the accused could have reacted bears little relevance to the kinds of reactions that women may have to provocation. Women are therefore excluded from the scope of the defence. As a result of this perceived gender bias, there have been calls for the abolition of provocation as a defence.

186 Such as the removal of the requirement for the response to be sudden, or allowing all of the circumstances to be taken into account in determining whether the conduct was provocative.

187 Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Defending Battered Women on Trial: The Battered Woman Syndrome and Its Limitations' (1992) 16 *Criminal Law Journal* 369.

 **CASE STUDY 6**

Cheryl lived with her abusive husband for 25 years. He subjected her to numerous assaults including striking her with a wheel brace, a monkey wrench and a gun butt. He raped her and procured an abortion with a teaspoon. In the month preceding the killing, he would not let Cheryl out of his sight and told her that he had hidden cartridges around the house but would not tell her where. On the morning of the shooting, he demanded breakfast in bed, then refused to let her back into bed, calling her a 'dog'. When he fell asleep, Cheryl shot and killed him. The jury convicted Cheryl of manslaughter on the basis of provocation.¹⁸⁸

6.13 Some legal theorists have argued, however, that abolishing provocation would act to disadvantage women, as 'there is an attendant risk that more women who kill a chronically violent spouse will be convicted of murder and sentenced accordingly.'¹⁸⁹ This argument is supported by cases like that outlined in Case Study 6. If provocation was abolished as a defence, unless Cheryl could prove that she acted in self-defence, she would be likely to be found guilty of murder.¹⁹⁰

6.14 Linked to this argument is the claim that provocation is not, in fact, gender biased. The former Law Reform Commission of Victoria and the Judicial Commission of New South Wales have conducted empirical research that suggests that while the provocation defence is used more frequently by men who kill women than women who kill men,¹⁹¹ the women who raise provocation seem to be more successful with the defence than men.¹⁹² That is, while a lot of men try to claim they were provoked, in many cases this claim is rejected by the jury. On the other hand, in most cases where women

188 The facts of this case study are taken from *R v Bradley* (Unreported, Supreme Court of Victoria, 14 December 1994), referred to in Rebecca Bradfield, 'Is Near Enough Good Enough? Why Isn't Self-Defence Appropriate for the Battered Woman?' (1998) 5(1) *Psychiatry, Psychology and Law* 71, 73.

189 Helen Brown, 'Provocation as a Defence to Murder: To Abolish or Reform' (1999) 12 *Australian Feminist Law Journal* 137, 138.

190 In fact, in the case on which Case Study 6 was based, the trial judge did not allow the jury to consider self-defence.

191 As noted above, this is likely because a far higher number of homicides are committed by men than by women: see n 185.

192 Law Reform Commission of Victoria, Report No 40, above n 27, 75–6; Donnelly et al, above n 32, Chapter 5.

claim they were provoked, they have been successful in reducing the conviction from murder to manslaughter.¹⁹³

6.15 The issue of gender bias is one that the Commission will be examining in this reference. We will be researching whether, on the available data, provocation does act to disadvantage women. If it does, it will be necessary to determine ways to combat that bias. Should provocation be abolished as a defence? Would that act to disadvantage women who currently rely on the defence? Should the formulation of the defence instead be amended to take into account issues of gender? For example, should the sex of the accused be a relevant characteristic to be taken into account in assessing an ‘ordinary person’s’ response to provocation?¹⁹⁴ Would this give rise to a stereotyped view of what it means to be a man or a woman, leading to further sexism? Would it violate the principle of equality to hold men and women to different standards of self-control?¹⁹⁵

CONFRONTATIONAL HOMICIDES

* CASE STUDY 7

Jayde was a 22-year-old skateboarder. One night he went out and got very drunk. On the way home he passed a group of people, and stopped to talk to them. He placed his t-shirt, which had been in his back pocket, on the ground. Somebody picked up the t-shirt, and started teasing Jayde with it. He held the t-shirt out of Jayde’s reach, and ducked around parked cars to prevent Jayde regaining it. Jayde also became separated from his cap, which he had won in a skateboarding competition and which was very valuable to him. Thwarted in his attempt to regain his clothing, Jayde walked away. On his way home, he became very angry. He went to a friend’s house and got a knife, which he concealed in his sleeve. He then walked back to the group of people, and asked who had taken his shirt. They indicated that it was Sam. He asked Sam where his shirt and cap were, and Sam told him they were up a tree. Sam continued to taunt Jayde. Jayde then produced the knife and stabbed Sam, killing him. Jayde was convicted of manslaughter on the basis of provocation.¹⁹⁶

193 See below paras 9.21–2 for a discussion of the outcomes of the cases in which women raised the defence of provocation.

194 This is the case in England: see, eg, *DPP v Camplin* [1978] AC 705; *R v Morhall* [1996] AC 90.

195 *R v Hill* [1987] 374, 397 (Wilson J).

196 The facts of this case study are based on *R v Diamond* [2000] NSWSC 1212.

6.16 The other main category of homicide in which provocation is likely to be raised as a defence is confrontational homicide. We saw in Chapter 4 that the defence of provocation developed in the context of duels over breaches of honour. While these ‘breaches of honour’ may often have arisen in relation to a man’s wife (thus occurring in the context of sexual intimacy), they would also occur in the context of a drunken argument between men. Similar homicides continue to take place and, as seen in Case Study 7, can still lead to provocation being raised as a defence.

Conceptual Basis of the Defence

6.17 Confrontational homicide cases raise the issue of why provocation should reduce a conviction from murder to manslaughter. Is the conceptual basis for the defence a sound one? On the one hand, it can be argued that provocation offers a degree of compassion to those who lose self-control in circumstances where the community can generally understand or empathise with them. A person who is taunted like Jayde and kills in ‘hot blood’ is seen by some to be less culpable than someone who plans to kill in ‘cold blood’, such as a person who, for example, kills for financial gain. While there may be an intention to kill in such circumstances, some believe that a person whose mental state was significantly affected by extenuating circumstances should not be considered fully criminally liable.

6.18 On the other hand, it can be argued that those who rely on provocation as a defence have generally formed an intention to kill. Why should the emotion of anger reduce moral culpability more than other emotions such as envy, lust or greed?¹⁹⁷ Why does the law have sympathy for killings made in anger, but not those made out of mercy? Why should it make a difference to the level of criminal responsibility that a person who intends to kill does so as the result of a loss of self control?

197 Horder, above n 107.

6.19 Linked to this issue is the question of why provocation should be a defence that acts to reduce the crime from murder to manslaughter, rather than simply being a factor the judge takes into account in sentencing.¹⁹⁸ Homicide is the only area of law in which a defence operates in this way. For all other crimes, factors such as provocation would be viewed as a mitigating circumstance by the judge, and may act to reduce the sentence. Historically, murder was punishable by a mandatory death sentence, and later by mandatory life imprisonment. The fact that provocation actually reduced the crime, rather than simply affecting the sentence, gave the judge sentencing discretion. But now that there is a discretionary sentence for murder, why should it continue to be treated differently from all other crimes, for which provocation is simply a sentencing question? Why is provocation so different from other kinds of mitigating circumstances, such as remorse or prospects for rehabilitation, that it should be decided by a jury rather than a judge? Would removing the defence from the jury place too much power in the hands of judges, or be otherwise undesirable?

6.20 In the next stage of this reference, the Commission will be carefully considering the foundation upon which any such defence should be based. In doing so, we will attempt to lay out a framework for the kinds of decisions which should be left to the jury, and those to be decided by the judge.

The ‘Ordinary Person’?

6.21 We have seen above that part of the test for provocation requires the jury to consider how grave the ‘ordinary person’ would have considered the provocative conduct to be, and how the ‘ordinary person’ might have reacted to provocation of that gravity. The ‘ordinary person’ test has drawn much criticism from both judges and academic commentators, and is an issue the Commission will be looking at as part of this project. Many law reform agencies

198 See, eg, *ibid*; Adrian Howe, ‘More Folk Provoke Their Own Demise’ (1997) 19 *Sydney Law Review* 336 and ‘Reforming Provocation (More or Less)’ (1999) 12 *Australian Feminist Law Journal* 127. The New Zealand Law Commission recently recommended the abolition of the defence of provocation, arguing that matters of provocation should instead be taken into account in the exercise of a sentencing discretion for murder: New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report 73 (2001) para 120 .

have argued that it should be abolished.¹⁹⁹ It is argued that in a heterogeneous society like Australia, it is very difficult to construct a viable model of an 'ordinary person'. Behaviour is affected by individual differences and these differences need to be taken into account in assessing criminal responsibility.

6.22 It is sometimes argued that the test should be purely subjective: did the accused kill when provoked?²⁰⁰ According to this argument, in Case Study 7 the question should simply be 'Was Jayde provoked into killing Sam?' Without any consideration of whether the 'ordinary person' in Jayde's position could have killed in those circumstances. This is seen to be in line with the rationale of provocation—the culpability of the accused is less because they killed while out of control, rather than in a premeditated fashion. What the 'ordinary person' would have done is not relevant.

6.23 Alternatively, others argue that the test should be subjective, but with some scope for community standards to be taken into account. For example, the former Law Reform Commission of Victoria recommended a subjective test, but one which allowed the jury to assess whether the provocation was such as to be a sufficient reason to reduce murder to manslaughter. Under such a test, the jury would need to apply some kind of moral standard, to determine whether a particular provoked killing is sufficiently excusable to reduce the crime from murder to manslaughter.²⁰¹

6.24 Those who argue in favour of having an ordinary person test usually do so on the basis that there needs to be an objective standard in the defence and the ordinary person is the best standard available. The benefit of having an objective standard is that all accused people are held to the same standard irrespective of their personal characteristics. Having an ordinary person test ensures 'there is no fluctuating standard of self-control against which accuseds are measured'.²⁰² It is argued that if only the accused's characteristics were

199 Law Reform Commission of Victoria, Report No 40, above n 27, paras 187–91; Criminal Law Revision Committee (Great Britain), *Offences Against the Person*, Report 14 (Cmnd 7844, 1980), paras 81–3, 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)* (1980) article 210.3; South Australia, Criminal Law and Penal Methods Reform Committee, *The Substantive Criminal Law*, Report 4 (1977) 21–2.

200 In 1978, the Irish Court of Appeal abandoned the objective test in provocation and subsequent cases have followed a subjective test that examines whether the accused, given his or her testament, character and circumstances, in fact killed under provocation: *People v MacEoin* (1978) 112 ILTR 43.

201 Law Reform Commission of Victoria, Report No 40, above n 27, 84, Recommendation 21.

202 *R v Hill* [1986] SCR 313, 324 (Wilson J).

taken into account, a broader range of accused people would be afforded the defence.²⁰³ For example, without any objective standard, the white supremacist who kills a black person for speaking to him, believing it to be the gravest insult, would be afforded a possible defence.²⁰⁴

Relevant Circumstances: The ‘Cultural Defence’

* CASE STUDY 8

Mr Dincer’s²⁰⁵ 16-year-old daughter, Zerrin, was in a relationship with a young man. One day Zerrin brought the man home, and tried to convince her parents to let her live with him. Although they disapproved, they eventually relented. The next day, however, they had second thoughts, and decided to bring Zerrin home. Mr Dincer found Zerrin in the man’s bedroom, and in the course of a confrontation with her, stabbed her to death.

In Mr Dincer’s trial he was described as being a ‘traditional’ Muslim. Evidence was led that ‘traditional’ Muslim men from Mr Dincer’s culture expected to be the undisputed head of their house, and that their daughters avoid contact with young men other than those of the family’s choosing. It was argued that a daughter’s loss of virginity outside marriage was a matter of shame and disgrace to the parents. The judge held that these kinds of factors could be taken into account in determining how the ‘ordinary person’ could have reacted in the circumstances. The ‘ordinary person’ for the purposes of provocation was to be an ordinary man of Mr Dincer’s origin, background and beliefs. Mr Dincer was convicted of manslaughter on the basis of provocation.²⁰⁶

203 Finbarr McAuley and J Paul McCutcheon, *Criminal Liability: A Grammar* (2000) 877.

204 Ibid.

205 In previous case studies we have used given names when outlining the facts of the cases. In this case, however, the law report does not contain Mr Dincer’s given name.

206 The facts of this case study are based on *R v Dincer* [1983] VR 460. We note that, although we are using the facts of this case as the basis of our case study, the principles of law laid down in *R v Dincer* have now been overtaken by those in *Stingel v The Queen* (1990) 171 CLR 312.

6.25 If provocation is retained, and the ‘ordinary person’ test is to be used, another issue which the Commission will be examining is the way in which it should be used. In some confrontational homicides, the question of who the ‘ordinary person’ is becomes one of great importance. We have seen above that the jury must determine how grave the ‘ordinary person’ would have considered the provocative conduct to be. In this part of the test, the courts have held the ‘ordinary person’ is to be regarded as having any relevant personal characteristics of the accused.²⁰⁷ Relevant characteristics include age, sex, race, ethnicity and past history. Thus, in Case Study 8, it was argued that one of the reasons why Mr Dincer killed his daughter was because of his belief that she had been having sex. For some people, finding out that their daughter has been having sex would not be regarded as a very grave provocation. However, when Mr Dincer’s cultural and religious beliefs are taken into account, the provocation may be seen as being sufficiently grave to have led to his violent reaction.

