



Victorian Law Reform Commission

Defences to Homicide Final Report

Victorian Law Reform Commission

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Contents

Preface	ix
Acknowledgments	xiii
Contributors	xiv
Terms of Reference	xv
Abbreviations	xvi
Executive Summary	xix
Recommendations	xlv
Chapter 1: Background to Report	1
Scope of Report	1
Our Approach	4
Taking Account of Differences in Culpability	5
The Social Context of Homicide	14
Consultations	18
Outline of Final Report	19
Chapter 2: Provocation	21
Introduction	21
The Historical Context	21
The Modern Law of Provocation	23
The Need for a Triggering Incident	24
Loss of Self-Control	24
The Ordinary Person Test	24
Criticisms of Provocation	26
A Loss of Self-Control Should Not Form the Basis of a Separate Excuse	26
Provocation is Gender-Biased	27
Provocation Privileges a Loss of Self-Control as a Basis For a Defence	31
Provocation Promotes a Culture of Blaming the Victim	32

Provocation Can Be Taken Into Account at Sentencing	33
The Test is Conceptually Confused, Complex and Difficult	34
Options	35
Retain Provocation	36
Provocation Reform	41
The Commission’s View and Recommendations	55
Chapter 3: Self-Defence, Duress and Necessity	59
Introduction	59
Self-Defence	60
Current Law	60
Problems With the Current Law: Is There a Need for Reform?	61
Proposals for a New Defence	64
Reform of Self-Defence	69
Proposed Model for Codification of Self-Defence	84
Anger, Fear, Self-Defence and the Deserving Accused	90
Excessive Self-Defence	92
Current Law	92
Arguments for the Reintroduction of Excessive Self-Defence	93
Arguments against the Reintroduction of Excessive Self-Defence	94
Excessive Self-Defence in Practice	95
Submissions and Consultations	98
The Commission’s View and Recommendations	101
Charging Practices, Plea Negotiations and Self-Defence	105
Current Trends	105
Problems with the Current Approach	106
The Commission’s View and Recommendations	109
Duress and Necessity	110
Current Law	111
Law Reform Proposals	114
Arguments for Applying Duress and Necessity to Homicide	117
The Commission’s View and Recommendations	118
Intoxication	124

The Current Position: Intoxication and the Requirement of 'Reasonableness'	124
The Commission's View and Recommendations	125
Chapter 4: Evidence of Relationship and Family Violence	129
Introduction	129
The Commission's Approach	130
Relevance of a History of Prior Violence	132
Where the Perpetrator of Prior Violence is the Accused	133
Where the Victim of Prior Violence is the Accused	134
Taking Culture and Personal Background into Account	137
Submissions and Consultations	139
The Commission's View and Recommendations	140
Other Possible Barriers to the Admission of Evidence of Prior Violence	142
Hearsay Rule and Rule Against Prior Consistent Statements	144
Expert Evidence and the Rule Against Opinion Evidence	159
The Judge's Charge to the Jury	188
Introduction	188
Taking Violence into Account	189
Submissions and Consultations	191
The Commission's View and Recommendations	192
Family Violence Awareness and Education	194
Introduction	194
Existing Professional Development and Education Programs	195
Submissions and Consultations	198
The Commission's View and Recommendations	199
Chapter 5: People with Mentally Impaired Functioning who Kill	203
Introduction	203
Mental Impairment	204
Changing the Formulation of Mental Impairment	204
Criticisms of the Current Formulation of Mental Impairment	206
Consultations and Submissions	207
The Commission's View and Recommendations	212

Nominal Term	218
Background	218
What is the Nominal Term?	218
Treatment and Detention Since the Introduction of the CMIA	219
Criticisms of the Nominal Term	221
Alternatives to the Nominal Term	222
Need for Education	223
The Commission's View and Recommendations	223
By Consent Hearings	225
What is a 'By Consent' Hearing?	225
Introduction of a New Plea of Guilty But Mentally Impaired	226
Introduction of a Specialist Court	227
A Judge-Alone Hearing for 'By Consent' Cases	228
Consultations and Submissions	228
The Commission's View and Recommendations	229
Diminished Responsibility	232
What is Diminished Responsibility?	232
Other Formulations of the Defence	235
Consultations and Submissions	236
The Commission's View and Recommendations	241
Automatism	243
Introduction	243
What Is Automatism?	244
Criticisms of Automatism	245
Options for Reform	247
The Commission's View and Recommendations	252
Chapter 6: Infanticide	253
Introduction	253
What is Infanticide?	253
Alternative Verdicts and the Onus of Proof	254
Historical Context	255
Criticisms of Infanticide	256

There Is No Need For a Separate Offence or Defence of Infanticide	256
The Medical Model	257
Infanticide Only Applies to Biological Mothers	257
The Current Age Limit	258
Options for Reform: An Overview	258
Should Infanticide be Retained or Abolished?	259
Arguments in Favour of Abolition	259
Arguments for the Retention of Infanticide	260
The Commission's View and Recommendations	261
Should Infanticide Be Reformed?	262
The Connection Between Biology and Infanticide	262
The Commission's View and Recommendations	265
The Age Limit	266
The Commission's View and Recommendations	266
Chapter 7: Sentencing	269
Introduction	269
Sentencing Process	271
Sentencing for Homicide	274
Case Studies	275
Case Study 1—Offender was a Victim of Family Violence	275
Commentary on Case Study 1	276
Case Studies 2 and 3—Offender Killed in the Context of Sexual Intimacy	280
Commentary on Case Studies 2 and 3	281
Case Study 4—Offender Killed While Suffering From a Mental Condition	284
Commentary on Case Study 4	284
Case Study 5—Offender Attempted to Kill Child While Suffering From a Mental Condition	285
Commentary on Case Study 5	286
Issues	287
Sentencing in the Context of Prior Family Violence	287

The Commission's View and Recommendations	290
Preventing Unfair Increases in Sentencing	290
Providing More Guidance for Trial Judges	290
Appendix 1: Participants at Consultations	295
Appendix 2: List of Submissions Received	311
Appendix 3: How Homicide Cases are Processed	313
Appendix 4: Draft Bill and Explanatory Memorandum	314
Draft Proposals for a Crimes (Defences to Homicide) Bill	314
Explanatory Memorandum	325
Glossary	337
Bibliography	343
Other VLRC Publications	359

Preface

This is the Victorian Law Reform Commission's Final Report on Defences to Homicide. Prior to the completion of the Final Report the Commission published an Issues Paper and an Options Paper to stimulate debate about possible changes to defences to homicide and to provide the basis for consultation on possible reforms.

The issues considered in this Report raise complex moral questions, on which people may legitimately disagree. This has made it particularly important for the Commission to consult widely on possible reforms. A range of views were expressed about possible changes and not everyone will agree with our recommendations. However, we hope that the Report clearly explains the reasoning which underpins our recommendations, including our arguments for accepting or rejecting the views expressed to us during consultations.

Throughout our work on this project we have emphasised the need to take account of empirical data on the social context in which killings typically occur. Both the Options Paper and this Report draw on information from a number of empirical homicide studies, including a study of Victorian homicide prosecutions which was undertaken by the Commission.

The Report includes a draft Bill to implement its recommendations. I am very grateful to Diana Fagan, Parliamentary Counsel, Office of the Chief Parliamentary Counsel, who offered her considerable expertise in the preparation of the draft Bill, and carried out the task with a high level of commitment, professionalism, good humour and patience, and to Eamonn Moran, Chief Parliamentary Counsel, for generously agreeing to make Diana Fagan available to the Commission to prepare the draft Bill.

I acknowledge the exceptional contributions made by Victoria Moore and Siobhan McCann to the planning, research and writing of this Report. Their work provides a model for the successful completion of a complex law reform project. Victoria Moore had primary responsibility for Chapters 2–4, Siobhan McCann for Chapters 5 and 6 and Marcia Neave for Chapters 1 and 7 and the section on duress and necessity in Chapter 2. Tanaya Roy and Yin Ho provided valuable

research support. The Report could not have been completed without the involvement and wise advice of members of the Defences to Homicide Division, Justice David Harper and Professor Felicity Hampel SC. I should also gratefully acknowledge Jamie Walvisch's important contribution at earlier stages of the reference.

The production of the Report was a team effort. The Acting CEO, Mathew Carroll and, after her return from maternity leave, the CEO Padma Raman, oversaw the work program for the reference. Kathy Karlevski, Operations Manager and Lorraine Pitman, my Personal Assistant, were involved in formatting and production and Julie Bransden, the Commission's Librarian, was responsible for preparing the bibliography. Alison Hetherington edited the Report and made valuable suggestions to improve its clarity. I also gratefully acknowledge the support provided by Simone Marrocco, Project Officer at the Commission, in arranging consultations.

I would like to thank all those who participated so generously in our consultative process. Shortly after the release of the Options Paper, the Commission held a public forum focusing on issues related to homicides in the context of family violence. I would like to thank all who contributed to these discussions, and particularly the speakers, facilitators and panel members. Participants are listed in Appendix 1. A special thanks must go to Associate Professor Julie Stubbs, who travelled down from Sydney to be a guest speaker at the forum, and Bronwyn Naylor, Senior Lecturer, Faculty of Law Monash University, who stepped in at very short notice as a workshop facilitator. The forum provided an important focus for the initial consultations on the Options Paper, and informed much of the Commission's thinking about possible reforms in this area. The forum also provided an opportunity to identify some of the more difficult issues around dealing with homicides that occur between intimate partners.

Thanks are also due to the organisations and individuals who contributed to the planning or hosting of consultations on a range of issues relevant to people from culturally diverse and Indigenous backgrounds. The Diversity Unit of the Department of Justice co-hosted a cultural diversity workshop. Mark Brandi helped to arrange and participated in the workshop and Maria Dimopoulos, Managing Director, Myriad Consultants Pty Ltd, facilitated the workshop and proved just what a difference a skilled facilitator can make in considering issues as challenging as 'culture', and how culture should be taken into account in the context of defences to homicide.

The Aboriginal Family Violence Prevention and Legal Service and its CEO co-hosted an Indigenous workshop. I thank Antoinette Braybrook, the CEO and the

two facilitators, Charmaine Clarke and Syd Fry, Lecturer, Faculty of Business and Law, Deakin University, who made sure we asked the right questions, and did a wonderful job in keeping participants focused on the issues. Julieanne James, Senior Policy Officer, Office of Women's Policy, also provided invaluable assistance in putting the invitation list together for the forum, and assisting us to track down addresses and contacts.

The forum and workshops reaffirmed the complexity of family violence which is often part of the background to homicides. They discussed proposals for making judges, jurors and legal and law enforcement professionals more aware of the experiences of people subjected to family violence. The outcomes of these discussions will be made available on the Commission's website. We will continue the conversation around these very important issues as part of the Commission's reference on the *Crimes (Family Violence) Act 1987*.

I would also like to thank those who represented the community legal sector and domestic violence sector at roundtables. These participants made an important contribution in roundtables in helping us understand the nature of family violence and its relevance in the context of defences. Special thanks must go to Dr Rhonda Cumberland, Director of the Women's Domestic Violence Crisis Service Victoria, who prepared the section in Chapter 4, 'Understanding the Need for Expert Evidence on Family Violence'; and to Libby Eltringham, Legal Education Worker, Domestic Violence and Incest Resource Centre; Joanna Fletcher, Law Reform and Policy Officer, Women's Legal Service; and Catherine Plunkett, Manager, Inner South Domestic Violence Service, who all contributed their ideas and thoughts. We would also like to thank Dr Debbie Kirkwood, who was not only a valued member of the Advisory Committee and an active participant in consultations, but who also helped us in thinking through some of the important implementation issues around the possible introduction of social framework evidence.

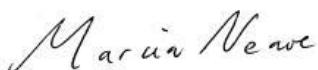
Many other people made significant contribution to the reference by participating in roundtables which the Commission held to discuss various legal issues. Participants in the various roundtables are listed in Appendix 1 and I thank them all. I am particularly grateful to members of the judiciary and the Victorian Bar, to forensic psychiatrists, mental health professionals, and to several members of the Homicide Squad at Victoria Police, who took time out of their busy schedules to contribute to roundtables. From their contributions to these discussions, it was clear that the members of the Homicide Squad bring a high level of commitment, compassion and professionalism to what must no doubt be at times a very difficult role. All roundtable participants brought a valuable perspective to the table.

Several representatives of the Criminal Bar, and of the Law Institute of Victoria, shared their considerable expertise in representing and appearing on behalf of those charged with homicide. Paul Coghlan QC, Director of Public Prosecutions; Bill Morgan-Payler QC, Chief Crown Prosecutor, OPP; Ray Gibson, Crown Prosecutor; and Richard Lewis from the OPP made useful comments from the prosecution perspective. David Neal contributed his considerable criminal law expertise to the reference and Dr Ian Freckleton contributed his considerable expertise on criminal law and evidence issues. I thank His Honour Justice Redlich, Supreme Court of Victoria, for allowing us to use drafts of his rulings, as well as his Associate Bronwyn Hammond.

I am particularly grateful to a number of people who contributed their ideas throughout the whole of the reference. Professor Jenny Morgan, Deputy-Dean, Faculty of Law, Melbourne University, gave generously of her time and expertise and provided us with some extremely useful feedback on drafts. Associate Professor Bernadette McSherry also read several chapters and provided us with prompt and helpful feedback. Associate Professor Bronwyn Naylor advised on data issues, as well as making comments on the law. Julie Stubbs also provided invaluable assistance to the researchers throughout the reference, by providing articles, cases and other reference material, and Ian Leader-Elliott, Senior Lecturer, Adelaide University Law School, helped to clarify a number of complex legal issues. His Honour Justice Tim Smith, Supreme Court of Victoria, provided much needed insight into the Uniform Evidence Act, helped us think through some of the more technical aspects relating to our recommendations on evidence and gave comments and advice on early drafts of Chapter 4 and on material on automatism and mental impairment.

The Commission received a number of very useful comments from Sir Roger Toulson, Chairman of the Law Commission for England and Wales, which I gratefully acknowledge. I also thank Mervyn Finlay QC for providing us with his Report to the New South Wales Government reviewing the law of manslaughter.

Thanks are also due to Tom Dalton of Forensicare who provided statistics on the operation of the mental impairment legislation and to Kerri Judd who wrote a Paper for us on sentencing, which provided a useful basis for Chapter 7.



Marcia Neave
Chairperson

ACKNOWLEDGMENTS

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* Homicide Division, constituted under Section 13 of the *Victorian Law Reform Commission Act 2000*.

Terms of Reference

On 21 September 2001 the Attorney-General, the Honourable Rob Hulls MP, gave the Victorian Law Reform Commission a 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

A Crim R	Australian Criminal Reports
AC	Appeal Cases (United Kingdom)
ACT	Australian Capital Territory
AIC	Australian Institute of Criminology
AIJA	Australian Institute of Judicial Administration
AJA	Acting Justice of Appeal
ALJR	Australian Law Journal Reports
All ER	All England Law Reports
ALR	Australian Law Reports
ALRC	Australian Law Reform Commission
BWS	Battered Woman Syndrome
Car & P	Carrington and Payne's Reports, Nisi Prius
CBA	Criminal Bar Association
CCC	Canadian Criminal Cases
Ch	chapter
CJ	Chief Justice
CLR	Commonwealth Law Reports
CMIA	Crimes (Mental Impairment and Fitness to be Tried) Act
Cox CC	EW Cox's Reports of Cases in Criminal Law
Crim LJ	Criminal Law Journal
Cth	Commonwealth
DPP	Director of Public Prosecutions

ER	English Reports
FCR	Federal Court Reports
FLR	Federal Law Reports
ILRC	Irish Law Reform Commission
J	Justice (JJ plural)
JCV	Judicial College of Victoria
JA	Justice of Appeal (JJA plural)
Kel	Sir John Kelynge's Reports
LRCV	Law Reform Commission of Victoria
n	footnote
NJCA	National Judicial College of Australia
NM	New Mexico Reports
NSW	New South Wales
NSWCCA	New South Wales Court of Criminal Appeal
NSWLR	New South Wales Law Reports
NSWLRC	New South Wales Law Reform Commission
NSWSC	New South Wales Supreme Court
NT	Northern Territory
num	number
OPP	Office of Public Prosecutions
OR	Ontario Reports
P	president (judicial office)
P 2d	Pacific Reporter Second Series
para	paragraph
pt	part
QB, QBD	Law Reports Queen's Bench Division
Qd R	Queensland Reports
Qld	Queensland

s	section (ss plural)
SA	South Australia
SASC	South Australian Supreme Court
SASR	South Australian State Reports
SCR	Canada Supreme Court Reports
Tas	Tasmania
Tas R	Tasmania Reports
Vic	Victoria
VLA	Victoria Legal Aid
VR	Victorian Reports
VSC	Supreme Court of Victoria
VSCA	Supreme Court of Victoria Court of Appeal
WA	Western Australia
WDVCSV	Women's Domestic Violence Crisis Service Victoria
WLR	Weekly Law Reports (United Kingdom)

Executive Summary

BACKGROUND TO THIS INQUIRY

On 21 September 2001 the Attorney-General asked the Law Reform Commission to review and report on defences and partial defences to homicide. This Final Report is the result of three years work on the reference, which has included conducting background research, considering how the defences operate in practice in Victoria and other jurisdictions, and discussing options for reform as part of the consultation process.

The Commission published an Options Paper in September 2003 which asked a number of questions and provided the basis for our consultations. Consultations held included a public forum on homicide in the context of violence against women, a series of roundtables, and two workshops focusing on how a person's cultural background should be taken into account. Those who participated in consultations included judges, police officers, barristers, solicitors, policy and research officers from the community legal sector, non-government organisations, and government agencies, representatives of victims' services, domestic violence workers, psychiatrists, psychologists, academics, and interested community members. These consultations, together with submissions received on the Options Paper, were invaluable to the Commission in informing the development of the final recommendations. However, as would be expected, a wide range of views were expressed by those we consulted and few issues generated a clear consensus.

THE COMMISSION'S APPROACH

HOW DIFFERENCES IN CULPABILITY SHOULD BE TAKEN INTO ACCOUNT

The central question considered in this review has been how the criminal law should take account of the fact that people kill in a range of different situations and that their culpability may be affected by a variety of factors.

Under the present law factors that reduce a person's blameworthiness for an intentional killing may be taken into account in one of three ways. In some

situations where people intentionally kill another person they may be charged with and convicted of an offence which attracts a lower sentence than murder (for example manslaughter or infanticide). In this case they will not be ‘labelled’ as a ‘murderer’.

In other situations they may not be guilty of any offence (as where they killed in self-defence) or they may be convicted of the lesser offence of manslaughter because they have a partial defence (as where they successfully argue they killed as the result of provocation). Alternatively, the circumstances of the killing may result in them being convicted of murder, but these circumstances will be taken into consideration by the judge in imposing a sentence on the accused.

Different legal systems take account of levels of blameworthiness in different ways. When law reform bodies have reviewed defences and partial defences to homicide, they have frequently reached different conclusions on how factors which affect the culpability of the accused should be taken into account by the criminal law. While there is no ‘right’ approach to these complex moral and legal issues, the Commission believes there is a need for greater consistency in how issues of culpability are dealt with in the Victorian criminal law. The legal framework in which defences to homicide operate in Victoria, including the existence of a flexible sentencing regime for murder, has influenced our approach, as has the symbolic function of the criminal law in setting the limits of acceptable and unacceptable behaviour, and the likely practical implications of our recommendations.

ABOLITION OF PROVOCATION

Our view is that differences in degrees of culpability should generally be dealt with through the sentencing process, rather than through the continued existence of partial defences. There are a number of factors that may reduce a person’s culpability for murder. Allowing these factors to be considered at sentencing provides for greater flexibility and avoids singling out one or two (such as a loss of control due to provocation) for special treatment. Further, as Victoria does not have a mandatory sentencing regime for murder, the argument that the continued existence of the partial defence of provocation is a necessary concession to ‘human frailty’ is in our view no longer a convincing one.

This Report therefore recommends that provocation be abolished as a partial defence to homicide. For reasons which we explain below, we recommend some exceptions to the principle that differences in culpability should be taken into account in sentencing. These exceptions are reflected in recommendations that the

existing offence of infanticide be retained and that a partial defence of excessive self-defence be reintroduced.

Provocation also raises important questions about the symbolic function of the law and the proper role of defences and partial defences. The Commission believes that the symbolic role of the criminal law justifies abolition of the partial defence of provocation. The partial defence of provocation sends the message that in some situations people (who are not at risk of being killed or seriously injured themselves) are not expected to control their impulses to kill or seriously injure another person. While extreme anger may partly *explain* a person's actions, in the Commission's view it does not mean such behaviour should be partly *excused*.

As provocation is not a partial defence to any other offence, it results in a person who loses self-control and kills the person who provoked him or her being partially excused, while the same actions resulting in, for example, a minor assault, do not provide a partial excuse. From a common sense perspective, most people would find it easier to understand how someone might, in an emotional state, hit another person because they did something to upset them, rather than how an ordinary person, even faced with the gravest provocation, might intentionally kill.

Historically, an angry response to a provocation might have been excusable, but in the 21st century, the Victorian community has a right to expect people will control their behaviour, even when angry or emotionally upset—particularly when the consequences are as serious as homicide. The continued recognition of provocation as a separate partial excuse for murder, in our view, is therefore both unnecessary and inappropriate. To the degree the circumstances of the killing may decrease a person's level of moral culpability, this can be adequately taken into account, as it is for all other offences, in sentencing.

NO PROVISION FOR A PARTIAL EXCUSE OF DIMINISHED RESPONSIBILITY

For similar reasons we have recommended against introduction of a partial defence of diminished responsibility, which would allow people suffering from states of mind not amounting to mental impairment to be convicted of manslaughter rather than murder.

IMPLICATIONS FOR SENTENCING

In adopting this position, the Commission supports the view that the current sentencing regime for murder is flexible enough to take into account differences in culpability, which arise because the accused has been provoked or is suffering from a mental condition such as depression. To address the concerns expressed by

people in consultations that current sentencing practices for murder might translate into longer sentences for ‘sympathetic’ cases of provocation (such as where a person kills as the result of anger about physical or sexual abuse), this Report recommends that judges consider the full range of sentencing options for murder where it is appropriate to do so. The Report also calls for greater guidance to be provided by the Court of Appeal on how issues such as a history of abuse should be taken into account at sentencing.

INTRODUCTION OF EXCESSIVE SELF-DEFENCE

The Commission recommends excessive self-defence be reinstated as a partial defence in Victoria. This is an exception to our general approach that factors affecting culpability should be taken into account at sentencing. Excessive self-defence was a partial defence to murder until the High Court decision in *Zecevic v Director of Public Prosecutions (Vic)* in 1987. It has been reintroduced in South Australia and New South Wales. In the Commission’s view, people who kill another person, genuinely believing their life is in danger, but who are unable to demonstrate the objective reasonableness of their actions, are deserving of a partial defence. In this case, the person intends to do something which is lawful, and is therefore in a very different position from someone who intends to kill unlawfully and intentionally due to provocation or a mental condition. This person’s lower level of culpability, we believe, should be recognised in the crime for which he or she is convicted.

CIRCUMSTANCES IN WHICH A PERSON HAS A COMPLETE DEFENCE TO HOMICIDE

The law must recognise that, in some circumstances, a person who kills should not be found criminally responsible for their actions. The Commission believes three circumstances justify a person being completely excused from criminal responsibility for murder:

- where a person has killed out of a belief that his or her actions were necessary for self-preservation, or to protect the life of another person, provided the person’s actions can be shown not to have been unreasonable in the circumstances;
- where a person was suffering from a mental impairment at the time of the killing; and
- where a person’s acts were not voluntary, because they were automatic or unwilled.

This Report therefore recommends that self-defence, mental impairment, and automatism continue to be available in Victoria. It further recommends that two other defences based on the need for self-preservation—duress (which is not available as a defence to murder) and sudden or extraordinary emergency (which may possibly already apply to murder)—be recognised as complete defences to homicide.

RETENTION OF THE OFFENCE OF INFANTICIDE

Infanticide, which is neither a partial defence nor a defence, but is an alternative verdict to murder, should also be an exception to the general principle stated above. We agree with the previous Law Reform Commission of Victoria that the killing of a young child by its natural mother constitutes a ‘distinctive form of human tragedy’ which should be reflected in the offence for which the accused is convicted. For this reason, the Commission recommends the retention of infanticide, with some modifications to ensure the offence better reflects modern medical understanding about factors which can lead to such killings. Statistics show child killings by mothers who are mentally disturbed due to the birth generally take place within the first two years after birth. In this Report, we therefore recommend the age limit for infanticide be extended from the killing of a child under 12 months to a child under two years.

We also recommend that infanticide be available in cases where a woman kills an older child due to a disturbance caused by the birth of a child aged under two. This will remedy any potential inconsistencies in how the killings of older children are dealt with where the mother develops a disorder following the birth of a younger child.

CHANGES TO THE LAW OF EVIDENCE

In addition to changes to defences and partial defences this Report recommends a number of changes to the laws of evidence, which aim to ensure that a wider range of evidence relevant to defences to homicide is admissible. This may be particularly important when the homicide has taken place against the background of prior family violence. Unless people have experienced first-hand what it is like to live in an abusive relationship, it may be difficult to understand what motivated the killing, and to assess why the accused acted as he or she did. The reforms recommended in this report include changes to the hearsay rule, and a new provision outlining what evidence may be relevant in support of self-defence or duress, where there is a history of prior violence between the accused and the deceased.

DRAFT BILL

With the exception of mental impairment and infanticide, the law on defences to homicide in Victoria is governed by the common law. In the interests of making the law more accessible and easy to locate, and facilitating a better understanding about available defences, the Commission believes defences to homicide should be included in a new part in the *Crimes Act 1958*. We acknowledge concerns that the flexibility of the common law be retained. In our view, this is a case for ensuring regular review of the criminal law, rather than against codification.

The Office of the Chief Parliamentary Counsel, on instructions from the Commission, has drafted proposals for a Crimes (Defences to Homicide) Bill, which appear at Appendix 4 of this Report. The draft proposals are accompanied by an Explanatory Memorandum prepared by the Commission which explains the purposes of the provisions. The draft Bill proposes the abolition of provocation as a defence in Victoria and includes a new draft Part 1C to be inserted into the *Crimes Act 1958*, with sections on self-defence, excessive self-defence, duress and sudden or extraordinary emergency, as well as a new provision on evidence which will apply when self-defence or duress is raised and there is a history of family violence. Proposals for changes to the law of evidence are discussed in more detail below.

The Bill also contains a provision clarifying the scope of ‘mental impairment’ (which is not currently defined under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*) and sets out the new hearing procedure proposed for mental impairment hearings where both the defence and prosecution agree the accused was mentally impaired at the time of the offence.

A PACKAGE OF REFORMS

The reforms recommended in this Report are intended to be considered as a complete package of reforms. Many of the recommendations made in this Report, including the abolition of provocation and changes to self-defence, are supported by the Commission on the understanding that the recommendations will be adopted in their entirety. We would therefore caution strongly against the implementation of recommendations relating to individual defences without proper consideration of the broader framework in which they are intended to operate.

THE SOCIAL CONTEXT OF HOMICIDES

Throughout its review the Commission has recognised that social problems rather than legal categories best inform our thinking about reform of defences to homicide. In recent years, homicide cases involving women who have killed abusive partners and been convicted of manslaughter or murder have led to concerns that defences to homicide—and particularly provocation and self-defence—operate in a way which is gender biased. The gender bias is seen to manifest itself both in the way the defences are framed, interpreted and applied, and in the very different circumstances in which men and women raise them.

Provocation, based on a sudden loss of control, is seen as reflecting a typically male response, which makes it difficult for women to successfully argue the defence. The Australian Institute of Criminology estimates there are around 77 homicides involving intimate partners each year in Australia. Of these, around 58 (75%) involve men killing their female partners. Men who kill their partners often argue provocation. In many of these cases, the alleged provocation involves their partner leaving them, threatening to leave them, or starting a new relationship with another person.

The much smaller proportion of women who kill their intimate partners may also raise provocation. However, even though some women do so it is argued that the defence still operates in a gender biased way because of the very different circumstances in which men and women typically raise it.

Unlike men, when women raise provocation in these circumstances, the killing is rarely motivated by jealousy or a need for control due to the breakdown of a relationship. When women rely on the defence, they are often responding to serious sexual and physical assaults perpetrated against them by their partners. These two circumstances, it is suggested, should not be seen as comparable. As a matter of law, a number of people consulted did not think men who killed due to a partner leaving or alleged or actual infidelity should have access to a defence. The Commission believes the problems with provocation go beyond possible gender bias. This was one of the factors which influenced our recommendation that the defence be abolished in Victoria.

In the case of self-defence, the criticism is not that men should not be able to rely on the defence in the circumstances they do, but rather that the way self-defence is interpreted and applied disadvantages women. Men most often, and most successfully, raise self-defence when they have killed in the context of a fight with another man—usually a friend, acquaintance or stranger. Women rarely kill in

these circumstances and are more likely to need to take action in self-protection against a violent intimate partner than against a friend or stranger.

As a result, women may face a number of barriers in establishing their actions are carried out in self-defence. First, because women may be responding to an ongoing threat of serious violence and/or the cumulative effects of violence, rather than a one-off attack, jurors who do not understand what it is like to live in an abusive relationship may underestimate the seriousness of the threat. For this reason juries may question the honesty of women's belief in the need to use force and/or decide their actions were unreasonable or out of proportion to the threat. Secondly, it is not unusual for women to wait to take action when their partners have their defences down, and to arm themselves with a weapon in advance. Because women are often smaller and physically weaker than their partners, this may be understandable. Due to the planning involved, and a belief by the jury that women may have other options open to escape the violence, such as calling for the assistance of police, women's actions in these circumstances may not be characterised by a jury as 'real' self-defence.

Women who kill abusive partners should not be automatically entitled to an acquittal on the basis of self-defence. However, we believe it is important for defences to take proper account of men's and women's experiences of violence, and the different circumstances in which men and women may genuinely believe they need to act to protect themselves from serious injury. This Report makes a number of recommendations aimed at ensuring the law better responds to people who kill in the context of family violence, and allows the broader context of the accused's actions to be considered. Recommendations include:

- clarifying that actions may be carried out in self-defence where:
 - the person believes the threat of serious harm is inevitable, rather than immediate;
 - the person uses more force than is used against him or her;
- introducing legislated exceptions to the hearsay rule (which generally prevents evidence of out-of-court statements being considered as evidence of the truth of what was said) to allow evidence of prior complaints of violence made by the accused, or the deceased, to other people (such as friends, or relatives) to be considered by the jury;
- providing better guidance to judges and lawyers about the sort of evidence that may assist a jury to assess whether the accused acted in self-defence or under duress where there is a history of prior violence;

- improving family violence education and training for police, lawyers and judges.

Proposed changes to the hearsay rule may also allow statements made by women killed by their partners to other people concerning prior abuse to be considered by the jury as evidence of the abuse. This may counter an argument by an abusive partner who kills that the killing was unintentional or accidental.

The next section summarises the content of the seven chapters in this report in more detail.

OVERVIEW OF THE FINAL REPORT

PROVOCATION (CHAPTER 2)

Under the current law provocation is a partial defence which, when accepted by the jury, reduces murder to manslaughter. Before the jury can reduce a charge of murder to manslaughter on the grounds of provocation, they must be satisfied that the following three requirements have been met:

- there must be sufficient evidence of provocative conduct;
- the accused must have lost self-control as a result of the provocation; and
- 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.

Once evidence of provocation is raised, the prosecution must prove beyond reasonable doubt that the killing was not provoked in the relevant legal sense.

In this Report the Commission recommends provocation be abolished as a partial defence in Victoria. Our general approach is that factors affecting culpability should be taken into account at sentencing. We are not persuaded by arguments that provocation is a necessary concession to human frailty or that provoked killers are not murderers. Both the serious nature of the harm suffered by the victim, and the fact the person intended to kill or seriously injure the victim, in our view justifies a murder conviction. Victoria also has a flexible sentencing regime for murder which allows all factors potentially affecting a person's level of blameworthiness, including personal circumstances and background, the circumstances of the offence, and the vulnerability of the victim, to be balanced in setting the appropriate penalty.

The Commission acknowledges concerns that the abolition of provocation could lead to harsher sentences for ‘deserving’ cases of provocation (such as, for example, people who kill out of anger after being subjected to sexual or physical abuse). In our view this outcome can be avoided by judges making use of the full range of sentencing options for murder. This recommendation is made in Chapter 7 of this Report.

While provocation sometimes provides a partial defence for women who have killed in the context of prior violence, we believe the costs of its retention outweigh any potential advantages. Where women kill out of a fear for their lives, the Commission believes the more appropriate defence is self-defence. We are confident the reforms proposed in this Report, including changes to self-defence, will assist women who kill violent partners to have the self-defensive nature of their actions recognised. In cases where women have not acted in self-defence, the history of prior abuse can be taken into account at sentencing in mitigation of sentence.

The Commission finds the continued reliance on provocation by violent men who kill their intimate partners particularly objectionable. The implication is that the women are somehow responsible for their own death, and men’s violent loss of self-control partly excusable. In our view, the Victorian community should no longer tolerate such a position.

SELF-DEFENCE, EXCESSIVE SELF-DEFENCE AND NECESSITY (CHAPTER 3)

SELF-DEFENCE

Self-defence has long been recognised as a defence to murder. All other jurisdictions, with the exception of Victoria, now have separate statutory provisions on self-defence. We believe self-defence should also be codified in Victoria.

The test for self-defence recommended by the Commission is based on the Model Criminal Code provision. Four jurisdictions in Australia—NSW, ACT, NT and the Commonwealth—have adopted the Model Criminal Code self-defence provisions. Under this formulation, a person carries out conduct in self-defence if he or she believes the conduct is necessary either to defend himself or herself or another person; or to prevent or terminate the unlawful imprisonment of himself or herself or another person; and the conduct is a reasonable response in the circumstances as he or she perceives them.