6.26 One of the criticisms made of the test is that imbuing the ordinary person with the accused’s ethnic or cultural background may lead to stereotyped views of various cultures being used, thereby giving rise to racism.²⁰⁸ There is a risk that judges and juries may draw on discriminatory generalisations about the cultures of minority groups of which they have little or no understanding. In addition, allowing such factors to be taken into account can lead to the accommodation of cultural claims about the use of domestic violence to ‘discipline’ women and children. For example, it can lead to controlling patriarchal behaviour such as Mr Dincer’s being seen as acceptable, in light of his religious and cultural origins. Similarly, it can be used to justify killings where a ‘homosexual advance’ has been made towards the accused.²⁰⁹

207 *Stingel v The Queen* (1990) 171 CLR 312.

208 Stanley Yeo, ‘Sex, Ethnicity, Power of Self-control and Provocation Revisited’ (1996) 18 *Sydney Law Review* 304.

209 See, eg, *Green v The Queen* (1997) 191 CLR 334, in which the accused killed one of his ‘best friends’, after the latter touched the accused’s side, bottom and groin area.

6.27 On the other hand, it is argued that if the ordinary person does not reflect the ethnic or cultural background of the accused, there is a danger that discrimination against minority groups may be concealed and perpetuated. Objective standards of behaviour are predicated on the existence of a ‘community consensus’ about what constitutes ordinary behaviour. However, where minority groups are not adequately represented either on juries or as judges, objective standards may be determined exclusively by the values of the dominant culture.²¹⁰ The Commission will be looking at ways to negotiate the difficulties of framing such a test in a multicultural and heterogeneous society.

210 Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992), 183–4.

Chapter 7

Mental Impairment, Automatism, Diminished Responsibility and Infanticide

INTRODUCTION

7.1 In Chapter 6 we saw that the law partially excuses those who kill as a result of a lack of self-control. The law also excuses those whose mental functioning is in some way 'impaired'. The way in which the law deals with this issue will depend on factors such as the nature of the impairment, its cause, the level of the impairment and the effect it had on the accused.

7.2 In this chapter we look at some of the ways the law deals with these matters in Australia. We start by focusing on the defence of mental impairment, formerly known as the 'insanity' defence. We then look at those who act involuntarily due to a state of impaired consciousness, yet do not suffer from a mental impairment (this is referred to as 'sane' automatism). Following our discussion of automatism, we investigate the defence of diminished responsibility, which is available in some States but not in Victoria. Finally, we look at the defence that may be used in the specific case of mothers who kill their children, called infanticide.

MENTAL IMPAIRMENT

* CASE STUDY 9

One day while Cheryl was sitting at the kitchen table, reading a letter, her sister-in-law, Andre, stabbed her to death. Later that same day, Andre went into the bedroom of her daughter, Sandy, and asked her to close her eyes whilst she read her a story. Andre then stabbed Sandy in the throat, killing her. The bodies remained undiscovered until three days later when Andre stabbed to death her second daughter, Suzanne, who had been away at camp when the first two killings occurred.

Seven psychiatrists were called to give evidence at the trial. Three psychiatrists testified that Andre was in a psychotic state at the time of the killings, such that she did not know that what she was doing was wrong, and that she therefore met the requirements for a defence of insanity. Another said she was suffering from a dissociative state that could support either a defence of insanity or one of diminished responsibility. Two others said she was suffering from a depressive illness that could support the defence of diminished responsibility, but not insanity. Andre's treating psychiatrist, who was called by the prosecution, said she had not been suffering from a mental illness at all at the time of the killings. The jury convicted Andre of murder. On appeal, this was reduced to manslaughter.²¹¹

7.3 We noted in Chapter 4 that the law has long excused from criminal liability those with mental disorders who lack the ability to reason. Initially, this led to what was called the 'insanity' defence. In Victoria, the 'insanity' defence was replaced by the defence of 'mental impairment' in 1997.²¹² This led to a change in the elements of the defence,²¹³ as well as the consequences of successfully using the defence.²¹⁴ The use of this defence in relation to

211 The facts of this case study are based on *R v Chayna* (1993) 63 A Crim R 178; see also Commentary (1993) 17 *Criminal Law Journal* 273. We note that this case arose in New South Wales, where diminished responsibility is a defence. This is not the case in Victoria.

212 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

213 In particular, the definition of 'mental impairment' differs from the former test of a 'defect of reason' arising from a 'disease of the mind'.

homicide is relatively rare. For example, in Kenneth Polk's study, only two out of the 380 cases he examined involved psychiatric evidence that he believed could form the basis of a defence of mental impairment.²¹⁵ He put these in the category of 'special' cases.

Elements of the Defence

7.4 The elements of the defence of mental impairment are set out in legislation:²¹⁶

- The accused must have been suffering from mental impairment at the time of committing the offence; and
- the mental impairment must have affected the accused such that he or she did not know:
 - the nature and quality of the conduct; or
 - that the conduct was wrong.

7.5 The prosecution is entitled to assume that the accused is not mentally impaired—it is up to the accused to prove, on the balance of probabilities, that the accused has a condition which falls within the scope of the defence of mental impairment. If the jury is in doubt, it should find that the accused was not mentally impaired at the time the crime was committed. This is in contrast to the other defences discussed in this Paper, such as self-defence or provocation. For these defences, once the possibility of the defence is raised, it is up to the prosecution to prove, beyond reasonable doubt, that the defence did not apply. If the jury is in doubt, it should make a decision in favour of the accused.

214 One of the main changes in this area was that previously the person who killed while 'insane' was held 'at the Governor's pleasure'. This meant that they would be held indefinitely, and could only be released if the government could be persuaded by the person's friends or relatives to recommend release. The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* replaced this with a scheme under which an automatic review of the person's detention must be undertaken by the Supreme Court after a minimum period has elapsed.

215 Polk, above n 33, 160, 164. We note that Polk is looking at the facts of the cases involved, not at the legal defences raised. It is possible that mental impairment was actually raised as a defence in more than two cases.

216 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 20(1).

7.6 In contrast to the other defences we have looked at, the effect of being found not guilty by virtue of mental impairment leads neither to an acquittal nor to the accused being convicted of a different offence (such as manslaughter instead of murder). Rather, it may lead to the judge making a custodial or non-custodial supervision order,²¹⁷ or in limited circumstances, releasing the accused without conditions.²¹⁸

‘Mental Impairment’

7.7 We can see from the definition of the defence that the accused must first establish that they were suffering from a ‘mental impairment’ when they committed the offence. However, the term ‘mental impairment’ is not defined in the legislation. While this term will include those conditions which are seen as ‘internal’ to the accused, such as psychotic disorders,²¹⁹ it is uncertain whether it has a wider application.

7.8 One of the issues the Commission will be investigating is whether the term ‘mental impairment’ should be defined.²²⁰ By leaving the matter undefined, is there the potential for too many conditions to fall within its scope? Is it leaving the decision about whether a person suffered from a ‘mental impairment’ too much in the hands of ‘experts’? For example, in Case Study 10, some psychiatrists argued that Andre was in a psychotic state at the time of the killing, some that she was in a dissociative state, and others that she was suffering a depressive illness. How is the jury supposed to determine which of these can form the basis of the defence of mental impairment? Should it be left to the ‘experts’ to say that a psychotic state is a ‘mental impairment’, that a depressive illness is not, and that a dissociative state might be? Is it possible to draft a definition that reflects modern psychiatric thinking, and gives guidance

217 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* ss 23(a), 26.

218 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 23(b). A person cannot be released unconditionally unless certain requirements are met: s 40(2).

219 These disorders traditionally fell within the scope of the ‘insanity’ defence: *Bratty v Attorney-General for Northern Ireland* [1963] AC 386, 412.

220 We note that the *Model Criminal Code Act 1995* (Cth), which is meant to serve as a model for the differing criminal law jurisdictions, contains a definition for ‘mental impairment’: s 7.3(8). In 1995, the Victorian Parliament’s Community Development Committee recommended that the definition of ‘mental impairment’ in the Victorian *Crimes Act 1958* should follow that set out by the Model Criminal Code Officers Committee, but this was not taken up by the Government: Parliament of Victoria, Community Development Committee, *Inquiry into Persons Detained at the Governor’s Pleasure* (1995), 170.

to a jury determining whether or not mental impairment existed at the time of the killing?²²¹ Would any such definition be sufficiently flexible to be able to adapt to changing medical notions?

7.9 Linked to this issue is the question of who should have the role of determining whether the accused was suffering from a mental impairment. In Victoria, it is currently the jury who make this determination. It would be possible to instead appoint a special medical panel or tribunal to make such decisions, as is the case in Queensland. When a person in Queensland is charged with an indictable offence, and there is reasonable cause to believe that they were mentally ill at the time of committing the alleged offence, they can be referred to the Mental Health Tribunal for assessment.²²² The Tribunal is constituted by a Supreme Court judge, assisted by two psychiatric assessors. The Tribunal determines the mental condition of the accused. If it finds the accused was suffering from ‘unsound mind’, it will detain him or her as a restricted patient, the consequences of which are set out in the legislation.

Indictable offence

An indictable offence is a serious criminal offence that is heard by a judge and jury.

7.10 The Commission will be examining whether a similar system should be instituted in Victoria. Would it be preferable to have the matter of mental impairment determined by a panel of ‘experts’, or should it be a matter for the jury? If it should be determined by a panel, who should be on that panel? What should its powers be? When should matters be referred to the panel? If it is a matter more appropriately left to the jury, what is the most appropriate role for ‘experts’ to play?

Effect on the Accused

7.11 The defence of mental impairment follows the old *M’Naghten Rules*²²³ in focusing on whether the mental impairment affected the accused’s knowledge. The legislation sets out two ways in which knowledge can be so affected that the defence of mental impairment can arise.

221 See further Bernadette McSherry, ‘Mental Impairment and Criminal Responsibility: Recent Australian Legislative Reforms’ (1999) 3 *Criminal Law Journal* 135.

222 *Mental Health Act 1974* (Qld) s 28D. They can refer themselves to the Tribunal, or be referred by the prosecution or the Director of Mental Health.

223 See above para 4.15.

7.12 The first possibility is that the accused did not have knowledge of the ‘nature and quality of the conduct’. In determining if this is the case, the court will look at whether the accused knew that they were physically acting in the way that they did—it is a question of the physical character of the conduct.²²⁴ For example, in Case Study 10, Andre would be able to use the defence of mental impairment if she could prove that she had a mental impairment that led to her not knowing that she was stabbing her children. This is often very difficult to prove and, as a result, this aspect of the test has rarely been used.

7.13 The second possibility is that the accused did not know that the ‘conduct was wrong’. The test for determining this is whether the accused ‘could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong’.²²⁵ The three psychiatrists in Case Study 10 who gave evidence that Andre was in a psychotic state at the time of the killing, such that she did not know that what she was doing was wrong, were addressing the second aspect of the test. This is the more common basis upon which the defence of mental impairment relies.

7.14 The Commission will be examining whether a third aspect to the test should be introduced: that the mental impairment affected the accused’s capacity to control his or her conduct. In other words, while the accused may have known what they were doing, and may have known it was wrong, their mental impairment prevented them from controlling their conduct. Lack of volition due to mental impairment is a defence in Queensland, South Australia, Tasmania and Western Australia.²²⁶ In looking at whether to introduce this aspect in Victoria, we will need to investigate the medical foundation for any such test. Is it possible to know that what you are doing is wrong, yet be unable to control your actions? How do you determine when a person could not control their conduct and when they would not?²²⁷

224 *Willgoss v The Queen* (1960) 105 CLR 295, 300.

225 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 20(1)(b).

226 See also *Criminal Code* (Cth) s 7.3(1)(c).

227 Abraham S Goldstein, *The Insanity Defense* (1967) 67–8.

AUTOMATISM

* CASE STUDY 10

Craig married Darlene when he was 22. They separated a few years later, and Darlene started seeing another man. In breach of an intervention order, Craig went to where Darlene was staying. They had an argument about a car Craig had given back to Darlene. Craig stabbed Darlene with a kitchen knife. He told police that 'she pushed me too far this time'. At Craig's trial, mental health professionals gave evidence that he had been in a 'dissociative state' due to severe external stress caused by the marriage breakdown. Craig was acquitted of murder on the grounds of automatism.²²⁸

7.15 We saw in Chapter 3 that, in a criminal trial, the prosecution must prove every element of an offence beyond reasonable doubt. For example, in Case Study 11, if Craig is charged with murder, the prosecution will not only have to prove that he actually killed Darlene, but that he had an intention to kill her or cause her grievous bodily harm, or knew that death or grievous bodily harm was a probable consequence of his conduct. In almost all criminal cases, another matter the prosecution will have to prove is that the accused's conduct was voluntary or willed. The 'defence' of automatism can be raised if this cannot be proven—if the accused killed while in an automatic or unwilled state. If this 'defence' is successful, the accused may be acquitted.²²⁹

7.16 Automatism is different from the other defences we have considered, such as self-defence or provocation. In relation to those defences, the prosecution will have already proven all the elements of the crime. The accused will then allege that, for some reason, they should not be held responsible. In the case of automatism, one of the elements of the crime itself has not been proven. It is therefore not technically a 'defence', but rather a failure by the prosecution to prove its case. In practice, however, it operates in a similar way to defences: the prosecution will claim the accused committed the crime, the accused's lawyer may claim that the accused was acting involuntarily, and it will then be up to the prosecution to prove, beyond reasonable doubt, that the accused was in

228 The facts of this case study are taken from *R v Mansfield* (Unreported, Supreme Court of Victoria, Hampel J, acquittal 5th May 1994). Discussed in Bernadette McSherry, 'Getting Away With Murder? Dissociative States and Criminal Responsibility' (1998) 21(2) *International Journal of Psychiatry and Law* 163.

229 This will depend on the cause of the automatism: see below para 7.19.

fact acting voluntarily. It is for this reason that we are discussing automatism in this Paper on ‘defences’ to homicide.²³⁰

7.17 Automatism has rarely been successfully used in Victoria in relation to homicide, although it has been argued in a small number of cases. For example, men such as Craig have sometimes argued that the stress of a relationship breakdown caused them to ‘snap’ and act involuntarily.²³¹ Alternatively, women who kill after a long history of being subjected to violence may also argue that their action was unwilling. The advantage of using automatism in such cases, rather than the more often used defence of provocation, is that in contrast to provocation, which merely reduces murder to manslaughter, automatism may lead to a complete acquittal.²³²

Elements of Automatism

7.18 ‘Automatism’ refers to conduct performed whilst the accused was in a state of ‘impaired consciousness’.²³³ The consciousness must have been so impaired that the accused was acting involuntarily. The courts have accepted evidence of automatism as arising from a blow to the head, sleep disorders, the consumption of alcohol or other drugs, neurological disorders, hypoglycaemia, epilepsy and dissociation arising from extraordinary external stress.²³⁴ In each of these cases, it was accepted that the consciousness was so impaired that the accused’s action should be considered to have been unwilling or automatic. For example, in Case Study 11, it was accepted that Craig’s behaviour was automatic or unwilling because he was in a dissociative state arising from extraordinary stress.

Sane and Insane Automatism

7.19 The courts have drawn a distinction between those forms of automatism which occur from some internal cause (referred to as ‘insane automatism’) and those which primarily result from an external cause (referred to as ‘sane

230 For the sake of simplicity, we will also be referring to the ‘defence’ of automatism.

231 See also *R v Leonboyer* [2001] VSCA 149, the facts of which form the basis of Case Study 1. Although automatism was argued in this case, it was not successful.

232 As noted below, a distinction is drawn between sane and insane automatism. Only sane automatism leads to a complete acquittal. Insane automatism may lead to the accused receiving a custodial or non-custodial supervision order under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

233 Robert F Schopp, *Automatism, Insanity, and the Psychology of Criminal Responsibility* (1991) 137.

234 See Bronitt and McSherry, above n 149, 225 and footnotes therein.

automatism').²³⁵ For example, a person who acts automatically due to a blow to the head may fall within the category of sane automatism, while a person who acts involuntarily due to suffering from epilepsy may fall within the category of insane automatism.²³⁶

7.20 One justification for differentiating between sane and insane automatism is that there is perceived to be an increased risk that a person found not guilty by virtue of insane automatism will offend again. This increased risk is seen to arise due to the fact that the internal condition that caused the automatic behaviour continues to exist, and may lead to similar behaviour in the future. For this reason, rather than being completely acquitted, those whose criminal behaviour is unwilling due to an internal cause may receive a custodial or non-custodial supervision order under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

7.21 By contrast, it is generally considered that, as there is no underlying mental disorder in cases of sane automatism, the accused is unlikely to be a danger to society. The involuntary behaviour is considered to be an aberration. As such, if the prosecution cannot convince the jury that the accused was acting voluntarily at the time they committed the crime, he or she will be acquitted. In Case Study 11, the jury accepted that Craig's mental state of dissociation was caused by external pressures including the breakdown of his marriage. It did not result from some pre-existing internal cause. He was therefore acquitted.

7.22 One of the issues the Commission will be examining is whether a distinction between sane and insane automatism should be drawn in Victoria. Should the law differentiate between involuntary acts committed by a person whose mental state results from an internal cause and those whose mental state results from something external? Should the law distinguish between those whose mental impairment is temporary rather than prone to recur? Is it justifiable to detain people because there is a risk that they may offend again? If it is justifiable in relation to those who kill while in a state of insane automatism, should it also be possible to preventatively detain other people

235 *R v Falconer* (1990) 171 CLR 30. 'Sane automatism' is also referred to as 'non-insane automatism'.

236 *R v Hennesy* [1973] 1 QB 910; *Attorney-General (Northern Ireland)* [1963] AC 386, 412 (Lord Denning). The internal/external distinction has been criticised on the basis that it can lead to arbitrary results. For example, sleepwalking has been held to amount to sane automatism in Canada (*R v Parks* [1992] 2 SCR 871), but insane automatism in England (*R v Burgess* [1991] 2 WLR 1206); Bernadette McSherry, "Defining What is a 'Disease of the Mind': The Untenability of Current Legal Interpretations" (1993) 1 *Journal of Law and Medicine* 76.

who pose a significant risk of reoffending? If a distinction is to be drawn between sane and insane automatism, what kinds of impaired consciousness should fall within the category of insane automatism, with potentially more drastic consequences for the accused?²³⁷ How broad should the category be? Should people like Craig, who kill due to extraordinary external stress, fall within the scope of sane or insane automatism? Who should decide whether a particular case is one of sane or insane automatism? Should it be left to the jury, or decided by a panel of experts?

DIMINISHED RESPONSIBILITY

* CASE STUDY 11

Mr Santos and his wife, Ms Ramos, were separated.²³⁸ According to material placed before the sentencing judge, one day Mr Santos saw Ms Ramos in the car park of a shopping centre with another man, Mr Gibney. He asked Ms Ramos what her relationship with Mr Gibney was, and she told him they were just friends. Mr Santos then asked Mr Gibney what their relationship was, and Mr Gibney replied 'I don't have nothing to do with you guys, this is your problem'. Mr Santos punched Mr Gibney, who then tried to defend himself. While they were wrestling, Mr Santos produced a knife, and repeatedly stabbed Mr Gibney in the head and body. Even after Mr Gibney collapsed to the ground, Mr Santos followed him, still stabbing him whilst kneeling over him. He continued stabbing Mr Gibney until two police officers arrived.

Mr Santos was examined by two psychiatrists. They found that, as a result of a prior head injury, which had caused brain damage, Mr Santos had become anxious, irritable and obsessive. They also found that he was suffering depression at the time of the killing. They concluded that although he understood what he was doing, and could judge that his actions were wrong, these conditions led to him not being able to control his behaviour. On this basis, Mr Santos pleaded guilty to manslaughter on the basis of diminished responsibility. This was accepted by the prosecution, and Mr Santos was sentenced to seven years imprisonment.²³⁹

- 237 The consequences differ not only in terms of the potential imposition of a custodial or non-custodial supervision order, but also in terms of the burden of proof faced by the accused. In the case of sane automatism, it is the prosecution who must prove that the accused acted voluntarily. In the case of mental impairment, it is the accused who must prove that the defence applies.
- 238 As noted in n 205 above, where possible we have used given names in our case studies. The law report in this case, however, does not reveal Ms Ramos' given name.
- 239 The facts of this case study are based on *R v Santos* [2001] NSWSC 923.

7.23 In the past, a verdict of not guilty by virtue of insanity would lead to the accused being detained indefinitely. As a result, it would be rare for a lawyer to recommend that a client plead insanity. We saw in Chapter 4 that this led to some courts developing the partial excuse of ‘diminished responsibility’, to deal with those cases where the accused has suffered from some kind of abnormality of the mind that falls short of insanity. It was felt that people who kill as a result of such an abnormality should not be held fully criminally liable, nor should they be detained indefinitely. As an alternative, the possibility of reducing the charge of murder to manslaughter in such circumstances, with a finite punishment, emerged.

7.24 Although diminished responsibility never became part of Victorian law, it was made a defence by legislation in some other Australian jurisdictions. It is currently a defence in the Australian Capital Territory, New South Wales, the Northern Territory and Queensland.²⁴⁰ In these jurisdictions, it often arises in relation to homicides that occur in the context of sexual intimacy. For example, men with an underlying pathology such as depression or borderline personality disorders may argue that they could not control their behaviour after their partner left or threatened to leave. This was the situation in Case Study 12 above. Alternatively, women who kill their partners after a prolonged history of violence may also claim that their responsibility was diminished.

Elements of the Defence

7.25 Each State that has a defence of diminished responsibility expresses the test using slightly different terminology. There are, however, three common elements. The accused must prove:²⁴¹

- that he or she was suffering from an abnormality of mind;
- that the abnormality of mind arose from a specified cause; and
- that the abnormality of mind substantially affected the accused in a specified way.

240 *Crimes Act 1900* (ACT) s 14; *Crimes Act 1900* (NSW) s 23A; *Criminal Code* (NT) s 37; *Criminal Code* (Qld) s 304A. There is also a defence of diminished responsibility under s 13 of the *Defence Force Disciplinary Act 1982* (Cth).

241 The accused need not prove these beyond reasonable doubt, but simply on the balance of probabilities: *R v Purdy* [1982] 2 NSWLR 964; *Tumanako* (1992) 64 A Crim R 149, 158–60.

ABNORMALITY OF MIND

7.26 As with the term ‘mental impairment’,²⁴² there is no clear definition of the term ‘abnormality of mind’ in the legislation. It is clear, however, that it covers a broader range of mental states than ‘mental impairment’. It includes cognitive disorders, uncontrollable urges and extreme emotional states. So while, in Case Study 12, Mr Santos would not have been able to successfully argue the defence of mental impairment (due to the fact that he understood what he was doing, and knew that it was wrong), because he could not control his conduct, his actions fell within the scope of diminished responsibility.

SPECIFIED CAUSE

7.27 While the term ‘abnormality of mind’ might be quite broad, the scope of the defence is limited by the fact that the abnormality must arise from a specified cause. In most Australian jurisdictions, it must have arisen due to:

- a condition of arrested or retarded development of mind;
- an inherent cause; or
- disease or injury.²⁴³

7.28 In New South Wales, the limitation is that the abnormality of mind must have arisen from an ‘underlying condition’—a pre-existing mental or physiological condition, other than a condition of a transitory kind.²⁴⁴ This does not mean that the abnormality must be permanent—it is possible for an ‘abnormality of mind’ to be temporary.²⁴⁵ It must, however, be more than fleeting. So in Mr Santos’ case, although he may not always suffer from depression, it existed prior to the killing and it was not simply a passing state of mind.

242 See above para 7.7.

243 *Crimes Act 1900* (ACT) s 14(1); *Criminal Code* (NT) s 1; *Criminal Code* (Qld) s 304A.

244 *Crimes Act 1900* (NSW) s 23A(8).

245 *Tumanako* (1992) 64 A Crim R 149; *R v Whitworth* [1989] 1 Qd R 437.

EFFECT OF THE ABNORMALITY OF MIND

7.29 Simply showing that the accused suffered from an abnormality of mind that arose from one of the specified causes is not sufficient to reduce the crime from murder to manslaughter. It is also necessary to show that it substantially impaired the accused's capacity in some manner. In most Australian jurisdictions,²⁴⁶ it must have impaired the accused's capacity to:

- understand what he or she was doing;
- know or judge that he or she ought not to do the act; or
- control her or his actions.

Diminished Responsibility in Victoria

7.30 One of the issues to be investigated by the Commission is whether the defence of diminished responsibility should be introduced into Victoria.²⁴⁷ In looking at this issue, it will be necessary to carefully consider how such a defence would relate to other defences, such as mental impairment. In light of the changes to the way that a person found not guilty by virtue of mental impairment is sentenced—such that indefinite detention is not required—is there a need for the alternative defence of diminished responsibility? Is it appropriate to have a position on the spectrum of culpability that enables the jury to recognise a mixture of some blameworthiness and some grounds for excuse?

7.31 It will also be necessary for the Commission to examine the conceptual basis of any such defence. Is the defence really based on the notion that the accused was not responsible for the actions, or is it instead relying on the idea that, while they were responsible, for some reason the sentence should be reduced? If the defence is about responsibility, how is it different from the

246 In the Australian Capital Territory, the test is that the accused's 'mental responsibility' was substantially impaired.

247 We note that the former Law Reform Commission of Victoria recommended in 1990 that the defence not be introduced in this State: Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Report No 34 (1990), 53. Similarly, the Model Criminal Code Officers Committee has also stated that the practical difficulties associated with the defence led it to recommend that it not be introduced into the Model Criminal Code: Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, above n 29, 129. On the other hand, the New South Wales Law Reform Commission recommended that the defence be retained in that State, but with a reformulated test: New South Wales Law Reform Commission, *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper 31 (1993) and Report 82, above n 28.

defence of mental impairment? Would it be preferable to modify the defence of mental impairment to incorporate those areas which currently fall outside its scope, but which we believe should reduce criminal liability? If the defence is more about sentencing than responsibility, would it be more appropriate for such considerations to be taken into account by the judge at the sentencing stage?²⁴⁸

7.32 If the defence is to be introduced into Victoria, the Commission will need to determine exactly how it should be formulated. What types of cases would we want it to cover? Should we use the concept of ‘abnormality of mind’, or is it too vague?²⁴⁹ Does it allow those with personality disorders or an inability to control their conduct a defence, when they should be held fully responsible for their actions? Should such a defence be available to women who kill their violent partners, yet who cannot fit within the categories of provocation or self-defence? Is it appropriate to claim that such killings are the result of an ‘abnormality of mind’, or would it be better to instead create a new defence to cover such circumstances?