Reforms to make self-defence more accessible to people who kill in response to family violence received strong support, both in submissions and during consultations. The provision will make it clear that:

- a person may believe his or her actions are necessary, and his or her response may be reasonable, when the person believes the harm to which he or she responds is inevitable;
- the use of force by a person may be a reasonable response in the circumstances as he or she perceives them, even though the force used by the person exceeds the force used against him or her.

Although this is already the position under the current law, the benefits of including reference to these two factors in the legislation are that the trial judge will be required to give a specific direction to the jury on these issues, thereby encouraging juries to think more carefully about how actions which may not fit within traditional notions of self-defence (such as homicides in response to ongoing family violence) may constitute self-defence. The provisions may also be used in other contexts. For example, where a man who is physically less strong than his assailant uses a weapon to protect himself.

EXCESSIVE SELF-DEFENCE

In this Report we recommend excessive self-defence be reintroduced in Victoria. Two other jurisdictions in Australia—SA and NSW—recognise excessive self-defence as a partial defence to murder. The formulation recommended is based on the NSW legislation.

Although this Report recommends abolition of the partial defence of provocation, we believe a partial defence of excessive self-defence is justified. A person who honestly believes his or her actions were necessary in self-protection, but is unable to establish the objective reasonableness of his or her actions, is in a very different position from a person who intentionally kills due to provocation or diminished responsibility.

Our recommendation that excessive self-defence be reintroduced will have a number of potential benefits for people who kill in response to family violence.

Currently, women who kill a violent partner may plead guilty to manslaughter, rather than going to trial and arguing self-defence, because of the risk of a murder conviction and the emotional pressure involved in defending the case at trial. Excessive self-defence may encourage more women to plead not guilty to murder, as self-defence will no longer be an ‘all or nothing’ defence. It may also provide greater flexibility in charging and plea practices. For example, in this Report we

recommend that the Office of Public Prosecutions consider charging a person with manslaughter on the basis of excessive self-defence in cases where there is strong evidence of self-defence. When, for whatever reason, the accused chooses to plead guilty to manslaughter prior to trial, the acceptance of a plea of manslaughter on the basis of excessive self-defence will also allow the self-defensive nature of the accused's actions to be recognised.

In submissions and consultations, concerns were raised by some people that if the defence was reintroduced, juries would automatically decide women's actions were excessive, without properly considering the reasonableness of their actions. As a result, women might be convicted of manslaughter, while men could continue to successfully argue self-defence and be acquitted. The Commission is confident the recommendations made in this Report, including clarifying the scope of self-defence, and encouraging the provision of better information to juries concerning the nature and effects of family violence, will help to prevent this outcome. As an added safeguard, we recommend the operation of the defence be reviewed after it has been in force for five years.

DURESS AND NECESSITY

Self-defence is based on the idea that an intentional killing was justified because the accused had to kill to save his or her or another person's life. It may also be necessary for people to kill because they are under duress (for example where they had a gun held at their head) or in a situation of sudden or extraordinary emergency (for example where they deliberately crash a plane knowing that some passengers might die, in order to avoid crashing into a school and killing a much larger number of people). Duress and sudden and extraordinary emergency (often called necessity) are not defences to murder in Victoria. There is also some doubt about whether these defences apply to attempted murder. In this Report the Commission recommends these defences be extended to murder and attempted murder.

Duress

Where a person kills an innocent third person to avoid being killed or seriously injured—such as a person who is ordered to shoot another person while a gun is held to his or her head—it cannot be said, in a moral sense, the person has acted voluntarily. A person who sacrifices his or her life when that person's own life is threatened if he or she does not kill another person, may be morally superior to someone who does not resist the threat. In the Commission's view, however, the

criminal law should not stigmatise a person as a murderer because he or she does not meet this standard of heroism.

Sudden or Extraordinary Emergency

Our reasons for recognising sudden or extraordinary emergency as a defence are similar. People faced with an extraordinary emergency, in which they are faced with an agonising choice between evils, should not be criminally liable so long as they act reasonably.

As with self-defence, the tests proposed in this Report for both defences are based on the recommendations of the Model Criminal Code Officers' Committee. The Model Criminal Code provisions for duress and sudden and extraordinary emergency are now in force in the ACT and the Commonwealth.

New Statutory Provisions on Duress and Necessity

Under the new provision proposed on duress in the draft Crimes (Defences to Homicide) Bill, a person will not be held criminally responsible for murder or manslaughter if: the person believes a threat has been made that will be carried out unless the person kills another person; there is no other way the threat can be rendered ineffective; and both the person's belief and actions in the circumstances are reasonable. A person will not be found to carry out conduct under duress if the threat is made by or on behalf of a person with whom the person is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out. This will prevent, for example, members of criminal gangs relying on the defence to excuse them from criminal liability for murder.

The defence of sudden or extraordinary emergency will be available where circumstances of sudden or extraordinary emergency existed at the time of the killing, committing the offence was the only reasonable way to deal with the emergency, and the person's conduct was reasonable in the circumstances.

As with the current position for self-defence, the prosecution will have the onus of proving, beyond reasonable doubt, the accused did not act under duress, or due to a sudden or extraordinary emergency.

INTOXICATION AS IT APPLIES TO DEFENCES TO HOMICIDE

People who are intoxicated may believe they need to kill in self-defence or because of duress or necessity. The current law may allow people to rely on their own self-induced intoxication for this purpose. The Commission does not believe defences to homicide should excuse a person from criminal responsibility simply on the basis he or she was drunk or under the influence of drugs at the time.

In Chapter 3 of this Report we therefore recommend that a provision, based on the Model Criminal Code provisions, be included in the new Part 1C of the *Crimes Act 1958* on defences. This makes it clear that self-induced intoxication is not to be taken into account in assessing the reasonableness of the accused's belief or response. If, however, the accused's intoxication is not self-induced, for instance because it came about involuntarily, or was accidental, the standard applied will be that of 'a reasonable person intoxicated to the same extent as the person concerned'.

EVIDENCE OF RELATIONSHIP AND FAMILY VIOLENCE (CHAPTER 4)

Changes to the substantive law will only ever provide a partial solution to ensuring defences to homicide operate fairly for those who kill in response to family violence. It is equally important to ensure juries are provided with information which allows them to understand, and take into account, the broader context of violence. Decisions made by judges, juries, lawyers, and police must also be informed by a proper understanding of the complex nature of family violence.

Recommendations made in Chapter 4 to achieve this outcome include:

- the introduction of exceptions to the hearsay rule;
- the provision of better guidance to lawyers and judges on evidence about family violence that will assist a jury assess whether the accused acted in self-defence or under duress; and
- improved family violence education and training for police, lawyers and judges.

LEGISLATED EXCEPTIONS TO THE HEARSAY RULE

Australian research has shown about 75–80% of people who have experienced family violence do not report the violence to police. While in some cases there may be other evidence of the violence (such as people who have seen physical signs of the abuse, or directly witnessed the violence), in many cases the only evidence supporting allegations of violence may be statements the person who has been subjected to the violence has made to friends, neighbours and relatives. Currently, much of this evidence of out-of-court statements made by the accused or the deceased may be excluded from the jury's consideration, or may not be considered as evidence of the truth of what was said, because it is 'hearsay'.

The Commission believes there are good reasons for allowing hearsay evidence to be considered in homicide trials. There are very low rates of reporting of family

violence. Where the perpetrator of prior violence is the accused, this evidence may be important, for example, to counter an argument by the accused the killing was accidental, or due to a sudden loss of self-control. While this evidence is often admitted to prove the state of the relationship, it currently can not be considered by the jury as evidence that what the deceased said to others in fact took place. Where the person subjected to prior abuse is the homicide accused, evidence about what the accused told other people about the violence may be critical in supporting his or her version of events.

The Report therefore recommends the adoption of a number of legislated exceptions to the hearsay rule currently available under the Uniform Evidence Act, developed by the Australian Law Reform Commission and now in force under Commonwealth law and in NSW, Tasmania and the ACT.

The principal recommendations in the Report on hearsay, based on the provisions of the Uniform Evidence Act, are:

- hearsay evidence that can be admitted under the current rules will be able to be used as evidence of the truth of the statement made;
- where the person who made the statement (such as the accused) is available to give evidence, hearsay evidence of the statement will be able to be given by the person who made it, or by someone who heard him or her making the statement. For this to apply the facts must have been fresh in the memory of the person when they made the statement;
- where the person making the statement is not available to give evidence (for example, because he or she is the homicide victim) the person who heard or saw the representation being made will be able to give evidence about the statement if the statement was made at or shortly after the alleged facts occurred or made in circumstances which make it highly probable it is reliable.

A minor extension has been recommended to allow documentary evidence (for example, a diary entry or letter) to be considered as evidence of the truth of the representations made where the maker of the statement is unavailable (for example, because he or she is dead), provided minimum requirements of reliability are met.

Safeguards for the accused have been included in our recommendations.

- The court can exclude hearsay evidence if it would be unfair to the accused to admit it.

- The jury must be told hearsay evidence may not be as reliable as direct evidence.

EVIDENCE OF FAMILY VIOLENCE: SELF-DEFENCE AND DURESS

In the context of both self-defence and duress, the jury must be satisfied the accused had an honest belief in the need to use force in self-protection, and his or her conduct was reasonable in the circumstances. Neither the honesty of the accused's belief, nor the reasonableness of the accused's action, can be properly evaluated unless the jury is aware of, and understands, the broader context of violence between the accused and the deceased and the accused's situation. It is important the evidence provides the jury with as complete a picture of the accused's situation leading up to the homicide as possible so the jury can put themselves in the accused's position. Relevant evidence might include:

- evidence of prior acts of violence against the accused and threats made;
- evidence demonstrating the ongoing nature and extent of abusive behaviour and escalation of the violence over time;
- evidence of past attempts by the accused to leave or get the assistance of others, and the outcome; and
- the accused's personal circumstances, including whether the accused was employed and had a means to support himself or herself, and the availability of a safe and affordable place to go.

The courts already recognise much of this evidence as relevant and admissible. The problem is that little guidance is provided to judges or defence lawyers about just what evidence may be useful for juries in these cases.

To assist this evidence to be more readily identified, and avoid any possible legal arguments concerning its relevance, the Commission recommends in this Report that a new evidentiary provision be introduced which provides that where self-defence or duress is raised and there is a history of prior violence between the accused and the deceased, evidence of the following may be relevant:

- the history of the relationship between the person and the deceased, including violence by the deceased towards the accused;
- the cumulative effects, including psychological effects, on the person of the violence; and
- the social, cultural and economic factors that impact on the accused.

The Report also recommends that legislation should clarify that expert evidence is admissible about the general nature and dynamics of abuse and social factors that

impact on people in violent relationships. This evidence could be given by people with expertise on family violence, such as family violence workers and researchers, and would assist jurors to better understand what it is like to live in a situation of ongoing abuse, and what may be reasonable for a person living in this situation.

Without this information, the Commission believes there is a danger the jury will misinterpret evidence of prior violence and the relationship between the accused and the deceased due to their own limited understanding of family violence. While community knowledge about family violence is improving, there still continues to be a general lack of understanding by many about the complex nature of family violence, and the reasons people stay in violent relationships.

In the past, expert evidence introduced in Australian trials of women who have killed violent partners has generally been confined to psychological evidence of ‘battered woman syndrome’ given by a psychiatrist or a psychologist. The use of this evidence has been strongly criticised because it suggests women’s responses to violence are irrational, individualised and due to a psychological condition, rather than the reasonable and normal reactions of someone placed in these circumstances. Instead of supporting the reasonableness of her actions, it is argued, this evidence may in fact undermine it. People who are not seen as fitting the stereotype of the ‘typical battered woman’—such as Indigenous women and people in same-sex relationships—may also be seen as somehow less deserving of a defence.

In consultations a number of people expressed serious reservations about the value of syndrome evidence. The Commission shares these concerns. While in some cases psychological effects of violence may be relevant, it should be recognised that women’s responses to violence vary considerably. Further, evidence of the social rather than psychological factors which impact on people in abusive relationships may be equally, if not more, valuable in assisting the jury to assess the accused’s actions. It is for this reason, we recommend in this Report that, together with evidence on the psychological effects of abuse, expert evidence on the nature and dynamics of violence, and related social and economic factors, be admissible to assist a jury to understand why a person subjected to violence may have acted as he or she did.

This Report recommends reference to these factors be included in the new provision on evidence. This will make clear that where it is alleged there is a history of prior violence perpetrated by the deceased against the accused, expert evidence about the following may be relevant:

- the nature and dynamics of abusive relationships, including the possible consequences of separation from the abuser;
- the psychological effects of abuse; and
- social and economic factors that impact on people who are or have been in an abusive relationship.

Decisions concerning what evidence should be introduced in an individual case will continue to be determined by the accused's legal representatives.

THE JUDGE'S CHARGE

When the jury is dealing with complex issues such as family violence in addition to case-specific evidence, general information may also be provided by expert witnesses to assist the jury, and referred to by the trial judge as part of his or her charge to the jury. Some submissions advocated a standard jury charge be adopted for cases involving family violence. The Commission does not support this position. It is the Commission's view that people with expertise on family violence are best placed to provide this information to the jury.

In some cases, however, expert evidence may not be led. In these cases, the Commission believes it may be vital, if the trial is to be fair, for relevant matters to be brought to the jury's attention. Information that might usefully assist a jury in its task includes information on such issues as:

- the immediacy of the threat—alerting the jury that an ongoing threat of serious harm may be sufficient to support self-defence;
- the availability of alternative options to escape the abuse—highlighting the options realistically available to escape the abuse, and the accused's perceptions of how effective they might be in preventing future harm; and
- the proportionality of the response—taking into account any disparity in size and strength between the accused and the deceased and the cumulative effect of the violence and reinforcing that a person is justified in using such force as is reasonably necessary to protect himself or herself, regardless of whether it is strictly proportionate to the threatened harm.

FAMILY VIOLENCE EDUCATION AND TRAINING FOR JUDGES, LAWYERS AND POLICE

Police, lawyers' and judges' understanding of the nature of family violence has the potential to affect decisions made at a number of stages in the legal process in homicide cases including:

- at the preliminary interview and investigation stage;

- pre-trial—in how matters are prepared for trial, and decisions made concerning pleas;
- at trial—affecting what evidence is introduced, whether the relevance of this evidence is properly communicated to the jury, and the rulings made by the trial judge concerning its admissibility and use; and
- at sentencing—determining whether the history of abuse and its impact on the accused or the deceased is understood, and taken into account in setting the appropriate penalty.

Professional education may assist those who manage these cases to overcome some of the myths and misconceptions about family violence we all share. In this Report, the Commission recommends all bodies which offer seminars and lectures for continuing professional development purposes include sessions on issues related to family violence.

MENTAL CONDITION DEFENCES (MENTAL IMPAIRMENT, DIMINISHED RESPONSIBILITY AND AUTOMATISM (CHAPTER 5)

MENTAL IMPAIRMENT

The current defence of mental impairment was introduced in 1997 as part of the Crimes (Mental Impairment and Fitness to be Tried) Act (CMIA). The CMIA replaced the old common law defence of insanity and the governor's pleasure system of indefinite detention of people who commit crimes while mentally ill, with a new defence of mental impairment and a new regime for managing mentally ill offenders.

The defence of mental impairment is set out in section 20 of the CMIA and requires the following elements to be proven on the balance of probabilities:

- the accused was suffering from a mental impairment; and
- the mental impairment affected the accused so he or she either did not understand the nature and quality of the conduct, or did not know that it was wrong.

These requirements are similar to the old common law defence of insanity.

Should Mental Impairment be Reformed?

In submissions and consultations there was almost universal support for leaving the defence of mental impairment unchanged. The Commission in this Report supports this view. Despite some criticisms of the defence, those consulted,

including psychiatrists, were overwhelmingly of the view that the current defence works well in practice and is well understood and appropriately applied. Further, the CMIA is the result of a recent and comprehensive review of the legislation. To change the legislation so soon after its introduction without clear evidence of a need to do so would in our view be inappropriate.

Clarifying the Meaning of Mental Impairment

The Commission believes, however, there is a need for the scope of ‘mental impairment’ to be clarified. Mental impairment is currently not defined in the CMIA. While the CMIA explicitly abolishes the common law defence of insanity, the tendency by the courts has been to interpret mental impairment restrictively by reference to the common law defence of insanity and the notion of a ‘disease of the mind’. The Commission disagrees with this restrictive interpretation and is concerned in some cases it may lead to unjust results. This Report therefore recommends a new provision be inserted into the CMIA to make clear mental impairment includes but is not limited to a disease of the mind.

The Nominal Term

Under the CMIA regime, a person who has been found not guilty of murder by reason of mental impairment is likely to be made subject to a custodial supervision order. Supervision orders, whether custodial or non-custodial, are for an indefinite term but the Act requires the court to set a nominal term for the supervision order. In the case of homicide, the nominal term is 25 years.

In consultations concerns were raised that mental impairment was not being relied upon as often as it might be, due to a basic lack of understanding by those in the legal profession about how the 25-year nominal term operates. This Report recommends that bodies which offer seminars and lectures for continuing professional development purposes should provide information on the operation of the CMIA, including the nominal term, and that proper data be collected which tracks how long people are subjected to orders under the CMIA.

Simplifying Mental Impairment Hearings

The most significant recommendations in this Report relating to the defence of mental impairment aim to simplify the process for mental impairment hearings. Currently, if a person argues he or she was mentally impaired at the time of the homicide, even if both the prosecution and defence agree the person was mentally impaired, a jury needs to be empanelled and return a verdict of ‘not guilty by reason of mental impairment’. In effect, juries are sometimes asked to simply

confirm the view of the defence and the prosecution. The Commission is concerned that the involvement of the jury in hearings where both parties agree the accused was mentally impaired at the time of the killing is unnecessary, and may compromise the proper role of the jury.

The new procedure for these hearings proposed in this Report will allow expert evidence to be heard before a judge alone. If the judge is satisfied, on the basis of this evidence, that it would not be possible for a jury to find the accused guilty of murder then the judge can make a finding that the accused is not guilty by reason of mental impairment. This evidence will still be heard in open court, and therefore the families of the victims and other members of the community will still be able to witness the process and hear the psychiatric evidence. In cases where the issue of the accused's mental impairment is in dispute, the case will proceed to trial to have the issue determined by a jury.

DIMINISHED RESPONSIBILITY

Diminished responsibility is not currently available in Victoria but is a partial defence to homicide in the ACT, New South Wales, the Northern Territory and Queensland. While the formulations in each jurisdiction vary, there are three common elements:

- the accused must have been suffering from an abnormality of mind;
- the abnormality of mind must have arisen from a specified cause; and
- the abnormality of mind must have substantially impaired the accused's mental responsibility for the killing.

The Commission recommends in this Report against the introduction of diminished responsibility in Victoria.

Diminished responsibility is open to criticisms which are similar to those made of provocation. While the person's mental state may in part explain why he or she killed, this does not make his or her behaviour excusable. As with provocation, the Commission believes any difference in culpability between offenders with a mental condition short of mental impairment can be adequately taken into account at sentencing.

If provocation is abolished in accordance with the Commission's recommendations, there is a danger that diminished responsibility could be used as a replacement defence. This would be of particular concern in the cases involving men who kill their partners following the breakdown of a relationship who might argue they killed due to severe depression.

The Commission also agrees with criticisms that the defence is too broad and vague in its formulation. 'Abnormality of the mind' is not defined in the legislation in any of the jurisdictions in which diminished responsibility is available. This makes diminished responsibility problematic, both in terms of defining what constitutes diminished responsibility and in its application.

AUTOMATISM

Automatism is not strictly speaking a 'defence' but rather a denial of one of the elements of the offence—that the accused's actions were voluntary. The 'defence' of automatism applies where the behaviour of the accused was automatic or unwillled (for example, if the accused person was sleepwalking, or due to an epileptic fit). In practice the doctrine of automatism operates in a similar way to other defences.

The law distinguishes between two broad categories of automatism: insane automatism and non-insane automatism. The effect of a finding of insane automatism is that the person is treated in the same way as if they were mentally impaired. The effect of a finding of non-insane automatism is a complete acquittal.

There have been some concerns that automatism is susceptible to abuse. In particular, cases involving so-called 'psychological blow' automatism are regarded as problematic because it is very difficult (if not impossible) to verify a person's claim that they were acting in a dissociative state. These claims are also frequently made in circumstances where the person who kills has been extremely upset or traumatised because of something which has been done by the person they subsequently kill, and has a clear motive for the killing.

The Commission recommends in this Report that, despite its problems, the doctrine of automatism should remain unchanged. We believe the removal of automatism for homicide alone would not be appropriate. In the Commission's view, concerns about the possible use of the defence are also largely theoretical, rather than reflecting the way the defence has been used in practice. Automatism is rarely raised and, where it is, is rarely successful. In the very few cases when automatism is argued, the Commission believes the jury is best placed to determine whether or not the acts of the accused were involuntary, based on the evidence presented.

INFANTICIDE (CHAPTER 6)

In Victoria, infanticide describes a particular kind of child killing. Unlike the other defences to homicide, infanticide is both an offence and an alternative verdict to murder, which has led to infanticide being treated as a partial defence. This means the prosecution can charge a woman with infanticide and also that a woman who has been charged with murder can raise infanticide in her defence at trial.

Under the current provision in section 6 of the *Crimes Act 1958*, the offence of infanticide occurs where a woman kills her child, who is aged under 12 months, due to a disturbance of mind which is caused by the effects of either childbirth or lactation. Where a woman has not been charged with infanticide, but with murder, a jury may return a verdict of infanticide instead of murder if they are satisfied the killing of the child occurred due to a disturbance of mind caused by childbirth or lactation.

The overwhelming response in consultations and submissions was that infanticide should be retained as a separate offence or alternative verdict in Victoria. Arguments in favour of retaining the defence included concerns that women who killed in these circumstances may not meet the requirements of mental impairment, leaving them to be labelled as ‘murderers’. We agree with the view expressed by the former Law Reform Commission that infanticide recognises a ‘distinctive kind of human tragedy’ which should be reflected in the offence for which the accused is convicted.

The Commission recommends that infanticide continue to be restricted to killings committed by biological mothers. There is a unique relationship between a biological mother and her young child. While there may be circumstances in which non-biological parents and fathers may have been affected by depression, causing anxiety and stress and mental disturbance as the result of the pressures of caring for a very young child, we believe these factors are more appropriately considered at sentencing.

To better reflect modern medical understanding about the factors which can lead to infanticide, however, the Commission recommends the current offence be replaced with a new provision. The current provision creates the impression that childbirth and breastfeeding themselves cause mental disturbance. Under the new formulation proposed, the offence will apply to women who, at the time of killing their child or children, were suffering from a disturbance of mind as the result of either not having recovered from the effect of giving birth or any disorder consequent on childbirth.

The Commission also recommends that the age limit of the child be increased from 12 months to two years, and that infanticide also be available in cases where a woman kills an older child due to a disturbance caused by the birth of a younger child. This will ensure women who kill a child as the result of a disturbance arising from the birth of another child are not excluded from the defence.

SENTENCING (CHAPTER 7)

The Commission's view that matters that reduce moral culpability should generally be taken into account at sentencing, rather than providing the basis for separate partial defences, has obvious implications for sentencing. The Commission believes the principles set out in the *Sentencing Act 1991* are flexible enough to take account of a wide range of factors affecting culpability.

Nevertheless, our recommended changes to homicide defences raise some important policy issues including:

- how to ensure family violence is adequately taken into account when courts sentence an offender who has killed a violent partner or an offender who has previously been violent to the deceased;
- how to meet the concern that the abolition of provocation may result in women who kill violent partners and others who kill as the result of provocation will invariably receive longer custodial sentences than those which would be imposed under the present law; and
- how to encourage appropriate consistency in judicial approaches to sentencing in cases involving domestic violence, excessive self-defence or a mental condition not amounting to mental impairment.

There is no minimum sentence for either murder or manslaughter. In some cases it may be appropriate, even where the offender is convicted of murder, for a short custodial sentence or suspended sentence to be imposed. This will depend on the particular facts of the case. The Commission therefore recommends that in sentencing an offender for murder in circumstances where the accused might previously have been convicted of manslaughter on the grounds of provocation, judges should consider the full range of sentencing options.

The Commission also makes a number of other recommendations aimed at promoting greater consistency in sentencing for murder and manslaughter, including:

- establishment of a database by the newly established Sentencing Advisory Council to monitor sentencing trends;

- the establishment of processes for making up-to-date sentencing information about homicide cases available to judges;
- the provision of judicial education on sentencing in homicide cases by the Judicial College, in consultation with the Sentencing Advisory Council;
- the provision of public education by the Sentencing Advisory Council on sentencing in homicide cases.

Finally, the Report calls for greater guidance to be provided by the Court of Appeal on the principles that should apply in particular cases, such as where an offender responded to, or was affected by, a history of prior family violence perpetrated by the deceased.

Recommendations

Chapter 2: Provocation

1. The partial defence of provocation should be abolished. Relevant circumstances of the offence, including provocation, should be taken into account at sentencing as they currently are for other offences.

(Refer to draft s 4 *Crimes Act 1958* in Appendix 4)

Chapter 3: Self-Defence, Duress and Necessity

2. The law of self-defence and other defences to homicide should be codified in Victoria and included in a new part in the *Crimes Act 1958*.

(Refer to draft Part 1C *Crimes Act 1958* in Appendix 4)

3. Factors which may assist the jury in determining whether a person who was subjected to family violence by the deceased acted in self-defence or under duress should be included in a separate provision on evidence.

(See also Recommendations 25–34)

Self-Defence

4. The new provision on self-defence in the *Crimes Act 1958* should specify that:

- ? a person may believe that the conduct carried out in self-defence is necessary; and
- ? a person's response may be reasonable—when the person believes the harm to which the person responds is inevitable, whether or not it is immediate.

(Refer to draft s 322I(3) *Crimes Act 1958* in Appendix 4)

5. The new provision on self-defence in the *Crimes Act 1958* should specify that the use of force by a person may be a reasonable response in the circumstances as the person perceives them, even though the force used by that person exceeds the force used against him or her.

(Refer to draft s 322I(4) *Crimes Act 1958* in Appendix 4)

6. The New South Wales formulation of self-defence, based on the Model Criminal Code provisions, as they apply to the offences of murder and manslaughter, should be adopted in Victoria. Under this formulation, a person is not criminally responsible for the offence if the person believes the conduct is necessary:

- ? to defend himself or herself or another person; or
- ? to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person; and

the conduct is a reasonable response in the circumstances as the person perceives them.

(Refer to draft s 322I(1)–(2) *Crimes Act 1958* in Appendix 4)

7. In any criminal proceeding for murder or manslaughter in which self-defence is raised, the prosecution has the onus of proving beyond reasonable doubt that the person did not carry out the conduct in self-defence.

(Refer to draft s 322H(1) *Crimes Act 1958* in Appendix 4)

8. Self-defence should not be available if:

- ? the person is responding to lawful conduct; and
- ? at the time of the response, he or she knew that the conduct was lawful.

However, conduct is not lawful merely because the person carrying it out is not criminally responsible for it.

(Refer to draft s 322J *Crimes Act 1958* in Appendix 4)

Excessive Self-Defence

9. The partial defence of excessive self-defence should be reintroduced in Victoria. The partial defence should apply:

- ? if a person uses force that causes or contributes significantly to the death of another; and

- ? the conduct is not a reasonable response in the circumstances as the person perceives them; but
- ? the person believes the conduct is necessary to:
 - (a) defend himself or herself or another person; or
 - (b) prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.

In these circumstances the person is not criminally responsible for murder, but on a trial for murder is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.

(Refer to draft s 322K *Crimes Act 1958* in Appendix 4)

10. A review of the operation of excessive self-defence should be carried out by the Department of Justice after the provision has been in force for a period of five years. The review should include investigation of how the defence is being used, in what circumstances, by whom and with what outcome.
11. The Office of Public Prosecutions should develop guidelines that allow a person to be charged with manslaughter on the basis of excessive self-defence in homicide cases where there is strong evidence to suggest the accused had a genuine belief his or her actions were necessary in self-defence.
12. The Office of Public Prosecutions should develop guidelines requiring the documentation of all plea negotiations in homicide cases, including written and verbal offers or representations by the defence.

Duress and Extraordinary Emergency

13. Duress and extraordinary emergency should be available as defences to murder and manslaughter in Victoria.
14. A person should not be held criminally responsible for murder or manslaughter if the person believes that:
 - ? a threat has been made that will be carried out unless the person kills another person;
 - ? there is no other way the threat can be rendered ineffective;
 - ? the belief is reasonable in the circumstances; and
 - ? the person's conduct is a reasonable response to the threat.

(Refer to draft s 322L(1)–(2) *Crimes Act 1958* in Appendix 4)

15. The person does not carry out conduct under duress if the threat is made by or on behalf of a person with whom the person is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.

(Refer to draft s 322L(3) *Crimes Act 1958* in Appendix 4)

16. A person should not be held criminally responsible for murder or manslaughter if the person's conduct is a response to circumstances of sudden or extraordinary emergency.

(Refer to draft s 322M(1) *Crimes Act 1958* in Appendix 4)

17. The defence of extraordinary emergency only applies if:

- ? circumstances of sudden or extraordinary emergency exist;
- ? committing the offence is the only reasonable way to deal with the emergency; and
- ? the conduct is a reasonable response to the emergency.

(Refer to draft s 322M(2) *Crimes Act 1958* in Appendix 4)

18. An accused who wishes to rely on the defence of duress or sudden or extraordinary emergency has an evidential burden in relation to the matter.

19. In any criminal proceeding for murder or manslaughter in which duress or sudden or extraordinary emergency has been raised, the prosecution has the onus of proving beyond reasonable doubt that the person did not carry out the conduct under duress or in response to circumstances of sudden or extraordinary emergency.

(Refer to draft s 322H(2)–(3) *Crimes Act 1958* in Appendix 4)

Intoxication

20. If the accused was intoxicated at the time of the offence, if any part of a defence is based on actual knowledge or belief, evidence of intoxication may be considered in determining whether that knowledge or belief existed.

(Refer to draft s 322O(1) *Crimes Act 1958* in Appendix 4)

21. If the accused was intoxicated at the time of the homicide, and that intoxication was self-induced, in determining whether any part of a defence based on reasonable belief exists, or whether the accused's response in the circumstances was reasonable, regard must be had to the standard of a reasonable person who is not intoxicated.

(Refer to draft s 322O(2)–(3) *Crimes Act 1958* in Appendix 4)

22. If the accused was intoxicated at the time of the homicide, but his or her intoxication was not self-induced, in determining whether any part of a defence based on reasonable belief or a reasonable response exists, regard must be had to the standard of a reasonable person intoxicated to the same degree as the accused.

(Refer to draft s 322O(4) *Crimes Act 1958* in Appendix 4)

23. Intoxication means intoxication because of the influence of alcohol, a drug or any other substance.

(Refer to draft s 322N(1) *Crimes Act 1958* in Appendix 4)

24. Intoxication should be taken as being self-induced unless it came about:

- ? involuntarily;
- ? as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force;
- ? from the use of a drug for which a prescription is required and that was used in accordance with the directions of the authorised person who prescribed it; or
- ? from the use of a drug for which no prescription is required and that was used for a purpose, and in accordance with the dosage level, recommended by the manufacturer.

However, if the person using the drug knew, or had reason to believe, when the person took the drug that the drug would significantly impair the person's judgment or control, his or her intoxication is taken as being self-induced.

(Refer to draft s 322N(2)–(3) *Crimes Act 1958* in Appendix 4)

Chapter 4: Evidence of Relationship and Family Violence

25. A provision should be introduced to clarify that where self-defence or duress is raised in criminal proceedings for murder or manslaughter and a history of family violence has been alleged, evidence on the following may be relevant:

- ? the history of the relationship between the person and the family member, including violence by the family member towards the person or any other person;

- ? the cumulative effect, including psychological effect, on that person of that violence; and
- ? the social, cultural and economic factors that impact on that person.

(Refer to draft s 322P(1)(a)–(c) *Crimes Act 1958* in Appendix 4)

Exceptions to the Hearsay Rule

26. A provision should be introduced in Victoria, based on section 65(2) of the Uniform Evidence Act, to provide an exception to the hearsay rule to allow admission of evidence of a previous representation made by a person who is not available, to give evidence where the evidence is:

- ? given by a person who saw, heard or otherwise perceived the representation being made; or
- ? contained in a document.

This exception should apply:

- ? in criminal proceedings for murder or manslaughter;
 - ? where the representation satisfies one of the following criteria:
 - (a) it was made under a duty to make that representation or to make representations of that kind; or
 - (b) it was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or
 - (c) it was made in circumstances that make it highly probable that the representation is reliable; or
 - (d) it was against the interests of the person who made it at the time it was made.
27. A provision should be introduced, based on sections 65(8) and 65(9) of the Uniform Evidence Act, to provide an exception to the hearsay rule to allow evidence of a previous representation made by a person who is not available to give evidence, to be adduced by the accused. This exception should apply in criminal proceedings for murder or manslaughter to:

- ? evidence of a previous representation given by a person who saw, heard or otherwise perceived the representation being made; or
- ? a statement contained in a document tendered as evidence by the accused, so far as it contains a previous representation, or another

representation to which it is reasonably necessary to refer in order to understand the representation.

28. Where evidence of a previous representation adduced by the accused has been admitted, the hearsay rule should not apply to evidence of another representation about the matter that is:

- ? adduced by another party; and
- ? given by a person who saw, heard or otherwise perceived the other representation being made.

29. A provision should be introduced, based on section 66 of the Uniform Evidence Act, to provide a specific exception to the hearsay rule to allow admission of evidence of a previous representation, where a person who made a previous representation is available to give evidence and that person has been or is to be called to give evidence. This exception should apply to evidence of the representation that is given by:

- ? that person; or
- ? a person who saw, heard or otherwise perceived the representation being made;

if when the representation was made the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

This exception should apply in criminal proceedings for murder or manslaughter.