7.33 As part of this examination, medical questions will also arise. In addressing these questions, we will need to examine a number of issues. Should the type of conditions upon which the ‘abnormality’ is based be specified? If so, what should they be? What effect on the accused’s capacity do they need to have for the defence to be successfully used? Should it be a defence that a person like Mr Santos could not control his actions, even though he knew that what he was doing was wrong? How impaired does the capacity have to be? If it needs to be ‘substantially’ impaired, who should be making this decision? Should there be a panel of ‘experts’ who make a decision, as was suggested in relation to mental impairment,²⁵⁰ or should it be a matter for the jury? If a panel is to make the decision, what should be its powers? Should the accused still be able to raise the matter at trial, even if it has been rejected by the

248 Susanne Dell, ‘Diminished Responsibility Reconsidered’ (1982) *Criminal Law Review* 809, 814.

249 The term ‘abnormality of mind’ is not a technical medical term, and is often seen to be problematic due to confusion about what is meant by ‘mind’. The New South Wales Law Reform Commission recommended that the defence instead refer to an ‘abnormality of mental functioning arising from an underlying condition’, a definition that was reached with the assistance of mental health professionals: New South Wales Law Reform Commission, Report 82, above n 28, 51. This was rejected by the New South Wales legislature, however, who decided to retain the term ‘abnormality of mind’.

250 See above para 7.10; see also *Mental Health Act 1974* (Qld) ss 28D, 33(1)(b), 35A(b).

panel?²⁵¹ If it is left to the jury to decide, should it be a simple matter of determining whether it was impaired to a certain absolute degree, or should there be a moral evaluation as to whether the accused's capacity was so impaired that the crime should be reduced to manslaughter?²⁵² If so, what role should 'experts' be allowed to play?

INFANTICIDE

* CASE STUDY 12

Maryanne's childhood was marked by abuse and physical violence. At the age of 12, she was made a State ward and lived for some time in State-run institutions or in foster homes. From about the age of 15, she started experiencing auditory hallucinations and was subsequently diagnosed with severe depression. When she was 19, she gave birth to Samantha and when she was 20, to Chloe. The father of the two girls physically abused Maryanne, and at one point she fled to a women's refuge, then stayed with members of the Salvation Army before moving to a Housing Commission flat. Within three months of Chloe's birth, Maryanne began to experience more intense auditory hallucinations with the voices telling her that she was not a good mother and that Chloe did not love her. When Chloe was six months old, Maryanne put her hand over the baby's mouth and nose and held it there until the baby stopped breathing. Maryanne pleaded guilty to infanticide and was put on a good behaviour bond for four years.²⁵³

7.34 In Chapter 2 we saw that, in Polk's categorisation, killings in the context of family intimacy (excluding killings between spouses) account for approximately 10% of killings in Victoria. Most of these killings involve parents killing their children (or step-children). Alder and Polk note that this is the

251 This is the case in Queensland: *Mental Health Act 1974* (Qld) ss 43A(2), 43B(2).

252 See, eg, *Crimes Act 1900* (NSW) s 23A.

253 The facts of this case study are based on *R v Maryanne Jane Cooper* (Unreported, Supreme Court of New South Wales, Simpson J, available from Butterworths Unreported Judgements, 31 August 2001, BC200105225).

one form of homicide where the offender is as frequently a woman as a man.²⁵⁴ They found that the patterns of killing differ between female and male offenders. For example, neonaticides (killing of a child within the first 24 hours of birth) almost exclusively involve female offenders. On the other hand, where children die as a result of fatal physical assaults, the offender is more likely to be a man. Other circumstances in which children are killed include those cases in which the parent also kills, or attempts to kill, him or herself, or where, as in Case Study 13, the parent suffers from an exceptional psychiatric disturbance.

7.35 We saw in Chapter 4 that over time society's attitude towards a mother killing her child has changed. While at times it has been considered acceptable,²⁵⁵ at others it has been completely outlawed. Most recently, the partial excuse of infanticide has been developed. This defence has adopted a medical model, under which it is argued that a mother who kills her young child while in a disturbed mental state due to the effects of childbirth or lactation should not be held fully criminally responsible. Instead, she should be able to rely on the fact of her 'mental disorder' to reduce a charge of murder to infanticide, with a reduction of the maximum penalty to 10 years imprisonment. Alternatively, the prosecution may choose to charge such women with the offence of infanticide rather than murder, with the same 10 year penalty.

Elements of the Defence

7.36 For infanticide to be successful as a defence, it must be shown that:²⁵⁶

- the accused was the natural mother of the victim;
- the victim was less than 12 months old; and
- at the time of the killing, the accused was suffering from a disturbance of the mind resulting from not having recovered from the effects of birth, or from the effect of lactation consequent upon the victim's birth.

254 Adler and Polk, above n 69.

255 As noted in Chapter 4, this was partly due to the lack of effective methods of contraception.

256 *Crimes Act 1958* s 6(1).

7.37 We note that infanticide is unique in Victorian law, as it operates both as a defence and an offence. For example, in Case Study 13, the prosecution may have chosen to charge Maryanne with murder. In such a case, she could have argued at her trial that she was suffering from a disturbance of the mind due to childbirth, and if successful the jury could convict her of infanticide instead of murder. Alternatively, as happened in Maryanne's case, the prosecution could charge Maryanne with the offence of infanticide. In Maryanne's case, she pleaded guilty to the charge of infanticide, and was placed on a good behaviour bond.

DISTURBANCE OF THE MIND

7.38 In order to successfully use the defence of infanticide, the accused must show that she was suffering from a disturbance of the mind resulting from childbirth or due to lactation. We saw in Chapter 4 that this medical requirement arose due to the historical context in which the defence was created. The medical foundation of such a requirement has been widely criticised. It has been argued that there is no causal link between the effect of lactation and a psychiatric disturbance of the mind. The requirement for such a link between women's biology and criminal responsibility is also questioned.

7.39 One of the issues that the Commission will be examining is whether this medical requirement should be retained. If it is not retained, what should replace it? Should the defence be based on medical criteria at all? Does this lead to the unjustified exclusion of social, psychological and economic factors as a valid basis for a defence? For example, Alder and Polk found that women who kill their children and attempt to kill themselves were usually living difficult lives: 'violent spouses, financial difficulties, separation from spouses, a handicapped child, fears of the spouse sexually assaulting the child, and fears of the loss of custody of the child.'²⁵⁷ We can see this in the case of Maryanne—she had a history of violent abuse and financial insecurity. Should these kind of factors be taken into account in determining the availability of any such defence? By relying simply on the medical questions, to the exclusion of social factors, are we forcing mental health professionals to distort their diagnoses in order to conform with the requirements of the legislation?²⁵⁸

257 Adler and Polk, above n 69, 52.

258 Robyn Lansdowne, 'Infanticide: Psychiatrists in the Plea Bargaining Process' (1990) 16 *Monash University Law Review* 41, 54.

RELATIONSHIP WITH MENTAL IMPAIRMENT AND DIMINISHED RESPONSIBILITY

7.40 If the notion of a ‘disturbance of the mind’ is to be retained as the basis of such a defence, the Commission will need to examine the relationship of such a defence with other defences. If infanticide is seen as being excusable due to some kind of ‘mental disorder’, why should it not be part of the defence of mental impairment? Where would it make sense to draw a distinction between the two defences? The New South Wales Law Reform Commission suggested abolishing infanticide, on the basis that diminished responsibility be reformulated so that women who traditionally fell within the scope of infanticide would likely fall within the scope of that defence.²⁵⁹ Should Victoria follow a similar approach? What is the best way to conceptualise the distinction between mental impairment, diminished responsibility and infanticide?

7.41 At a broader level, the Commission will investigate whether infanticide should be retained as a defence at all.²⁶⁰ Does it reflect an out-dated and paternalistic view of women being in danger of ‘mental instability’ due to childbirth?²⁶¹ Does it imply that women are inherently weak and not responsible for their actions? Alternatively, is the presence of a gender-specific defence such as infanticide desirable? Does it act to recognise the particular difficulties that mothers may face following childbirth? How else should the social and psychological stresses of child-rearing be taken into account? Would its abolition lead to higher sentences for women in such circumstances, even if they fell within the scope of another defence such as diminished responsibility?

259 New South Wales Law Reform Commission, Report 83, above n 28, Recommendation 3.

260 As noted above, the New South Wales Law Reform Commission recommended in 1997 that infanticide be abolished: New South Wales Law Reform Commission, Report 83, above n 28, Recommendation 3. The Model Criminal Code Officers’ Committee has also recommended that there be no defence or special offence of infanticide: Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, above n 29, 139. However, the former Law Reform Commission of Victoria has previously recommended its retention: Law Reform Commission of Victoria, Report No 40, above n 27, Recommendation 27.

261 Bernadette McSherry, ‘The Return of the Raging Hormones Theory: Premenstrual Syndrome, Postpartum Disorders and Criminal Responsibility’ (1993) 15 *Sydney Law Review* 292.

NATURAL MOTHER

7.42 Under the current scheme, in order to use the defence of infanticide, the accused must be the natural mother of the deceased child. We have seen, however, that in over 50% of cases of child-killings, men are responsible, most commonly the step-father of the child. Often the reasons given for such killings are similar to those of natural mothers—uncontrollable crying, pent-up frustration with the child, difficult economic circumstances. If the test is changed in relation to mothers, and broadened beyond mere medical factors, should it also apply to fathers? Would this extend the test too far? What about women who adopt children, and step-mothers? The Commission will be examining the most appropriate scope for any such defence, in light of the data available on the issue.

AGE LIMIT

7.43 A final issue the Commission will need to investigate in relation to infanticide is the age limit. Under the current law, the child must be under 12 months old in order for the defence of infanticide to be available. This has been criticised as being an arbitrary limit. For example, if Maryanne had killed her eldest child, she could not have pleaded guilty to infanticide in relation to that killing, although she could in relation to killing Chloe. Does such a distinction make any sense? In light of the fact that over 40% of child homicides take place when the child is less than 12 months old, should this limit be retained?²⁶² On what grounds would another limit be drawn? Should it be a question of age at all, or simply one of the mental state of the accused at the time?

262 See above Graph 6, para 2.42.



Chapter 8

Duress, Necessity and Marital Coercion

INTRODUCTION

* CASE STUDY 13

Mark was a member of a motorcycle gang called the Coffin Cheaters. His wife, Jacqueline, met him when she was 17 and was 'enthralled' by his dominating personality. Mark assaulted her a couple of weeks after they met, and for the next 16 years subjected her to sexual abuse and beatings that included picking her up in a 'death hold' that would render her unconscious. Mark demanded she have sex with other men while he watched, and he forced her to have a tattoo on her back which said 'Property of Mark'.

Mark's involvement with the Coffin Cheaters led to him being away quite often. Jacqueline started having an affair with Michael. Mark found out about the affair and violently assaulted Jacqueline. He then tried to extort money from Michael, before turning up at Michael's work and assaulting him. Mark was jailed for these assaults. Jacqueline subsequently killed Michael by firing seven shots at him when he opened the front door of his house.

At Jacqueline's trial, a psychologist gave evidence that he believed that Mark had given Jacqueline an ultimatum to kill Michael, or else Mark would kill her. He believed that Jacqueline killed Michael out of fear for her own life. Jacqueline was convicted of murder and sentenced to 15 years jail.²⁶³

263 The facts of this case study were reported in the press: Neil Mercer, 'Kill or Be Killed', *The Age* (Melbourne), 18 December 2001, 11.

8.1 On rare occasions, a person may claim that they were forced into killing because of some kind of external pressure. For example, as was argued in Case Study 14, the accused's own life may have been threatened if she hadn't taken another person's life. Alternatively, an accused may feel it to be necessary to kill in the circumstances, to avoid some greater loss. For example, if two people stranded at sea, with no supply of food, kill a third person and eat him or her in order to survive, they may claim it was necessary in order to avoid all three of them dying.²⁶⁴

8.2 At the moment, duress is a complete defence to any criminal offence except murder.²⁶⁵ That is, if someone can show that they committed any crime, except murder, under a threat of physical harm to her or himself or others, they will be acquitted. It is believed that in such circumstances it was justified for the accused to act in the way they did, and so they should not be held criminally responsible. Similarly, in Victoria, 'marital coercion' is a statutory defence enabling a woman to have a complete defence to an offence other than treason or murder, where her action was due to coercion by a man to whom she was then married.²⁶⁶ This is a gender specific subset of duress, which relies on a similar justification. Necessity is also a complete defence to any crime other than murder: a person who commits a crime because of an extraordinary emergency will be found not guilty.

8.3 None of these defences apply in the case of murder. The usual justification offered for this is that a person of ordinary 'firmness of mind' would always choose to sacrifice their own life rather than kill an innocent person.²⁶⁷ So in Case Study 14, it would be argued that Jacqueline should have been more willing to die than to kill Michael. Since she chose to kill Michael rather than die herself, she should be held criminally responsible. As seen in Case Study 14, she was convicted of murder.

8.4 Although such circumstances do not arise often, it is necessary for the Commission to consider the outcomes of such cases. Should a person be considered a murderer if they were coerced into the killing, or did so because of an extraordinary emergency?

264 See, eg, *R v Dudley and Stevens* (1884) 14 QBD 273.

265 *R v Harding* [1976] VR 129. There may also not be a defence to attempted murder: *R v Gotts* [1992] 2 AC 412.

266 *Crimes Act 1958* s 336(2).

267 See, eg, *Abbott* (1977) AC 755, 764–5 (Lord Salmon). On this point, see Kenneth J Arenson, above n 110.

ELEMENTS OF THE DEFENCES

Duress

8.5 Duress is a common law defence; it is not defined in legislation. It has a number of elements. The accused must have been required to commit the crime she or he has been charged with in all of the following circumstances.²⁶⁸

- When the accused was under a threat that death or grievous bodily harm would be inflicted upon a human being if he or she failed to do the act.
- Where the circumstances were such that a person of ordinary firmness would have been likely to yield to the threat in the way the accused did.
- Where the threat was present and continuing, imminent and impending.
- Where the accused reasonably apprehended that the threat would be carried out.
- Where the threat induced the person to commit the crime.
- Where the accused did not expose him or herself to the threat by their own volition.
- Where the accused had no means to safely prevent the execution of the threat.

Necessity

8.6 Like duress, necessity is not defined in legislation. There are three elements to the defence.²⁶⁹

- The crime must have been committed for the sole purpose of protecting the accused (or someone he or she was obliged to protect) from some form of irreparable harm.
- The accused must have honestly believed, on reasonable grounds, that she or he (or the person they were protecting) was placed in a position of imminent danger.

268 *R v Hurley and Murray* [1967] VR 526.

269 *R v Loughnan* [1981] VR 443. See also Kenneth J Arenson, above n 110.

- The crime committed must be no more than a reasonable person in like circumstances would have considered as necessary to avert the danger.

Marital Coercion

8.7 As noted above, in Victoria there is a statutory defence of marital coercion.²⁷⁰ This provides that a woman is to be acquitted of an offence (other than treason or murder) where her action was due to coercion by a man to whom she was then married. ‘Coercion’ is defined as pressure, whether in the form of a threat or another form that is ‘sufficient to cause a woman of ordinary good character and normal firmness of mind, placed in the circumstances in which the woman was placed, to conduct herself in the manner charged’.²⁷¹

APPLICATION TO MURDER

8.8 The Commission will be examining whether duress, necessity or marital coercion should be extended in scope, so that they apply to murder.²⁷² Relevant policy questions that will need to be examined include: is it realistic to require a person to choose to die, or allow a loved one to die, rather than commit murder? Should people who kill in such circumstances be criminally liable? How does such a harsh standard of conduct fit with the ‘concession to human frailty’ made by the provocation defence? Would it be too lenient to allow such a defence in the case of murder? Should human life be preserved at all costs? If we allow the use of such defences in the case of murder, how do we prevent people succumbing too easily to threats of violence? Are the requirements of the tests for necessity, duress or marital coercion sufficient to ensure that any such test is appropriately restricted? Is it appropriate to have a gender-specific defence such as marital coercion? How should any defence of duress or necessity be formulated?²⁷³

270 *Crimes Act 1958* s 336(2).

271 *Crimes Act 1958* s 336(3).

272 We note that the Criminal Law Officers Committee recommended in 1992 that duress and necessity should be defences to all criminal offences: Criminal Law Officers Committee of Attorneys-General, above n 30, 65. The former Law Reform Commission of Victoria also recommended that duress and necessity should be available on murder charges: Law Reform Commission of Victoria, Report No 40, above n 27, Recommendation 31.

273 For one possible approach see *Criminal Code Act 1995* (Cth) s 10.2 for the model defence of duress, and s 10.3 for the model defence of necessity.

Chapter 9

Prosecution Outcomes

INTRODUCTION

9.1 In Chapter 2 we examine the data that is available on homicides in Victoria, focusing on the contexts in which killings take place. In Chapters 3–8 we explore the relevant law in the area, focussing on the defences that are available and the ways in which they can be used. In this chapter we investigate the application of the existing legal framework to the incidents of homicides that take place. How often are these defences successful? In what contexts are they most likely to be successful? What sentences are being imposed? It is only by answering such questions that we can properly understand how the law is working in practice, and determine whether there is need for change.

9.2 The best way to determine the answers to these questions is to examine data relating to homicide prosecutions and sentencing. Unfortunately, there have been very few qualitative studies of homicide prosecutions in Australia, and none that have been conducted recently. The two main studies in the area are:

- A study conducted by the former Law Reform Commission of Victoria (LRCV).²⁷⁴ This study examined all homicide prosecutions in Victoria between 1981–7 (a total of 302 cases). It involved an examination of files compiled by the office of the Victorian Director of Public Prosecutions.
- A study conducted by the Judicial Commission of New South Wales (JCNSW).²⁷⁵ In contrast to the LRCV study, which examined all homicide prosecutions, the JCNSW study only examined sentenced homicides. That is, it only included cases in which the defendant was convicted of murder, manslaughter or infanticide. It did not

274 Law Reform Commission of Victoria, Appendix 6, Report No 40, above n 31.

275 Donnelly et al, above n 32.

include any data on cases in which the defendant was acquitted (for example, on the grounds of self-defence). The study investigated sentenced homicides in New South Wales between 1990–3 (a total of 256 cases). It involved an examination of files compiled by the office of the New South Wales Director of Public Prosecutions as well as court files.

9.3 In this chapter we mainly focus on the study conducted by the LRCV,²⁷⁶ because it covers both the successful and unsuccessful use of defences to homicide, and because it is a Victorian study.²⁷⁷ We emphasise, however, that the LRCV study is based on data which is up to 20 years old and must therefore be regarded with some caution. As has been discussed, since the time the study was undertaken, the defence of insanity has been replaced by the defence of mental impairment,²⁷⁸ the common law principles governing the other defences have changed considerably and the penalty for murder has become discretionary.²⁷⁹

9.4 As in Chapter 2, this chapter focuses on gender differences in homicide prosecutions. As we noted in Chapter 2, other variables (such as socio-economic status and ethnicity) are also likely to be significant. We have placed greater emphasis on gender than on these other variables because less data is available on them, or the data that is available is unreliable.²⁸⁰

9.5 At this stage, we have not conducted any data collection of our own. Given the lack of available data, and the age of the data that is available, we believe that it is important to conduct a study of homicide prosecutions. We intend to undertake such a study in the next stage of this reference.

276 Unless otherwise indicated, all of the figures in this chapter are based on data from the Law Reform Commission of Victoria study.

277 The one exception is in relation to the defence of diminished responsibility. As noted in Chapter 7, this is not a defence in Victoria. It is therefore necessary to use data from the New South Wales study.

278 See above para 4.15.

279 See above para 4.3.

280 See above paras 2.3–5.

OVERVIEW OF HOMICIDE PROSECUTIONS

9.6 We saw in Chapter 3 that it is the police who charge people whom they suspect have committed homicide. It will be up to the police to determine what to charge people with: murder, manslaughter or infanticide.²⁸¹

9.7 Once the police have charged a person, committal proceedings are held to decide whether or not there is sufficient evidence for the person to be put on trial. At the end of the committal proceedings, it is up to the Director of Public Prosecutions (DPP) or a Crown Prosecutor to decide on what grounds the person should stand trial. Often this will be the offence charged by the police, but the DPP and Crown Prosecutor are able to decide that the person should stand trial for a different offence.

9.8 Murder was by far the most common charge used by police in the homicide prosecutions examined by the LRCV. The police charged the accused with murder in 75% of the cases examined by the LRCV. Manslaughter was used in a much smaller proportion (12%) of the prosecutions. The police did not file any infanticide charges during the period studied.²⁸²

9.9 These proportions changed slightly following the committal stage. The proportion of murder cases dropped to 65% of all homicide cases, and manslaughter cases increased to 28%. In addition, in six cases (2%) the prosecuting authorities decided to proceed on the basis of infanticide, rather than murder or manslaughter.²⁸³

9.10 The LRCV study showed that very few defendants facing trial for murder pleaded guilty, whereas a significant proportion of those facing trial for manslaughter pleaded guilty and all of the defendants facing trial for infanticide pleaded guilty.²⁸⁴

281 The police could also charge the accused with a number of other offences, including culpable driving causing death. However, as the focus of this Paper has been on murder, manslaughter and infanticide, they form the basis of our investigation.

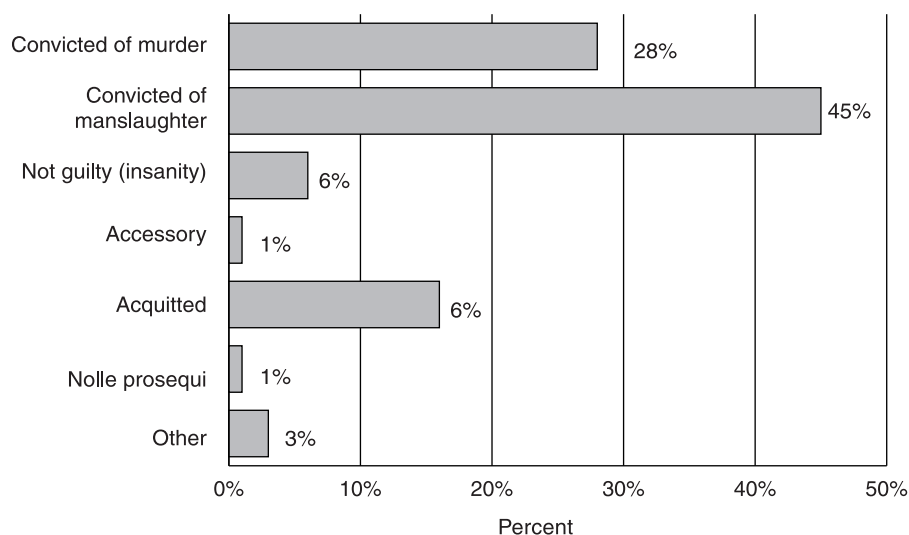
282 Law Reform Commission of Victoria, Appendix 6, Report No 40, above n 31, 59–60.

283 Ibid 60–1.

284 The low number of defendants who pleaded guilty to murder is likely to be because, for part of the period studied, murder carried a mandatory sentence of life imprisonment. When murder carried a mandatory life sentence, there was no incentive for a defendant to plead guilty. Now that the sentence for murder is discretionary, there is an incentive for a defendant to plead guilty because a plea of guilty may be taken into account as a mitigating factor and could lead to a lower sentence being imposed. The sentences for manslaughter and infanticide were discretionary throughout the period of the study.

9.11 Overall, almost three quarters (73%) of murder prosecutions resulted in the defendant being convicted of either murder or manslaughter (see Graph 7 below). The most common outcome was for the defendant to be convicted of manslaughter. These accounted for 45% of all murder prosecutions.²⁸⁵ The defendant was convicted of murder in approximately one quarter (28%) of murder prosecutions. Only a small number (6%) were found not guilty on the basis of what was then the ‘insanity’ defence.²⁸⁶ Approximately one sixth (16%) of murder prosecutions resulted in the defendant being entirely acquitted.²⁸⁷

GRAPH 7: OUTCOMES OF MURDER PROSECUTIONS²⁸⁸



285 This includes cases in which the defendant pleaded guilty to manslaughter, whether before or during the trial.

286 The current defence of mental impairment was introduced after the LRCV study had been completed.

287 We can see in Graph 7 that 1% of cases resulted in the prosecutors entering a ‘nolle prosequi’. A nolle prosequi is an undertaking, made by the Crown Prosecutor or the DPP, to not continue with the prosecution.

288 Based on data from Law Reform Commission of Victoria, Appendix 6, Report No 40, above n 31, 68, Table 47.

9.12 The pattern for manslaughter prosecutions was similar. The majority (70%) of those prosecutions resulted in a conviction. Only a quarter (25%) of manslaughter prosecutions resulted in the defendant being entirely acquitted.²⁸⁹

SELF DEFENCE AND EXCESSIVE SELF-DEFENCE

9.13 The figures outlined above show that in 16% of murder cases, and 25% of manslaughter cases, the defendant was acquitted. While some of the acquittals would have been due to a successful claim of self-defence (which gives rise to complete acquittal), others would have been due to factors such as the jury not being convinced that it was the accused who had committed the crime (for example, if the defendant successfully raises an alibi).

9.14 In fact, the LRCV found that self-defence was only argued in 37 murder prosecutions (18%). The outcomes in the cases in which self-defence was argued are shown in Table 2.

TABLE 2: OUTCOMES OF CASES IN WHICH SELF-DEFENCE WAS RAISED²⁹⁰

| | |
|-------------------------------|----|
| Convicted of murder | 8 |
| Convicted of manslaughter | 17 |
| Acquitted | 11 |
| Nolle prosequi ²⁹¹ | 1 |

289 Ibid. Note that we have taken ‘Guilty plea to murder’ where it appears for the second time in Table 47 to mean ‘Guilty plea to manslaughter’.

290 Based on data from Law Reform Commission of Victoria, Appendix 6, Report No 40, above n 31, 80–1, Table 58. The figures for ‘acquitted’, ‘acquitted—self defence’ and ‘directed acquittal’ in Table 58 have been consolidated. The LRCV also noted that self-defence was argued in 29 manslaughter cases; however, its report does not say what the outcomes were in those cases: at 75.