30. A provision should be introduced, based on section 60 of the Uniform Evidence Act, to provide an exception to the hearsay rule where evidence of a previous representation is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation.

This exception should apply in criminal proceedings for murder or manslaughter.

31. A provision should be introduced, based on section 165 of the Uniform Evidence Act, providing that where evidence is admitted under provisions allowing for the admission of evidence of representations as proof of facts in issue asserted by those representations, the judge should be required to:

- ? warn the jury the evidence may be unreliable;
- ? inform the jury of matters that may cause it to be unreliable; and

- ? warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.
32. A party should not be allowed to adduce evidence of a representation as proof of facts in issue asserted by those representations unless that party has given reasonable notice in writing to the other party of his or her intention to adduce the evidence and the facts in issue to which it is relevant.
33. Provisions allowing for the admission of hearsay evidence to prove facts in issue should not detract from or modify common law rules allowing for the admission of evidence of statements made as proof of the fact intended to be asserted by the representation, or for another purpose.

Expert Evidence

34. A provision should be introduced to clarify that where self-defence or duress is raised in a criminal proceeding for murder or manslaughter and the accused alleges a history of family violence, the court should recognise that the following expert social context evidence may be relevant:
- ? the nature and dynamics of abusive relationships, including the possible consequences of separation from the abuser;
 - ? the psychological effects of abuse; and
 - ? social and economic factors that impact on people who are or have been in an abusive relationship.

(Refer to draft s 322P(1)(d)–(e) *Crimes Act 1958* in Appendix 4)

Professional Development and Judicial Education

35. Bodies which offer continuing professional development or judicial education, including Victoria Legal Aid, the Law Institute of Victoria, the Office of Public Prosecutions, the Victorian Bar and the Judicial College of Victoria should include sessions on family violence.
36. Professional legal education sessions on family violence should aim to assist judges and lawyers practising in criminal law to understand the nature of family violence and could include discussion of issues such as:
- ? common myths and misconceptions about family violence;
 - ? the nature and dynamics of abusive relationships;
 - ? the social context in which family violence occurs;

- ? barriers to disclosure of abuse and seeking the assistance of police and other service agencies, including the additional barriers faced by persons who are Indigenous, from a culturally and linguistically diverse background, who live in a rural or remote area, who are in a same-sex relationship, who have a disability and/or have a child with a disability;
- ? the emotional, psychological and social impact of family violence;
- ? the relationship between family violence and other offences, including murder and manslaughter;
- ? how expert evidence about family violence may assist in supporting a plea of self-defence or duress;
- ? the use of expert reports on family violence in sentencing.

Chapter 5: People with Mentally Impaired Functioning who Kill

The Defence of Mental Impairment

37. The current mental impairment defence should be retained.
38. A provision should be added to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* which specifies that the term ‘mental impairment’ includes but is not limited to the common law notion of a ‘disease of the mind’.
(Refer to draft definition s 3(1) *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* in Appendix 4).
39. The Department of Human Services, in conjunction with the Department of Justice, should conduct an ongoing evaluation of the effectiveness of the legislation. Evaluation should include data showing how often the defence is raised, how often the defence is successful and the kinds of illnesses which do and do not form a successful basis for the defence.
40. The nominal term for mental impairment should be retained.
41. Bodies which offer seminars and lectures for continuing professional development purposes should include material on the operation of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* and more specifically on the operation of the nominal term.
42. The Department of Justice and the Department of Human Services should coordinate an ongoing evaluation of the operation of the nominal term and

related provisions of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*. Data should be collected on the following:

- ? the kinds of mental illnesses which result in a successful mental impairment defence and those which do not;
- ? the average period of time people managed under the Act are subject to hospital or community based orders;
- ? how many people are released from hospital prior to the end of the nominal term (but remain subject to some kind of community based order);
- ? how many people succeed in having their orders revoked prior to the expiration of the nominal term; and
- ? how many people continue to be subject to orders (both hospital based and community based) after the expiration of the nominal term.

'By Consent' Hearings

43. If a judge, having heard such expert evidence as may be called on the issue, is satisfied that no jury properly instructed could find the accused guilty of murder because of the accused's mental impairment, and the prosecution and the defence agree that the accused was mentally impaired at the time of the killing, then the judge should make a finding that the accused is not guilty of the offence because of mental impairment. This evidence should be heard in a hearing before a judge alone. The judge should have a discretion to direct that the matter be dealt with by a jury.

(Refer to draft section 21(4) *Crimes (Mental Impairment and Unfitness to be Tried Act 1998* in Appendix 4.)

44. Where the matter is not proceeding on a 'by consent' basis, that is, where there is disagreement as to whether or not the accused should be found not guilty by reason of mental impairment, the matter should proceed to trial and a jury should be empanelled. As is currently the case, a judge may remove the matter from the jury during the trial if he or she decides that, based on the evidence provided, no jury properly instructed could properly find the accused guilty of the offence.

Diminished Responsibility

45. The partial excuse of diminished responsibility should not be introduced in Victoria. As is currently the case, mental disorder short of mental impairment,

which may have a mitigating effect, should be taken into account in sentencing.

46. The doctrine of automatism should remain unchanged.

Chapter 6: Infanticide

47. Infanticide should be retained as an offence and as a statutory alternative to murder.

(Refer to draft s 6(2) *Crimes Act 1958* in Appendix 4)

48. Infanticide should apply where a woman has suffered from a disturbance of mind as the result of not having recovered from the effect of giving birth or any disorder consequent on childbirth.

(Refer to draft s 6(1) *Crimes Act 1958* in Appendix 4)

49. The offence of infanticide should be modified by:

- ? extending the offence to cover the killing of an infant aged up to two years; and
- ? applying the offence to the killing of older children as the result of the accused not having recovered from the effect of giving birth or any disorder consequent on childbirth.

(Refer to draft s 6(1) *Crimes Act 1958* in Appendix 4)

Chapter 7: Sentencing

50. In sentencing an offender for murder in circumstances where the accused might previously have been convicted of manslaughter on the grounds of provocation, judges should consider the full range of sentencing options.

51. When an appropriate case arises, the Court of Appeal should consider indicating the principles which should apply in sentencing an offender who has been subjected to abuse by the deceased and how these should be taken into account in sentencing the offender.

52. The Sentencing Advisory Council should establish a statistical database to monitor sentencing trends in homicide cases. This database should be developed in consultation with members of the judiciary.

53. Construction of the database should allow monitoring of sentencing trends in cases where:

- ? the offender killed a person who subjected her/him to family violence;
 - ? the offender had previously subjected the deceased to violence;
 - ? the offender acted under provocation from the deceased; and
 - ? the offender was suffering from a mental condition at the time of the killing.
54. In consultation with the judiciary, the Sentencing Advisory Council should establish processes for making up-to-date sentencing information about homicide cases available to judges.
55. The Judicial College of Victoria should offer judicial education on sentencing in homicide cases, in collaboration with the Sentencing Advisory Council.
56. The Sentencing Advisory Council should provide public education on sentencing in homicide cases.

Chapter 1

Background to Report

SCOPE OF REPORT

1.1 This is the Victorian Law Reform Commission's Final Report on defences to homicide. The terms of reference for this inquiry require us to report on whether the existing defences and partial excuses¹ to homicide should be changed.

1.2 The problem of family violence has been a central issue during our work on this reference. Almost two out of every five homicides in Australia take place between family members. Every year in Australia there are about 129 family homicides, with the majority of these—about 77—involving intimate partners.² These findings were confirmed in the Commission's recent research on homicide prosecutions in Victoria that occurred between 1 July 1997 and 30 June 2001, which is discussed in more detail at [1.39]–[1.45].³ This research found that just under a third of homicide incidents took place in the context of a relationship of sexual intimacy.⁴

1.3 The overwhelming majority of homicides involving intimate partners are committed by men against their female partners,⁵ often as the culmination of a

¹ We refer to partial excuses here because they are described in this way in the terms of reference. A defence to homicide results in complete acquittal of the accused. A partial excuse reduces the crime from murder to manslaughter. Although there is technically a difference between a defence and a partial excuse, they are often both described as 'defences'. In the remainder of this Report we refer to defences and partial defences.

² Jenny Mouzos and Catherine Rushforth, *Family Homicide in Australia* (2003), 1–2. These estimates are based on data sourced from the National Homicide Monitoring Program collected over a 13 year period (1 July 1989–30 June 2002).

³ The sample involved all cases which proceeded beyond the committal stage on a charge of murder, manslaughter or infanticide. Victorian Law Reform Commission, *Defences to Homicide Options Paper* (2003), para 2.3.

⁴ *Ibid* paras 2.43–2.44, Graph 6.

⁵ In the Commission's study, 42 of the 52 accused who killed in this context (81%) were male: *ibid* para 2.50, Graph 8. See also Mouzos and Rushforth (2003), above n 2, 2. Mouzos and Rushforth

history of abuse,⁶ the breakdown of the relationship and/or their partner leaving or threatening to leave the relationship.⁷ In the much smaller number of cases in which women kill their partners, the homicide often follows a history of physical abuse at the hands of their male partners.⁸ In Victoria and elsewhere, there have been a number of recent and well-publicised cases in which women who were the victims of sustained violence killed their violent partners.⁹

1.4 Although this Report does not focus on individual cases,¹⁰ much of our work has involved considering how the criminal law should respond to homicides

report that 75% of intimate partner homicides in Australia over this period involved men killing female partners. Women consisted of only 20% of intimate partner homicide offenders.

- 6 In the Commission's study, there were allegations of prior family violence by the accused against the victim in about half the homicides taking place in the context of a relationship of sexual intimacy. Twenty-one of the 22 victims who were allegedly subjected to violence by the accused were women: Victorian Law Reform Commission (2003), above n 3, para 2.56. See also Jenny Mouzos, *Homicidal Encounters: A Study of Homicide in Australia 1989–1999* (2000), 119. This study, based on data collected for the National Homicide Monitoring Program, found that in the period 1996–1999 there were 193 intimate partner homicides and in 30% of cases, there was documented evidence of a prior history of domestic violence. However, as the NHMP data are extracted from police records, Mouzos suggests that information concerning a prior history of domestic violence may not necessarily be recorded—this may underestimate the extent of prior violence in the relationship.
- 7 A quarter of the intimate partner homicides occurring in Australia between 1989 and 2002 occurred between former partners and separated or divorced couples. In over four out of five cases (84%), women were the victims: Mouzos and Rushforth (2003), above n 2, 2. In the Commission's study, at least 14 male accused killed their partners when they left, or threatened to leave the relationship: Victorian Law Reform Commission (2003), above n 3, para 2.55. Wallace similarly found in her earlier study that in nearly half of cases involving men who had killed their female partners (46%), the woman had left or was in the process of leaving when she was killed: Alison Wallace, *Homicide: The Social Reality* (1986), 99.
- 8 A number of studies have confirmed that in a significant proportion of cases when women have killed their partners, they have experienced a history of violence and/or a physical attack immediately prior to the killing. In the Commission's recent homicide prosecutions study, of the 10 women who killed in the context of sexual intimacy, four argued their actions were in response to prior violence by the deceased: Victorian Law Reform Commission (2003), above n 3, para 2.53, Graph 9. In an earlier NSW study, Wallace found that there was a history of violence in 70% of cases in which women had killed their spouses, and that over half of killings by women of their spouses had occurred in response to an immediate threat or attack: Wallace (1986), above n 7, 97. Bradfield, in a study of 76 homicide cases from across Australia involving women who had killed their male partners over the period 1980–2000, found that in 65 cases there was a history of physical violence prior to the homicide: Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (Unpublished PhD Thesis, University of Tasmania, 2002), 22.
- 9 See for example *Osland v The Queen* (1998) 197 CLR 316 and *R v Besim* [2004] VSC 168 (Unreported, Supreme Court of Victoria, Redlich J, 17 February 2004).
- 10 The Federation of Community Legal Centres' Violence Against Women and Children Working Group argues in its submission that the Commission should have included detailed consideration and analysis of *R v Osland* (1998) 197 CLR 316 in the Options Paper (Submission 16). The Commission

which take place in a context of ongoing family violence. This Report considers what defences should be available in these circumstances, and what changes should be made so the law is interpreted and applied fairly to people who kill in response to family violence. The Report also considers the implications of our recommendations for homicides which occur in other circumstances.

1.5 Prior to the completion of this Final Report the Commission distributed an Issues Paper and an Options Paper, to stimulate debate about possible changes to defences to homicide. The Issues Paper, published in March 2002, explained the social context in which killings typically occur, described the existing defences to homicide and identified the main issues we would consider during this inquiry.

1.6 The Options Paper, published in September 2003, reported the findings of the Commission's study of homicide prosecutions and compared the defences and partial defences to homicide that are currently available under Victorian law with the defences and partial defences which apply in other jurisdictions. The Paper considered the arguments for and against various changes to the major defences and partial defences to homicide including self-defence,¹¹ provocation, mental impairment and infanticide. It also considered the arguments for and against introducing new partial defences of excessive self-defence and diminished responsibility which, if successfully raised, would result in a person who kills intentionally being convicted of manslaughter rather than murder.

1.7 This Final Report does not revisit all the possible reforms considered in the Options Paper. Instead it examines the arguments for and against the main options for change and explains the reasons for our final recommendations.

1.8 As well as proposing codification of and/or changes to self-defence, provocation, infanticide, duress and necessity, the Report recommends changes to the laws of evidence, which determine what evidence is admissible in homicide trials. These changes are intended to ensure that relevant evidence, including evidence of an abusive relationship between the deceased and the accused, can be admitted and that juries hear evidence which enables them to understand the dynamics of family violence. Such evidence will often be important when a jury is considering whether a person has acted in self-defence or under duress. The Report also considers the sentencing consequences of the changes we have

believes the law can only respond appropriately in such cases if it adopts a more systematic approach to the issue of family violence being adopted. The principles enunciated by the High Court in *R v Osland* (1998) 197 CLR 316 are considered in this Report in the context of our discussions on self-defence (Chapter 3) and evidence of relationship and family violence (Chapter 4).

11 The meanings of words and phrases in bold are explained in the Glossary.

recommended to the **substantive law**, for example the sentencing implications of the proposed abolition of provocation. It includes draft legislation to implement our recommendations.

OUR APPROACH

1.9 The Commission has considered how the criminal law should take account of factors which have historically been regarded as reducing or eliminating the **criminal culpability** of people who kill others, in light of the social context in which homicides now typically occur. We have also considered whether new defences or partial defences to homicide should be introduced. In this section we explain the broad principles which underpin our recommendations. These may be summarised as:

- **Differences in degrees of culpability for intentional killing should be dealt with at the sentencing stage.** In the section below we consider how differences in culpability should be taken into account and also explain our view that this issue should usually be dealt with through sentencing, rather than by partial defences. An exception is provided in the case of a person who genuinely believes his or her conduct is necessary for self-protection, but is unable to satisfy the jury his or her conduct was not unreasonable in the circumstances.
- **There are only three circumstances that should justify a person being completely excused from criminal responsibility for murder:** (1) where a person has killed out of necessity in self-protection, or to protect the life of another person, provided his or her actions were not unreasonable in the circumstances; (2) where a person was suffering from a mental impairment at the time of the killing; and (3) where the person's actions were not voluntary. On this basis this Report recommends that self-defence, mental impairment and **automatism** should continue to be available in Victoria, and that the defences of duress and sudden or extraordinary emergency be extended to murder.
- **The symbolic and practical effects of defences and partial defences.** Defences to homicide should take account of the symbolic purpose of criminal law in defining the limits of legal and illegal behaviour. In considering reforms to the current law it is also important to consider the practical impact of the proposed changes, including the way such changes may affect the practices of prosecutors and defence counsel and decision-making by people accused of homicide offences about whether or not to plead guilty. Our recommendations on changes to provocation, self-

defence and mental condition defences/partial defences consider the way that changes to the substantive law are likely to affect pleas as well as the outcomes of murder trials.

- **Clear, simple and accurate fact finding.** The criteria for particular defences to homicide (for example self-defence) should be readily understandable by juries. This will help to ensure fair and consistent decision-making, in accordance with law. Juries should be accurately informed about factors relevant to the availability of defences, for example the dynamics of family violence.

TAKING ACCOUNT OF DIFFERENCES IN CULPABILITY

THE PRESENT LAW

1.10 The defences and partial defences to homicide which are considered in this Report reflect criminal law judgments about the level of culpability which applies to different types of killing. The label ‘murder’ applies to the most serious type of killing—when a person intentionally kills another or intentionally inflicts serious injury on another person who dies as a result. In some situations a person who kills intentionally is not regarded as having any culpability for the killing, so they have a complete defence to a charge of murder. For example a person who kills in self-defence or kills because they are mentally impaired is not guilty of murder.

1.11 The label ‘manslaughter’ applies to killing in various situations in which the offender is not regarded as being as culpable as a murderer.¹² For example a person who commits an unlawful and dangerous act which results in another person’s death, although the offender did not intend to kill, is guilty of manslaughter but not of murder.¹³

1.12 The label ‘manslaughter’ also applies to some intentional killings. If the killing occurred in a situation where the accused has a ‘partial defence’ to murder,

12 There are also some statutory offences which cover unintentional killings which do not amount to manslaughter, such as culpable driving causing death under s 318 of the *Crimes Act 1958* (Vic).

13 The other form of involuntary manslaughter in Victoria is manslaughter by negligence. To establish manslaughter by a negligent act or omission, the prosecution must prove: that there is a breach of a duty of care owed to the victim; that the breach of duty caused the death; and that the breach was such that it could be characterised as ‘gross negligence’: *R v Adomako* [1995] 1 AC 171. Under ss 6B(1) and 6B(2) of the *Crimes Act 1958* (Vic), a survivor of a suicide pact may also be found guilty of manslaughter rather than murder, although a lesser penalty applies (a maximum of 10 years imprisonment).

the accused must be found guilty of manslaughter rather than murder. Under Victorian law provocation is a partial defence which if successfully raised will reduce the criminal liability of a person who has killed intentionally from murder to manslaughter. The maximum penalty for murder is life imprisonment, while the manslaughter maximum penalty is 20 years imprisonment.¹⁴ As we explain in later chapters of this Report, the existing defences and partial defences to murder reflect the historical circumstances in which they evolved and may no longer be appropriate today.

1.13 Victorian law also recognises a separate offence of infanticide, that also operates as an alternative verdict to murder.¹⁵ A woman who kills her infant (a child aged under 12 months) while her mind was disturbed by the effects of childbirth or lactation may be charged with and convicted of infanticide.¹⁶ Alternatively she may be charged with murder and argue infanticide. If she is charged with and convicted of infanticide, or successfully argues infanticide after being charged with murder, the maximum penalty is five years imprisonment.

1.14 The current offences, defences and partial defences to homicide are not the only way in which the law can take account of the different levels of culpability of a person who kills. Such differences may also be taken into account by prosecutorial authorities when they make decisions about whether to charge a person at all and what offence to charge them with.

1.15 Where it seems clear that a person has intentionally killed another person, the Director of Public Prosecutions (DPP) is unlikely to decide that the accused should not be charged at all, except in a very clear case of self-defence. In cases where the accused appears to have killed intentionally as the result of provocation, usual DPP practice is to charge the person with murder, as the issue of whether the provocation is sufficient to reduce the offence from murder to manslaughter is generally seen as a question to be resolved by a jury. However, where there is doubt about whether the accused had an intention to kill (eg where the person dies as the result of a single blow) the DPP may decide a person should be charged with manslaughter rather than murder.

¹⁴ *Crimes Act 1958* (Vic) s 3 (murder), s 5 (manslaughter). There is no mandatory minimum sentence for either offence.

¹⁵ Although an alternative verdict, infanticide is often referred to as both an offence and a defence. See further Chapter 6.

¹⁶ *Crimes Act 1958* (Vic) s 6.

1.16 Similarly, in a child killing case the DPP may decide to charge the mother with infanticide rather than murder. Prosecutorial decisions typically take account of the strength of the evidence against the accused and whether the accused is prepared to plead guilty to an offence, but they may also reflect the DPP's views about the culpability of the defendant.

1.17 Factors which affect the culpability of an offender can also be considered in the sentencing process. When a person is convicted of murder, the sentencing judge takes account of factors which reduce or increase the offender's blameworthiness. For example, if the killing occurred at a time when the offender was seriously depressed or was suffering from some other mental condition, the offender might be sentenced to a shorter term of imprisonment than an offender who was not suffering from a mental condition. If a person killed for financial gain, he or she is likely to receive a longer sentence than someone who killed a person who had previously abused the offender's child.

1.18 In criminal law generally, there is no consistent approach which determines whether factors relevant to culpability are taken into account in defining the offence, in the defences which can be raised to the offence, or the mitigating circumstances which are considered when the offender is sentenced. The partial defence of provocation and the defence of infanticide developed at a time when those convicted of murder were automatically sentenced to death. Allowing a jury to convict an intentional killer of manslaughter rather than murder meant the death penalty could be avoided where this penalty was too harsh because of the circumstances of the killing. Similarly, in jurisdictions which have abolished the death penalty but have a mandatory sentence of life imprisonment for murder, it may be desirable to retain the partial defence of provocation so judges are not required to sentence offenders to life imprisonment in situations where their culpability may be reduced.¹⁷ These considerations do not apply in Victoria where there is no mandatory sentence for murder. In

17 A mandatory life sentence for murder applies in Queensland, South Australia and Western Australia: see *Criminal Code Act 1899* (Qld) s 305; *Criminal Law Consolidation Act 1935* (SA) s 11 and *Criminal Law (Sentencing Act) 1988* (SA) s18; *Criminal Code Compilation Act 1913* (WA) s 282. The Northern Territory also has a mandatory life sentence for murder, but this does not prevent the court fixing a non-parole period, see *Criminal Code Act 1983* (NT) s 164. In New South Wales a lesser sentence than imprisonment for life can be applied, see *Crimes Act 1900* (NSW) s 19A and *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21.

Tasmania, where the court can impose any term of imprisonment for murder it considers appropriate,¹⁸ the partial defence of provocation has been abolished.¹⁹

1.19 The central question for the Commission has been whether factors which have historically reduced criminal liability from murder to manslaughter (eg the partial defence of provocation) should be retained. We have also had to consider whether it is appropriate to introduce new partial defences (eg excessive self-defence or diminished responsibility). This has required us to decide whether factors which may provide some extenuation for killing another person should still be dealt with as partial defences to murder as sentencing matters instead.

THE COMMISSION'S VIEW ON PARTIAL DEFENCES

1.20 As mentioned above, the criminal law does not contain any general principles to guide the way that factors affecting culpability should be considered.²⁰ The Commission has considered the arguments in favour of retaining the partial defence of provocation, which reduces liability for some intentional killings from murder to manslaughter. We have also considered whether new partial defences, such as the partial defence of diminished responsibility, should be introduced. Arguments in favour of retaining partial defences instead of dealing with differences of culpability as an issue for sentencing are as follows.

- Killers who are provoked (and perhaps killers who are suffering from a mental condition at the time of the killing) are not as morally culpable as cold-blooded murderers. Partial defences such as provocation (and possibly diminished responsibility) allow differences in culpability to be recognised in the way that offenders are ‘labelled’.
- Retaining partial defences such as provocation (and perhaps introducing new partial defences such as diminished responsibility) allows offences to be graded in a way that reflects differences in culpability.
- Abolishing partial defences may result in prosecutors charging more people with murder, rather than accepting pleas of guilty to manslaughter. Public

18 *Criminal Code Act 1924* (Tas) s 158.

19 *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas). This change came into effect on 9 May 2003.

20 Andrew Ashworth and Barry Mitchell (eds) *Rethinking English Homicide Law* (2000), 111–112.

money may be expended on murder trials in situations where the accused would now plead guilty to manslaughter.

- Where a person kills as the result of provocation, a jury may be reluctant to convict them of murder.²¹ As a result, some people who kill may escape all criminal liability, instead of being convicted of manslaughter as is the case under the present law. Retention of partial defences allows people who are culpable to some extent to be convicted of manslaughter instead.
- Decisions about culpability usually depend on determinations of fact. A jury, rather than a judge, should make decisions on the facts. If matters affecting culpability are left until the sentencing stage, the judge will have to make a determination about the factual circumstances of the offence, without the benefit of the jury's verdict.
- Because juries are drawn from the community they are better equipped than judges to decide whether the circumstances of the killing should reduce a person's culpability. The retention of partial defences such as provocation and the introduction of an offence of diminished responsibility would ensure these decisions were made by juries.
- Removing the partial defence of provocation may result in some offenders, who would previously have been convicted of manslaughter, receiving longer sentences than is currently the case. This may be unfair.

1.21 The Commission does not find these arguments convincing. In our view, it is no longer appropriate for the law to retain partial defences which reduce an offender's culpability for an unjustified and intentional killing. Generally the label 'murder' applies to those who kill intentionally or who intentionally cause serious injury which results in death, while the label 'manslaughter' covers unintentional killings. The partial defence of provocation is the main exception to this principle. Our view is that where the accused has an intention to kill or to cause serious injury, the accused should be labelled a murderer. The fact that a person kills because they have lost self-control (as in the case of provocation) or because they are suffering from a mental condition such as depression, which does not amount to a mental impairment,²² is not sufficient to distinguish them from other intentional killers.

21 House of Lords, Report of the Select Committee on Murder and Life Imprisonment (1989), para 81.

22 For discussion of the definition of mental impairment see Chapter 5, paras 5.7–5.44.

1.22 In some areas of the criminal law, gradations of culpability reflect the seriousness of harm suffered by the victim. In the area of assault, for example, offences and penalties are graded according to whether the assault caused physical harm and whether that harm was serious or trivial. Obviously this approach is irrelevant to homicide, where the harm caused by the offender (death) is the same whether or not the killer was provoked by the victim. Treating some categories of intentional killings as murder and others as manslaughter could be seen as a way of ‘blaming the victim’.

1.23 We have argued that both the nature of the harm suffered and the fact that the accused intended to kill justify the removal of the partial defence of provocation. Social factors which contribute to the offender’s criminal behaviour may also be relevant in assessing their culpability. In areas of the criminal law other than murder, these are dealt with as sentencing matters. For example a father may steal to feed his children. This factor does not result in him being acquitted of theft, or found guilty of a less serious offence, though it may result in him receiving a lighter sentence.

1.24 A wide range of factors may have contributed to offenders intentionally killing another person. They may have been brought up in a violent family or community and as a result may react to stressful situations violently. They may have low intelligence and poor impulse control. They may have previously been subjected to persecution or torture. They may be unemployed, have serious financial worries or be living in a dysfunctional family situation. They may have been subjected to abuse as a child, or be unemployed or ill. They may have killed a person they love to relieve them from intolerable pain.

1.25 None of these factors standing alone or in combination are regarded by the criminal law as sufficient to reduce criminal liability from murder or manslaughter, although they can be taken into account as mitigating factors in sentencing. In the Commission’s view, it is anomalous to treat some factors which contributed to the killing as partial defences to be considered by a jury (eg a person losing self-control as the result of provocation) while treating other factors which are equally relevant to culpability (eg killing a spouse who was terminally ill and in terrible pain) as sentencing matters. The New Zealand Law Commission in its recent review of criminal defences took a similar view:

There are many circumstances that may reduce the culpability of an intentional killer and it seems unfair and illogical to single out one particular situation. The ‘lesser culpability’ argument would in logic require a partial defence for every set of circumstances which renders intentional killing less culpable or a system of degrees of

murder which recognises all the levels of seriousness, from an aged pensioner assisting a spouse to gain release from an excruciatingly painful, incurable condition, to an armed robber callously killing a policeman in order to gain access to a bank vault.²³

1.26 Another problem with partial defences is that they assess gradations of blameworthiness on an all-or-nothing basis. If the jury does not think there is a reasonable doubt about the partial defence argued, the accused must be convicted of murder. In Victoria, where there is no mandatory sentence for murder, the sentencing process allows greater scope to take account of degrees of culpability. For example, a judge exercising his or her sentencing discretion can give greater or lesser effect to evidence of provocation or a mental condition which has affected the person's culpability, depending on the circumstances of the case.²⁴

1.27 It is true that the abolition of the partial defence of provocation will require judges to make factual findings about whether the offender was provoked when they are determining the sentence which should be imposed. However, sentencing already requires judges to consider factual issues other than provocation. As the New Zealand Law Commission has commented, 'the task of crafting penalty to blameworthiness has long been the daily diet of judges'.²⁵ Dealing with provocation as a matter to be taken into account in sentencing would ensure the fact that the killing occurred as the result of the offender's loss of self-control could be weighed against other matters which also affected the offender's culpability. Similarly, leaving factors relating to the mental condition of the offender to be dealt with during sentencing, rather than introducing a partial defence of diminished responsibility, allows this to be taken into account alongside other relevant factors. Measures to deal with the concern that some offenders will receive longer sentences if provocation is abolished are discussed in Chapter 7 of this Report.

1.28 We note the concern that abolishing the partial defence of provocation may lead to higher acquittal rates in murder cases. The Commission does not believe this is the inevitable result of abolishing provocation. Juries in recent years may have become more reluctant to accept the partial defence of provocation. In the Commission's homicide prosecution study, 61% of those who went to trial for

23 New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants Report No 73* (2001) 41.

24 D A Thomas, 'Form and Function in Criminal Law' in P R Glazebrook (ed) *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (1978), 28.

25 New Zealand Law Commission (2001), above n 23.

murder were convicted of murder,²⁶ compared with a conviction rate of about 25% in the study undertaken in the early 1990s by the former Law Reform Commission of Victoria.²⁷ In addition, there will still be many cases in which it is not clear whether the accused had an intention to kill or intentionally killed as a result of provocation. The proposed partial defence of excessive self-defence (discussed in Chapter 3, paras 3.103–3.115) will also provide the basis for a manslaughter verdict in some cases.

1.29 In summary, the philosophy which underpins this Report is that factors which affect the culpability of a person who kills intentionally should be considered at sentencing rather than taken into account as partial defences, which reduce the offender's criminal liability from murder to manslaughter. Consistently with this approach, we recommend the partial defence of provocation should be abolished and there should not be a partial defence of diminished responsibility.

1.30 We have, however, recommended the reintroduction of a partial defence of excessive self-defence. Under the present law, a person who intentionally kills another person because he or she believes on reasonable grounds it is necessary to do so, must be acquitted of murder because the criminal law regards self-defence as a justification for homicide. The partial defence of excessive self-defence is intended to cover the case where the accused was justified in defending him or herself but used excessive force to do so.

1.31 The Commission believes there is a clear distinction between a situation where an offender kills as the result of provocation where there was no justification for their actions, and the case of excessive self-defence where the accused acted lawfully in defending him or herself, but his or her response was disproportionate to the threat offered by the deceased. Where the accused relies on provocation, they concede the killing was unlawful but seek to rely on a factor that makes their act less heinous. By contrast, in the case of self-defence they are

26 Victorian Law Reform Commission (2003), above n 3, para 2.72, Table 9.

27 In the earlier study of homicide prosecutions between 1981 and 1987, of 206 offenders presented on murder 57 (27.7%) were convicted of murder: Law Reform Commission of Victoria, *Homicide Prosecutions Study*, Appendix 6 to Report No 40 (1991), 68, Table 47. The percentage of accused presented on a murder charge was similar in both studies. In the 1991 study, 64.6% (num=206/319) of accused were presented on murder, compared with 66.5% (num=121/182) in the Victorian Law Reform Commission's more recent study. However, a higher percentage of accused pleaded guilty to murder prior to trial in the more recent study than the 1991 study, with around 16.5% of accused presented on a murder charge pleading guilty to murder (num=20/121) compared with only 3.9% (num=8/206) in the 1991 study. The two studies are not strictly comparable as different counting rules were adopted for each.

arguing they acted lawfully, but that the killing was an overreaction to the danger with which the deceased person threatened them. The factual issues of whether the accused acted reasonably in defending him or herself or used excessive force in doing so are inextricably connected. It follows that both these issues should be resolved by the jury and excessive self-defence should not be left to be dealt with at sentencing.

THE COMMISSION'S VIEW ON COMPLETE DEFENCES

1.32 As discussed above, there are some circumstances in which a person who kills another person may be found not to have any culpability for the killing. Consistent with views expressed in submissions and consultations, in the Commission's view only three circumstances should justify a person being completely excused from criminal responsibility for murder:

1. where a person has killed out of a genuine belief that his or her actions were necessary in self-protection, or to protect the life of another person, provided the person's actions can be shown not to have been unreasonable in the circumstances;
2. where a person was suffering from a mental impairment at the time of the killing; and
3. where a person's acts were not voluntary.

1.33 The Commission therefore recommends in this Report that self-defence and mental impairment, with some minor clarifications, and automatism continue to be available in Victoria, and the defences of duress and sudden or extraordinary emergency be extended to murder.

1.34 Self-defence is already available under the current law. It makes good sense that people who genuinely believe their lives are in danger, or the life of another person is in danger, should be allowed to lawfully protect themselves or that other person from harm.²⁸ A person should not be expected to sacrifice his or her life, or have another person's life endangered because of another person's unlawful actions.

28 Or as Lord Morris of Borth-y-Gest, speaking for the Judicial Committee, suggested in *Palmer v The Queen* [1971] AC 814, 831: 'It is both good law and good sense that a man [or woman] who is attacked may defend himself [or herself]. It is both good law and good sense that he may do, but may only do, what is reasonably necessary.'

1.35 Duress and the defence of sudden or extraordinary emergency also are ‘self-preservation’ defences, which provide a defence to some crimes to a person who acts out of necessity to protect his or her life, or the life of another person. Under the current law in Victoria, duress does not apply to murder, and it is unclear whether it applies to attempted murder. There is also some uncertainty as to whether sudden or extraordinary emergency provides a defence to murder under the common law.

1.36 While the Commission believes a person who gives up his or her life for another person may be morally superior to someone who does not, we do not believe that person should be convicted of murder. For this reason, the Commission recommends in Chapter 3 of this Report that duress and the defence of sudden or extraordinary emergency be extended to murder.

1.37 The defence of mental impairment, as set out in the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, is a complete defence to murder in Victoria. The defence allows someone with a mental impairment which affected the accused such that he or she did not understand the nature or quality of his or her actions, or that his or her actions were wrong, to be acquitted and dealt with through the mental health system. Mental impairment, or the old defence of insanity, has long been recognised as a defence to murder. While the Commission recommends some minor changes to clarify the scope of mental impairment, and some procedural changes, we recommend that the defence remain substantially as it currently is.

1.38 The final circumstance which the Commission believes justifies a person being found not criminally responsible for murder is where the accused’s actions were not voluntary (in the sense of being automatic or unwilled)—often referred to as the ‘defence’ of automatism. While there are some arguments for abolishing automatism, including in the interests of simplifying the law, the Commission believes that the removal of automatism for homicide alone would not be appropriate. The Commission therefore recommends the retention of automatism as a defence.

THE SOCIAL CONTEXT OF HOMICIDE

1.39 In the Occasional Paper which was written for this reference, Professor Jenny Morgan argued that ‘social problems rather than legal categories best inform

our thinking about the law reform we need or want'.²⁹ We take a similar view in this Report. Defences and/or partial defences to homicide should not be based on abstract philosophical principles, but should reflect the context in which homicides typically occur. In particular, the law should deal fairly with both men and women who kill and defences should be constructed in a way that take account of the fact they tend to kill in different circumstances.

1.40 The Options Paper described the results of our study of homicide prosecutions that occurred between 1 July 1997 and 30 June 2001.³⁰ Important findings include:

- homicides are overwhelmingly committed by men—84.1% of the accused in our study were men;³¹
- both male and female accused were most likely to kill in the context of sexual intimacy—31.5% of homicides involved situations where a person killed his or her partner or former partner, or a sexual rival;³²
- men and women killed in the context of sexual intimacy for different reasons. Men tend to be motivated by jealousy or a desire to control their partner.³³ Although there was only a small number of women in our study, our findings were consistent with other research which shows women who kill partners are likely to kill in response to alleged violence by their partner and rarely kill as the result of jealousy or a desire to control their partner;³⁴ and
- in about half the incidents of homicide in the context of sexual intimacy there were allegations of violence against the accused. In 95.5% of these incidents (num= 21/22) the deceased was a woman.³⁵

29 Jenny Morgan, *Who Kills Whom and Why: Looking Beyond Legal Categories* (2002), 1.

30 The sample involved all cases which proceeded beyond the committal stage on a charge of murder, manslaughter or infanticide: Victorian Law Reform Commission (2003), above n 3, para 2.3.

31 Victorian Law Reform Commission (2003), above n 3, para 2.12. A total of 182 people were charged with homicide in the period of the study. Of these, 153 were men and 29 were women.

32 Ibid paras 2.43, 2.50.

33 Over three-quarters (78.6%) of men who killed in the context of sexual intimacy (n=33/42): ibid para 2.53, Graph 9.

34 Ibid paras 2.52–2.53. See also Kenneth Polk, *When Men Kill: Scenarios of Masculine Violence* (1994), 24.

35 Victorian Law Reform Commission (2003), above n 3, para 2.56.

1.41 Homicides involving the use of violence to resolve a dispute (eg a dispute about a debt) were the second most common category of killings (16.8%), followed by ‘spontaneous encounter’ homicides which occurred as the result of fights (11.9% of killings).³⁶ All spontaneous encounter killings involved men killing men and generally involved the killing of an acquaintance or a stranger.³⁷ The parties in these cases were usually affected by drugs and/or alcohol.³⁸ This fact is relevant in considering whether changes should be made to self-defence.

1.42 Defences may be raised at a variety of stages in the prosecution process. It was not possible to determine which defences and/or partial defences were raised, if any, for a large number of the accused in our study. However, it appears men and women tend to raise different defences. Men most often argued they had no intention to kill or cause serious harm (this is not, strictly speaking, a defence but relates to the intention to kill or cause serious injury which is required for murder) and provocation.³⁹ Twelve of the men who killed in the context of sexual intimacy raised provocation at trial. Four of them received a manslaughter verdict.⁴⁰ Seventeen men who went to trial raised self-defence. Six were acquitted. Four of the six cases involved killings in the context of spontaneous encounters.⁴¹

1.43 Women most frequently denied participation in the killing or argued they had no intention to kill.⁴² Two of the women who went to trial successfully relied on lack of participation or lack of intention.⁴³ The three women who raised a

36 Ibid para 2.43, Graph 6.

37 Ibid para 2.58.

38 The accused was under the influence of alcohol or drugs in at least 15 of the 17 spontaneous encounter homicides: *ibid*, n 135.

39 Of the 94 male accused who raised a defence at some stage of the prosecution process, 47.9% (num=45) raised lack of intention and 30.9% (num=29) raised provocation: *ibid*, para 2.88, Table 11.

40 *Ibid*, paras 3.28–3.29. Overall, 24 men raised provocation at trial. In seven cases at least, where there was a conviction for manslaughter, the verdict was attributable to provocation. Four of these involved killing in the context of family intimacy and three involved the killing of family members.

41 Victorian Law Reform Commission (2003), above n 3, paras 4.12–4.13, Graph 14.

42 Of the 12 female accused who raised a defence at some stage of the prosecution process, five (41.7%) denied participating in the killing, and four (33.3%) argued lack of intention to kill or cause serious injury: *ibid*, para 2.88, Table 11.

43 *Ibid*, paras 2.91–2.92, Table 13.

defence of provocation at trial were all convicted of murder.⁴⁴ Similarly, both women who raised self-defence at trial were convicted of murder.⁴⁵

1.44 The number of women in our study was too small to draw valid conclusions about how these defences affect women. In Rebecca Bradfield's study of 65 cases of women who killed violent spouses across Australia between 1980 and 2000, self-defence was left to the jury in 21 cases. Of these, nine were acquitted on the grounds of self-defence.⁴⁶ Of 11 women who raised provocation at trial, 10 did so successfully.⁴⁷ The majority of women who were convicted of manslaughter were convicted on the basis of a lack of intention to kill or to cause serious injury.⁴⁸

1.45 The most likely outcome for those charged in the Commission's recent study was a murder conviction. More than a third of those charged with homicide offences in our study (69, or 37.9% of the 182 accused) pleaded guilty to murder or manslaughter.⁴⁹ Overall, women were slightly less likely than men to be convicted of murder. This reflects the fact that women were more likely to plead guilty to manslaughter than men. However, women who went to trial had the same likelihood as men of being convicted of murder.⁵⁰ While the data does not allow definitive conclusions to be drawn, we suspect women often plead guilty to manslaughter rather than relying on self-defence in cases where they kill violent partners. As a result, they may lose the chance of a complete acquittal.⁵¹

44 Victorian Law Reform Commission (2003), above n 3, para 3.30.

45 Ibid para 4.14.

46 Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (Unpublished PhD Thesis, University of Tasmania, 2002), 194. See also Victorian Law Reform Commission (2003), above n 3, n 491.

47 A further 10 women pleaded guilty to manslaughter on the basis of provocation: Bradfield (2002), above n 46, 27.

48 Lack of intention was the most common basis for a manslaughter conviction for women who had killed their male partners. Of the 76 female accused in Bradfield's study, 22 pleaded guilty to manslaughter on the basis of a lack of intention, while a further 8 women were found guilty of manslaughter at trial on this basis: ibid, Table 1.3, 27.

49 Victorian Law Reform Commission (2003), above n 3, para 2.67, Table 8.

50 Ibid, paras 2.68–2.72.

51 See further Chapter 3.

CONSULTATIONS

1.46 The questions considered in this Report require judgments about moral as well as criminal law issues on which people can and do legitimately disagree. For this reason the Commission has made considerable efforts to consult with individuals and organisations with relevant expertise and views on the matters considered in this Report.

1.47 Prior to the publication of the Options Paper the Commission held two information sessions: one for the general public and one for women's groups, organisations providing services to victim/survivors of domestic violence and the police. We also had preliminary discussions with lawyers from the Victorian Aboriginal Legal Service and Victoria Legal Aid, Supreme Court judges who deal with homicide cases and forensic psychiatrists.

1.48 Following the release of the Options Paper, the Commission ran information sessions for government, professionals and community agencies to highlight some of the main issues we were considering. Participants came from the Department of Justice, the Department of Human Services, Forensicare, the Victorian Aboriginal Legal Service, Victoria Legal Aid, the Law Institute of Victoria, the Criminal Bar Association, the Office of Public Prosecutions, Victoria Police and the Federation of Community Legal Centres.

1.49 The information sessions provided the basis for more formal consultations. The Commission convened the following roundtables to deal with particular issues relating to the reference:

- Four roundtables on provocation and self-defence.
- Four roundtables on mental condition defences (mental impairment, diminished responsibility and automatism).
- A roundtable on child killings/infanticide.
- A roundtable on issues relating to the admission of evidence.

1.50 Participants in these roundtables included members of the judiciary, prosecution and defence lawyers, the DPP, psychiatrists, psychologists, legal academics, research and policy officers, and family violence workers.

1.51 One of the central issues considered during this reference was the approach the law should take to men and women who kill in the context of family violence. To explore this issue the Commission hosted a public forum at Victoria University. Over 80 people from a range of government and non-government organisations participated in the forum and expressed their views on case studies

prepared by the Commission to highlight the types of questions we were considering.

1.52 The Commission also held two workshops to explore how a person's cultural background might be relevant in understanding why fatal force was used by victims and perpetrators of family violence. The first workshop, held with the support of the Diversity Unit of the Department of Justice, involved representatives of non-English speaking background communities. The second workshop was held jointly by the Commission and the Aboriginal Family Violence and Prevention and Legal Service and discussed issues relating to Indigenous family violence.

1.53 The roundtables and workshops described above provided invaluable information to the Commission and helped shape our recommendations.

OUTLINE OF FINAL REPORT

1.54 Chapter 2 of this Report describes the current law of provocation and explains the reasons why the Commission recommends the abolition of this partial defence for murder.

1.55 Chapter 3 proposes modifications to the law of self-defence and the reinstatement of a partial defence of excessive self-defence. It also proposes that the defences of duress and sudden and extraordinary emergency should be extended to murder. The changes to self-defence and duress are intended to ensure that these defences are more readily available to people who kill in response to family violence.

1.56 Chapter 4 recommends changes to the law of evidence which are intended to assist juries in making decisions about an accused, including whether an accused acted in self-defence or under duress.

1.57 Chapter 5 considers the existing defence of mental impairment. It proposes some procedural changes but recommends that otherwise this defence should not be changed. It recommends against the introduction of a partial defence of diminished responsibility and also proposes changes to deal with the concept of automatism.

1.58 Chapter 6 recommends changes to the offence of infanticide.

1.59 Chapter 7 makes recommendations about sentencing, consequent upon our recommendations for changes to the substantive defences.

Chapter 2

Provocation

INTRODUCTION

2.1 In this Chapter the Commission recommends the abolition of the partial defence of provocation. This is consistent with the Commission's general approach discussed in Chapter 1 that differences in degrees of culpability for intentional killings should be dealt with at sentencing, rather than through the continued existence of partial defences to homicide. Under the current law, provocation when accepted by the jury reduces murder to manslaughter. A person who successfully argues provocation escapes the label of 'murderer' and is likely to receive a lower sentence as a result of being sentenced for manslaughter rather than murder.⁵²

2.2 In this Chapter we briefly explore the historical foundations of provocation and the current form of the defence. We discuss a number of criticisms of the defence, before considering arguments in favour of the retention of provocation and some options for reform. Finally, we set out in more detail the Commission's reasons for recommending the abolition of the defence.

THE HISTORICAL CONTEXT

2.3 The defence of provocation developed at a time when the death penalty was mandatory for those convicted of murder. The existence of provocation as a partial justification or excuse is therefore inextricably linked with the desire to mitigate against the harshness of a mandatory sentence.

2.4 The development of provocation can be traced back to 16th and 17th-century England when drunken brawls and fights arising from 'breaches of honour' were commonplace. The notion of honour was of great importance to society. A major breach of honour occurred, for example, if a man's wife

52 See further Chapter 7.

committed adultery,⁵³ as this was regarded as ‘the highest invasion of property’.⁵⁴ But honour could be breached by other means. If insulted or attacked, it was seen as necessary for a man to ‘cancel out’ the affront by retaliating in some way. An angry response was expected and the failure to produce such a response would be considered cowardly. Anger was considered to be a reasonable and rational response in the circumstances.⁵⁵ The focus was therefore on the magnitude of the wrong rather than the mental state of the accused.

2.5 The modern law of provocation can be traced back to the judgment of Chief Justice Holt in *R v Mawgridge*⁵⁶ in 1707. Chief Justice Holt, in that case, limits the circumstances in which a manslaughter verdict would be open to four circumstances: killing in response to a grossly insulting assault; killing a person you see attacking a friend; killing to free a person who is being unlawfully deprived of their liberty; and killing a man caught in the act of adultery with one’s wife.⁵⁷ Insulting words or gestures were at that time regarded as insufficiently grave to support a plea of provocation.

53 *R v Maddy* (1672) 1 Ventris 158; 86 ER 108. Note that Ian Leader-Elliott suggests the defence appears to have been confined before the 19th century to the killing of sexual rivals, rather than a wife, and that the husband must have witnessed the two in the act of committing adultery. The first reported cases to consider the possibility that provocation might be available to a husband who killed his wife were in the early 19th century, and in the context of denying a defence of provocation to men who killed on suspicion of adultery (*R v Pearson* (1835) 2 Lewin 216; 168 ER 1133 and *R v Kelly* (1848) 175 ER 342. Ian Leader-Elliott, ‘Passion and Insurrection in the Law of Sexual Provocation’ in Rosemary Owens Ngaire Naffine (ed) *Sexing the Subject of Law* (1997), 153.

54 *R v Mawgridge* (1707) Kel 119; (1707) 84 ER 1115. See further n 57 below. Ian Leader-Elliott suggests the English conceived adultery as a wrong to property, rather than to honour, which may have accounted for the refusal to allow a husband who killed his rival a complete defence: Leader-Elliott, above n 53, 155.

55 Jeremy Horder, *Provocation and Responsibility* (1992), 40. Jeremy Horder calls this notion of a rational anger ‘anger as outrage’, and he sees it as forming the original basis of the defence of provocation. For a discussion of the notion of ‘anger as outrage’, see Jeremy Horder, *Provocation and Responsibility* (1992), Chapter 4, 59–71.

56 *R v Mawgridge* (1707) Kel 119; (1707) 84 ER 1107.

57 *R v Mawgridge* (1707) Kel 119, 135–137; (1707) 84 ER 1107, 1114–1115. Lord Holt CJ defined the categories as follows:

‘First, if one man upon angry words shall make an assault upon another, either by pulling him by the nose, or filliping upon the forehead, and he that is so assaulted shall draw his sword, and immediately run the other through, that is but manslaughter...Secondly, if a man’s friend be assaulted by another, or engaged in a quarrel that comes to blows, and he in the vindication of his friend, shall on a sudden take up a mischievous instrument and kill his friend’s adversary, that is but manslaughter...Thirdly, if a man perceives another by force to be injuriously treated, pressed, and restrained of his liberty, though the person abused doth not complain, or call for aid or assistance; and others out of

2.6 By the early 19th century, the defence of provocation had shifted from being based on the idea of anger as a justified response in some situations, to being based on the idea of 'anger as loss of self-control'. In 1869 in *R v Welsh*, the concept of an objective standard of self-control by way of the 'reasonable man' was also introduced.⁵⁸ These developments are reflected in the modern law of provocation.

2.7 The justification for having a defence is no longer that the accused acted with an appropriate level of retaliation given the circumstances. Instead, provocation is generally justified on the basis that the accused could not properly control his or her behaviour in the circumstances, and an ordinary person might react similarly. Passion or anger is seen to unseat reason, rather than being in accordance with it. This is why provocation is often referred to as a 'concession to human frailty'.⁵⁹ People are seen as suffering from a wave of anger which overcomes their capacity to behave in a normal law-abiding fashion. A person who kills due to a sudden loss of self-control after being provoked is regarded by some as being less morally culpable than someone who kills 'deliberately and in cold blood'.⁶⁰

THE MODERN LAW OF PROVOCATION

2.8 Under the modern law, there are three requirements that must be met to establish provocation.

- There must be evidence of something accepted as provocation.
- 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 form an intention to inflict grievous bodily harm or death.⁶¹

compassion shall come to his rescue, and kill any of those that shall so restrain him, that is manslaughter...Fourthly, when a man is taken in adultery...with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter: for jealousy is the rage of a man, and adultery is the highest invasion of property.'

58 (1869) 11 Cox CC 336, 338, Keating J.

59 *East's Pleas of the Crown* (1803) Vol 1, 239. See also Coleridge J in *R v Kirkham* (1837) 8 Car & P 115, 119; 173 ER 422, 424: '[T]he law condescends to human frailty'.

60 *Parker v R* (1963) 111 CLR 610, 651, Windeyer J.

61 *Masciantonio v R* (1995) 183 CLR 58, 66.

THE NEED FOR A TRIGGERING INCIDENT

2.9 While historically there was a requirement that there must be a particular triggering incident before provocation can be argued, courts are now more likely to recognise the cumulative effect of the circumstances leading up to the accused's loss of control.⁶² This includes the background and history of the relationship between the accused and the victim. For instance, the courts have accepted that a loss of self-control can develop after a period of prolonged abuse, and without there needing to be a specific triggering incident.⁶³ It is also 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.⁶⁴

LOSS OF SELF-CONTROL

2.10 Originally, the required loss of self-control had to be the result of anger. It has now been expanded to include loss of self-control due to fear or panic.⁶⁵ The central question is 'whether the killing was done whilst the accused was in an emotional state which the jury are prepared to accept as a loss of self-control'.⁶⁶ Historically, it was also necessary for the 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.⁶⁷ However, evidence of a 'cooling-off period' between the provocative conduct and the homicide will be a factor 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

2.11 The final element of the test is whether the provocation was such that it was capable of causing an 'ordinary person' to lose self-control and act in a

62 *Chhay v R* (1994) 72 A Crim R 1.

63 *Chhay v R* (1994) 72 A Crim R 1.

64 *The Queen v R* (1981) 28 SASR 321, 326.

65 *Van den Hoek v R* (1986) 161 CLR 158, 168.

66 *Chhay v R* (1994) 72 A Crim R 1, 14, Gleeson CJ.

67 *Parker v R* (1964) 111 CLR 665, 679.

manner that would encompass the accused's actions.⁶⁸ There are two aspects to this test:

- the gravity of the provocation; and
- whether the provocation was of such gravity that it could cause an ordinary person to lose self-control and act like the accused.

2.12 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.⁶⁹ Relevant characteristics may include age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history.⁷⁰ They do not include 'exceptional excitability or pugnacity or ill-temper',⁷¹ but may include 'mental instability or weakness'.⁷²

2.13 Having assessed the gravity of the provocation, the jury must then determine whether provocation of that level of gravity could have caused an ordinary person to lose self-control to such an extent that he or she could act in a manner like the accused. Could an ordinary person form an intention to inflict grievous bodily harm or death in those circumstances?⁷³ Unlike the question of gravity—for which the ordinary person can have all of the relevant characteristics of the accused—in answering this question no personal characteristics, apart from age, may be taken into account.⁷⁴ Using an example taken from the Options Paper, if a 33-year-old white man with a stutter killed his estranged wife after she had made disparaging remarks about him and teased him about his stutter, in determining the gravity of the provocation, the jury may consider how an ordinary 33-year-old white man with a stutter might have viewed those comments. The jury would then have to consider how an ordinary adult not

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

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

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

71 *DPP v Camplin* [1978] AC 705, 726, Lord Simon.

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

73 *Masciantonio v The Queen* [1995] 183 CLR 58, 66–7.

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

sharing any of the accused's characteristics, such as his stutter or sex, might have reacted to provocation of that gravity.⁷⁵

CRITICISMS OF PROVOCATION

2.14 As we discussed in Chapter 3 of the Options Paper, provocation is one of the most strongly criticised defences in the criminal law. A number of calls have been made for provocation to be reformed or abolished. Criticisms of the defence include :

- provocation and a loss of self-control is an inappropriate basis for a partial defence—people should be able to control their impulses, even when angry;
- provocation is gender biased;
- provocation promotes a culture of blaming the victim;
- provocation privileges a loss of self-control as a basis for a defence;
- the test for provocation is conceptually confused, complex and difficult for juries to understand and apply;
- provocation is an anomaly—it is not a defence to any crime other than murder; and
- provocation is an anachronism—as we no longer have a mandatory sentence for murder, provocation should be taken into account at sentencing as it is for all other offences.

2.15 In this section we summarise the main criticisms of the defence, and some of the views expressed in submissions and during our consultations on the Options Paper.

A LOSS OF SELF-CONTROL SHOULD NOT FORM THE BASIS OF A SEPARATE EXCUSE

2.16 Provocation is seen as offending against one of the fundamental assumptions of the criminal law: '[t]hat individuals ought at all times to control their actions and to conduct themselves in accordance with rational judgment'.⁷⁶ In submissions and consultations, a number of people considered a 'loss of self-

75 Victorian Law Reform Commission (2003), above n 3, Case Study 1 discussed at paras 3.14–3.15.

76 Andrew Ashworth, 'The Doctrine of Provocation' (1976) 35 (2) *Cambridge Law Journal* 292, 317.

control' as a problematic basis for a partial defence⁷⁷—‘a violent loss of control’ should not be excused.⁷⁸ Several submissions maintained that defences for intentionally killing another person ‘should not be available in our legal system apart from rare occasions, such as self-defence’.⁷⁹

2.17 Similar criticisms have been made in past reviews of the defence. The loss of self-control, it is argued, does not provide ‘a sufficient reason, moral or legal, to distinguish such people from cold-blooded killers’.⁸⁰ Short of mental impairment, it is suggested we should expect people to be able to control their impulses regardless of what provocation is offered. In the Commission’s view, this provides one of the most compelling reasons for recommending the abolition of the defence.

PROVOCATION IS GENDER-BIASED

2.18 Provocation is also criticised on the basis that the defence predominantly operates to excuse male anger and violence toward women.⁸¹ As we noted in Chapter 3 of the Options Paper, this gender bias is seen to manifest itself in two ways.⁸²

2.19 First, the way the test is framed makes it difficult for women to argue it successfully. Because the defence was originally framed to deal with male aggressive responses to provocative conduct, the sexless ordinary person, it has been argued, is in fact male.⁸³ The association of provocation with typical male responses is said to make it a defence which is more suited to men than to women, even taking into account changes that have occurred over the past 50 years. A sudden violent loss of self-control in response to a particular triggering act is seen

77 Submission 14; Roundtable 11 December 2003.

78 Submission 11.

79 Submissions 3, 4, 6, 7 and 8.

80 Law Reform Commission of Victoria, *Homicide Report No 40* (1991), para 156. See also Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, *Model Criminal Code, Chapter 5, Fatal Offences Against the Person Discussion Paper* (1998), 105.

81 See, for example, Model Criminal Code Officers Committee of the Attorneys-General (1998), above n 80, 89.

82 The main criticisms are summarised in this section. For a more comprehensive discussion of the issues raised in this section, see Victorian Law Reform Commission (2003), above n 75, 3.38–3.52.

83 Peter Papathanasiou and Patricia Easteal, ‘The “Ordinary Person” in Provocation Law: Is the “Objective” Standard Objective?’ (1999) 1 (1) *Current Issues in Criminal Justice* 53, 54.

to be the archetypal male response to provocative conduct. Despite changes that have been made over time,⁸⁴ this test remains very difficult for women to use.

2.20 The perceived failure of provocation to accommodate women's experiences of violence has provided a strong impetus for calls to abolish provocation.⁸⁵ Last year Tasmania became the first jurisdiction in Australia to abolish the defence.⁸⁶ In introducing the Bill abolishing provocation as a defence, the Minister for Justice expressed a number of the above concerns:

[T]he defence of provocation is gender biased and unjust. The suddenness element of the defence is more reflective of male patterns of aggressive behaviour. The defence was not designed for women and it is argued that it is not an appropriate defence for those who fall into the 'battered women syndrome'. While Australian courts and laws have not been sensitive to this issue, it is better to abolish the defence than to try to make a fictitious attempt to distort its operation to accommodate the gender-behavioural differences.⁸⁷

2.21 Some have argued that when women raise provocation they may be as successful or more successful with the defence than men. This has been supported by findings of empirical research conducted by the former Law Reform Commission of Victoria (LRCV)⁸⁸ and the Judicial Commission of New South Wales.⁸⁹ By contrast, in the recent homicide prosecutions study undertaken by the

⁸⁴ 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.

⁸⁵ See, for example, Model Criminal Code Officers Committee of the Attorneys-General (1998), above n 80.

⁸⁶ Provocation was abolished by the *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas) which repealed s 160 of the *Criminal Code Act 1924* (Tas). This change came into effect on 9 May 2003.

⁸⁷ Tasmania, *Parliamentary Debates*, House of Assembly, 20 March 2003, 60 (Judy Jackson, Minister for Justice).

⁸⁸ Law Reform Commission of Victoria (1991), above n 80, para 164, discussed at paras 165 and 167–168. In the Commission's homicide prosecutions study, 10 women and 65 men raised provocation as a defence. Of the 10 women who raised provocation, six (60%) were convicted of manslaughter, and three (30%) were acquitted. None were convicted of murder. In comparison, 13 (20%) of the 65 male accused who argued provocation were convicted of murder, 42 (65%) of manslaughter, and six (9%) were acquitted.

⁸⁹ Judicial Commission of New South Wales, *Sentenced Homicides in New South Wales 1990–1993, A Legal and Sociological Study* (1995), ch 5. In the Judicial Commission's study, four of the 10 men who raised provocation were found guilty of manslaughter and six were convicted of murder. All three of the women who raised provocation were found guilty of manslaughter. However, it should be

Commission for the purpose of this reference, only three women raised provocation as a defence at trial. None of these women were successful in doing so.

2.22 It is not simply on this basis that the defence is criticised as being gendered. The defence is also seen as gender biased due to the very different circumstances in which men and women raise it.⁹⁰ When many men who kill their partners successfully raise provocation, the provocation is often their partners' alleged infidelity and/or their partner leaving or threatening to leave.⁹¹ Their actions are therefore primarily motivated by jealousy and a need for control. In comparison, when women kill their partners and successfully raise the defence, there is often a history of physical abuse in the relationship.⁹² Therefore, as the New South Wales Law Reform Commission (NSWLR) has cautioned in discussing the former LRCV's research:

It is...important to be aware of what lies behind these figures. The general pattern that emerges from the cases is that men use the provocation defence when they kill their partners or ex-partners in a jealous rage and that women use it...where they have been the victims of long term domestic abuse. The data treats these situations as commensurate—something which itself should be examined for gender bias.⁹³

cautioned that as so few women raised provocation, it is not possible to draw any conclusions from this data.

90 See also Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (Unpublished PhD Thesis, University of Tasmania, 2002), 146. It is important to note that the argument presented here is not that domestic violence excuses retaliatory violence, but rather that the defence is applied in a gendered way.

91 Ibid 145. In her study of homicides between intimate partners between 1980 and 2000, Bradfield found that in eight of the 15 cases where men successfully relied on provocation, the provocative conduct relied on was their partners' infidelity or separation. A further 17 men unsuccessfully argued provocation on this basis.

92 Ibid 145–146. In the case of all 22 women who killed their partners and successfully argued provocation, there was a history of prior physical violence. Only one woman who argued that the provocative conduct was prior violence was unsuccessful in doing so (*Osland v The Queen* (1998) 197 CLR 316).

93 New South Wales Law Reform Commission, *Provocation, Diminished Responsibility and Infanticide* Discussion Paper 31 (1993), para 3.98. See also Jeremy Horder, who notes 'superficial reflection on these bare statistics might lead one to suppose that it is easier for women than for men to 'get off' with manslaughter on the grounds of provocation when charged with murder. If one bears in mind, though, the very large percentage of women facing a murder charge in domestic homicide cases who have themselves been battered, something rarely true of men facing such a charge, it might be thought rather surprising that the proportion of women who are convicted only of manslaughter is not much higher, compared with their male counterparts': Jeremy Horder, *Provocation and Responsibility* (1992), 187.

2.23 The Commission's recent homicide prosecutions study conducted for this reference confirmed that provocation is most often raised by men in the context of a relationship of sexual intimacy in circumstances involving jealousy or an apparent desire to retain control.⁹⁴ The continued existence or availability of provocation in these circumstances may therefore be seen as sending an unacceptable message—that men's anger and use of violence against women is legitimate and excusable.⁹⁵ Some people have questioned 'how, in a supposedly "civilised" society, can the desire to leave a relationship constitute behaviour which would provoke anyone to kill?':⁹⁶

2.24 In her submission Dr Danielle Tyson, in calling for the abolition of the defence, similarly argued:

[Provocation] has historically operated, and continues to operate, as a profoundly sexed and gendered excuse for men to kill their former or current partners, and for men to kill other men who are said to have made a non-violent sexual advance.⁹⁷

2.25 While a number of submissions and those consulted shared these views, for many, this provided an argument for reform of the defence rather than its abolition.⁹⁸ We discuss reform proposals at [2.53]–[2.91].

94 Twenty-four men raised provocation at trial, and three women. Half of the killings involving male accused had occurred in the context of sexual intimacy. Four of the 12 men who killed in the context of sexual intimacy were found guilty of manslaughter and 8 were convicted of murder. In comparison, none of the three female accused who raised provocation as a defence at trial were successful in doing so. However, the sample size of the study was very small.

95 Debbie Kirkwood, *Women Who Kill: A Study of Female Perpetrated Homicide in Victoria Between 1985 and 1995* (Unpublished PhD Thesis, Monash University, 2000), 209.

96 Adrian Howe, 'Reforming Provocation (More or Less)' (1999) 12 *Australian Feminist Law Journal* 127, 130. Jenny Morgan notes that some judges will not leave provocation to the jury for consideration in such cases. She suggests that whether or not provocation is removed from the jury in these cases might depend on the particular reading of the facts. When provocation is left to the jury in these cases, the judge's focus is on the 'sexual' behaviour, with the conduct viewed as being in the 'heat of passion'. In those few cases where provocation is not left to the jury, the judge emphasises the 'separation' rather than the 'sex': Jenny Morgan, 'Critique and Comment: Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them' (1997) 21 *Melbourne University Law Review* 237, 248–9.

97 Submission 31.

98 See, for example, Submissions 14 and 16.

PROVOCATION PRIVILEGES A LOSS OF SELF-CONTROL AS A BASIS FOR A DEFENCE

2.26 Provocation has also been criticised as unfairly privileging certain factors over others as reducing an accused's level of criminal responsibility. In consultations it was argued there are a number of factors, other than a loss of self-control, that may play an equal if not more important role in assessing the blameworthiness of a person who intentionally kills.⁹⁹ These include a person's reasons for killing (eg did the offender kill for profit, out of compassion, as the culmination of a pattern of violent control of their partners, out of jealousy, or to escape abuse?) and the vulnerability of the victim (eg did the offender kill a child?). The Model Criminal Code Officers Committee in its review of provocation took this position, suggesting 'some perhaps even most [hot-blooded killers], are morally just as culpable as their cold-blooded counterparts'.¹⁰⁰

2.27 In the Commission's view it is difficult, if not impossible, to explain why anger and a loss of self-control should provide a partial defence to murder, while other circumstances that may reduce an offender's culpability—for instance killing a person out of compassion—are simply taken into account at sentencing. After considering a number of possible approaches, we have taken the position that matters affecting culpability, including a loss of self-control, should not form the basis of separate partial defences.

2.28 In consultations the conceptualisation of men's behaviour as a loss of self-control was also criticised as misconceived. Rather than a loss of self-control, the use of anger and violence by men against women is often instrumental—a deliberate and conscious process—intended to gain compliance and control. Those who inflict violence, including in the context of a relationship of sexual intimacy, it was argued, generally make a decision to act or not to act.¹⁰¹ On this

99 Roundtable 11 December 2003.

100 Model Criminal Code Officers Committee of the Attorneys-General (1998), above n 80, 105.

101 One of the participants at the roundtable of 4 December 2003 commented that a man who is violent towards his partner invariably is not violent towards others, due to the risk of consequences. Violence towards acquaintances risks social ostracism. Violence towards an employer risks termination and criminal charges. Therefore, 'the notion that men irrationally commit violence towards their partners does not hold water'. In the context of family violence, anger can be a way of gaining control over women by instilling fear. See also Submission 23. This point has previously been made by other commentators. For example R Emerson Dobash and Russell P Dobash, *Violence Against Wives* (1979), 45.

argument, even if provocation were to be retained as a defence, men who kill in these circumstances should not have access to a defence.