291 See above n 287.

9.15 It appears that during the period studied, the complete defence of self-defence was rarely successful. Table 2 shows that the defendant was acquitted in only approximately one third of the 36 cases in which self-defence was argued. Because the jury is not required to give reasons for why it reached a verdict of acquittal, it is usually not possible to know whether an acquittal was based on self-defence or on other grounds. According to the LRCV study, self-defence was known to be the basis for the defendant's acquittal in only three of the 11 cases in which self-defence was raised and the defendant was acquitted. This means that self-defence was completely successful in at least 1% and at most 5% of murder prosecutions.

9.16 The most common result in the murder prosecutions where self-defence was argued was for the defendant to be convicted of manslaughter. This outcome was possible because, during the period covered by the LRCV study (1981–7), excessive self defence was available as a defence to murder. As noted in Chapter 5,²⁹² this former defence, if successful, had the effect of reducing the crime from murder to manslaughter. Excessive self-defence was abolished in 1987. If the cases studied by the LRCV had been tried under current Victorian law, where there is no partial excuse of excessive self-defence, it is possible that those 17 convictions for manslaughter would have become murder convictions. In our study of homicide prosecutions, we will be investigating whether the abolition of excessive self-defence has had an impact on the use of self-defence and the outcomes of those cases in which it has been raised.

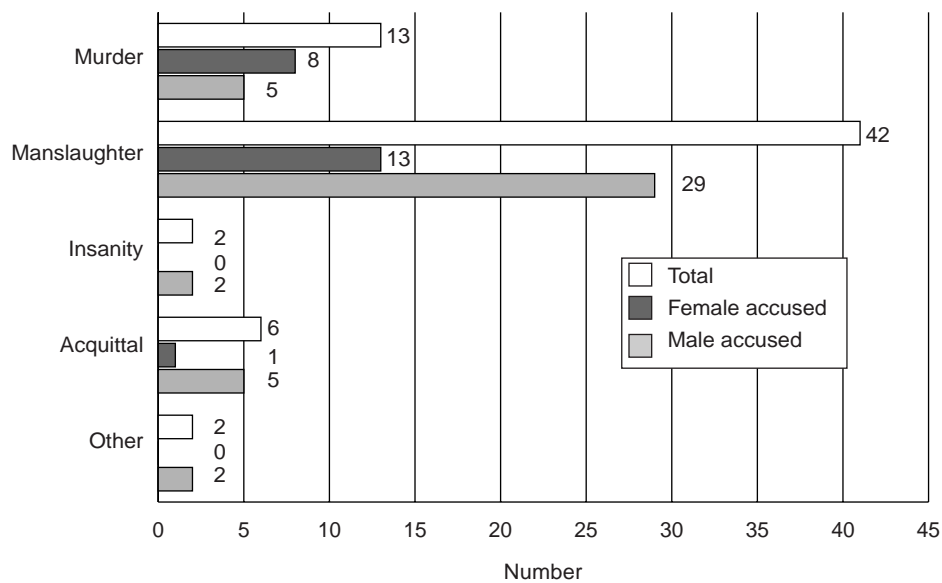
9.17 The LRCV study did not analyse the cases in which self-defence was raised according to the gender of the accused. We intend to undertake such an analysis in the next stage of our project. This will help us determine whether the current defence is biased against women, as has been suggested. By looking at the kinds of cases in which self-defence is being used, both successfully and unsuccessfully, we will be better equipped to determine the most appropriate scope for any such defence.

292 See above paras 5.9–10.

PROVOCATION

9.18 Provocation was raised as an issue in a much higher number of cases than self-defence. It was argued in almost one quarter of the cases studied (23%, or 75 cases).²⁹³ Most of those cases involved a man killing another man (43 cases) or a man killing a woman (22 cases). Nine involved a woman killing a man and one involved a woman killing another woman. Graphs 8 and 9 examine the outcomes in these cases according to the gender of the defendant and the deceased. Graph 8 looks at those cases with male defendants and Graph 9 at those with female defendants.

GRAPH 8: PROVOCATION CASES, MALE DEFENDANTS²⁹⁴



293 When provocation was raised, it was not always the only issue. In some cases, for example, it was raised alongside self-defence, or the defendant’s lawyers also sought to raise doubts about whether the killing was intentional.

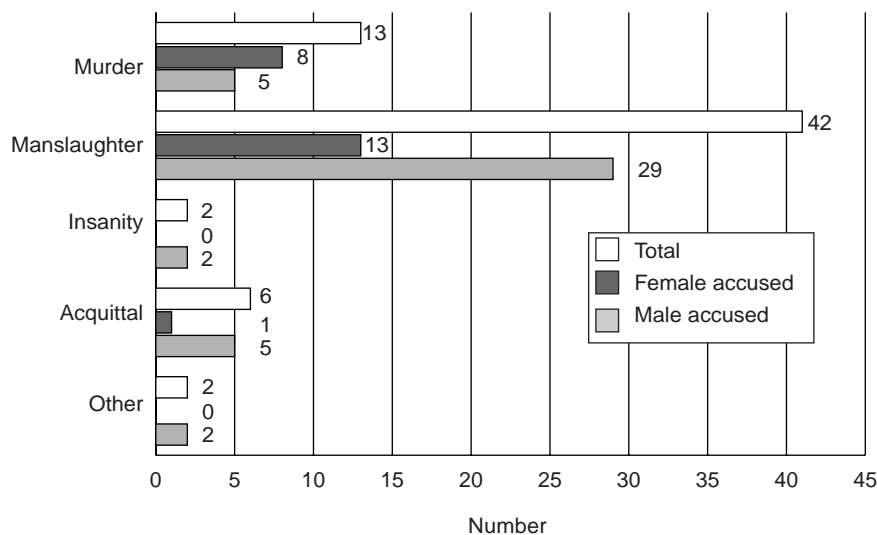
294 Based on data from Law Reform Commission of Victoria, Appendix 6, Report No 40, above n 31, 77, Table 55.

9.19 We can see from Graph 8 that male defendants were frequently successful in using the defence of provocation. Forty-two cases resulted in the defendant being found guilty of manslaughter, as opposed to only 13 cases in which the defendant was found guilty of murder. However, we can see that the success rate differs depending on whether the deceased was male or female. Of the 43 cases in which the deceased was another man, many more resulted in a conviction for manslaughter (67%, or 29 cases) than for murder (12%, or 5 cases). By contrast, of the 22 cases in which the deceased was female, the number convicted for manslaughter (59%, or 13 cases) was much closer to the number convicted for murder (36%, or 8 cases).

9.20 This suggests that during the period of the LRCV study:

- men were more likely to succeed in using the defence of provocation when they killed another man than when they killed a woman; and
- in either type of case, the defence of provocation was more likely to be successful than unsuccessful.

GRAPH 9: PROVOCATION CASES, FEMALE DEFENDANTS²⁹⁵



²⁹⁵ Based on data from Law Reform Commission of Victoria, Appendix 6, Report No 40, above n 31, 76, Table 54.

9.21 The story was markedly different when it was a female defendant who raised the issue of provocation. None of the female defendants in cases where provocation was raised as an issue were convicted of murder. This might suggest that female defendants are more successful in using the defence of provocation than male defendants; however, the number of cases involving a female defendant was very small, so we need to be careful in drawing any conclusions from the outcomes.

9.22 We will be gathering similar data to that outlined above in the next stage of our project, to see whether the situation has remained the same. We will be investigating how often provocation is raised, and in what contexts (eg confrontational homicides/homicides in the context of sexual intimacy). We will be looking to see whether the outcomes differ according to the context of the killing, and the gender of the person raising the defence. This data will help us answer some of the questions raised in Chapter 6, such as whether the defence of provocation is gender biased, and whether it should be retained, reformulated or abolished.

DIMINISHED RESPONSIBILITY

9.23 As noted in Chapter 7, there is currently no defence of diminished responsibility in Victoria. It is therefore not discussed in the LRCV homicide prosecutions study. However, the defence does exist in a number of other Australian jurisdictions, including New South Wales (NSW). As such, it forms part of the study conducted by the Judicial Commission of New South Wales (JCNSW) in its review of sentenced homicides in NSW.²⁹⁶

9.24 Diminished responsibility is a partial excuse to murder. That is, it acts to reduce murder to manslaughter. This is the same effect as that of the partial excuse of provocation. In fact, in many cases in NSW both of these defences are used together—the defendant’s lawyer will argue that either the defendant had lost self-control (provocation) or that they were suffering from an ‘abnormality of the mind’ (diminished responsibility) at the time of the killing. In Victoria, defendants in such cases are only able to argue a claim of provocation.

296 See above n 32.

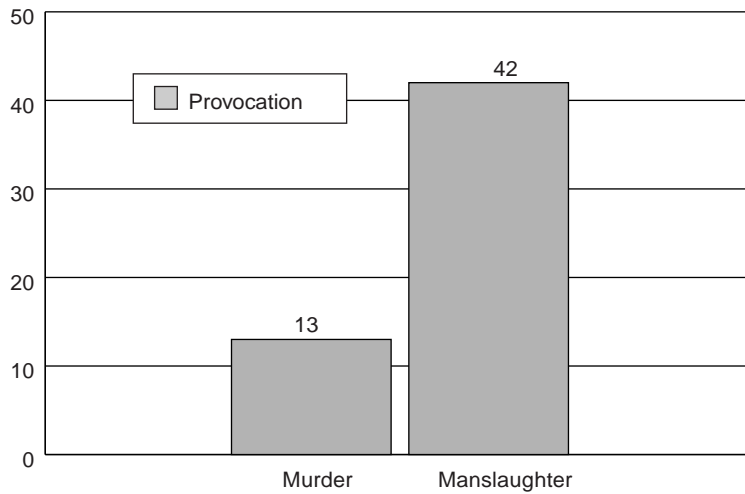
9.25 Given the close relationship between the defences, it would be interesting to see how they work together in practice. How often is diminished responsibility raised at the same time as provocation and how often are they raised separately? Does the existence of the defence of diminished responsibility in NSW mean that provocation is raised less often than in Victoria? In NSW, are more people convicted of manslaughter, rather than murder, due to the existence of the diminished responsibility defence?

9.26 While the JCNSW study, in combination with the LRCV study, can help answer some of these questions, it is not possible to answer them all. This is because the JCNSW study looked only at sentenced homicides. This means that it only looked at cases in which the outcome was murder or manslaughter. It gives no indication of how often provocation or diminished responsibility are raised as a proportion of all homicide prosecutions. By contrast, the LRCV study looked at all homicide prosecutions. These included not only cases in which the outcome was murder or manslaughter, but also cases in which the defendant was acquitted or a *nolle prosequi*²⁹⁷ was entered. In relation to cases where provocation was raised as an issue, almost one fifth (19%) had one of these other outcomes (ie an outcome that was neither murder nor manslaughter).

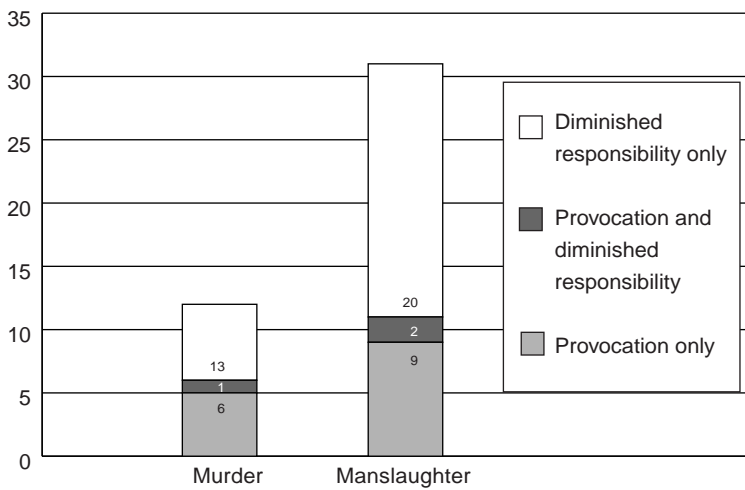
9.27 This means that we cannot compare the JCNSW study with the LRCV study to see whether partial excuses are raised more or less frequently in NSW than in Victoria, or to see whether the availability of the defence of diminished responsibility affects the frequency with which provocation is used. Even so, we can compare the 'success rate' of partial excuses in NSW and Victoria in reducing murder to manslaughter, by looking only at those cases in which there was a conviction. We do this in Graphs 10–13 below. Graphs 10 and 11 look at outcomes of cases in which male defendants raised partial excuses, while Graphs 12 and 13 examine cases in which female defendants raised partial excuses.

297 See above n 287.

GRAPH 10: PROVOCATION—MALE DEFENDANTS, VICTORIA²⁹⁸



GRAPH 11: PARTIAL EXCUSES—MALE DEFENDANTS, NSW²⁹⁹



298 Based on data from Law Reform Commission of Victoria, Appendix 6, Report No 40, above n 31, 77, Table 55.

299 Based on data from Donnelly et al, above n 32, 59, Table 3.

9.28 Graphs 10 and 11 indicate that:

- in both the NSW and Victorian studies, male defendants who raised provocation as a defence were more likely to be successful (in the sense of being convicted of manslaughter rather than murder) than unsuccessful;
- the proportion of male defendants who raised provocation, and who were convicted of manslaughter rather than murder, was substantially higher in the Victorian study than in the NSW study; and
- in the NSW study, defendants who raised any partial excuse, or any combination of partial excuses, were more likely to be successful than unsuccessful.