PROVOCATION PROMOTES A CULTURE OF BLAMING THE VICTIM

2.29 The continued existence of provocation can be seen as promoting a culture of blaming the victim and sending a message that some victims' lives are less valuable than others. An argument that the victim provoked his or her own death can understandably be the cause of significant distress to the friends and families of victims—particularly when the homicide took place against the background of prior family violence. They may find it difficult to accept that someone who kills in those circumstances can only be found guilty of manslaughter, even though he or she had an intention to kill.¹⁰² The sense of injustice experienced by many victims' families in these circumstances was confirmed by Victims Referral and Assistance Service in its submission:

[I]n our role of providing support to the families of victims attending a trial, we are aware of the levels of distress they experience in hearing the defence mount a case which effectively seeks to attribute blame to the victim for her [or his] own death, particularly when they know she [the victim] has endured years of abuse from the defendant. As noted in the Options Paper, a verdict of manslaughter can often lead the families of victims to report feeling justice was not served because the perpetrator 'got away with murder'.¹⁰³

2.30 The fact that homicide victims are not available to give their side of the story, and that there will often be no independent witnesses or corroborating evidence, has also led to criticisms that claims that an assault was provoked are easily fabricated.¹⁰⁴

102 Roundtable 4 December 2003.

103 Submission 23.

104 See for example, Model Criminal Code Officers Committee of the Attorneys-General (1998), above n 80, 99. See further Victorian Law Reform Commission (2003), above n 75, paras 3.99–3.100. But note, at one of the roundtables held by the Commission it was suggested that now unsworn evidence is no longer admissible, there is less danger of provocation being abused by the defence: Roundtable 11 December 2003. See *Evidence Act 1958* (Vic) s 25 (abolition of accused's right to make unsworn statement or to give unsworn evidence). An example of use being made by the defence of an unsworn statement by the accused as a basis for arguing provocation is *Moffa v The Queen* (1977) 138 CLR 601, 617–618, Stephen J.

PROVOCATION CAN BE TAKEN INTO ACCOUNT AT SENTENCING

2.31 Provocation is an anomaly in the law. It does not operate as a defence or partial defence to any other crime in Victoria.¹⁰⁵ Historically, provocation mitigated against the harshness of a mandatory death penalty for murder. As Australia no longer has the death penalty and Victoria has a flexible sentencing regime for murder, it can be argued that provocation is no longer necessary as a partial defence.

2.32 A number of people consulted who were in favour of the abolition of the defence argued that, to the extent that provocation may reduce an offender's moral culpability, it should simply be taken into account with other mitigating factors at sentencing.¹⁰⁶ One of the perceived benefits of this approach is that it will allow for greater flexibility to take provocation into account when it is appropriate to do so, and to ignore it when it is not.¹⁰⁷ The Model Criminal Code Officers Committee provided this as one of its reasons for recommending the abolition of the defence:

In place of the partial defence of provocation, with all its doctrinal defects, the sentencing process offers a flexible means of accommodating differences in culpability between offenders. Some hot blooded killers are morally as culpable as the worst of murderers. Some are far less culpable. The differences can be reflected as they are at present, in the severity of the punishment.¹⁰⁸

2.33 The abolition of the defence might initially cause some uncertainty about appropriate sentences for offenders who might previously have received a manslaughter verdict on the basis of provocation. However, many of those consulted did not see this as a sufficient reason for retaining the defence. Over time, sentencing practices for murder will change to take account of the situations in which people kill and the effect of provocation.¹⁰⁹ Sentencing issues are discussed further in Chapter 7.

105 Submission 14; Roundtables 4 and 11 December 2003.

106 Roundtables 4 and 11 December 2003.

107 Roundtables 4 and 11 December 2003. The comment was made that while the circumstances might justify a reduced penalty in some cases, in others killing in anger might be seen as an aggravating rather than mitigating factor. Unlike juries, judges have to give reasons for their sentencing decisions, which also allows potential biases based on racism, sexism or homophobia to be exposed and subject to scrutiny.

108 Model Criminal Code Officers Committee of the Attorneys-General (1998), above n 80, 105.

109 Roundtable 11 December 2003. See further Chapter 7, particularly 7.53–7.54.

THE TEST IS CONCEPTUALLY CONFUSED, COMPLEX AND DIFFICULT

2.34 Finally, the current test for provocation is criticised as being conceptually confused, complex and difficult for juries to understand and apply. The ordinary person test, in particular, has attracted much criticism from both judges and academic commentators. A number of law reform agencies have argued it should be abolished.¹¹⁰ Criticisms of the current test include:

- it fails to deal adequately with the issue of ‘culture’;
- it fails to distinguish sufficiently between values and beliefs the law should and should not tolerate—for instance, by allowing all of the accused’s values and beliefs to be taken into account, it can lead to the acceptance of prejudiced views as providing an excuse for lethal force;
- the current test, which requires the jury to distinguish between the ordinary person for the purposes of determining the gravity of the provocation and the ordinary person for the purposes of determining powers of self-control, is confusing and difficult for juries to understand and apply.

2.35 Some have gone further and argued that the ordinary person test should be abandoned altogether as it unfairly imposes criminal liability according to an objective standard of behaviour. This is said to be contrary to basic principles of criminal responsibility, according to which the accused’s ‘culpability is to be assessed on the basis of his or her subjective mental state’.¹¹¹

¹¹⁰ Law Reform Commission of Victoria (1991), above n 80, paras 187–191; Criminal Law Revision Committee, *Offences Against the Person Report No 14* (1980), paras 81–3 followed by the Law Commission, *A Criminal Code for England and Wales: Volume 1 Report and Draft Criminal Code Bill [Great Britain]* Report No 177 (1989), cl 58 and Law Commission, *A Criminal Code for England and Wales: Volume 2 Commentary on Draft Criminal Code Bill [Great Britain]* Report No 177 (1989), para 14.18; American Law Institute, *Model Penal Code and Commentaries (Official Draft and Revised Comments) with text of Model Penal Code as adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C. May 24, 1962, Part 1, General Provisions 3.01 to 5.07* (1985), Article 210.3; Criminal Law and Penal Methods Reform Committee of South Australia, *Fourth Report: The Substantive Criminal Law* (1977), 21–2.

¹¹¹ Model Criminal Code Officers Committee of the Attorneys-General (1998), above n 80, 79. See also New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide* Report No 83 (1997) paras 2.51–2.53.

2.36 Those consulted suggested the ordinary person test was particularly confusing for juries—requiring them to ‘perform a kind of mental gymnastics’.¹¹² As the Model Criminal Code Officers Committee observed, the ordinary person has ‘a split personality in that his or her character [is] suddenly changing depending on which part of the test is being addressed’.¹¹³ In reality, it is unlikely that jurors are capable of making these fine distinctions.¹¹⁴

2.37 Some of those consulted felt that attempts made over time to allow provocation to apply in a broader range of circumstances has led to the development of a test that is riddled with public policy decisions.¹¹⁵ While some considered that the problems with the defence could not easily be resolved and the defence should therefore be abolished, many saw the problems only as a justification for reforming the current test.¹¹⁶ A number of the preferred options for reform are discussed below.

OPTIONS

2.38 In the Options Paper we explored three options for provocation:

1. Retain provocation.
2. Reform provocation.
3. Abolish provocation.

The Commission ultimately has decided that provocation should be abolished as a partial defence in Victoria. In this section we discuss some of the arguments for retaining provocation, and some of the options for reform supported in

112 Roundtable 4 December 2003. This point was made by a number of people over the course of consultations, including at the forum on Defences to Homicide in the Context of Violence Against Women held on 5 December 2003. See also Submission 16 which supported on this basis a test which simply asked a jury to consider if the person’s actions in the circumstances were reasonable.

113 Model Criminal Code Officers Committee of the Attorneys-General (1998), above n 80, 79.

114 See, for example, *R v Rongonui* [2000] 2 NZLR 385, para 111, Elias CJ (dissenting): ‘It is highly artificial to ask the jury to take the characteristics of the accused into account for the purposes of assessing the gravity of the provocation but to disregard them when considering whether the ordinary man would, faced with provocation as grave, have lost his self-control. The distinction is oversubtle and is likely to be so regarded by the jury.’ See also *Camplin* [1978] AC 705, 718 (Lord Diplock) and *R v Romano* (1984) 36 SASR 283, 291, King CJ.

115 Roundtable 11 December 2003.

116 For a discussion of some of the preferred options for reform, see further paras 2.53–2.91.

submissions and consultations, before setting out our reasons for recommending its abolition.

RETAIN PROVOCATION

2.39 Despite the substantial criticisms of the defence, a number of commentators and law reform bodies have argued in favour of the retention of provocation as a partial defence.¹¹⁷ Similarly, a number of submissions and those consulted supported reforms. Arguments generally put forward for the retention of provocation include:

- provoked killers are not ‘murderers’;
- juries should decide questions of culpability;
- by allowing the accused to be convicted of manslaughter, provocation provides an important ‘halfway’ defence;
- abolishing provocation would lead to increased sentences and uncertainty; and
- abolishing provocation would increase community dissatisfaction with sentencing.

PROVOKED KILLERS ARE NOT MURDERERS

2.40 Arguments for retention are generally premised on the view that a person who kills in response to provocation is less morally culpable than other intentional killers and this should be reflected in the offence he or she is convicted of.¹¹⁸

2.41 As discussed in Chapter 1, for some commentators the labels assigned under the criminal law to defences and offences are seen as performing an important symbolic function in communicating and accurately describing the nature and quality of an offender’s actions. According to this argument, the difference in culpability between provoked and unprovoked killings cannot adequately be taken into account at sentencing. The Irish Law Reform

¹¹⁷ Those in favour of retaining provocation include the Criminal Law and Penal Methods Reform Committee of South Australia (1977), above n 110; Criminal Law Revision Committee (1980), above n 110; Law Reform Commission of Victoria (1991), above n 80; New South Wales Law Reform Commission (1997), above n 111.

¹¹⁸ See, for example, Submission 20 and 27. This view was also reflected by some roundtable participants.

Commission (ILRC), in taking this position, has argued that the distinction between murder and manslaughter:

marks an important moral boundary which, bearing in mind that provoked killings have been recognised as a species of manslaughter for five centuries, would be compromised by the abolition of the plea of provocation.¹¹⁹

2.42 Similar views were expressed by some in submissions and during consultations. As the Criminal Bar Association (CBA) and Victoria Legal Aid (VLA) suggested in their joint submission: ‘Murder is unique. It might be argued that no other crime carries a greater stigma’.¹²⁰ Those holding this view argued that people who kill as the result of provocation should not be labeled as murderers.

JURIES SHOULD DECIDE QUESTIONS OF CULPABILITY

2.43 The abolition of provocation is also opposed by some on the basis that it would place too much power in the hands of judges. Decisions about culpability, it is argued, are best made by a jury.

2.44 Many of those who supported the retention of provocation in submissions and consultations saw the continued role of juries in making decisions about culpability as critical ‘particularly where what is involved is the application of a community or moral standard’.¹²¹ It was suggested that retaining a defence with the flexibility to reflect community values and standards, according to the particular individual and social circumstances surrounding the crime, plays an

119 Law Reform Commission, *Consultation Paper on Homicide: The Plea of Provocation [Ireland]* (2003), 132 para 7.06. The Law Reform Commission of Ireland (ILRC), while recognising the ‘over-inclusiveness’ of the current category of murder, which includes everything from mercy killings to contract killings, gangland killings and multiple killings, suggests this problem ‘might usefully be addressed by introducing, among other measures, new defences (and partial defences)’. Therefore, rather than accepting the range of circumstances which may reduce an offender’s culpability as an argument for the abolition of the defence, under the ILRC’s approach an even greater range of circumstances may be recognised as an appropriate basis for a defence: *ibid* para 7.26. Another possible solution to the problem of over-inclusiveness suggested by the Irish Law Reform Commission would be to create a new category or categories of mitigated murder: Law Reform Commission, *Seminar on Consultation Paper: Homicide: The Mental Element in Murder: A Rejoinder to Submissions Received: Commissioner McAuley [Ireland]* (2001), 4.

120 Submission 27.

121 Submission 15. See also Submission 23. These views were also expressed by some roundtable participants (Roundtable 11 December 2003).

important role in promoting community confidence in the justice system.¹²² Conversely, taking provocation away from the jury could decrease public confidence in the justice system.¹²³

2.45 These views came through particularly strongly at the forum on Defences to Homicide in the Context of Violence Against Women, held by the Commission in December 2003.¹²⁴ While there might be problems with the representativeness of juries, leaving such questions to be decided by a jury of 12 people drawn from the community was regarded by many of those consulted as preferable to leaving them to just one person (the sentencing judge).

PROVOCATION PROVIDES AN IMPORTANT HALFWAY DEFENCE

2.46 From a practical perspective, many supported the continued retention of provocation on the basis it provides an important ‘halfway house’.¹²⁵ If there is no basis for a jury to return a manslaughter verdict for someone who kills intentionally, it is argued there is a danger that juries will acquit an accused because they are sympathetic towards him or her,¹²⁶ or will convict a person of murder where manslaughter might have been the more appropriate outcome.

2.47 In submissions and during consultations, particular concern was expressed about the likely consequences of removing provocation as a safety net for women who kill violent partners, but who are unable to successfully argue self-defence. It was argued that due to existing problems with the availability of self-defence, provocation may be the only defence available to women who kill in response to

122 Submission 23.

123 See, for example, New South Wales Law Reform Commission (1997), above n 111, which concluded that ‘it is essential to retain a separate partial defence to murder which permits the community, as represented by the jury, to make judgments as to an individual’s culpability for killing where there is evidence of provocation, in order to enhance public confidence in the criminal justice system and community acceptance of sentences’: para 1.15.

124 This forum was held on 5 December 2003. Participants are listed in Appendix 1.

125 Roundtable 4 December 2003. The case of *The Queen v R* (1981) 28 SASR 321 was seen by some roundtable participants as exemplifying this, although the outcome in that case was that the accused was acquitted. The accused in that case killed her husband after he disclosed he had been sexually abusing their children. The trial judge had declined to leave provocation to the jury on the basis there had been a cooling-off period. A retrial was ordered and provocation was left to the jury. It was felt there should be some recognition that the response by the accused and others in this situation is understandable in the circumstances.

126 Submission 10.

violence.¹²⁷ There was some support for the abolition of provocation to be delayed until self-defence could be shown to offer women who kill in response to violence a true defence.¹²⁸ The Federation of Community Legal Centres' Violence Against Women and Children Working Group, in taking this position commented:

Overall, we take the view that while provocation is operating in unacceptable ways it should not be abolished. Its abolition should not be considered until women who kill violent partners are demonstrably able to use self-defence successfully. We would like to see self-defence reformed and monitored to ensure that it is available to female defendants before we consider the abolition of provocation.¹²⁹

2.48 While Dr Jeremy Horder, in his submission, saw the case of provocation constituted by domestic violence as 'the most plausible case for retaining the plea', he argued this 'ought to be captured by a broader self-defence plea'.¹³⁰ The Commission supports this view.

ABOLISHING PROVOCATION WOULD RESULT IN INCREASED SENTENCES AND UNCERTAINTY

2.49 Concerns were also raised about how judges would approach sentencing of an offender for murder in circumstances which previously would have provided a strong basis for arguing provocation,¹³¹ and the likely effect abolishing the partial defence would have on the length of the sentence imposed.¹³²

2.50 If provocation were to be abolished as a defence, the sentencing judge would have to decide on an appropriate sentence on the basis of a finding of murder, rather than manslaughter. The judge would also no longer have the jury's

127 Submissions 10, 16 and 18. Note that in reality, many women who kill in these circumstances are convicted of manslaughter, rather than murder, on the basis of a lack of intention to kill or cause serious injury. For example, in Bradfield's study of 76 women who had killed their partners between 1980 and 2000, 22 pleaded guilty to manslaughter on the basis of lack of intention, and a further eight were convicted of manslaughter on the basis of lack of intention. This compared with 10 women who pleaded guilty to manslaughter on the basis of provocation, and 10 women who were found guilty of manslaughter on the basis of provocation: Bradfield (2002), above n 90, Table 1.3, 27. The abolition of provocation as a partial defence, it could be argued, is unlikely to change this.

128 Submissions 14 and 16; Roundtable 24 February 2004.

129 Submission 16.

130 Submission 2.

131 Roundtables 4 and 11 December 2003.

132 Submissions 10, 16 and 18; Roundtables 4 and 11 December 2003.

indication of culpability involved in the returning of a manslaughter verdict¹³³ and would therefore need to make a determination on his or her own as to whether the alleged provocation had been established, and if so, the extent to which it should affect the offender's culpability.¹³⁴

2.51 Particular concerns were expressed about the potential for the abolition of the defence to result in an increase in sentences for Indigenous accused, who are already over-represented as homicide offenders,¹³⁵ and women who kill in the context of a history of abuse but are unable to establish self-defence.¹³⁶ There is also a risk that if provocation is abolished, the Office of Public Prosecutions may be less likely to accept a plea to manslaughter. This is because the chances of a verdict of manslaughter rather than murder at trial would be reduced.¹³⁷

ABOLISHING PROVOCATION WOULD INCREASE COMMUNITY DISSATISFACTION WITH SENTENCING

2.52 Finally, the abolition of provocation and its consideration at sentencing, it was argued, might lead to community perceptions that judges are 'letting murderers off lightly' and result in greater community dissatisfaction with the sentencing process.¹³⁸ In turn, this might lead to calls for tougher sentences and the introduction of measures such as mandatory minimum sentences for murder.¹³⁹ Others we consulted saw this as an argument against the adoption of

133 See Submission 15.

134 It was suggested this might drag out sentencing hearings in cases where the Crown contests allegations that the killing was provoked: Roundtable 24 February 2004.

135 Submissions 10,16 and 20. The Federation of Community Legal Centres' Violence Against Women and Children Working Group (Submission 16) saw this issue in terms of disadvantaging Indigenous men who killed other men, and expressly did not consider this argument should apply to Indigenous men who kill their female partners due to jealousy and/or a loss of control. They also pointed to the impact more generally of abolishing provocation on 'people who live disadvantaged and violent lives'.

136 See, for example, Submission 16.

137 Submission 16. At roundtables, and the Defences to Homicide in the Context of Violence Against Women forum, views were expressed that provocation is rarely viewed by the Office of Public Prosecutions as an appropriate basis upon which to accept a plea to manslaughter, as it is generally seen as a question for the jury. The Federation of Community Legal Centres' Violence Against Women and Children Working Group in its submission, while noting this position, express the view 'it is difficult to imagine that without the availability of a partial defence being available that the OPP would be so willing to accept a plea to manslaughter' (Submission 16).

138 Submissions 15, 16; Roundtables 4 and 11 December 2003.

139 Roundtable 4 December 2003. Submission 16 argues that this in turn, may result in a push by the 'law and order lobby' for higher penalties and the introduction of mandatory minimum sentences.

mandatory sentencing rather than a basis upon which to oppose the abolition of the defence.¹⁴⁰

PROVOCATION REFORM

2.53 The overwhelming majority of submissions and those consulted who were in favour of retaining provocation argued in favour of reform. However, a small minority argued that the reform of provocation was unnecessary. This is because the common law would develop in time to ensure cases in which provocation should not be accepted as a satisfactory basis for reducing an offender's culpability, such as where the provocation was based on an accused's racism, sexism or homophobia, would either be removed from or rejected by a jury as a sufficient basis for the defence. The CBA and VLA, in adopting this position argued: '[c]ourts declaring the common law reflect changing community attitudes...There is no demonstrated need for change'.¹⁴¹

2.54 As discussed in Chapter 1, juries in recent years may have become more reluctant to accept the partial defence of provocation.¹⁴² The discretion of the trial judge not to leave provocation for the jury's consideration has also been relied upon in a number of recent Victorian cases.¹⁴³ In the sample of 27 cases in the

140 Roundtable 4 December 2003.

141 Submission 27.

142 In the homicide prosecutions study the Commission conducted for this reference, 61% of those who went to trial for murder were convicted of murder, compared with a conviction rate of around 28% in the study undertaken in the late 1980s by the former Law Reform Commission of Victoria: Law Reform Commission of Victoria, *Homicide Prosecutions Study*, Appendix 6 to Report No 40 (1991). The percentage of accused presented on a murder charge was similar for both—in the 1991 study, 64.6% (num=206/319) of accused were presented on murder, compared with 66.5% (num=121/182) in the Commission's more recent study. However, a higher percentage of accused pleaded guilty to murder prior to trial in the more recent study than the 1991 study, with around 16.5% of accused presented on a murder charge pleading guilty to murder (num=20/121) compared with only 3.9% (num=8/206) in the 1991 study. These studies are not strictly comparable as different counting rules were adopted for each.

143 See for example, *R v Tuncay* [1998] 2 VR 19; *R v Parsons* (2000) 1 VR 161; *R v Leonboyer* [2001] VSCA 149 (Unreported, Phillips CJ, Charles and Callaway JJA, 7 September 2001); *R v Kumar* (2002) 5 VR 193. But compare with *Thorpe v R* [1999] 1 VR 326; *R v Abebe* (2000) 1 VR 49; *R v Bohay* (2000) 111 A Crim R 271. In some recent cases, a decision by the trial judge not to leave provocation for the jury's consideration has been successfully appealed. See, for example *R v Yasso* [2004] VSCA 127 (Unreported, Charles, Batt and Vincent JJA, Vincent JA dissenting, 5 August 2004). It could be argued that this may result in a more conservative approach being taken by judges at trial as to whether provocation should be left to the jury. The question for the trial judge in determining whether provocation should be left to the jury is 'whether, on the version of events most

Commission's recent homicide prosecutions study in which provocation was raised at trial, the judge did not allow the jury to consider it on four occasions.¹⁴⁴ On the other hand, those who argue in favour of reform have argued this should not be left up to individual judges to decide case by case.¹⁴⁵

2.55 Options for reform discussed in Chapter 3 of the Options Paper, which received some support in submissions and consultations included:

- the exclusion of certain conduct as a basis for provocation;¹⁴⁶
- a simplified test, with the application of community standards, along the lines of that proposed by the NSWLRC;¹⁴⁷
- the adoption of the current test adopted in New South Wales and the ACT, which removes the need for a particular triggering incident.¹⁴⁸

2.56 We consider each of these models below, together with a proposal recently put forward by the Law Commission of England and Wales. We also discuss views of those consulted on how the accused's cultural background should be taken into account, before setting out the Commission's reasons for recommending the abolition of the defence.

favourable to the accused which is suggested by material in the evidence, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the killing was unprovoked in the relevant sense': *Stingel v The Queen* (1990) 171 CLR 312, 334.

¹⁴⁴ Participants at the roundtable of 1 March 2004 could recall only three instances in recent years in which judges had declined to leave provocation to the jury.

¹⁴⁵ See further para 2.59.

¹⁴⁶ Submissions 10, 14, 16, 18 and 23; Roundtable 11 December 2003. This option was discussed during the second series of roundtables on 24 February 2004 and 1 March 2004. Some of those consulted argued for a more objective test to be adopted in addition to this approach. Note that the Federation of Community Legal Centres' Violence Against Women and Children Working Group in its submission preferred the phrase 'indicated they would leave' rather than 'threatened to leave' as "threatened" implies that it is a potentially dangerous [sic] when actually everyone has the right to leave a relationship if they chose [sic] to'. They further argued that provocation should be restricted to 'an act of violence or threat of violence or other form of abuse rather than an "affront to honour"'.

¹⁴⁷ Roundtable 24 February 2004.

¹⁴⁸ See, for example, Submission 27. While the submission argues that 'the law touching provocation is adequate to meet current needs', it suggests that '[s]hould it be considered that the law requires change...to specifically cater for the needs of women...the NSW model provides an acceptable guide'. See also Submission 10 and Submission 16 which argue for the removal of a need for a 'triggering incident' where there has been a history of violence or that what constitutes a 'trigger' be clarified to include a history of violence or abuse perpetrated by the deceased.

EXCLUSION OF CERTAIN DEFINED CONDUCT AS A BASIS FOR PROVOCATION

2.57 The Commission raised the possibility of excluding certain defined conduct from the scope of the defence in its Options Paper. This could be achieved either by requiring judges to remove provocation from the jury's consideration in certain circumstances, or by directing the jury to not find the defendant was provoked if the situation was one that was specified. Circumstances excluded from the scope of the defence could include those where the accused argues that he or she was provoked by:

- the deceased leaving, attempting to leave, or threatening to leave an intimate sexual relationship;
- suspected, discovered or confessed infidelity; or
- a non-violent sexual (including homosexual) advance.¹⁴⁹

2.58 Other circumstances in which provocation could be excluded might include:

- where the context is sexual intimacy or spousal homicide;
- where the homicide is based on racism; or
- where the accused has engineered a confrontation with the deceased, for example if the accused has breached an intervention order.¹⁵⁰

2.59 This option appealed to a number of those who made submissions¹⁵¹ and participated in consultations.¹⁵² Proponents of this model argued that rather than

149 Helen Brown, 'Provocation as a Defence to Murder: To Abolish or to Reform?' (1999) 12 *Australian Feminist Law Journal* 137, 140; The NSW Attorney-General's Working Party also recommended the legislative exclusion of a non-violent homosexual advance from forming the basis of the defence of provocation: Criminal Law Review Division, NSW Attorney-General's Department, *Homosexual Advance Defence: Final Report of the Working Party* (1998), para 6.7.

150 This type of situation, also referred to as 'self-induced' provocation, is already technically excluded from the scope of provocation, but it is argued this aspect of the law is applied inconsistently: see Victorian Law Reform Commission (2003), above n 75, paras 3.89–3.90. Some claim it would be preferable to make this exclusion explicit. Such circumstances are specifically excluded from the scope of provocation in New Zealand, where the relevant legislation states 'no-one shall be held to give provocation to another by...doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person': *Crimes Act 1961* (New Zealand) s 169(5).

151 Submissions 10, 14, 16, 18 and 23. Submission 31, while supporting the abolition of provocation, suggested this proposal was worth considering and suggested an addition to the list proposed by Brown: 'Where a defendant alleges provocation where the deceased used words (a single word, phrase or a particular style and manner of speaking) and/or behaviour to provoke (insult, goad, belittle etc)

relying on the discretion of judges to remove provocation from the jury in these cases, or trusting the matter to juries to determine, there ought to be defined circumstances in which, as a matter of law, provocation could not be raised. This would protect against potential prejudices by judges and jurors, particularly in applying the ordinary person standard. It would also perform an important symbolic function by sending a message that the accused's response was contrary to the rights of the deceased, unacceptable and inexcusable.¹⁵³

2.60 The Federation of Community Legal Centres' Violence Against Women and Children Working Group in supporting this option argued:

Leaving an intimate relationship, pursuing another sexual relationship or verbally criticising your partner, should never be seen as actions which constitute provocation to kill. The implication of such claims are that women, by simply pursuing their right to personal autonomy and safety, are provoking their own deaths and that the men who kill them should be excused for doing so...The courts' acceptance of such provocation arguments compounds and reinforces men's control of women in our society and gender inequality. The reality is that most men who kill women do so after a history of violence and abuse against their partner that precipitated her attempting to leave the relationship.¹⁵⁴

2.61 Those who argued against this approach pointed to the extreme difficulties of defining, with any degree of certainty, the circumstances in which provocation should be excluded. It was felt the exclusion of certain circumstances from the scope of the defence might be applying an overly simplistic view of the range of factors which might be relevant in any particular case. For instance, there are very few cases in which the provocation will be simply that the person says he or she is leaving. The context is critical.¹⁵⁵ The CBA and VLA in their joint submission took this view:

The law touching this area should remain flexible in order to deal with the infinite variety of circumstances in which the defence might arise.

the defendant (causing the defendant to feel denigrated, ridiculed etc, or that his or her resistance had been worn down over time etc'). Submission 32 expressed a view that a woman leaving a relationship should never be considered a sufficient excuse for a man to argue provocation.

¹⁵² This option was discussed during the second series of roundtables on 24 February and 1 March 2004. While a number of participants spoke in favour of this approach, many were opposed.

¹⁵³ Roundtable 24 February 2004.

¹⁵⁴ Submission 16.

¹⁵⁵ Roundtables 24 February and 1 March 2004.

Express circumscription or limitation of the defence may lead to miscarriages of justice. Unforeseen circumstances meriting reliance upon the defence might be omitted from legislation imposing limits. It is preferable to leave the common law to deal with new circumstances.¹⁵⁶

2.62 Such a reform may also raise questions about the purpose of the defence. If the defence is justified as a concession to human frailty, it should be recognised that this frailty seems to most readily manifest itself in men who kill their partners in the context of sexual intimacy. As one of the roundtable participants suggested, once you exclude provocation from applying in these contexts ‘what’s left?’. Further, as the standard applied under the current test is that of an ordinary person rather than a ‘reasonable person’, if provocation is retained as a defence, it was argued, the question should always be one left to a jury. An accused should be judged by a jury of his or her peers, rather than be held to account to a higher standard of behaviour.¹⁵⁷

2.63 It would appear from the Commission’s recent homicide prosecutions study conducted for this reference that questions of provocation also commonly arise in family contexts and the context of a spontaneous encounter. If some grounds are excluded, questions will arise about the underlying foundation of the principle. It will no longer be simply about loss of self-control, or even about an understandable loss of control. Rather, it will become a defence based on an acceptable loss of control. If so, there may be a problem with saying that some homicides are more ‘acceptable’ than others.

2.64 The potential difficulties with this option for reform led some of those consulted to suggest that an inclusive rather than an exclusionary approach to defining what might constitute sufficient provocation should be adopted. Under this approach, for example, what would legally count as provocation could be redefined as a physical assault, thereby excluding a verbal exchange alone as a sufficient basis on which to raise the defence.¹⁵⁸ As with the exclusionary approach, the danger is that some circumstances which might properly be considered as creating sufficient provocation to reduce culpability—for example the situation of a person who, after years of racial abuse, loses self-control in response to a particularly grave racist taunt—would be excluded from the defence.

156 Submission 27.

157 Roundtable 1 March 2004.

158 Forum 5 December 2003; Roundtables 24 February and 1 March 2004. Alternatively, it was suggested, it could include threats to kill: Roundtable 24 February 2004.

2.65 Along similar lines, Dr Jeremy Horder, who favoured the abolition of the defence, suggested in his submission that if provocation were to be retained:

I would favour a very narrow defence: confined to sudden and immediate loss of self-control in the face of a clear trigger, albeit with some past history that explains the gravity of the provocation.

He further suggested that judges should be empowered ‘to remove weak or specious claims from the jury’ and the jury should be told that ‘only the gravest provocation can reduce murder to manslaughter: certainly nothing run of the mill, like V leaving D for another man’.¹⁵⁹

2.66 The exclusionary model has been recently adopted in the ACT in relation to non-violent sexual advances through amendments to section 13 of the *Crimes Act 1900*. Section 13(3) now provides:

- (3) ...conduct of the deceased consisting of a non-violent sexual advance (or advances) towards the accused—
 - (a) is taken not to be sufficient, by itself, to be conduct to which subsection (2) (b) applies; but
 - (b) may be taken into account together with other conduct of the deceased in deciding whether there has been an act or omission to which subsection (2) applies.¹⁶⁰

2.67 The provision has the effect of making a non-violent sexual advance towards the accused insufficient by itself to amount to provocation. A non-violent sexual advance is, however, able to be taken into account along with other conduct of the deceased in deciding whether the accused has met the test for provocation.

2.68 The effectiveness of the provision has yet to be tested. In line with views expressed during consultations, the Commission thinks it is likely the provocative conduct will simply be redefined in a way that allows it to fall within the scope of the defence. The facts of homicide cases are rarely simple and can often be viewed in a variety of different ways.¹⁶¹ Instead of a case being seen to be about an

¹⁵⁹ Submission 2. On the problems this might cause for battered women who kill, Dr Horder argued the answer should be broadening self-defence.

¹⁶⁰ *Sexuality Discrimination Legislation Amendment Act 2004* (ACT), pt 2.1, date of commencement 22 March 2004.

¹⁶¹ See for example, Morgan (1997), above n 96.

unwanted homosexual advance, it could be constructed as being about a physical assault or a reaction to a person's childhood experiences.¹⁶² When combined with possible jury prejudices (eg homophobia), this may allow the intention of the test to be subverted and a manslaughter verdict to be delivered. It may also further complicate what is an already extremely complex test.

THE NEW SOUTH WALES LAW REFORM COMMISSION MODEL

2.69 As discussed above at [2.34]–[2.36], the ordinary person test has given rise to a number of criticisms and calls for reform. It could be argued that because the ordinary person test is about what the ordinary person *might* do rather than *would* do, the question for the jury about whether the accused acted under provocation is probably best thought of as a moral one. The jury makes a moral judgment about the degree of blameworthiness of the accused through the application of the ordinary person standard, and whether, in the circumstances, a conviction for manslaughter rather than murder is justified.¹⁶³ The ordinary person test thereby serves to ‘give body and substance to the moral imagination and provide a vehicle for the exercise of intuitive judgment’.¹⁶⁴

2.70 Taking this position, it could be argued that invocation of the ordinary person is unnecessary as in reality the jury is simply making a decision, after taking all the circumstances into account, as to whether the accused person should be convicted of manslaughter rather than murder. On the other hand, the ordinary person test could be seen as serving a useful purpose by allowing the moral judgments of jurors to be considered within the framework of what an ordinary person might do.

2.71 The NSWLRC’s recommended reformulation of provocation represents an attempt to retain a subjective element, while taking community standards into account, without reference to an ordinary person standard. The NSWLRC recommended reforming the defence so it consists of a subjective test (actual loss

162 See De Pasquale, who notes ‘the charge that HAD is homophobic is invariably met with the response that a successful provocation defence is not the product of heterosexist reasoning, but rather some pseudo-psychiatric complaint—perhaps a “sexual abuse factor” or a “flashback”’: Santo De Pasquale, ‘Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy’ (2002) 26 (1) *Melbourne University Law Review* 110, 139.

163 Ian Leader-Elliott, ‘Sex, Race and Provocation: In Defence of Stingel’ (1996) 20 *Criminal Law Journal* 72.

164 Ibid 96.

of self-control by the accused) qualified by the application of general community standards of culpability:

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

2.72 The test is similar to that set out by the majority in the recent English House of Lords judgment of *R v Smith (Morgan)*.¹⁶⁵ In *Smith (Morgan)* there was an added caution that the jury should not treat defects of the accused's character as an excuse for failing to exercise the degree of self-control over emotions that society expects.

2.73 This model received support from some participants during consultations on the basis it would simplify what had become an almost incomprehensible test for jurors and overcome many of the existing problems with the current test.¹⁶⁶ The simplicity of this test understandably has some appeal and may reflect the approach that the jury is taking in practice. However, the benefits of simplifying the task of the jury in this way need to be weighed against the potential dangers.