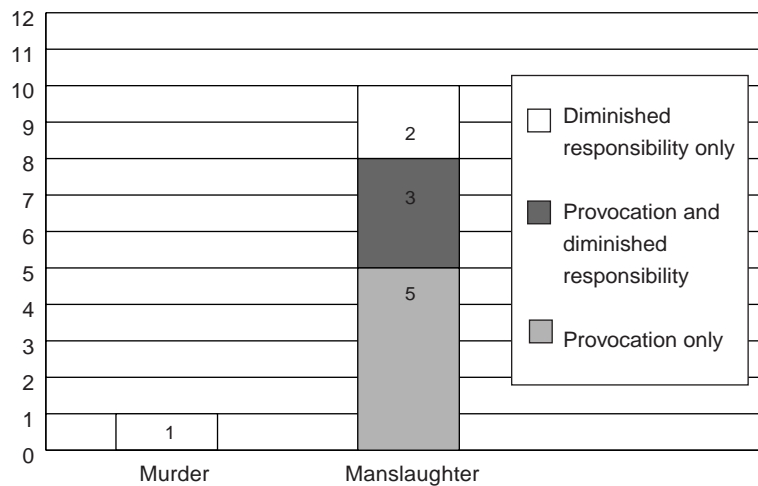
9.29 We should note that the number of cases in which partial excuses were raised by male defendants in either study was quite small, so we need to exercise care when drawing any conclusions from these outcomes.

GRAPH 12: PROVOCATION—FEMALE DEFENDANTS, VICTORIA³⁰⁰



³⁰⁰ Based on data from Law Reform Commission of Victoria, Appendix 6, Report No 40, above n 31, 76, Table 54.

GRAPH 13: PARTIAL EXCUSES—FEMALE DEFENDANTS, NSW³⁰¹



9.30 Graphs 12 and 13 indicate that in both the NSW and the Victorian study, female defendants who raised a partial excuse (whether provocation, diminished responsibility or a combination of the two) were generally successful, in the sense of being convicted of manslaughter rather than murder. The number of those convicted of murder was far lower than for male defendants who raised such partial excuses.

9.31 Of course, we should emphasise that the number of cases in which partial defences were raised by female defendants in either study was even smaller than the number involving male defendants, so again we need to be careful when drawing any conclusions from these outcomes.

OTHER DEFENCES

9.32 The most common other defence raised in the period of the LRCV study was insanity. Insanity was raised as an issue in 8% of cases studied by the LRCV, and was successful in approximately half of those cases. ‘Mental disorder less than insanity’ was raised in 10% of the cases studied.³⁰² We saw in Chapter

301 Based on data from Donnelly et al, above n 32, 59, Table 3.
 302 While ‘mental disorder less than insanity’ was not a defence at the time of their study, the LRCV noted that it may have been relevant to the question of intent: Law Reform Commission of Victoria, Appendix 6, Report No 40, above n 31, 81.

7 that the defence of insanity was replaced in 1997 by the defence of mental impairment.³⁰³ One of the issues the Commission will be examining is whether these changes have had an impact on the number of cases in which such a defence is raised, and the success of the new defence.

9.33 We saw above³⁰⁴ that infanticide was never charged as an offence in the period of the LRCV study, although in a small number of matters the prosecution proceeded with infanticide after the committal proceedings. In each of these matters, the defendants pleaded guilty, so there was no trial.³⁰⁵ The LRCV report does not indicate whether infanticide was raised as a defence in any of the cases in its study.

9.34 The defence of duress was raised in only 1% of cases studied by the LRCV.³⁰⁶ The LRCV study does not record the outcome of cases in which duress was raised. The defence of necessity was not raised in any of the prosecutions studied by the LRCV.³⁰⁷

9.35 We can see that each of these defences is rarely used. Although it is important to ensure that the law in these areas is appropriate, given the rarity of use they will not be the main focus of our investigations.

SENTENCING

9.36 We saw in Chapter 3 that, once a defendant has been found guilty, a sentencing hearing takes place. The sentencing judge must take into account a range of considerations when formulating a sentence.³⁰⁸ These considerations include the nature and circumstances of the offence (for example, whether it was spontaneous or premeditated, the motive (if any) for the killing, etc), as well as factors that are personal to the offender (such as the presence or absence of remorse, any prior history of violence, etc).

9.37 Because of this range of considerations, some care needs to be taken when comparing different sentences. It is difficult to directly compare any one

303 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

304 See above para 9.8.

305 Law Reform Commission of Victoria, Appendix 6, Report No 40, above n 31, 65.

306 Ibid 81.

307 Ibid.

308 See above paras 3.17–20.

sentence with another, because each case will have its own particular circumstances. Nevertheless, it is possible to identify some general patterns in the sentencing of homicides. We will also be conducting a more detailed examination of sentencing patterns during the next stage of the reference.

Murder

9.38 Since 1985, sentencing for murder in Victoria has been discretionary, with a maximum penalty of life imprisonment. In this section we examine sentences imposed between 1986–96, when the Victorian Department of Justice ceased publishing sentencing statistics for the Supreme Court.

9.39 During the period studied, sentences of imprisonment for life (rather than for a fixed term of years) were relatively uncommon. Between 1986–96, there were 240 sentences for murder. Life imprisonment was imposed in approximately one fifth of these cases (21%). In cases where a term of years was imposed, the average total effective sentence³⁰⁹ was approximately 16 years. The maximum was 30 years and the minimum was 6 years.³¹⁰

9.40 When a court imposes a sentence, it can fix a non-parole period. This means that at the end of the non-parole period, the offender can apply to the Parole Board to be released back into the community, subject to certain conditions. In deciding whether or not to release the offender, the Parole Board considers a range of factors, including the offender's behaviour while in prison. Non-parole periods can be fixed for people who are sentenced to life imprisonment, as well as people sentenced to a term of years. It is rare for an offender to be sentenced to life imprisonment with no non-parole period.

309 A person can be charged with more than one offence. If a person is being sentenced for more than one separate offence, the sentencing judge must impose a distinct sentence for each separate offence. For example, if a person is found guilty of murdering two people, he or she will be sentenced for two separate offences of murder. The offender might receive two separate sentences of 20 years imprisonment for each of those offences. The sentences would not normally be served cumulatively (one after the other, with the offender serving 40 years in prison): normally there would be an order for at least partial concurrency (in other words, at least part of the two sentences would be served at the same time). The total effective sentence takes account of multiple offences and any orders for cumulation or concurrency. In the example given, the sentencing judge might order that 10 years of the second murder sentence be served cumulatively on the first sentence, so that the total effective sentence would be 30 years. The judge would then decide whether or not to set a non-parole period in relation to the total effective sentence.

310 Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (1999), 880, Table 12.205. Table 12.205 lists the median total effective sentence for each year from 1986–96. The average of those figures is approximately 16 years.

9.41 Offenders who receive sentences at the top of the range for murder (approximately 20 years to life) include³¹¹ those convicted of terrorist-style killings (such as the bombing of the Russell Street Police Headquarters)³¹² or mass killings (such as the ‘Hoddle Street massacre’).³¹³ They also include gangland-style conflict resolution killings,³¹⁴ particularly sadistic killings³¹⁵ or killings associated with other offences such as sexual assault.³¹⁶

Offender

The term offender is used to refer to a person who has been found guilty of a crime.

9.42 ‘Confrontational’ murders of the sort described in Chapter 2 typically result in sentences that fall in the middle range of penalties for murder (approximately 12–18 years).³¹⁷ In many of these cases, defences such as self-defence or provocation will have been raised unsuccessfully.

9.43 It is difficult to generalise about sentences for murders that take place in the context of sexual intimacy. The courts have frequently emphasised that ‘domestic’ murders are not less worthy of punishment than the killing of a stranger,³¹⁸ however, in many of these cases there are factors such as a lack of prior convictions, the absence of premeditation and a loss of self-control, a plea of guilty and co-operation with the authorities, all of which can lead to lower sentences than for other types of murder where these factors are less common.³¹⁹

9.44 The Victorian Court of Criminal Appeal has suggested that it would be unlikely to consider excessive a sentence in the region of 16-17 years with a non-parole period of 11-12 years for a case in which a man kills his wife and the defence of provocation has failed, particularly if there is evidence of previous violence by the man against his wife.³²⁰

311 A number of these examples are taken from *ibid*, 881–3.

312 *Taylor and Minogue* (Unreported, Supreme Court of Victoria, Young CJ, Gray and McDonald JJ, 22 June 1989). The principal offender received a life sentence with no non-parole period.

313 *Knight* [1989] VR 705: life sentence with 27 years non-parole period.

314 *Pollitt* (Unreported, Supreme Court of Victoria—Court of Criminal Appeal, Crockett, O’Byrne and Cummins JJ, 23 November 1990): life sentence with 18 year non-parole period.

315 *Beckett* [1998] VSCA 148: life sentence with 35 year non-parole period.

316 *Lowe* [1997] 2 VR 465: life sentence with no non-parole period.

317 An example is *Al* (Unreported, Supreme Court of Victoria—Court of Criminal Appeal, Crockett, McGarvie and Phillips JJ, 23 November 1990): 16 years, 4 months, with an 11 years, 4 months non-parole period.

318 See, for example, *Hanley* (Unreported, Supreme Court of Victoria, Marks, Southwell and Harper JJ, 9 March 1993).

319 Richard Fox and Arie Freiberg, above n 310, 880.

320 *Hanley* (Unreported, Supreme Court of Victoria—Court of Criminal Appeal, 9 March 1993).

Manslaughter

9.45 The maximum penalty for manslaughter is currently 20 years imprisonment. Prior to 1997, it was 15 years.

9.46 Sentences imposed for manslaughter cover a very wide range—from non-custodial sentences such as a community based order, to imprisonment for 10 years. Between 1986–96, the average total effective custodial sentence for manslaughter was approximately 5 years imprisonment.³²¹

9.47 It is difficult to identify distinct sentencing patterns for manslaughter, particularly in relation to confrontational homicides where provocation has been raised. In part this is because in many cases the possibility of convicting the defendant of manslaughter is put to the jury on two bases—either as provocation, if the jury is satisfied that the killing was intentional or reckless; or as an unlawful and dangerous act, if the jury is not satisfied that the killing was intentional or reckless.³²² A conviction for unlawful and dangerous act manslaughter will usually result in a lower sentence than a conviction for manslaughter based on provocation.³²³ Therefore, when the jury's verdict is manslaughter, the sentencing judge must decide whether to characterise the case as one based on provocation or as one based on an unlawful and dangerous act.³²⁴ Many confrontational homicides where provocation is raised on the facts are sentenced on the basis of unlawful and dangerous act manslaughter.³²⁵

9.48 Sentences at the higher end of the range for manslaughter have been imposed in relation to some homicides in the context of sexual intimacy, where provocation has been successfully argued in the context of jealousy, possessiveness or frustration.³²⁶ There have also been similar cases which have resulted in sentences in the middle range for manslaughter.³²⁷

321 Fox and Freiberg, above n 310, 880, Table 12.215(b). Table 12.215(b) lists the median total effective sentence for each year from 1986–96. The average of those figures is approximately 5 years.

322 See above para 6.19.

323 *Deniz* [2001] VSC 36, para 15.

324 As noted above, one of the issues the Commission will be examining is whether it is desirable to require the jury to specify the grounds for its decision: see above paras 5.13–14.

325 Examples are *Deniz* [2001] VSC 36: 8 years with a 6 year non-parole period; *El-Rahi* (Unreported, Supreme Court of Victoria—Court of Appeal, Tadgell JA, 19 August 1997): 6 years with a 4 year non-parole period.

326 For example, *Abebe* [2000] VSC 562: 8 years with a 6 year non-parole period; and *Farfalla* [2001] VSC 99: 9 years with non-parole period of 7 years.

327 For example, *Teeken* [2000] VSC 295: 5 years with a 3 year non-parole period.

9.49 Where provocation has been successfully argued in the context of a response to lengthy physical abuse (not amounting to self-defence), sentences appear to fall most often at the middle and lower ranges of penalties for manslaughter.³²⁸ One of the issues the Commission will be examining is whether sentencing practices in such cases are appropriate, when compared to successful claims of provocation in other contexts.

9.50 Manslaughter cases in which the victim is an infant killed by their parent or step-parent also result in a wide range of sentences. Some fall at the high end of the sentencing range,³²⁹ while others are in the middle range of sentences.³³⁰

Infanticide

9.51 Unfortunately, the available data does not provide any information about sentences imposed for infanticide in Victoria. We hope to obtain such information in the next stage of our project.

Review of Sentencing in Victoria

9.52 In October 2000, the Attorney-General commissioned Professor Arie Freiberg to review sentencing laws in Victoria. Professor Freiberg's terms of reference required him to consider whether any mechanism could be adopted to more adequately incorporate community views into the sentencing process.³³¹

9.53 Whilst Professor Freiberg's terms of reference did not specifically refer to sentencing for homicide, his review has considerable relevance to any discussion of the appropriate role of the judge and the jury in determining the relative culpability of a particular homicide offender and the sentence to be

328 For example, *Collingburn* (1985) A Crim R 294: 4 years with a 2 year non-parole period. Note also *Denney* [2000] VSC 323: 3 years, wholly suspended; *Raby* (Unreported, Supreme Court of Victoria, Teague J, 22 November 1994): 2 years with non-parole period of 7 months.

329 For example, *Kesic* [2000] VSC 420: 10 years with a non-parole period of 7 years; *Dempsey* [2001] VSC 123: 9 years with a non-parole period of 7 years.