2.74 One of the strongest criticisms of this approach is the very limited guidance it provides to juries on the standards to be applied. Lord Hobhouse, in the minority in *Smith (Morgan)* shared this concern:

It is not acceptable to leave the jury without definitive guidance as to the objective criterion to be applied. The function of the criminal law is to identify and define the relevant criteria. It is not proper to leave the decision to the essentially subjective judgment of the individual jurors who happen to be deciding the case. Such an approach is apt to lead to idiosyncratic and inconsistent decisions. The law must inform the accused, and the judge must direct the jury, what is the objective criterion which the jury are to apply in any exercise of judgment in deciding the guilt or innocence of the accused. Non-specific criteria also create difficulties for the conduct

165 *R v Smith (Morgan)* [2001] 1 AC 146, Lord Hoffman, Lord Clyde and Lord Slynn.

166 Forum 5 December 2003; Roundtable 24 February 2004. The Federation of Community Legal Centres' Violence Against Women and Children Working Group also supported a simplified test which required the jury to consider if the person's actions were reasonable in the circumstances. They further suggested '[i]n cases involving sexual partners and a history of violence, the jury in determining what is reasonable, should be informed about the impact/realities of domestic violence': Submission 16.

of criminal trials since they do not set up the necessary parameters for the admission of evidence or the relevance of arguments.¹⁶⁷

2.75 The test would also fail to protect against potential biases that may influence jury members in considering whether the accused should be excused for his or her behaviour. In response to these criticisms, the NSWLRC has argued these ‘are risks which are inherent in the jury system itself’ and ‘it is vitally important that juries remain central to the task of determining liability for serious offences’.¹⁶⁸

2.76 The Commission shares concerns that such a test would fail to provide adequate guidance to jurors and may lead to inconsistent results in comparable factual circumstances. While the jury does play an important role in the criminal justice system, its role should be to determine whether the requirements of the defence have been met—not what the scope of the law should be.

PROVOCATION AND CULTURE

2.77 The ordinary person requirement has also given rise to questions concerning how the accused’s cultural background should be taken into account in determining whether he or she acted under provocation. Currently, a person’s background may be taken into account in assessing the gravity of the provocation, but not the powers of self-control of an ordinary person.

2.78 As discussed in Chapter 3 of the Options Paper, some people have argued in favour of extending the ordinary person test to allow culture to be taken into account in assessing both the gravity and the powers of self-control of the ordinary person. Others have argued strongly against this approach. Some of the alternative models discussed above take a more flexible approach to the issue. For instance, under the NSWLRC model all the characteristics of the accused may be taken into account in determining whether the accused should be excused for having lost self-control and be convicted of manslaughter rather than murder. An objective and general community standard of behaviour is still applied under this test.

167 *R v Smith (Morgan)* [2001] 1 AC 146, 206, Lord Hobhouse.

168 New South Wales Law Reform Commission (1997), above n 111, para 2.83.

2.79 The Commission explored the issue of culture at two workshops—the ‘No Way Out?’ workshops.¹⁶⁹ Those consulted were overwhelmingly of the view that while culture may be important in understanding what has occurred, it should not be used as an excuse for criminal behaviour. Workshop participants seemed to support the current separation in the ordinary person test, between the gravity of the provocation and the accused’s powers of self-control. Culture should be relevant in understanding the accused’s behaviour (or how he or she might have viewed particular conduct) but not to allow people to escape or minimise their criminal responsibility. Care should also be taken in the use of witnesses giving evidence about how a person from a particular cultural background would view certain behaviour.¹⁷⁰ As pointed out by workshop participants, the concept of culture is extremely problematic, and it is unlikely that two people will view a culture, or what is acceptable, in the same way. Culture is relative. What is represented as ‘culture’ by an expert is likely to be simply that person’s subjective views of what that culture is, and what normal behaviour may be for someone from that background.¹⁷¹

2.80 The NSWLRC, in rejecting the expansion of the ordinary person test, took a similar position. It argued that it would be unfair for people to have a greater or lesser chance of success in using the defence because people of particular backgrounds might be shown to have a greater or lesser capacity for self-control.¹⁷² The law should not apply different standards of criminal behaviour to people depending on their particular background.

169 The workshops, ‘No Way Out? Understanding the Use of Fatal Force by Victims and Perpetrators of Family Violence’ were held on 29 March 2004 (with representatives of culturally and linguistically diverse communities) and on 6 May 2004 (with representatives of Indigenous communities). Cultural issues were also explored at the Homicides in the Context of Violence Against Women forum held on 5 December 2003 and in roundtable discussions.

170 In a number of recent cases in which provocation has been raised in Victoria, evidence has been introduced by community members in support of the accused’s claims that the deceased’s behaviour or comments were particularly offensive due to that person’s cultural background. See for example, *R v Yasso* (2002) 6 VR 239, in which a witness described as a ‘matriarch of the Iraqi community’ gave evidence about how the spitting by a wife at her husband would be viewed in that community. Evidence was also given concerning how extra-marital relations were viewed in the Iraqi Chaldean Christian community.

171 Concerns were raised by workshop participants about how cultural ‘experts’ are identified. A suggestion was made that court appointed cultural experts could be used in appropriate cases, who might be nominated by, for example, a committee of community members. Others questioned how useful evidence of culture was in this context, given how subjective a person’s view of a particular culture is likely to be.

172 New South Wales Law Reform Commission (1997), above n 111, para 2.68.

2.81 The VLRC endorses views that a person's culture or ethnicity should never be used as an excuse for homicide. However, a person's background, including their ethnicity, will clearly be relevant to understanding the circumstances in which the homicide occurred, and that person's perceptions at the time of the killing. We explore this issue further in Chapter 3.

REMOVE THE NEED FOR A TRIGGERING INCIDENT OR IMMEDIATE LOSS OF CONTROL

2.82 As men are more likely than women to respond to provocation instantaneously, the effect of retaining a defence that requires a sudden loss of self-control is seen as privileging men's experiences of violence over women's.¹⁷³ While the strictness of the requirement has been reduced in recent years, so that the accused can rely on a cumulative history of provocation, in practice the defence still seems to require a particular incident which caused the killing. In the absence of a sudden response, the jury may also conclude that the killing was in revenge rather than in response to provocation.

2.83 In NSW and the ACT, legislative changes have explicitly removed the need for a particular triggering incident and the requirement of 'suddenness'.¹⁷⁴ These provisions state that conduct can amount to provocation if it occurred 'immediately before the act or omission causing death *or at any previous time*' (emphasis added).¹⁷⁵ Under this test, cumulative provocation such as a history of domestic violence could therefore form the basis of the defence as there is no need for a particular trigger. The NSW Attorney-General explained the rationale for introducing these changes when introducing the Bill:

The current law of provocation is based on a theory of human behaviour which assumes that all people respond to provocation suddenly—as the present section says, in the heat of passion. This is not true. It is certainly not true for women, and it is also not true for men.

173 Roundtable 4 December 2003; Submission 16.

174 In NSW, these changes were made in 1982, in response to recommendations made by a government task force on domestic violence, which found the defence was too restrictive in relation to women who kill in situations of domestic violence: New South Wales Task Force on Domestic Violence, *Report of the New South Wales Task Force on Domestic Violence to the Honourable N K Wran, Premier of New South Wales* (1981), Recommendation 24. On the history of the NSW provisions, see New South Wales Law Reform Commission (1997), above n 111, paras 2.4–2.6.

175 *Crimes Act 1900* (NSW) s 23(2) and *Crimes Act 1900* (ACT) s 13(2).

The rule requiring sudden action upon provocation caters for those whose personality is explosive or whose conduct has not been inhibited by years of training in submissive behaviour. The new section 23 says that a conduct may be provocative, in the legal sense, whether it occurred immediately before the act or omission causing death, or at any previous time. Under the new law, it matters not when the provocation occurred. The only question is whether, at the time of the act, the accused had lost self-control.

Loss of self-control is the basis for the old law of provocation, and has not been changed in the new provision. The new section 23 makes it clear that any conduct of the deceased, towards or affecting the accused, may be basis for provocation.¹⁷⁶

2.84 The CBA and VLA, in their joint submission, argued the ‘sudden response’ requirement should be retained as otherwise ‘the risk of pre-meditated killing being passed off as one that is provoked is too great’.¹⁷⁷

2.85 In reality, it could be argued there is no need to adopt this test as it may simply reflect what is already the position at common law. The amended section 23 was considered by the NSW Court of Appeal in *Chhay v R*¹⁷⁸ The Court of Appeal held that to establish a defence of provocation, both at common law and under the *Crimes Act 1900* (NSW), it is essential that at the time of the killing there was a sudden and temporary loss of self-control caused by the provocation. However, there is no requirement that the killing immediately follow upon the provocative act or conduct of the deceased. The loss of self-control can also develop after a lengthy period of abuse and without the necessity for a specific triggering incident.

2.86 The Commission is concerned that to seek to remedy current problems with the defence in this way would be to ignore its more fundamental problems. They include the very different contexts in which men and women kill, and the necessity to conceptualise women’s responses as a ‘loss of self-control’. The continued reinterpretation and redefining of the limits of provocation, even where such change is warranted, is also likely to contribute to an even more conceptually confused defence and a continued lack of clarity about its proper rationale.

176 NSW, *Parliamentary Debates*, Legislative Assembly, 11 March 1982, 2485 (Francis John Walker, Attorney-General).

177 Submission 27. While arguing for the retention of the current position, the CBA and VLA suggested: ‘[s]hould it be considered that the law requires change...to specifically cater for the needs of women, then the CBA believes that the NSW model provides an acceptable guide’.

178 *Chhay v R* (1994) 72 A Crim R 1.

AN ALTERNATIVE MODEL: THE LAW COMMISSION FOR ENGLAND AND WALES

2.87 Following a recent review of partial defences to murder, the Law Commission for England and Wales recommended that a combined partial defence incorporating elements of provocation and excessive self-defence replace the existing test for provocation. Unlike Victoria, England and Wales have retained a mandatory life sentence for murder. The model proposed is as follows:

- 1) Unlawful homicide that would otherwise be murder should instead be manslaughter if the defendant acted in response to
 - (a) gross provocation (meaning words or conduct or a combination of words and conduct which caused the defendant to have a justifiable sense of being seriously wronged); or
 - (b) fear of serious violence towards the defendant or another; or
 - (c) a combination of (a) and (b); and

a person of the defendant's age and of ordinary temperament, ie ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way.
- 2) In deciding whether a person of the defendant's age and of ordinary temperament in the circumstances of the defendant might have acted in the same or a similar way, the court should take into account all the circumstances of the defendant other than matters (apart from his or her age) which bear only on his or her general capacity for self-control.
- 3) The partial defence should not apply where the provocation was incited by the defendant for the purpose of providing an excuse to use violence, or the defendant acted in pre-meditated desire for revenge.
- 4) A person should not be treated as having acted in pre-meditated desire for revenge if he or she acted in fear of serious violence, merely because he or she was also angry towards the deceased for the conduct which engendered that fear.¹⁷⁹

2.88 Under this model, a loss of self-control would no longer be required to establish the defence as the focus would be on whether the accused acted in response to a gross provocation and whether his or her reaction was understandable. 'Gross provocation' is defined as 'words or conduct or a

179 Law Commission, *Partial Defences to Murder [Great Britain]* Provisional Conclusions on Consultation Paper No 173 (2004), 12–13.

combination of words and conduct that caused the defendant to have a justifiable sense of being seriously wronged'. Under the test proposed, all the circumstances of the accused, apart from those relevant only to the accused's powers of self-control, are to be taken into account in determining how an ordinary person might have reacted. The test therefore shares some features of the current Australian common law test.

2.89 In suggesting this model, the Law Commission appears to be advocating a return to 'anger as outrage'—a reaction which is justifiable in the circumstances—rather than 'anger as loss of self-control' as the proper basis for the defence.¹⁸⁰ The Federation of Community Legal Centres' Violence Against Women and Children Working Group in its submission supported a similar basis for the defence being adopted in Victoria.¹⁸¹ On these grounds, many of the circumstances in which it is currently argued a person should not have access to the defence, such as where the killing is in response to a person's partner leaving, may fall outside the scope of the defence as the person's sense of being seriously wronged may be found to be unjustified.

2.90 The Law Commission's model would seem to have a number of benefits over the existing test, including that it no longer relies on a 'loss of self-control' which may provide a barrier to women arguing the defence. It could, however, be argued that the defence lacks sufficient certainty and still fails to provide adequate guidance to a jury on the principles to be applied. There is also a danger that existing prejudices and biases may lead some jurors to conclude that a person subjected to an unwanted and non-violent homosexual advance or who found out his or her partner was leaving, had, to use the Law Commission's words, 'a justifiable sense of being seriously wronged'. Many would therefore argue that the better approach is to exclude such circumstances from the scope of the defence.¹⁸² Further, simply because a person might react as the accused did when faced with a particular provocation does not mean that person should be partly excused for his or her behaviour.

180 See para 2.4 and n 55.

181 Submission 16. The working group suggested that the outrage caused should be shown to be reasonable in the circumstances. For instance, they argued it would be unreasonable 'to be outraged to the extent of using lethal violence because your partner is planning to leave the relationship', and the defence should therefore not be available in these circumstances.

182 See paras 2.59–2.60.

2.91 As Dr Jeremy Horder suggested in his submission to the Commission, the argument for retaining some flexibility in taking extenuating circumstances into account through the continued existence of provocation, is understandably stronger in England and other jurisdictions which retain a mandatory sentence for murder.¹⁸³ In jurisdictions such as Victoria that have a flexible sentencing regime, these considerations do not apply. Such factors can adequately be taken into account at sentencing.

THE COMMISSION'S VIEW AND RECOMMENDATIONS

2.92 The Commission has carefully considered the arguments for and against the retention of the partial defence, together with possible models for reform, and finds the submissions and arguments in favour of abolition compelling.

2.93 In Chapter 1 we discussed the Commission's view that factors that decrease a person's culpability for an intentional killing should be taken into account at sentencing rather than form the basis of a separate partial defence. In reaching this position we have accepted that an intentional killing only justifies a partial or complete defence to murder in circumstances in which a person honestly believes that his or her actions were necessary to protect himself, herself or another person from injury. It is principally on this basis that we recommend the abolition of provocation as a partial defence to murder in Victoria.

2.94 There are a number of factors and circumstances that may reduce the culpability of intentional killers. It seems illogical to single out one scenario—a loss of self-control caused by provocation—as deserving of a partial defence while leaving all other circumstances as matters to be taken into account at sentencing. If provocation were to be retained, the Commission would need to consider the introduction of partial defences or offences to cover all circumstances in which an offender's culpability should be reduced, or a system of degrees of murder.¹⁸⁴ Given the range of circumstances in which homicides occur, and the number of

183 Submission 2.

184 Many jurisdictions in the United States recognise 'degrees of murder'. For example, murder in the first degree generally is a premeditated homicide, often with aggravating circumstances such as extreme brutality. Second-degree murder is a homicide committed without deliberation or premeditation. A structured system of degrees of murder or manslaughter has not been adopted in any jurisdiction in Australia. The Hon Mervyn Finlay QC, conducting a review of the law of manslaughter on behalf of the NSW Government, recently recommended against the introduction of statutorily defined categories of manslaughter: Criminal Law Review Division, NSW Attorney General's Department, *Review of the Law of Manslaughter in New South Wales* (2003), 75.

factors that may contribute to determinations of moral culpability, the Commission believes that defining in advance the circumstances in which an intentional killer may be less blameworthy would be fraught with difficulty. For this reason, the Commission advocates that such factors are better taken into account at sentencing.

2.95 We are also concerned that the moral basis of provocation is inconsistent with contemporary community values and views on what is excusable behaviour. One of the recognised roles of the criminal law is to set appropriate standards of behaviour and to punish those who breach them. The continued existence of provocation as a separate partial defence to murder partly legitimates killings committed in anger. It suggests there are circumstances in which we, as a community, do not expect a person to control their impulses to kill or to seriously injure a person. This is of particular concern when this behaviour is in response to a person who is exercising his or her personal rights, for instance to leave a relationship or to start a new relationship with another person. In our view, anger and a loss of self-control, regardless of whether such anger may be understandable, is no longer a legitimate excuse for the use of lethal violence. People should be expected to control their behaviour—even when provoked. The historical justification for retaining a separate partial defence on the grounds of compassion—a ‘concession to human frailty’—is, we believe, difficult to sustain.

2.96 Retaining a partial defence of provocation also sends a message that the homicide victim may have somehow contributed to, or must bear some of the blame for, his or her own death. This can be deeply upsetting for friends and family of homicide victims.

2.97 The Commission has failed to be persuaded by arguments that provocation is a necessary concession to human frailty or that ‘provoked killers are not murderers. Both the serious nature of the harm suffered by the victim, and the fact the person intended at the time to kill or seriously injure the victim, in our view justifies a murder conviction in these cases.

2.98 The test for provocation also suffers from a number of conceptual problems that are not easily resolved. As it currently stands, the test is internally incoherent, confusing and difficult for juries to apply. Despite the best efforts of legislatures and law reform bodies to remedy current problems with the defence, the Commission believes that no entirely satisfactory and conceptually coherent test has yet been developed. In our view, any attempt to reform the defence would simply risk creating a new set of problems. It would also overlook the more fundamental question of why a person who loses self-control and/or reacts emotionally due to something a person has said or done should have a partial

defence to murder, while other intentional killers who may have the same or a lower level of moral culpability—for instance, those who may kill a sick partner or relative out of compassion—are convicted of murder.

2.99 We acknowledge the strong views expressed in consultations that the defence should be retained to preserve jury participation in the determination of levels of culpability. While we are sympathetic to these views, if the defence were to remain, it would be logical to extend jury participation to determinations of levels of culpability to all crimes. In the case of most other offences, we as a community trust judges to make these decisions. As judges are required to give reasons for their decisions, they are open to public scrutiny and review through appeal processes. To the extent that provocation reduces an offender's culpability for murder, the Commission believes that, in the future, this can be adequately taken into account at sentencing—as it is for other offences.¹⁸⁵

2.100 Leaving the offender's culpability to be determined at sentencing has the advantage of allowing a flexible approach to be taken in assessing the offender's background and the particular circumstances of the offence. This includes consideration of the reasons for killing—for instance jealousy or fear—and other factors that might come into play, such as the vulnerability of the victim.

2.101 We are sensitive to concerns that as a result of the abolition of this defence sentences for those who kill in response to provocation will increase, as they will be convicted of murder rather than manslaughter. In some cases this may be appropriate. However, an increase in all cases can be guarded against through judges making use of the full range of sentencing options which are applicable to murder. We discuss this issue further in Chapter 7.

2.102 Strong views were expressed in submissions and during consultations that provocation should remain as a possible defence for women who kill their violent partners, until such time as self-defence is reformed. The Commission shares concerns that should our reforms in relation to self-defence and the introduction of social framework evidence not be adopted, women who might genuinely be in fear of their lives and kill in response to prior domestic violence may be left without access to a defence. In some cases, those women may be able to argue a lack of intention to kill or seriously injure their partners, however, this will depend on the circumstances of the case. To ensure women who might otherwise have had access to a defence are not disadvantaged, the abolition of provocation should

185 See further Chapter 7.

be closely linked to proposed reforms in relation to self-defence, including the reintroduction of excessive self-defence, and the introduction of information on the social context of family violence. Where the killing is not carried out in self-defence, but there are extenuating circumstances such as a history of abuse, this should be taken into account at sentencing.

2.103 We are confident the recommendations made in this Report in relation to self-defence and the introduction of social framework evidence are likely to result in better outcomes for women than the attempted reform of what is already a conceptually confused and complex defence. Further, with its strong emphasis on a loss of self-control, provocation does not, nor has it ever, truly reflected the reality of women's experiences and responses to prolonged and serious violence. The retention of provocation and the continued distortion of women's experiences to fit within the defence, or the distortion of the defence to fit women's experiences, are in our view neither sustainable nor satisfactory solutions.

!**RECOMMENDATION(S)**

1. The partial defence of provocation should be abolished. Relevant circumstances of the offence, including provocation, should be taken into account at sentencing as they currently are for other offences.

(Refer to draft s 4 *Crimes Act 1958* in Appendix 4)

Chapter 3

Self-Defence, Duress and Necessity

INTRODUCTION

3.1 In this Chapter we discuss the current law relating to the defences of self-defence, excessive self-defence, duress and necessity. We consider whether there is a need for reform and make a number of recommendations aimed at clarifying the operation of these defences as they relate to homicide.

3.2 There is a close relationship between the four defences discussed in this Chapter. All are based on a necessity to act in self-protection or to protect others from harm. Of these defences, only self-defence is currently available to an accused person in Victoria charged with murder or attempted murder.¹⁸⁶

3.3 Few people would question the need to retain self-defence as a defence to murder. However, as we noted in Chapter 4 of the Options Paper, the defence has been criticised on the basis that it is interpreted and applied in a way that is gender biased. In this Chapter, and the following Chapter on evidence, we make a number of recommendations aimed at ensuring self-defence operates fairly for both male and female accused. Reforms to self-defence recommended in this Chapter include codifying the current law of self-defence and clarifying that:

- a person may be acting in self-defence when he or she believes the harm threatened by the deceased is inevitable, although not immediate; and
- a person's response need not be proportionate to the harm threatened to successfully establish they acted in self-defence, so long as it is reasonable in the circumstances.

186 For a discussion of the law relating to excessive self-defence in Victoria, see para 3.88. On the availability of duress and necessity to a charge of murder or attempted murder in Victoria, see paras 3.133–3.139.

3.4 We also recommend the reintroduction of the partial defence of excessive self-defence in Victoria. This will allow a person who has an honest belief in the need to use defensive force, but who is unable to establish the reasonableness of his or her actions in the circumstances, to be convicted of manslaughter rather than murder. It is our view that a person who has an honest belief in the need to use force in self-protection, or to protect others, is in a different position from those who kill intentionally in other situations and this should be recognised in the crime that person is convicted of. Finally, this Chapter recommends the extension of the defences of necessity and duress to a person charged with murder or attempted murder.

SELF-DEFENCE

CURRENT LAW

3.5 The current test for self-defence set out by the High Court of Australia in *Zecevic v Director of Public Prosecutions (Vic)* is straightforward:

The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he [or she] did. If he [or she] had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he [or she] is entitled to an acquittal.¹⁸⁷

3.6 Self-defence therefore 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 (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 are not present.¹⁸⁸ For the prosecution to negate self-defence, it must satisfy the jury beyond reasonable doubt either that the accused did *not* believe it was

187 162 CLR 645, 661, Wilson, Dawson and Toohey JJ. 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?

188 However, the judge has a discretion not to leave self-defence for the jury’s consideration. The judge has this discretion if any properly instructed jury, having regard to the version of events most favourable to the accused, would have been satisfied beyond reasonable doubt that the killing was not in self-defence.

necessary to do what he or she did, or that his or her belief did *not* have a reasonable basis.

3.7 There are few rules limiting the scope of self-defence—once raised, it is largely a matter for the jury to decide on the basis of the evidence presented.¹⁸⁹ This test is usually quite simple for the jury to apply.¹⁹⁰

PROBLEMS WITH THE CURRENT LAW: IS THERE A NEED FOR REFORM?

3.8 While the test for self-defence is easily understood, concerns have been raised that it is interpreted and applied in a way that disadvantages women. The traditional association of self-defence with a one-off spontaneous encounter, such as a pub brawl scenario between two people (usually men) of relatively equal strength, has made it difficult for women to successfully argue the defence.

3.9 In Chapter 1 we noted that when women kill, they often kill intimate partners or someone who is emotionally close to them.¹⁹¹ In a significant number of cases when women kill in the context of an intimate relationship, there is a history of prior violence.¹⁹² A history of violence may also be important to understanding other homicides that occur in the context of a family or close personal relationship. For instance, research has found that in the overwhelming majority of homicides involving the killing of a parent by a child, there is a history of prior abuse.¹⁹³ Family violence, while most commonly perpetrated by men against their female partners, can occur in the context of any close personal relationship, including women against male partners, between same-sex partners, children and parents or grandparents, and other family and non-family members. While much of the discussion below relates to women who kill in response to prior violence, the same issues would arise for others subjected to family violence who kill their abusers.

189 DPP Reference (No 1 of 1991) (1992) 60 A Crim R 43.

190 This question is more complex in the case of women who kill in response to domestic violence: see paras 3.8–3.14.

191 See Chapter 1, para 1.40.

192 A number of studies have confirmed that in a significant proportion of cases when women have killed their partners, they have experienced a history of violence and/or a physical attack immediately prior to the killing. See Chapter 1, paras 1.40–1.45.

193 One study found that 90 % of young people who killed their parents had been abused by their parents prior to the homicide. P Mones, *When a Child Kills* (1991) as cited in Jenny Mouzos and Catherine Rushforth, *Family Homicide in Australia* (2003), 4.

3.10 The Queensland Taskforce on Women and the Criminal Code, in examining similar issues, suggests the use of force in circumstances of abuse can be characterised as an extension of self-defensive behaviour used by those in abusive relationships:

According to those who work with domestic violence survivors many survivors are really exercising a form of ‘self-defence’ for much of the relationship—often, by remaining ‘passive’ in the face of physical, emotional and other types of abuse. It also tends to include complying with the on-going and ever-present demands of their abuser (for example having dinner ready on time, not eating until he arrives no matter how long the wait is, keeping the children quiet, taking a beating, concealing a beating).

One day some of these women choose a different kind of self-defence—attack. This is often a kind of self-preservation or final desperate act and does not always happen when there appears to be a present threat—as would usually happen in a ‘man-to-man combat’ situation.¹⁹⁴

3.11 Because men are often physically stronger than their female partners and can easily overpower them, women often kill their partners when they are asleep or have their guard down.¹⁹⁵ Women also typically use a weapon to protect themselves.¹⁹⁶ In some cases, women enlist the assistance of others to kill their violent partners.¹⁹⁷

194 Office for Women, Department of the Premier and Cabinet, Queensland Government, *Report of the Taskforce on Women and the Criminal Code* (2000), 149. See also Office of the Status of Women, *Against the Odds: How Women Survive Domestic Violence: The Needs of Women Experiencing Domestic Violence Who Do Not Use Domestic Violence and Related Crisis Intervention* (1998), 14–22. Interviews were conducted as part of this study with 122 women who had experienced domestic violence. The research confirmed that women employ a diverse range of ‘survival’ strategies to deal with their partner’s violence, including conflict avoidance, active resistance, diversionary tactics such as diverting their energies into other activities, and switching off or trying to ‘dull’ or ‘blunt’ the effects of abuse, for instance through the use of drugs and alcohol.

195 Wallace, in a study of intimate partner homicides in NSW between 1968 and 1991, found that in 52% of cases where women had killed their husbands, there was an ‘immediate threat or attack by the victim’, suggesting that in 48% there was no ‘immediate threat or attack’: Alison Wallace, *Homicide: The Social Reality* (1986), 97.

196 In Bradfield’s study of 76 women who killed their spouses over the period 1980–2000, all had used a weapon: Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (Unpublished PhD Thesis, University of Tasmania, 2002), 204. Mouzos made a similar finding in her examination of 56 cases in which women killed abusive partners: ‘In two-thirds of the cases where a woman killed an abusive intimate partner, a knife or some other sharp instrument (num=38) was used, followed by a firearm (num=12) and a blunt

3.12 In Chapter 4 of the Options Paper we discussed the number of barriers faced by women arguing self-defence in these circumstances including establishing:

- the immediacy and seriousness of the threat—particularly if they have waited until their partner has his guard down to take action, or are responding to what may seem to be a relatively minor threat or assault;
- the proportionality of their response to the threat; and
- the necessity of their actions given the available avenues to escape the threat or to call for outside help.

3.13 While none of these factors is an express requirement of self-defence, each may influence the jury's assessment of whether the accused believed her actions were necessary, and the reasonableness of her conduct in the circumstances.

3.14 Although self-defence is technically equally available to both men and women, it is argued that in practice the defence is usually only useful to men. These criticisms have led many commentators to call for the law of self-defence to be reformed. The homicide prosecutions study conducted by the Commission for this reference confirmed that self-defence is most frequently and successfully argued by men who kill other men in the context of a spontaneous encounter.¹⁹⁸

instrument (num=5). One female offender used accelerant to set fire to her victim': Jenny Mouzos, *When Women Kill: Scenarios of Lethal Self-Help in Australia 1989–2000* (Unpublished PhD Thesis, University of Melbourne, 2003), 112. In the Commission's study of homicide prosecutions over the period 1996–2001, all female accused who acted alone used a weapon other than their hands and feet. This compares with nearly one-quarter (22.3%) of male accused who acted alone who used their hands and feet: Victorian Law Reform Commission (2003), above n 3, para 2.35.

197 In a small number of cases, women do not feel able to leave a battering relationship, nor do they feel able to end the violence. They come to form what may be a reasonable belief that the only way to avoid serious injury or death is to engage someone else to kill their abuser. This provides the court with evidence of planning and may provide a basis for rejecting self-defence. It is argued, however, that as such steps may be necessary in particular circumstances, women who kill via an agent should not be excluded from the scope of self-defence simply because they did not commit the homicide themselves. We note that such circumstances are extremely rare. For example, in Mouzos' study of female-perpetrated homicides involving an abusive intimate partner during 1989–2000 there 'were only three recorded cases where the woman killed her partner with the assistance of another person (usually her son). In all these cases both the female and the co-offender had suffered abuse at the hands of the victim': Mouzos (2003), above n 196, 118.

198 Victorian Law Reform Commission (2003), above n 196, paras 4.10–4.13. Of the 17 men who raised self-defence at trial, six were acquitted. Of these six, four had killed in the context of a spontaneous encounter. In the homicide prosecutions study, all 17 accused who killed in the context of a spontaneous encounter were male, as were their victims. It should be noted, however, that the number of women included in the study was very small.

Only two women raised self-defence at trial and both did so in the context of sexual intimacy. In each case the accused alleged she had been sexually assaulted by the deceased and had responded with fatal violence. Both women were convicted of murder.¹⁹⁹ Other research has supported the view that women who kill in response to prior violence may experience difficulties in arguing self-defence at trial, although they are sometimes successful in doing so.²⁰⁰

PROPOSALS FOR A NEW DEFENCE

As a result of these problems, some people have argued that the only way to ensure self-defence works properly for women who kill in response to prior violence is to design legal responses that deal specifically with the issue.²⁰¹ In Chapter 4 of the Options Paper we considered three possible models for a new defence:

- the ‘battered woman syndrome’ model—which would require a woman to establish she was suffering from ‘battered woman syndrome’ at the time of the offence;
- the ‘self-preservation’ model—which would apply in circumstances where a woman honestly believes there is no protection or safety from the abuse and is convinced the killing is necessary for her self preservation;²⁰² and
- the ‘coercive control’ model—which would focus on a person’s need to free himself or herself from circumstances of coercive control.²⁰³

¹⁹⁹ Victorian Law Reform Commission (2003), above n 196, paras 4.11, 4.14.

²⁰⁰ For example, in Rebecca Bradfield’s study of 65 cases of women who killed their violent spouses across Australia between 1980 and 2000, self-defence was left for consideration in 21 cases. Of the women who raised self-defence at trial, nine were acquitted on the basis of self-defence. Bradfield notes that in fact the number of acquittals may be higher, as her sample was selected through cases that were reported, at some stage of the trial process. It is possible that some acquittals were never reported at any stage and so will not have fallen within her sample: Bradfield (2002), above n 196, 194.

²⁰¹ For a discussion of these arguments, see Victorian Law Reform Commission (2003), above n 196, paras 4.153–4.161.

²⁰² This model is suggested by Suzanne Beri, ‘Justice for Women Who Kill: A New Way?’ (1997) 8 *Australian Feminist Law Journal* 113. For another discussion of this model, see New Zealand Law Commission, *Battered Defendants, Victims of Domestic Violence Who Offend* Preliminary Paper 41 (2000), paras 70–73; New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants* Report No 73 (2001), para 71.

²⁰³ This option was created in conjunction with Associate Professor Jenny Morgan. A similar option of introducing a defence of ‘tyrannicide’ was suggested by Jane Cohen who recommended two requirements for the defence: (i) proof of a regime of private tyranny; and (ii) the killing of the tyrant

3.15 While the emphasis of each model is slightly different, all three are aimed at overcoming current problems faced by women who kill in response to a history of abuse in successfully raising a defence.

ARGUMENTS FOR AND AGAINST THE INTRODUCTION OF A NEW DEFENCE

3.16 The introduction of a separate defence might have a number of benefits including: recognising the realities of women's responses to violence in intimate relationships; providing more women who kill violent partners with a prospective defence; and making the law more certain for people who kill in such circumstances, thereby encouraging more women to go to trial rather than pleading guilty to manslaughter.

3.17 The main argument against this approach is that it is preferable to amend the current law so that it accommodates the experiences of people who kill in response to a history of family violence. This would avoid the complexity of introducing a new defence, and encourage the greater recognition of people's actions in response to a history of abuse as 'genuine' self-defence. If the defence was confined to women or those in an intimate sexual relationship, it could also be argued that it may be defined too narrowly. Family violence is not confined to women in heterosexual relationships, but may also be experienced by children, parents, grandparents, male partners and people in same-sex relationships. There may also be problems with community acceptance of a new defence, particularly if it is not framed in gender neutral terms—it may be seen as giving women in violent relationships a 'licence to kill'.

SUBMISSIONS AND CONSULTATIONS

A New Defence?

3.18 Dr Patricia Easteal in her submission supported the introduction of a new defence for women who kill in response to family violence:

must be reasonably necessary for the subject to escape from the tyranny. 'Private tyranny' exists where a person maintains control of the subject through social isolation, violence and threats of violence to the subject and those important to them and uses these means to prevent the subject from freeing him or herself from the tyrant's control. In determining what is reasonably necessary for the subject to escape, it is suggested that the risks to the subject of choosing an alternative, and the availability and efficacy of the community's own efforts to end such tyrannies, should be taken into account: Jane Maslow Cohen, 'Regimes of Private Tyranny: What do they Mean to Morality and for the Criminal Law' (1996) 57 *University of Pittsburgh Law Review* 757. This option is discussed in New Zealand Law Commission (2000), above n 202, paras 77–81; New Zealand Law Commission (2001), above n 202, paras 73, 78.

I believe that the unique circumstances of violence against women in the home necessitate a separate defence for such defendants. Both self-defence and provocation will I am afraid continue to be defined or interpreted in a non-inclusive manner that for the most part neither comprehends nor integrates...women's experiences.²⁰⁴

3.19 The majority of submissions and those consulted on the Options Paper, however, were of the view that the emphasis should be on making self-defence work for women, rather than on introducing a new defence.²⁰⁵

3.20 Although the Federation of Community Legal Centres' Violence Against Women and Children's Working Group saw some merit in consideration of the coercive control and self-preservation models, it concluded: 'ultimately it may be more desirable for self-defence to be available to women rather than developing a specific defence for battered women'.²⁰⁶

3.21 The Women's Legal Service Victoria similarly gave priority to ensuring that women's experiences are accommodated within self-defence. The Service specifically argued against the admission of evidence or the introduction of a new defence, such as the 'battered woman syndrome' defence, which would risk medicalising women's behaviour:

Women's experiences should ideally inform and be reflected in a universally available defence and we would like to see all possible attempts made to achieve this before consideration is given to creating a special defence. Any approach to evidence or a new defence that constructs women as 'overreacting', 'sick' or 'unreasonable' when they respond with fatal force in order to save their own life or the life of another should be avoided.²⁰⁷

Reform of Self-Defence

3.22 Participants in the Commission's roundtables on self-defence, and the public forum on Homicides in the Context of Violence Against Women, overwhelmingly supported reforms aimed at making self-defence more accessible

²⁰⁴ Submission 29. Submission 19 also supported the concept of a separate defence, and favoured either the self-preservation model or the coercive control model.

²⁰⁵ Forum 5 December 2003; Submissions 14, 16, 18. A number of submissions were in favour of reforming self-defence to ensure it operates fairly for women who kill in response to prior violence. See n 208.

²⁰⁶ Submission 16. This submission was endorsed by Submission 18.

²⁰⁷ Submission 14.

to people who kill in response to family violence.²⁰⁸ Many of those consulted affirmed the view that while the test for self-defence is broad enough to encompass women's experiences of violence, in practice this may not be occurring.²⁰⁹ While sympathetic verdicts might be returned in some cases, it was seen as objectionable that women must rely on the sympathy of the jury, rather than legal principles, as a basis for their defence. A number of those consulted considered it important that the way self-defence is interpreted and applied should take women's experiences into account.²¹⁰

3.23 This view was also reflected in submissions. The Domestic Violence Resource Centre's submission was one of a number of submissions which expressed support for reforms to improve women's access to self-defence:

We strongly support the reform of self-defence so that women who kill violent partners to protect themselves or their children from serious harm or death can utilise the defence. Legislative, procedural and educational reforms are necessary to improve women's access to self-defence.²¹¹

3.24 The Mental Health Legal Centre similarly argued:

Self-defence ought to be broadened to include the reality of women's lives and their mental states when they have been subjected to prolonged violence... We believe the law should embrace a broadened definition of self-defence which incorporates the mental states that develop as a result of chronic and persistent violence and powerlessness.²¹²

3.25 Changes to the substantive defence, however, were not universally supported. Some, including the CBA and VLA, were opposed to codifying self-defence on the basis that the test was a clear and flexible one and the common law would develop over time to respond to changing social circumstances and community views.²¹³ In their joint submission, the CBA and VLA commented:

The law of self-defence is generally thought to be uncomplicated and understood by juries. It is a defence that evolves in the common law tradition and is assessed by

208 Submissions 2, 3, 4, 6–8, 10, 14, 16, 17, 18, 19, 22, 23, 25.

209 Roundtables 4 December 2003, 11 December 2003; Forum 5 December 2003.

210 Roundtable 4 December 2003.

211 Submission 18.

212 Submission 25.

213 Roundtable 4 December 2003.

courts in the context of prevailing community standards...Until [the Defences to Homicide] Options Paper there has been no demand for reform.²¹⁴

THE COMMISSION'S VIEW AND RECOMMENDATIONS

No Special Defence for Women Who Kill

3.26 In the Commission's view, the focus of reforms in this area should be on ensuring self-defence properly accommodates women's experiences, rather than on creating a special defence for women who kill in response to family violence.²¹⁵ We believe it is possible to ensure that self-defence is defined and understood in a way that takes adequate account of women's experiences of violence through reforms to evidence and clarification of the scope of the defence. For this reason, the Commission recommends against the introduction of a new defence for people who kill in response to family violence.

Making Self-Defence Fairer

3.27 While the current test for self-defence is clear, simple and easily understood, the Commission shares concerns that in practice, the law is at risk of being interpreted and applied unfairly. The continued association of self-defence with a one-off confrontation will continue to make it difficult for jurors to identify actions taken in self-protection as 'self-defence' outside this context. This may particularly disadvantage those responding to an ongoing threat of harm, rather than a single attack or threat of violence, and those who kill in non-confrontational circumstances.

3.28 People who kill in the context of family violence clearly should not have an automatic claim to self-defence. Each case must be considered on its individual merits. Equally, where a person's actions have been carried out in fear for their lives and under a belief there is no other alternative, self-defence should not be excluded simply because he or she killed in non-confrontational circumstances or in response to an ongoing threat of violence, rather than an immediate attack. We

214 Submission 27.

215 As noted above, while men who argue self-defence have often killed in the context of a spontaneous encounter (such as a pub-brawl scenario) or to resolve a conflict with an acquaintance or friend, women typically raise the defence when they have killed a partner in the context of a history of prior abuse. For the reasons discussed in this Chapter, including that they may be responding to an ongoing threat rather than an attack, and use a weapon or wait until their physically stronger partner has his guard down, women are less likely to be able to successfully argue the defence.

believe the best way of countering current stereotypes about what self-defence ‘really is’ is to ensure the scope of the defence is clarified and that relevant evidence in support of the defence is introduced. Recommendations relating to evidence are explored further in Chapter 4.

3.29 While there is some benefit to be gained in ensuring that the law relating to self-defence retains a degree of flexibility, the Commission recommends the law of self-defence should be codified. Victoria is now the only jurisdiction in Australia in which self-defence is defined solely by reference to the common law. In all other jurisdictions self-defence is regulated by statute.²¹⁶ Defining the requirements of self-defence, and other defences to homicide, in legislation will promote a better understanding by jurors and other members of the community about the scope of these defences. Due to the particular difficulties which may be experienced by a person who kills in response to family violence in arguing the defence, we also see value in clarifying the range of factors that may assist a jury in these cases in determining whether the accused’s actions were carried out in self-defence. We discuss some options for reform and our preferred model for codification below.

! RECOMMENDATION(S)

2. The law of self-defence and other defences to homicide should be codified in Victoria and included in a new part in the *Crimes Act 1958*.

(Refer to draft Part 1C *Crimes Act 1958* in Appendix 4)

REFORM OF SELF-DEFENCE

3.30 In considering options for reform we have tried to ensure that the defence is defined and operates in a way that is fair and sufficiently flexible to take into account the range of circumstances in which a person may be reasonably acting to protect himself, herself or another. As discussed at [3.8]–[3.12], women who kill in response to violence face a number of barriers in successfully arguing self-defence, including:

216 *Criminal Code Act 1995* (Cth) s 10.4; *Criminal Code 2002* (ACT) s 42; *Crimes Act 1900* (NSW) s 418; *Criminal Code Act 1983* (NT) s 29; *Criminal Code Act 1899* (Qld) ss 271, 272; *Criminal Law Consolidation Act 1935* (SA) s 15; *Criminal Code Act 1924* (Tas) s 46; *Criminal Code Act Compilation Act 1913* (WA) ss 248, 249.

- demonstrating that the level of force used was reasonable and proportionate in the circumstances, particularly where a weapon has been used against their unarmed or sleeping partners;
- explaining the reasonableness of their actions given the apparent existence of alternative options, such as leaving the house or calling for assistance;
- establishing the nature of threat and harm, for example where they may have been responding to the cumulative effects of harm or an ongoing threat of violence; or
- explaining why they may have reasonably believed they had to plan the killing or to use another person to kill their abusive partners.

3.31 In Chapter 4 of the Options Paper we suggested a number of possible options for reform aimed at addressing these barriers, including:

- specifying factors to be taken into account in determining if the accused acted in self-defence;
- clarifying particular circumstances in which self-defence should not be automatically excluded; and
- amending the law to specify that it is reasonable to believe fatal force is necessary if the threat of serious injury or death is inevitable or unavoidable.

We consider each of these below.

SPECIFYING FACTORS TO BE TAKEN INTO ACCOUNT (INCLUSIONARY MODEL)

3.32 The aim of specifying factors to be taken into account would be to focus attention on factors that might not otherwise be recognised as relevant in determining whether the accused acted in self-defence. For instance, a generic statement could be introduced making it clear that the history of the relationship should be taken into account in determining whether the accused acted in self-defence. The following formulation was suggested by Zoe Rathus in a submission to a review of the Queensland Criminal Code:

A person is justified in using in defence of himself or herself or of another person, such force as he or she believes, on reasonable grounds, is necessary in the circumstances. In determining the reasonableness of the beliefs of the defendant the personal history of the defendant and the history of any relationship between the defendant and the

person against whom force is used and the effects of that relationship upon the defendant are relevant.²¹⁷

3.33 Alternatively, factors which may be relevant in deciding whether the accused has acted in self-defence could be set out in more detail. These factors might include, for instance:²¹⁸

- the accused's background, including any past abuse suffered by the accused;
- the nature, duration and history of the relationship between the accused and the deceased;
- the cumulative effect of any violence;
- the age, race, sex, physical and psychological characteristics and economic status of the accused and the deceased;
- the nature and inevitability of the threat of violence;
- any efforts made by the accused to resist, expose or reduce the violence, and the results of such efforts;
- the accused's experience regarding the efforts of others to seek intervention or assistance to prevent the violence; and
- the means available to the accused to respond to the violence, including the accused's mental and physical abilities and the existence of options other than the use of force.

3.34 Judge Ratushny, in advocating that a similar list of factors be adopted as part of a review of the law of self-defence in Canada, suggested one of the benefits of this approach would be:

To require the court to assess the context, including the history of violence and the availability of help. It may be that it is extremely difficult for a male judge to decide what is reasonable fear for a woman, but the substantive law can indicate what

217 Zoe Rathus, *Rougher Than Usual Handling, Women and the Criminal Justice System, A Gender Critique of Queensland's Criminal Code and the Review Process Initiated by the Queensland Government with Particular Reference to the Draft Criminal Code Bill, 1994* (2nd ed) (1995), Recommendation 26.

218 These factors are drawn from a number of sources, including Bradfield (2002), above n 196; Department of Justice, Canada, *Self Defence Review, Women in Custody* Final Report (1997), ch 5; and Canadian Association of Elizabeth Fry Associations, *Response to the Department of Justice Re: Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property* (1998). For a more detailed list of factors which might be taken into account, see Victorian Law Reform Commission (2003), above n 196, para 4.131.

evidence will be relevant and require that specific issues be addressed. This is not to argue for separate legal standards, but simply for recognition that a woman may reasonably perceive herself to be in danger when a man might not.²¹⁹

3.35 While this approach is aimed at addressing a particular problem—the difficulties that women who are subjected to abuse have in successfully arguing self-defence—it would apply more generally.²²⁰ This may create a perception that the defence is being broadened to allow some accused, whose conduct should not be regarded as carried out in self-defence, to successfully raise the defence. There is also a danger that by listing relevant factors, other factors which might be relevant may be excluded from consideration.

SPECIFYING WHEN SELF-DEFENCE SHOULD NOT BE EXCLUDED

3.36 This model approaches the same issue in a slightly different way by specifying that self-defence may be available in circumstances where it may otherwise be thought to be irrelevant, but making it clear that the accused may still have believed, on reasonable grounds, that her actions were necessary despite the existence of such circumstances.

3.37 While this might help remove some of the barriers to women raising self-defence, it could be argued that this reform is unnecessary. As in the case of defining self-defence inclusively, it may be criticised on the basis that it would not be confined to women who kill in response to a history of abuse, and as a result, it may make it easier for some accused, who should not have access to self-defence, to successfully raise the defence.

A HYBRID MODEL

3.38 A draft provision prepared by the Queensland Taskforce on Women and the Criminal Code provides an example of an approach that combines elements of both the above approaches.²²¹ The provision, based on a model drafted by Dr Rebecca Bradfield, was as follows:

219 Department of Justice, Canada (1997), above n 218.

220 This was noted by the Taskforce on Women and the Criminal Code (2000) in its final report, above n 194, 156.

221 Office for Women, Department of Premier and Cabinet, Queensland Government (2000), above n 194, 163–164. Ultimately the Taskforce did not recommend any changes to self-defence.

Conduct is carried out in self-defence or in defence of another where such conduct was a reasonable response to the circumstances as the person believed those circumstances to be taking into account the personal history (and attributes) of the person.

For the purpose of determining whether a person was acting in self-defence or the defence of another, there is no rule of law that such defences are negated if-

- (a) the person is responding to a history of personal violence against himself or herself or another rather than an isolated attack/assault;
- (b) the person has not pursued options other than the use of force; or
- (c) the person used a weapon against an unarmed person.

Where a person is responding to a history of personal violence against himself or herself or another, consideration may be given to the cumulative effect of such violence in assessing whether the force used was reasonable.²²²

3.39 Again, it could be argued that by making explicit reference to factors such as the use of a weapon against an unarmed person, the result of adopting such a test may be to create a perception that the scope of the defence is being broadened. While this might make it easier for women who kill in response to a history of abuse to argue the defence, it may also be seen as making it easier for some accused, whose conduct should not be regarded as carried out in self-defence, to successfully raise the defence.

SUBMISSION AND CONSULTATIONS

3.40 As discussed above at [3.22]–[3.23], submissions and people consulted were overwhelmingly in favour of reforms to self-defence to take into account women's experiences and responses to violence. It was generally felt that while the current formulation was broad enough to encompass actions carried out in self-protection in response to family violence, in reality it was difficult for people who killed in these circumstances to argue the defence. In considering whether the accused acted in self-defence, many of those consulted suggested the jury should be able to take into account factors such as the cumulative effects of violence and the nature, duration and history of the relationship between the accused and the deceased.²²³ There was no general consensus on how this could best be achieved,

222 Office for Women, Department of the Premier and Cabinet, Queensland Government (2000), above n 194.

223 Roundtables 4 and 11 December 2003, 24 February and 1 March 2004.

although some support was given to introducing a new provision to clarify evidence that should be admissible in these cases.²²⁴

3.41 The Federation of Community Legal Centres' Violence Against Women and Children Working Group was in favour of legislative reforms to make clear the relevance of a history of violence to a consideration of what is 'reasonable'.²²⁵ Support was given to the model formulated by Zoe Rathus, discussed at [3.32]. This submission was endorsed by the Domestic Violence and Incest Resource Centre Inc.²²⁶

3.42 The Women's Legal Service Victoria also saw merit in including a provision along the lines of the Zoe Rathus formulation.²²⁷ One submission specifically supported the principle that there should be no duty to retreat from one's home where there has been a history of prior family violence.²²⁸

3.43 A number of people also considered it important that the cumulative effects of violence be recognised in some way. The Victorian Aboriginal Legal Service Co-operative Ltd, in its submission,²²⁹ referred approvingly to comments made by the former Chief Justice of the Supreme Court of Victoria, Justice Phillips, in the 1999 *Inaugural Lesbia Harford Oration*. In cases where the accused was responding to a history of violence, Justice Phillips suggested it was necessary to take account of the 'accumulation, the sum total, of the deceased's violence and abuse'.²³⁰

THE COMMISSION'S VIEW AND RECOMMENDATIONS

3.44 The Commission notes concerns that as men are the majority of homicide offenders, any perceived widening of self-defence may benefit violent men. On the other hand, under the common law test, defence counsel and judges are left with fairly limited guidance on the range of issues that might be relevant to the jury's

224 Roundtable 19 February 2004.

225 Submission 16.

226 Submission 18.

227 Submission 14. The Women's Legal Service Victoria had some concerns, however, that without ensuring relevant information concerning family violence was included in the judge's charge to the jury, it might lead to 'certain important information not being considered'.

228 Submission 19.

229 Submission 20.

230 The Chief Justice of the Supreme Court, Justice John Harber Phillips, *Inaugural Lesbia Harford Oration* (1999).

determination of the question of reasonableness. We believe there is some value in specifying factors that may be relevant where there have been allegations of abuse in the relationship between the accused and the deceased.

3.45 After considering the merits of the different approaches discussed above, we propose that reference to factors that might be relevant where a history of violence is alleged should be included in a separate provision on evidence, rather than listed in the substantive provision on self-defence. This approach has the advantage of identifying factors that might be relevant, while avoiding the dangers referred to by the majority of the High Court in *Zecevic v Director of Public Prosecutions (Vic)* of elevating ‘matters of evidence’ to ‘rules of law’.²³¹

3.46 An accused will be able to rely upon the proposed provision to adduce evidence of relevant issues only in circumstances in which the accused has made allegations against the deceased of prior violence.²³² This will allow evidence supporting the reasonableness of the accused’s actions to be put before the jury in these limited circumstances, and thereby avoid any unintentional broadening of the defence. This provision will also apply in cases where the accused alleges he or she acted under duress.

3.47 The evidence provision we propose does not make special mention of the issues of planning, a duty to retreat, the use of an agent, or killings carried out in anger or in response to a sexual assault. It does refer more generally to factors that might be relevant in determining whether the accused acted in self-defence, including the history of the relationship, the cumulative effects of violence, and social, cultural and economic factors that might have affected the accused. This evidence may assist to explain, for instance, why the accused might have had to plan the killing, or have believed there was no other way of protecting himself or herself than by using deadly force against his or her abuser.

3.48 We have intentionally kept the range of factors about which evidence may be introduced broad, while not excluding the admission of other evidence that might be relevant. We believe this approach is preferable to attempting to list all the factors which may be relevant in an individual case, as the danger is that relevant factors will inadvertently be missed. An accused must still satisfy the test that he or she believed his or her actions to be necessary, and that his or her

231 (1987) 162 CLR 645, 662, Wilson, Dawson and Toohey JJ.

232 See Chapter 4 further. This provision is not limited to women who are the victims of spousal violence, but will extend to a range of circumstances where there is a history of personal violence perpetrated by the deceased against the accused.

actions were reasonable in the circumstances as he or she perceived them. Whether this test is satisfied will depend on the particular circumstances of the case. Recommended changes to evidence are discussed further in Chapter 4.

!

RECOMMENDATION(S)

3. Factors which may assist the jury in determining whether a person who was subjected to family violence by the deceased acted in self-defence or under duress should be included in a separate provision on evidence.

USE OF FORCE MAY BE REASONABLE WHERE THREAT OF HARM IS NOT IMMEDIATE

Current Position

3.49 Imminence is now only a factor relevant to whether the accused believed that it was necessary to act in self-defence, and the reasonableness of that belief.

Since the decision of the High Court in *Zecevic*, juries are instructed that the ultimate question is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he [or she] did. However, the imminence and seriousness of the threat to which the accused was supposedly responding are important, and often critical, factual considerations going to the accused's supposed belief, and the reasonableness of his [or her] belief.²³³

3.50 Justice Kirby in *Osland v The Queen* discussed the relevance of a history of violence in supporting self-defence and its relationship to the question of imminence:

Such evidence may assist a jury to understand, as self-defensive, conduct which on one view occurred where there was no actual attack on the accused underway but rather a genuinely apprehended threat of imminent danger sufficient to warrant conduct in the nature of a pre-emptive strike...The significance of the perception of danger is not its imminence. It is that it renders the defensive force used really necessary and justifies the defender's belief that 'he or she had no alternative but to take the attacker's life'.²³⁴

233 *R v Rogers* (1996) 86 A Crim R 542, 545, Gleeson CJ.

234 (1998) 197 CLR 316, 382, Kirby J citing *Lavallee* [1990] 1 SCR 852, 876, Wilson J.

3.51 This has been explicitly recognised in some cases. For instance, the Northern Territory Court of Criminal Appeal in *R v Secretary*²³⁵ found that threatening words uttered by the deceased before he fell asleep could be characterised as a continuing assault and thereby satisfy the requirements under the Northern Territory *Criminal Code Act 1983*.²³⁶ In the Queensland case of *R v Stjernqvist*, the trial judge similarly directed the jury that even in the absence of a particular threat at the time of the killing, a continuing threat may be sufficient to support self-defence.²³⁷

Problems with Imminence/Immediacy

3.52 While not an express requirement of self-defence, there is a danger that juries will dismiss action in response to a threat of injury that is not immediate as not being acts in self-defence, simply on the basis that it does not accord with their views on what self-defence ‘really’ is. ‘Imminent harm’, according to dictionary definitions, implies an impending or overhanging threat of harm,²³⁸ but in the context of self-defence, courts have tended to use the term in the sense of an ‘immediate’ threat such as a physical attack.

3.53 Establishing the immediacy of the threat can operate as a significant impediment to women successfully arguing self-defence where they might genuinely believe there is no option to escape death or serious injury other than to kill their violent partners. In such cases it will be important to ensure jurors are

235 *R v Secretary* (1996) 86 A Crim R 119.

236 Section 28(f) of the *Criminal Code Act 1983* (NT) at the time required the accused to show that ‘the nature of the assault being defended is such as to cause the person using the force reasonable apprehension that death or grievous harm will result’. Under s 187, an ‘assault’ is defined as: ‘(a) the direct or indirect application of force to a person without his consent...; or (b) the attempted or threatened application of such force where the person attempting or threatening it has an actual or apparent present ability to effect his purpose and the purpose is evidenced by bodily movement or threatening words...’. Self-defence is now defined under s 29 of the *Criminal Code Act 1983* (NT) which adopts the Model Criminal Code model for self-defence. The new section was inserted by the *Criminal Code Amendment Act 2001* (Act No 27 of 2001) s 3.

237 *R v Stjernqvist* Transcript of Proceedings (Unreported, Queensland Supreme Court, Cairns Circuit Court, Derrington J, 19 June 1996) 172–173. See further, Chapter 4 paras 4.142–4.143. Section 271 of the *Criminal Code Act 1899* (Qld) is drafted in similar terms to the old s 28(f) of the *Criminal Code Act 1983* (NT). See also *R v Kontinnen* (Unreported, Supreme Court of South Australia, Legoe J, 30 March 1992).

238 See, for example, A Delbridge, JRL Bernard, D Blair et al (eds) *The Macquarie Dictionary* (3rd ed) (2001), 1069 which defines ‘imminent’ as (1) ‘likely to occur at any moment; impending’ or (2) ‘projecting or leaning forward; overhanging’.

encouraged to turn their minds to the possibility that a person's actions may be reasonable in circumstances where the threat is not immediate, but is inevitable.

3.54 In some cases the fear of serious injury experienced by a person who has been subjected to family violence may be constant.²³⁹ In this context, it is argued, it may not be sensible to talk in terms of a particular immediate threat to that person's life. Similarly, while individual acts of violence on their own may not seem to justify the use of deadly force, it could be argued this ignores the cumulative effects of violence.²⁴⁰ While incidents on their own may not be life-threatening, the cumulative effects of abuse may well be. A recent report released by VicHealth has reported that intimate partner violence is the 'leading contributor to premature death, disability and illness in Victorian women aged 15–44', and is 'responsible for more of the disease burden than many other risk factors, such as high blood pressure, smoking and obesity'.²⁴¹ Other studies have confirmed that the effects of abuse over time are cumulative.²⁴² Requiring a woman who is subjected to serious abuse to wait until she is under attack to act may increase the risk she will be killed, or as one commentator has suggested, sentence her to 'murder by instalment'.²⁴³ While there may not appear to be a present threat, the threat may nevertheless be very real. In these circumstances, there may not be a need to prevent immediate harm but rather an immediate need to act to prevent inevitable harm.

3.55 A comparison has sometimes been made between the circumstances of women in abusive relationships who kill, and people in a hostage situation. Rather

239 Victorian Law Reform Commission (2003), above n 196, para 4.37. See also Zoe Rathus, *There Was Something Different About Him That Day: The Criminal Justice System's Response to Women Who Kill Their Partners* (2002), 14.

240 As discussed in the Options Paper, Ogle and Jacobs have suggested that severe domestic violence should be seen as a 'slow homicidal process': Robbin Ogle and Susan Jacobs, *Self-Defense and Battered Women Who Kill, A New Framework* (2002), ch 3, as cited in Victorian Law Reform Commission (2003), above n 196, para 4.38.

241 Victorian Health Promotion Foundation, *The Health Costs of Violence: Measuring the Burden of Disease Caused by Intimate Partner Violence: A Summary of Findings* (2004), 10.

242 World Health Organisation, *Women and Mental Health: An Evidence Based Review* (2000); Angela Taft, *Promoting Women's Mental Health: The Challenges of Intimate/Domestic Violence Against Women* (2003); Jacqueline Golding, 'Intimate Partner Violence as a Risk Factor for Mental Disorders: A Meta-Analysis' (1999) 14 (2) *Journal of Family Violence* 99 as cited in Victorian Health Promotion Foundation (2004), above n 241, 12.

243 Eber, 'The Battered Wife's Dilemma: To Kill or To Be Killed' (1981) 32 *Hastings Law Journal* 895, 928 as cited in *State v Gallegos* 719 P 2d 1268 (NM 1986), 1271. This was also referred to by Wilson J in *R v Lavallee* [1990] 1 SCR 852, 883.

than an immediate threat of harm, it could be argued, there is an immediate need to act to prevent inevitable harm. As Justice Wilson suggested in *Lavallee*:

If the captor tells [the accused] that he will kill her in three days time, is it potentially reasonable for her to seize an opportunity presented on the first day to kill the captor or must she wait until he makes the attempt on the third day? I think the question the jury must ask itself is whether, given the history, circumstances and perceptions of the appellant, her belief that she could not preserve herself from being killed by Rust [the deceased] that night except by killing him first was reasonable.²⁴⁴

3.56 The potential problems caused by a reading down of self-defence to apply only in circumstances where the threat is immediate led the Law Commission of New Zealand to recommend that self-defence be amended ‘to make it clear that there can be fact situations in which the use of force is reasonable where the danger is not imminent but is inevitable’.²⁴⁵

3.57 Several submissions supported a reference to harm that is inevitable, rather than immediate.²⁴⁶ While this issue was not specifically canvassed in consultations, a number of people spoke about the need for self-defence to better accommodate women’s experiences of violence.

3.58 The CBA was strongly opposed to incorporating the concept of inevitability into the test for self-defence, arguing:

First, such a reform would involve a major and unprecedented change to self-defence. It would legitimate violent self-help at a new level. It would require a major reconsideration of the objective element of self-defence. It would expand the related defences of defence of others and defence of property. It would expand the scope of the defence of honest and reasonable mistake of fact.

The CBA considers that there needs to be some certainty in criminal trial directions. For example what is necessary to establish ‘inevitable’? Is the concept to be objective inevitability? What evidence is admissible to prove ‘inevitability’? Is inevitability to be regarded as a proper field for expert evidence?

Second, such a reform would add complexity by way of judicial direction.

244 *R v Lavallee* [1990] 1 SCR 852, 889, Wilson J.

245 New Zealand Law Commission (2001), above n 202, paras 31–32.

246 Submissions 14, 16, 19. See also Submission 2 which argued there should be no requirement of ‘immediacy’ or ‘imminence’.

The CBA considers that the proposal is adventurous, controversial and frankly unsubstantiated.²⁴⁷

3.59 As discussed at [3.51], Australian courts have already recognised that circumstances may give rise to an argument of self-defence where the harm threatened is not immediate, but may be more remote in time—for example, where an accused kills the deceased while he or she is asleep.

Recommendations

3.60 In most cases, the use of fatal force will not be reasonable if the threat of harm is not immediate. This is because the person who is threatened will have an opportunity to escape or to seek the assistance of others. There may be circumstances in which an accused's belief in the need to take action is reasonably held where the danger is not immediate, but is inevitable. An example is the case of a person who is subjected to family violence, abuse or bullying who kills, believing it is only a matter of time before he or she is seriously injured and believing there is no other way to protect himself or herself.

3.61 The Commission believes the current formulation of self-defence can accommodate actions carried out in self-protection against future violence likely to cause serious injury or death. However, jury directions may not always deal with this issue adequately. We therefore recommend that legislation should expressly refer to the fact that actions may be carried out in self-defence, where the threat is not immediate, but may be more remote in time.

3.62 This may be seen as inconsistent with our approach that matters going to the issue of 'reasonableness' should be included in a separate provision on evidence. However, we believe this issue is important enough to warrant special mention in the substantive provision on self-defence. Its inclusion within the substantive provision on self-defence will also ensure juries are directed on this issue at trial. This may encourage a more careful analysis by jurors of circumstances in which a person may quite reasonably believe his or her life is in danger, where that person is not under immediate attack or at risk of immediate harm.

3.63 The provision proposed, which would operate in conjunction with the test for self-defence set out below, is as follows:

- (a) a person may believe that the conduct is necessary [in self-defence]; and

²⁴⁷ Supplementary Submission 27 (Criminal Bar Association).

- (b) a person's response may be reasonable [in self-defence]—
when the person believes that the harm to which he or she is responding is inevitable,
whether or not it is immediate.

3.64 The question of inevitability under this formulation focuses on the subjective belief of the accused. There is no requirement that inevitability be established in an objective sense, nor is it implied that by establishing that the accused believes the threat was inevitable the objective test of reasonableness will be satisfied. Rather, the provision aims to ensure that the actions of an accused person are not automatically excluded from the scope of the defence on the basis that the harm threatened is not immediate. Ultimately the question of whether the accused acted reasonably in self-defence will remain one for the jury. We believe the approach we have taken merely clarifies what is already the position under the common law.

! RECOMMENDATION(S)

4. The new provision on self-defence in the *Crimes Act 1958* should specify that:
- a person may believe that the conduct carried out in self-defence is necessary; and
 - a person's response may be reasonable—

when the person believes the harm to which the person responds is inevitable, whether or not it is immediate.

(Refer to draft s 322I(3) *Crimes Act 1958* in Appendix 4)

PROPORTIONALITY

The Current Position

3.65 There is no requirement that the accused be at threat of death or serious injury, or that the force used be strictly proportionate to the threat of harm or force used against the accused. For instance, a threatened sexual assault may provide a sufficient basis for self-defence to be raised.²⁴⁸ As with the question of immediacy, the proportionality of the accused's response to the threat or attack is

248 See *R v Walden* (1986) 19 A Crim R 444, 446.

a matter relevant only to the reasonableness of the accused's actions. The High Court, in setting out the test for self-defence in *Zecevic v Director of Public Prosecutions (Vic)*²⁴⁹ emphasised the importance of considering all of the circumstances surrounding the homicide being considered, of which the proportionality of the response to the threat is only one part.

[I]t will in many cases be appropriate for a jury to be told that, in determining whether the accused believed that his actions were necessary in order to defend himself and whether he held that belief on reasonable grounds, it should consider whether the force used by the accused was proportionate to the threat offered. However, the whole of the circumstances should be considered, of which the degree of force used may only be part. There is no rule which dictates the use which the jury must make of the evidence and the ultimate question is for it alone. The trial judge should also offer such assistance by way of comment as is called for in the particular case. No doubt it will often be desirable to remind the jury that in the context of self-defence, it should approach its task in a practical manner and without undue nicety, giving proper weight to the predicament of the accused which may have afforded little, if any, opportunity for calm deliberation or detached reflection.²⁵⁰

3.66 As noted at [3.29], all jurisdictions but Victoria have now codified the test for self-defence.²⁵¹ South Australia is the only jurisdiction retaining a direct reference to proportionality. Section 15 of the *Criminal Law Consolidation Act 1935* (SA) requires the accused's conduct to be, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat the defendant genuinely believed to exist. Section 15B qualifies this by making it clear that a requirement that the accused's conduct be objectively and reasonably proportionate to the threat the defendant genuinely believed to exist 'does not imply that the force used by the defendant cannot exceed the force used against him or her'.²⁵²

249 *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645.

250 *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, 662–3, Wilson, Dawson and Toohey JJ.

251 See n 216.

252 Under s 15C of the *Criminal Law Consolidation Act 1935* (SA), a complete defence is also provided in cases where the accused would have had a defence if his or her conduct had been (objectively) reasonably proportionate to the threat that he or she genuinely believed to exist, even if his or her conduct was not (objectively) reasonably proportionate to the perceived threat. This applies if the accused establishes, on the balance of probabilities, that he or she genuinely believed the victim to be committing, or to have just committed, home invasion; provided the accused was not engaged in

3.67 Queensland and Western Australia require a reasonable apprehension of death or serious bodily harm from the deceased's assault which may also limit the use of the defence in some circumstances—for instance, where a sexual assault is threatened.

Problems with the Current Law

3.68 While there is no requirement that the force used be proportionate, the level of force used can provide a barrier to the successful use of self-defence by women who kill in response to family violence. This will especially be the case for 'non-confrontational' killings, where the use of force by a woman against her sleeping partner, or while her partner's back is turned, can easily be constructed as disproportionate.²⁵³ It can also be a problem in confrontational cases, as women in such circumstances nearly always use a weapon. All women in the Commission's homicide prosecutions study who acted alone killed using a weapon of some kind.²⁵⁴ Taken out of context, women may also be seen as responding to an attack that is not 'life-threatening', in which case the use of fatal force may be regarded as excessive.