330 *Hender-Bulman* [2001] VSC 418: 5 years with a very short non-parole period of 3 days; *Bandman* (Unreported, Supreme Court of Victoria, Phillips CJ, Southwell and Hampel JJ, 27 February 1995): 5 years with a non-parole period of 3 years.

331 Item 4.1 of the Terms of Reference reproduced in Arie Freiberg, *Pathways to Justice: Sentencing Review 2002* (2002), 24.

imposed on that offender. For example, it is sometimes argued that the partial defence of provocation should not be abolished because this would restrict the role of the community (represented by the jury) in deciding on the level of culpability of an offender. By giving a verdict of manslaughter the jury has some influence over the sentence imposed on the offender.

9.54 In August 2001, Professor Freiberg published a discussion paper addressing mechanisms to incorporate community views into the sentencing process. Following extensive consultation, Professor Freiberg's report was published in March 2002.³³²

9.55 In his report, Professor Freiberg has recommended the establishment of a Sentencing Advisory Council. The proposed Council would comprise approximately 12-15 members from a broad range of backgrounds including the judiciary, the legal profession, the police, correctional services, academics and victims' groups. The proposed Council's functions would include conducting research into sentencing, providing information about the availability and effectiveness of treatment programs, providing sentencing statistics, being involved in judicial and public education about sentencing, monitoring sentencing trends and gauging public opinion.³³³

9.56 On 19 March 2002, the Attorney-General announced that the Government would act immediately on the establishment of a Sentencing Advisory Council and guideline judgments for various categories of crime, and that legislation to this effect will be introduced in the Spring session of Parliament in 2002.³³⁴ If these measures are adopted, this may affect views on the importance and purpose of partial defences to homicide, such as provocation.

332 Arie Freiberg, *Pathways to Justice: Sentencing Review 2002* (2002).

333 Ibid 197-8.

334 Office of the Attorney-General for Victoria, *Freiberg Report Backs Public Input into Sentencing*, Media Release, 19 March 2002, available from <http://www.dpc.vic.gov.au/domino/web_notes/newmedia.nsf>.

CONCLUSION

9.57 This chapter has presented existing data on homicide prosecutions, in order to show what is currently known about how often various defences are used, how often they are successful in differing contexts, and what sentences are imposed for different types of homicides. We have identified a number of patterns suggested by that data, but it must be emphasised that the existing data is far from adequate.

9.58 The prosecution data published by the former Law Reform Commission of Victoria in 1991 relates to prosecutions conducted up to 20 years ago, and does not take into account changes to the law since then. The Department of Justice ceased publishing sentencing statistics from the Supreme Court in 1996. Accordingly, the minimum, maximum and median sentences for homicide offences in more recent years is not known. We have provided a large number of examples to illustrate sentences that have been imposed for homicides in a range of circumstances in recent years; however, the examples given are not based on a comprehensive statistical survey.

9.59 Because of the limitations of previous studies, the Commission will be conducting its own data collection and analysis in the next stage of our project. This will enable us to more accurately examine how the legal principles discussed in Chapters 4–8 are actually being applied in Victoria. In turn, this will enable us to make a more informed assessment of the adequacy or otherwise of those legal principles.

Chapter 10

Conclusion

PURPOSE OF THIS PAPER

10.1 As noted in Chapter 1,³³⁵ this Issues Paper is the first stage in our examination of defences to homicide. The aim of this Paper is to identify the areas that we will be investigating, to outline the current law in those areas, and to raise some of the issues at which we will be looking. The main issues raised in this Paper are summarised below. We are not, at this stage, seeking submissions on the questions raised. We will be calling for submissions, and engaging in public consultation, at a later stage. Our process from here is outlined more fully at the end of this chapter.

SUMMARY OF ISSUES

Homicides in Victoria

10.2 Throughout this Paper, our analysis has been informed by the view that, in order for the law reform process to work most effectively, it is necessary to have a clear understanding of the social problem that it is seeking to address.³³⁶ For this reason, our Paper began with an analysis of the existing data on homicides in Victoria, focusing in particular on the contexts in which homicides take place.³³⁷

335 See above paras 1.26–7.

336 For further discussion, see the Victorian Law Reform Commission's Occasional Paper by Jenny Morgan, *Who Kills Whom and Why: Looking Beyond Legal Categories*.

337 See Chapter 2.

10.3 Using the categorisation devised by Kenneth Polk, who studied Victorian coroners files between 1985–9, we saw that particular patterns can be discerned in relation to homicide. Of particular interest to our study are the two categories into which fall the highest proportion of homicides: homicides in the context of sexual intimacy and confrontational homicides. Most of this Paper revolves around a discussion of these two types of homicide, and the way that the law applies to them.

10.4 The third category of Polk's study that is also of some interest to us for the purposes of our project is homicide occurring in the context of family intimacy. We noted that a large proportion of these homicides involve parents killing children, raising the possibility of the defence of infanticide.³³⁸ These killings generally take place in a very specific context, which is important to keep in mind when discussing any possible legal defences.

The Criminal Justice System

10.5 Alongside our analysis of the context in which homicides take place, we have focused on the way in which the criminal justice system deals with such homicides.³³⁹ We noted that there are two main criminal offences that can apply in such cases: murder and manslaughter. Neither of these offences are currently defined in Victorian legislation. One of the issues we will be examining is whether it would be desirable to have a legislative definition of murder and of manslaughter.³⁴⁰

10.6 We saw that, when a person is charged with a criminal offence, there are a number of possible defences they can raise. Currently, in Victoria, the defences of self-defence, provocation, mental impairment, infanticide and automatism³⁴¹ are available to a charge of murder. We examined each of these defences in detail. We also looked at some other possible defences, including excessive self-defence, diminished responsibility, duress, necessity and marital coercion. One of the main issues to be examined in the course of this project is which of these defences should be available to a person charged with killing another, and what should be the scope of any available defences. In undertaking

338 See above paras 7.34–43.

339 See, in particular, Chapters 1, 3, 4 and 9.

340 See above para 1.5.

341 'Automatism' is not, technically speaking, a defence: see above n 12.

this examination, we will not simply be looking at whether to amend the current defences, but at whether it would be more appropriate to develop a new conceptual framework for the entire area.

10.7 In order to be able to adequately recommend avenues for change, it is necessary to understand how the current defences are working in practice. We noted in Chapter 9 that the available data on homicide prosecutions is now quite old, and in need of updating.³⁴² We intend to conduct a study of such prosecutions in the next stage of the project. This will involve an analysis of the number of cases in which particular defences were raised, the context in which they were raised, the characteristics of the accused and the victim in the cases in which defences were used, and the success or failure rates of those defences.

10.8 The other main issue to be addressed in the course of this project relates to sentencing. We will be investigating the most appropriate framework in which to determine sentences for those found guilty of homicide. In doing so, we will need to examine current sentencing practices in detail, looking to see whether they are sufficiently fair and flexible. In addition to analysing data on length of sentences and factors taken into account by sentencing judges, we will also need to examine the role of the judge and jury. In particular, we will need to focus on which issues should be treated as defences, and left to the jury to decide, and which should be taken into account by the judge at sentencing.³⁴³ As seen in Chapter 6, this is a particularly important issue in relation to provocation, which is a substantive defence in relation to murder, but is a sentencing consideration in relation to all other criminal offences.³⁴⁴

10.9 In addition to these general issues that span across the whole of our area of investigation, our discussion of each particular defence raises a number of specific issues. The main issues raised by each defence are discussed briefly below.

SELF-DEFENCE

10.10 Self-defence raises a number of issues which we discuss in Chapter 5. Of these, there are perhaps two that will form the main focus of our future

342 See above para 9.3.

343 See above paras 3.10–12.

344 See above paras 6.2–9.

investigations. Firstly, there is the question of what should be the precise scope of self-defence. Should it contain an objective element?³⁴⁵ Is it appropriate to convict a person of murder if they kill, believing it was necessary to do what they did in the circumstances, but whose belief was unreasonable? Is it necessary for a person to have reacted proportionately to a threat of harm to have a defence available, or should there be a defence of excessive self-defence?³⁴⁶

10.11 Secondly, there is the question of how the law should deal with women who kill in response to domestic violence.³⁴⁷ We saw that historically, the law has had difficulty coping with such homicides. Although the law has changed over time, there is still concern that it cannot adequately respond to the specific context of women who kill their abusers in response to prolonged violence. In examining this matter, we will be looking at issues ranging from the use of 'battered woman syndrome' at trial, to the creation of a completely new defence.

PROVOCATION

10.12 As with self-defence, provocation raises a number of complex issues. Many of these stem from what we have seen to be a confused conceptual basis for the defence. An important issue the Commission will be investigating in the next stage of this project is whether provocation should continue to exist as a defence, and if so what should be the foundation for the defence.³⁴⁸ In examining this issue, we will need to address questions such as why murder should be treated differently from any other crime (for which provocation is simply a sentencing factor), and whether it is more appropriate for decisions relating to provocation to be determined by a judge or jury.

10.13 If we decide that provocation should be retained as a defence, it will be necessary to clearly determine its scope. Issues involved in doing so include: should there be an 'ordinary person' test?³⁴⁹ If so, how should it be used, in light of the fact that Australia is a multicultural and heterogenous society? How do we avoid the dangers of stereotyping?

345 See above paras 5.6–8.

346 See above paras 5.9–10.

347 See above paras 5.17–27.

348 See above para 6.3.

349 See above paras 6.7–9.

10.14 In determining the scope of any such defence, the Commission will be looking at the important issue of gender bias. We saw in Chapter 6 that the main criticism made of the current defence of provocation is that it operates to excuse male anger and violence toward women.³⁵⁰ The empirical analysis of prosecution outcomes that we will be undertaking may provide some guidance on whether this is happening in practice. If so, it will be necessary to determine ways to combat this bias.

MENTAL IMPAIRMENT, AUTOMATISM, DIMINISHED RESPONSIBILITY AND INFANTICIDE

10.15 We saw in Chapter 7 that there is an overlap between the defences of mental impairment, automatism, diminished responsibility and infanticide. The main issue we will be examining is which of these defences should form part of Victorian law, and how the defences should interact. The kinds of questions we will need to ask include: when should an accused be able to use the defence of mental impairment, and when would it be more appropriate to rely on automatism? Should diminished responsibility be introduced in Victoria? If so, should infanticide be abolished, in favour of an expansive definition of diminished responsibility?

10.16 As each of these defences requires some type of medical ‘impairment’, another issue we will need to examine is the appropriate role for medical ‘experts’ in such cases.³⁵¹ Who should determine whether the accused was suffering from the relevant impairment—the jury or a special medical panel? If it is to be a panel of ‘experts’, what should be the power of this panel? Who should be on the panel? What role should the judge play? If the jury is to make the decision, what role should ‘experts’ play in the trial?

10.17 In addition to these general questions, each of these defences raises specific issues we will be examining, some of which are listed below:

- **Mental impairment:** Should the term ‘mental impairment’ be defined in legislation?³⁵² Should there be an additional element to the test that excuses from criminal responsibility people whose capacity to control their conduct has been impaired?³⁵³

350 See above para 6.10.

351 See above para 7.9.

352 See above para 7.8.

353 See above para 7.14.

- **Automatism:** Should the law differentiate between different types of automatism on the basis of whether the accused is likely to offend again?³⁵⁴ Is it justifiable to detain people because there is a risk they may offend again?
- **Diminished responsibility:** If diminished responsibility is introduced in Victoria, what should be the precise scope of the test?³⁵⁵ Should the kinds of conditions which fall within the scope of the defence be defined?
- **Infanticide:** Should infanticide continue to be based on medical criteria?³⁵⁶ If not, what criteria should replace those currently in place? Should social or economic factors be taken into account? Should the test be extended to people other than natural mothers (eg, fathers or step-mothers)?³⁵⁷ Should the 12 month age limit be retained?³⁵⁸

DURESS, NECESSITY AND MARITAL COERCION

10.18 We saw in Chapter 8 that while duress, necessity and marital coercion are currently defences to most crimes, this does not include murder. The Commission will be examining whether any of these defences should be extended in scope, to apply to murder.

OUR PROCESS FROM HERE

10.19 As noted above, this Issues Paper is only the first stage of our project. It provides an outline of the current law, and raises some of the issues at which we will be looking. It provides the basis for the future stages of the reference.

10.20 Following the publication of this Paper, we will begin the additional research necessary to tackle the issues raised. This will involve further legal research into the areas examined, looking both to legal and academic writings in the area, as well as to the ways in which these issues are dealt with in other jurisdictions. In the course of conducting this research, we will engage in some

354 See above para 7.22.

355 See above paras 7.30–3.

356 See above para 7.39.

357 See above para 7.42.

358 See above para 7.43.

preliminary consultations. We will also be undertaking an empirical analysis of homicide prosecutions in Victoria, as outlined above.³⁵⁹

10.21 We anticipate that the next stage in this process will be the publication of a Discussion Paper. The Discussion Paper will bring together the results of the preliminary consultations, additional research and studies. In the Discussion Paper we will raise some specific proposals for reform.

10.22 We will then engage in a consultative process, seeking feedback and submissions from the community. This consultation will be focussed upon the recommendations outlined in the Discussion Paper. The final stage in the process—publication of our Report—will combine the results of our consultations with our research and studies. In the Report we will make recommendations about whether it is appropriate to reform, narrow or extend defences to homicide, and the best way in which to do so.

³⁵⁹ See above para 9.59.



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