Recommendations

3.69 The Commission recommends below that excessive self-defence be reintroduced in Victoria. In light of this, we believe it is important that juries be discouraged from placing undue emphasis on the issue of the proportionality of the response to the force used, or threatened to be used, against the accused in determining whether the accused's actions were reasonable in the circumstances. We believe this is best achieved by including a statement in the substantive provision on self-defence that a person's actions may be reasonable in circumstances where the threat of force used exceeds the force used against him or her. As with the issue of inevitability of harm, this will ensure appropriate directions are given to a jury, and encourage a more careful consideration of

criminal misconduct, or substantially affected by voluntary and non-therapeutic consumption of a drug.

253 We note that this issue is related to that of the imminent threat of harm discussed above. A woman who kills a sleeping man may be excluded from the scope of self-defence either because the threat is not imminent, or because her use of force in the circumstances is disproportionate.

254 Victorian Law Reform Commission (2003), above n 196, para 2.35, Graph 5: Six women (50%) used a knife, one woman (8.3%) used a firearm, two women (16.7%) used a blunt instrument, one woman (8.3%) used fire and two women (16.7%) used some other kind of weapon. No women used their hands or feet, compared with 21 men (22.3% of all male offenders). This finding has been confirmed by other studies.

whether the accused's actions may have been reasonable, even if he or she used a level of force greater than may have appeared to have been necessary.

3.70 In making this recommendation, we acknowledge the particular disadvantage that may result to an accused if juries are not provided with appropriate guidance on this issue when women have killed their abusive partners. The disparity in size and physical strength between a woman and her partner, and a belief that leaving will not protect her against the threat, may reasonably lead her to believe there is no option to protect herself other than arming herself or using fatal force while her partner is asleep or his defences are down.²⁵⁵

3.71 This provision will apply equally in other circumstances—for instance where a young man, who kills defending himself against someone who is physically much stronger and in genuine fear for his life, uses a level of force which may at first appear to be excessive.

!

RECOMMENDATION(S)

5. The new provision on self-defence in the *Crimes Act 1958* should specify that the use of force by a person may be a reasonable response in the circumstances as the person perceives them, even though the force used by that person exceeds the force used against him or her.

(Refer to draft s 322I(4) *Crimes Act 1958* in Appendix 4)

PROPOSED MODEL FOR CODIFICATION OF SELF-DEFENCE

3.72 With the exception of mental impairment and infanticide (which is an offence and alternative verdict, rather than a defence), the law on defences to homicide in Victoria, including self-defence, is governed by the common law. In the interests of making the law more accessible and easy to locate, and facilitating a better understanding about available defences, the Commission recommends that defences to homicide should be included in a new part to the *Crimes Act 1958*. We acknowledge concerns that the flexibility of the common law be

²⁵⁵ See, for example, *R v Secretary* (1996) 86 A Crim R 119; *R v Kontinnen* (Unreported, Supreme Court of South Australia, 30 March 1992); *R v Bradley* (Unreported, Supreme Court of Victoria, Coldrey J, 14 December 1994).

retained. In our view, this is a case for ensuring regular review of the criminal law, rather than against codification.

3.73 After considering a number of existing models, we are persuaded that the Model Criminal Code provision proposed by the Model Criminal Code Officers Committee²⁵⁶ and now adopted in NSW,²⁵⁷ the ACT,²⁵⁸ the Northern Territory²⁵⁹ and the Commonwealth,²⁶⁰ strikes the right balance between the subjective beliefs of the accused and the element of ‘reasonableness’. The adoption of this test also has the advantage of promoting consistency of approach between jurisdictions. The test is as follows:

- 10.4 (1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.
 - (2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:
 - (a) to defend himself or herself or another person; or
 - (b) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or
 - (c) to protect property from unlawful appropriation, destruction, damage or interference; or
 - (d) to prevent criminal trespass to any land or premises; or
 - (e) to remove from any land or premises a person who is committing criminal trespass; and the conduct is a reasonable response in the circumstances as he or she perceives them.
 - (3) This section does not apply if the person uses force that involves the intentional infliction of death or really serious injury:
 - (a) to protect property; or
 - (b) to prevent criminal trespass; or

256 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapters 1 and 2: General Principles of Criminal Responsibility* (1992), 70.

257 *Crimes Act 1900* (NSW) s 418.

258 *Criminal Code 2002* (ACT) s 42.

259 *Criminal Code Act 1983* (NT) s 29.

260 *Criminal Code Act 1995* (Cth) s 10.4.

(c) to remove a person who is committing criminal trespass.²⁶¹

Subsection (3) makes it clear that not all these forms of self-defence apply to homicide.

MIXED SUBJECTIVE AND OBJECTIVE TEST

3.74 During consultations, some participants were in favour of the adoption of a completely subjective test for self-defence.²⁶² Under a subjective test, the question asked would simply be whether the accused honestly believed it was necessary to do what he or she did to protect himself, herself or another person. The LRCV advocated this approach in its 1991 report *Homicide*.²⁶³

3.75 In our view, the necessity of using force in self-defence should be assessed from the point of view of the accused. If a person honestly believes his or her actions are necessary to defend himself, herself or another person, often this will be the best evidence that they were necessary. On the other hand, the Commission believes that a person who has an honest belief, but whose actions are not objectively reasonable in the circumstances as he or she perceived them, is not entirely without blame and should bear some level of criminal responsibility.²⁶⁴

261 *Criminal Code Act 1995* (Cth) s 10.4; Criminal Law Officers Committee of the Standing Committee of Attorneys-General (1992), above n 256, 70, cl 313 Model Criminal Code. This test is also largely consistent with s 46 of the *Criminal Code Act 1924* (Tas) which provides: ‘A person is justified in using, in the defence of himself or another person, such force as, in the circumstances as he believes them to be, it is reasonable to use’.

262 Roundtables 4 and 11 December 2003.

263 In addition, the LRCV recommended the introduction of a new offence of culpable homicide to cover a person who has an honest, but grossly unreasonable belief in either the necessity of using force, or the proportionality of his or her response: Law Reform Commission of Victoria, *Homicide* Report No 40 (1991), para 223, Recommendation 27. Therefore the LRCV would appear to have accepted that an honest belief on its own is an insufficient basis for a complete defence to murder; such a belief must also not be grossly unreasonable.

264 In doing so we support the view expressed by Simon Bronitt and Bernadette McSherry who argue: ‘Generally, if an offence requires a particular mental state as part of its definition, then a subjective test can be applied. However, a mental state forming part of a defence requires an objective test. This distinction is based on societal values. That is, before a society decides to exercise compassion by exculpating an accused from criminal liability, it is entitled to demand that the accused lacked any blameworthiness in relation to the plea relied on. As Stanley Yeo...has pointed out “[a]n unreasonable or negligently held belief would constitute blameworthiness denying the accused the excuse”’: Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2001) 305–6, citing Stanley Yeo, *Compulsion and the Criminal Law* (1990), 200. For a discussion of the arguments for and against the adoption of a completely subjective test, see Victorian Law Reform Commission (2003), above n 196, paras 4.136–4.145.

For this reason, we support the continued retention in the test for self-defence of an objective element of reasonableness. However, in our view the culpability of a person who kills another person genuinely believing that it is necessary for self-protection is reduced, even if that person is unable to establish the reasonableness of his or her conduct in the circumstances. It is principally on this basis that we recommend the reintroduction of excessive self-defence in Victoria. We discuss our reasons below at [3.103]–[3.105].

3.76 Under the Model Criminal Code formulation, the test applied to the need to use force is subjective, while the reasonableness of the response, including the level of force used, is objective. In assessing the objective reasonableness of the response, the jury must consider its reasonableness in the circumstances as the accused subjectively perceived them. While the objective test of reasonableness is therefore retained, the jury must consider the reasonableness of the accused's actions from the accused's perspective. At common law, the jury in determining whether there are reasonable grounds for the belief actually held must consider not what a reasonable person would have believed, but what the accused might have reasonably believed in all the circumstances.²⁶⁵ While the standard applied is an objective one, the jury must consider the surrounding circumstances to determine whether there was a reasonable basis for that belief.

ONUS OF PROOF

3.77 Once self-defence is raised, the prosecution has the onus of proving beyond reasonable doubt that the accused did not carry out the conduct in self-defence. This is consistent with the current position. Therefore, it is only where the jury is satisfied beyond reasonable doubt, either that the accused did not genuinely believe his or her actions were necessary, or that his or her actions were not reasonable in the circumstances, that the defence will not be made out. Under the Commission's recommendations below to reinstate excessive self-defence as a partial defence in Victoria, a person who fails in meeting the test only because his or her actions cannot be shown to be objectively reasonable in the circumstances, may be convicted of manslaughter rather than murder.

REASONABLENESS OF CONDUCT RATHER THAN REASONABLENESS OF BELIEF

The major difference between the two tests is that under the Model Criminal Code it is the reasonableness of the accused's *conduct*, rather than the

265 See *Viro v The Queen* (1978) 141 CLR 88; *R v Conlon* (1993) 69 A Crim R 92, 98–99, 101.

reasonableness of the accused's *belief* that is at issue. Therefore a person who believed he or she was in danger, even if mistaken about that perception, would be able to rely on self-defence, unless his or her conduct was not a reasonable response in the circumstances as he or she perceived them. The reasonableness of the belief is only relevant as a matter to be taken into account by the jury in considering whether the belief was in fact honestly held. The NSW Court of Appeal in considering the NSW provision²⁶⁶ based on the Model Criminal Code provision has recognised that '[c]odification of what constitutes "self-defence" thereby refines and elaborates on the common law elements, but without introducing any major change'.²⁶⁷

RESPONSE TO LAWFUL CONDUCT

3.78 Under the model proposed, self-defence is not available as a defence if the accused was responding to conduct that he or she knew to be lawful. This is largely consistent with the position at common law,²⁶⁸ and is based on the Model Criminal Code provision now operating in the Commonwealth, ACT and NT.²⁶⁹

3.79 The common law in relation to a person who is being lawfully arrested or who has escaped from lawful custody was set out by the majority of the High Court in *Zecevic v Director of Public Prosecutions (Vic)*. In *Zecevic* it was suggested that a person's actions in these circumstances should be understood not as actions carried out in self-defence, but rather actions in pursuit of that person's original design.

[W]here an accused person has created the situation in which force might lawfully be applied to apprehend him or cause him to desist—where, e.g., he is engaged in criminal behaviour of a violent kind—then the only reasonable view of his resistance to that force will be that he is acting, not in self-defence, but as an aggressor in pursuit

266 *Crimes Act 1900* (NSW) s 418.

267 *R v Trevenna* [2004] NSW CCA 43 (Unreported, Santow JA, James and Barr JJ, 4 March 2004) para 38, Santow JA.

268 *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645. Note Brennan J's dissenting judgment on this issue at 666–670. See also Deane J at 682, who suggested that the requirement of unlawfulness should be retained but defined in terms of an 'unjustified' rather than an 'unlawful' attack. For an exhaustive examination of the authorities on this issue and more generally of the history of self-defence, see *R v Lawson and Forsythe* [1986] VR 515, 549–582.

269 *Criminal Code 2002* (ACT) s 42(4); *Criminal Code Act 1983* (NT) ss 29(5), 29(6); *Criminal Code Act 1995* (Cth) s 10.4(4).

of his original design. A person may not create a continuing situation of emergency and provoke a lawful attack upon himself and yet claim upon reasonable grounds the right to defend himself against that attack.²⁷⁰

3.80 We believe an accused person who is responding to force which he or she knew to be lawful is not acting in self-defence, and should therefore not be permitted to argue self-defence. In doing so we recognise, as the High Court did in *Zecevic v Director of Public Prosecutions (Vic)*, that it is unlikely an attack which is lawful will ever provide reasonable grounds for a resort to the use of violence.²⁷¹

3.81 Under the proposed test, self-defence is also not excluded simply because the other person carrying out the conduct to which the accused has responded is not criminally responsible for it. This is consistent with the common law and the ACT, Commonwealth, NSW and Northern Territory formulations, and will allow a person who honestly believes that his or her actions are necessary to defend himself or herself against a child, or someone who is mentally impaired, to raise the defence.

3.82 Self-defence will only be available as a defence to homicide in circumstances in which the person believes he or she is acting to protect himself, herself or another person, or to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person. In our view a person is never justified in intentionally causing death or serious injury where the threat of harm is to property only.

! RECOMMENDATION(S)

6. The New South Wales formulation of self-defence, based on the Model Criminal Code provisions, as they apply to the offences of murder and manslaughter, should be adopted in Victoria. Under this formulation, a person is not criminally responsible for the offence if the person believes the conduct is necessary:

270 (1987) 162 CLR 645, 664, Wilson, Dawson and Toohey JJ.

271 (1987) 162 CLR 645, 663–664, Wilson, Dawson and Toohey JJ.

!

RECOMMENDATION(S)

- to defend himself or herself or another person; or
- to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person; and

the conduct is a reasonable response in the circumstances as the person perceives them.

(Refer to draft s 322I(1)–(2) *Crimes Act 1958* in Appendix 4)

7. In any criminal proceeding for murder or manslaughter in which self-defence is raised, the prosecution has the onus of proving beyond reasonable doubt that the person did not carry out the conduct in self-defence.

(Refer to draft s 322H(1) *Crimes Act 1958* in Appendix 4)

8. Self-defence should not be available if:

- the person is responding to lawful conduct; and
- at the time of the response, he or she knew that the conduct was lawful.

However, conduct is not lawful merely because the person carrying it out is not criminally responsible for it.

(Refer to draft s 322J *Crimes Act 1958* in Appendix 4)

ANGER, FEAR, SELF-DEFENCE AND THE DESERVING ACCUSED

3.83 In thinking about options for the reform of self-defence, it has been necessary for us to consider how the emotion of anger should affect a person's claim to self-defence. In our view it is a somewhat futile and unnecessary exercise to try to make a distinction between killings carried out in fear and those carried out in response to anger or out of a desire for revenge. In many circumstances in which a person kills, he or she will experience and be motivated by mixed emotions including fear and anger. For instance, women responding to a history of physical and psychological abuse might quite legitimately have feelings of anger towards their abusers, while still acting out of fear for their lives.

3.84 The Law Commission for England and Wales has relied partly on this argument as a basis for recommending a combined defence of provocation and a type of excessive self-defence.²⁷² In our view, the provision proposed by the Law Commission does not overcome the very real concerns we have about provocation providing a proper basis for a defence. In particular, as discussed in Chapter 2, it remains an overly subjective assessment of what constitutes sufficient provocation, and involves speculation about how a person *might have* reacted in the circumstances. While recognising anger as a possible motivator, the provision explicitly excludes actions carried out ‘in premeditated desire for revenge’.²⁷³

3.85 We believe the existence of anger should never preclude reliance on self-defence, or indeed excessive self-defence. The focus should properly remain on whether the accused honestly believed his or her actions were necessary for self-protection, regardless of other emotions he or she may have been experiencing at the time. The subtleties and complexities of human emotions and experience must not be ignored or reduced down to artificial dichotomies.

3.86 We also cannot stress enough the important role that trial judges must play in guiding juries away from stereotypes of what ‘really’ constitutes self-defence and assumptions jurors might have about who is, and is not, deserving of the defence. When women kill in the context of abusive relationships, it may well be tempting for jurors to judge their behaviour against that of a stereotype of how a person subjected to abuse should act.²⁷⁴ For instance, jurors may be less likely to

272 The Law Commission argues: ‘Morally, the common element is that of response to unjust conduct (whether in anger, fear or a combined emotional state)’: Law Commission, *Partial Defences to Murder [Great Britain]* Provisional Conclusions on Consultation Paper No 173 (2004), para 37. Although for the sake of convenience we refer to the defence as a combined defence of provocation and excessive self-defence, under the provision proposed the accused does not need to demonstrate, as he or she would to establish excessive self-defence, that he or she had an honest belief it was necessary to do what he or she did. Instead, the provision refers to a response to a ‘fear of serious violence towards the defendant or another’, and requires that ‘a person of the defendant’s age and of ordinary temperament...in the circumstances of the defendant might have reacted in the same or a similar way’: *ibid* para 58.

273 *Ibid* para 58.

274 See further Bradfield (2002), above n 196, 226–231. Bradfield, citing Bronwyn Naylor, ‘Media Images of Women who Kill’ (1990) 15 *Legal Service Bulletin* 4, 7 notes that: ‘the female killer is typically presented in stereotypical terms—“either weak—a victim of her circumstances, emotions or hormones—or as wicked, a cunning monster”. If she is weak, she is deserving of our sympathy; otherwise she is deserving of our condemnation. If the woman conforms to the “passive” stereotype, then it is harder to make a claim to rationality and normalcy...the stereotypes of passivity and irrationality operate to subvert the rationality of the battered woman’s actions, and so make it more difficult to argue that the accused’s actions were carried out in reasonable self-defence’: *ibid* 226–227.

see a woman who has tried to fight back, or who has an alcohol or drug dependency as ‘deserving’ of a defence. Where the accused is Indigenous or from a different cultural background, cultural stereotypes might also come into play to make it more difficult for the jury to understand a woman’s behaviour.²⁷⁵

3.87 Our recommendations in the following Chapter on evidence and judicial and professional legal education are intended to promote a better understanding by judges, jurors and legal representatives of the circumstances and range of reactions people might have in response to family violence. We discuss jury charges further in Chapter 4.²⁷⁶

EXCESSIVE SELF-DEFENCE

CURRENT LAW

3.88 Until the High Court decision of *Zecevic v Director of Public Prosecutions (Vic)*²⁷⁷ in 1987, a jury could return a verdict of manslaughter where the accused genuinely feared harm but was found by the jury to have reacted unreasonably and excessively by using fatal force, rather than taking a less extreme course of action.²⁷⁸ Excessive self-defence is no longer a partial excuse in Victoria.

3.89 One of the reasons the majority of the High Court recommended its abolition was the complexity it added to the law. The defence involved the jury being instructed about a complicated six-stage test, filled with difficult language and double negatives. Such a test was seen to be unnecessarily complex when weighed against the advantages of retaining the defence. It was also felt that if the jury believe there are reasonable grounds for the belief in the necessity to use the level of force used, or are in reasonable doubt about this issue, the accused would meet the test for self-defence. The possibility that this might result in a conviction for murder of a person lacking the moral culpability for murder was suggested by the majority of the High Court to be ‘unlikely in practice’.²⁷⁹

²⁷⁵ Julie Stubbs and Julia Tolmie, ‘Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome’ (1999) 23 *Melbourne University Law Review* 709, 748.

²⁷⁶ See further Chapter 4, 4.139–52.

²⁷⁷ (1987) 162 CLR 645.

²⁷⁸ See for example, *R v Howe* (1958) 100 CLR 448; *Viro v The Queen* (1978) 141 CLR 88.

²⁷⁹ *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, 664, Wilson, Dawson and Toohey JJ.

ARGUMENTS FOR THE REINTRODUCTION OF EXCESSIVE SELF-DEFENCE

3.90 The decision to abolish excessive self-defence has been criticised by a number of commentators as lacking in logic.²⁸⁰ The reintroduction of excessive self-defence has been recommended by a number of law reform bodies²⁸¹ and has occurred in both New South Wales²⁸² and South Australia.²⁸³ The New Zealand Law Commission, in its recent review of defences and their application to battered women who kill, recommended against its introduction because it preferred not to introduce or retain partial defences. However, the Commission concluded that '[o]f all the partial defences considered...this is the one we would most favour introducing into New Zealand law'.²⁸⁴

280 See for example, Stanley Yeo (ed) *Partial Excuses to Murder* (1991), 161–73; Helen Brown, *Beyond Battered Woman Syndrome: Reforming Self-Defence to Seek Justice For Women Who Kill* (Unpublished MA Thesis, Monash University, 1996), 78–79; Paul Ames Fairall, 'Excessive Self-Defence in Australia: Change for the Worse?' in Stanley Yeo (ed) *Partial Excuses to Murder* (1991), 178–89. Louis Waller and C R Williams, *Brett, Waller and Williams Criminal Law Text and Cases* (8th ed) (1997), 181.

281 See for example, House of Lords, *Report of the Select Committee on Murder and Life Imprisonment* (1989), para 89; Criminal Law Revision Committee, *Offences Against the Person Report No 14* (1980). Compare with the Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, *Model Criminal Code, Chapter 5, Fatal Offences Against the Person Discussion Paper* (1998), 107–113; and Gibbs Committee, *Review of the Commonwealth Criminal Law (Third Interim Report on Principles of Criminal Responsibility and Other Matters* (1990).

282 *Crimes Act 1900* (NSW) s 421, which provides:

- (1) This section applies if:
 - (a) the person uses force that involves the infliction of death, and
 - (b) the conduct is not a reasonable response in the circumstances as he or she perceives them, but the person believes the conduct is necessary;
 - (c) to defend himself or herself or another person, or
 - (d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.

(2) The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.

283 *Criminal Law Consolidation Act 1935* (SA) s 15(2), which provides:

It is a partial defence to a charge of murder (reducing the offence to manslaughter) if:

- (a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; but
- (b) the conduct was not, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.

284 New Zealand Law Commission (2001), above n 202, para 67.

3.91 The reintroduction of excessive self-defence has a number of potential advantages. Excessive self-defence may play an important role in providing a ‘halfway house’ for those cases where self-defence is not successful, but where manslaughter is the more appropriate outcome. No matter how remote the possibility, there may be circumstances in which a person may honestly believe his or her actions are necessary to protect himself or herself against serious injury, but where his or her response is grossly unreasonable in the circumstances. A person who has an honest belief in the need to defend himself or herself, but is mistaken about the level of force required to counter the threat, should be considered morally less culpable than others who kill intentionally. Under the current law, a person who kills in these circumstances is likely to be convicted of murder.

ARGUMENTS AGAINST THE REINTRODUCTION OF EXCESSIVE SELF-DEFENCE

3.92 The strongest argument against the reintroduction of excessive self-defence is that it may prevent women from being acquitted on the basis of self-defence, due to the existence of an ‘easy’ middle option.²⁸⁵ Many women who kill in response to family violence use a weapon,²⁸⁶ often against their unarmed partner. A jury, presented with the option of returning a verdict of manslaughter on the basis of excessive self-defence, may therefore simply accept that such a killing was unreasonable and disproportionate, instead of properly considering the reasonableness of her actions in the circumstances. There is a fear that excessive self-defence will effectively become a defence for women who kill in response to family violence (resulting in a manslaughter verdict) while men will continue to be able to successfully bring themselves within the scope of self-defence and be acquitted of murder.

3.93 Excessive self-defence may also be seen as providing some accused, such as people who are excessively fearful, with a defence in circumstances where they should arguably be convicted of murder. For instance, if a white person who is excessively fearful of black people sees a black person walking towards him or her and kills the person believing he or she is about to be attacked, he or she might be

²⁸⁵ See Canadian Association of Elizabeth Fry Associations, *Response to the Department of Justice Re: Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property* (1998), 31–2.

²⁸⁶ See n 254.

convicted of manslaughter on the basis that although this response was not reasonable, the belief in the need to use force was genuinely held.²⁸⁷

3.94 Another common argument put forward against the reintroduction of the defence is the complexity it might add to the law. The Model Criminal Code Officers Committee rejected its reintroduction on this basis, suggesting that as a concept excessive self-defence is ‘inherently vague’ and has resulted in ‘no satisfactory test being promulgated’.²⁸⁸ However, Stanley Yeo in a recent paper prepared for the Law Commission for England and Wales has suggested that ‘the South Australian formulation of excessive defence appears to be working well in practice’.²⁸⁹ In South Australia, trial judges have used written directions to assist the jury to understand the test and its relationship to self-defence.²⁹⁰

EXCESSIVE SELF-DEFENCE IN PRACTICE

3.95 Excessive self-defence was introduced by South Australia in 1991 and in NSW in 2002. The original test in South Australia was much criticised,²⁹¹ and a revised test was subsequently introduced in 1997.²⁹²

287 Another example referred to in an article by Schopp et al is that of a racist man who sees a person of another race walking towards him with a baseball bat. Believing he is in danger, he kills the other person. In fact, if he had looked around he’d have seen he was near a baseball field, where a number of people were congregating for the day’s game. His fear in the circumstances was unreasonable, but it was also genuinely held: Robert Schopp, Barbara Sturgis and Megan Sullivan, ‘Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse’ (1994) *University of Illinois Law Review* 45, 98–9. This argument has also been used against the introduction of a completely subjective test for self-defence. See Victorian Law Reform Commission (2003), above n 196, para 4.141.

288 Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General (1998), above n 281, 113.

289 Stanley Yeo, ‘Partial Defences to Murder in Australia and India: Provocation, Diminished Responsibility and Excessive Defence’ in Law Commission, *Partial Defences to Murder: Overseas Studies Consultation Paper No 173 (Appendices)* (2003), 58.

290 Ibid. Stanley Yeo refers to *R v Clothier* [2001] SASC 9 (Unreported, Mullighan, Williams and Bleby JJ, 18 January 2002) as providing a good illustration of the use of written directions.

291 See *R v Gillman* (1994) 62 SASR 460, 466 in which Mohr J commented: ‘In my opinion the section as drafted is completely unworkable and should be repealed and either redrafted in a way to make it clear what is intended or repealed to allow the common law principles...to operate.’ See also *R v Bednikov* (1997) 95 A Crim R 200, 211 in which Matheson J referred to ‘the notoriously ill-drafted s 15 of the *Criminal Law Consolidation Act*.

292 *Criminal Law Consolidation (Self-Defence) Amendment Act 1997* (SA) s 2 amending *Criminal Law Consolidation Act 1935* (SA) s 15.

3.96 In NSW where the defence has only recently been reintroduced, the defence appears to have most frequently been used as the basis for a plea of manslaughter. Four recent cases, in which excessive self-defence was relied upon as the basis for a manslaughter plea or a verdict of manslaughter, are discussed below.



CASE STUDY 1²⁹³

L, a woman, shared a house with the male deceased. The killing occurred while L was visiting the house to collect some clothes after spending the weekend with another man. The deceased became angry as he had been unable to contact L and felt she was avoiding him. L accused the deceased during the course of the argument of sexually abusing her son and the argument escalated. On L's evidence, the deceased had threatened to kill her, knocked her to the floor and attempted to strangle her. L then grabbed the deceased's gun from its hiding place and stood up. The deceased had a cricket bat in his hand and allegedly said 'I'll smash your face in so no one will ever know you. You will never see [your son] again'. L then shot the deceased in the back of his head. Although L and the deceased were not romantically involved, there was evidence that the deceased was infatuated with her and wanted to control her. The deceased had a history of inflicting violence upon women with whom he was closely associated. L pleaded guilty to manslaughter on the basis of excessive self-defence and was sentenced to 7 years imprisonment with a non-parole period of 4 years.

293 *R v Trevenna* [2003] NSWSC 463 (Unreported, Buddin J, 29 May 2003). See also on appeal, *R v Trevenna* [2004] NSWCCA 43 (Unreported, Santow JA, James and Barr JJ, 4 March 2004). The NSW Court of Criminal Appeal dismissed both the Crown's appeal and the respondent's appeal against the sentence imposed.



CASE STUDY 2²⁹⁴

S killed her de facto husband. There was a history of abuse in the relationship. S claimed that her de facto husband had tried to kill her and she had picked up an iron and struck him on the head with it three times. Three weeks later she called a man in to dig a hole in the backyard. When asked what size she wanted, she replied 'grave size'. Police executed a search warrant upon S's home a little more than two months later and recovered the deceased's body. S pleaded guilty to manslaughter on the basis of excessive self-defence and was sentenced to five years imprisonment with a non-parole period of 2 years.



CASE STUDY 3²⁹⁵

C was convicted of manslaughter at trial. C killed another man following an altercation that occurred outside a hotel where they had both been drinking with their friends. During the fight C was punched and kicked a number of times. He produced a gun and fired a shot at the deceased but missed. C then ran away and was pursued by the deceased. There was a struggle and C fired a shot that hit the victim in the chest. At trial C raised excessive self-defence, provocation and lack of intention to kill. The jury found C guilty of manslaughter and he was sentenced by the trial judge on the basis of excessive self-defence to eight years imprisonment with a non-parole period of five years for the manslaughter offence. On appeal his sentence was reduced to 6½ years imprisonment with a non-parole period of four years.

294 *R v Scott* [2003] NSWSC 627 (Unreported, Whealy J, 10 July 2003).

295 *R v Cioban* [2002] NSWSC 972 (Unreported, Studdert J, 18 October 2002); and on appeal, *Cioban v R* (2003) 139 A Crim R 265.



CASE STUDY 4²⁹⁶

N was a 24-year-old man with a prior criminal history, including armed robbery. N killed the deceased after the deceased, and seven other persons who were carrying weapons including iron bars, knocked on the door and burst into his home. A very brief conversation took place after which N discharged two shots from a handgun, killing the deceased. The defendant pursued the other robbers who were attempting to escape. N pleaded guilty to manslaughter on the basis of excessive self-defence and was sentenced to seven years imprisonment with a non-parole period of 3½ years.

3.97 Of the case studies discussed above, only one (Case Study 3) involved the successful use of excessive self-defence at trial. In the two cases involving female accused, excessive self-defence was relied upon as the basis for a plea.

3.98 During consultations on the Options Paper, it was noted that a manslaughter plea often appears to be accepted by offices of public prosecutions in Victoria and elsewhere on the basis of a lack of intention to kill or cause serious injury in circumstances where there is some evidence to support a finding the accused acted in self-defence.²⁹⁷ The existence of excessive self-defence may therefore provide an additional basis for a plea of manslaughter to be negotiated, without resulting in any substantive change in how these cases are managed.²⁹⁸ In some cases, it may also provide an additional basis on which an accused might be charged with manslaughter (see further [3.116]–[3.128]).

SUBMISSIONS AND CONSULTATIONS

3.99 Mixed views were expressed by those consulted about the reintroduction of excessive self-defence.²⁹⁹ Some people were of the view that if a person killed to protect himself or herself, they should be able to argue self-defence.³⁰⁰ It was

296 *R v Nguyen* [2002] NSWSC 536 (Unreported, James J, 14 June 2002).

297 Roundtable 4 December 2003.

298 The view was expressed that whereas provocation was generally viewed as involving an application of community standards, and therefore a question best left to the jury, excessive self-defence would involve an assessment of the reasonableness of the accused's actions, which is a question of fact. The Crown may therefore be more willing to accept a plea on this basis: Roundtable 1 March 2004.

299 Roundtables 4 December and 11 December 2003, 24 February and 1 March 2004.

300 Roundtable 24 February 2004.

argued that there was no need to reintroduce the defence because if the force used by the accused is substantially out of kilter with the threat, the jury is unlikely to accept that it was, in fact, an honest belief.³⁰¹

3.100 Many of those consulted felt that if provocation were abolished it was important to retain a ‘safety net’ for women who kill in response to family violence.³⁰² In the absence of a partial defence or excuse, some women, who might otherwise have been convicted of manslaughter, might be convicted of murder.³⁰³ Others suggested that regardless of whether excessive self-defence was reintroduced, at least some women in these circumstances could argue they lacked the intention to kill or cause serious injury—the reintroduction of excessive self-defence would not change this.³⁰⁴

Three submissions specifically opposed the reintroduction of excessive self-defence.³⁰⁵ The Federation of Community Legal Centres’ Violence Against Women and Children Working Group, in arguing against the reintroduction of excessive self-defence, reiterated concerns that it would result in men being acquitted and women who killed violent partners being convicted of manslaughter. The working group also questioned how the actions of a person who honestly believes his or her life is in danger could ever be considered as ‘excessive’.³⁰⁶

3.101 The CBA, which expressed cautious support for the reintroduction of the defence, were of the view that ‘[t]here are situations which call for such a

301 Roundtable 4 December 2003.

302 Roundtable 24 February 2004; Forum 5 December 2003.

303 Roundtable 24 February 2004.

304 Roundtable 24 February 2004.

305 Submissions 2, 16, 18 (endorsing Submission 16).

306 Submission 16. In a supplementary submission, one of the participants at the Roundtable 24 February 2004 expressed similar concerns about the use of the word ‘excessive’ as women’s conduct may be automatically assumed to be excessive, for example because they have used a weapon. Similar criticisms have been made by other commentators. See, for example, Edwards who argues: ‘The “proportionate” requirement embodies a mathematical and physical abstraction, which disavows the qualitative and quantitative difference of gender, *inter alia*, physical attributes, and unequal access to inherent body force. Women who use weapons in self-defence, do so in order to arm themselves against the *a priori* disproportionate force of men in order to achieve a notional equality between unequals. Women use such force as they consider necessary to repel the real possibility of a disproportionate and life threatening male force, which in their mind is in the continuous present’: Susan Edwards, ‘Abolishing Provocation and Reframing Self-Defence—The Law Commission’s Options for Reform’ (2004) *Criminal Law Review* 181, 190.

defence—the “understandable over-reaction” scenarios’, including victims of ‘moderate abuse who respond excessively’.³⁰⁷ The CBA offered the recent case of *R v Calway*³⁰⁸ (Case Study 5) as an example of a case in which the availability of excessive self-defence might have mitigated the verdict.



CASE STUDY 5

Ms Calway killed her stepfather following her mother’s death. While she claimed she had no memory of the events, the evidence suggested there was a fight between Ms Calway and the deceased, during which Ms Calway sustained several bruises. The cause of the deceased’s injuries appeared to have been a blow to the head with a brick, rock or garden fork. Ms Calway and her stepfather were not on good terms. On a previous occasion, Ms Calway had become upset at the deceased for smoking in front of her mother who was at that stage dying of lung cancer, and the deceased had punched her in the face. The jury convicted Ms Calway of murder and she received a sentence of 15 years imprisonment, with a non-parole period of 10 years.

3.102 It could be argued that in *Calway* there was insufficient evidence to support the reasonableness of her actions.³⁰⁹ If excessive self-defence had been available, a jury might have found the accused guilty of manslaughter rather than murder. It is also possible that the jury, in rejecting self-defence, might not have accepted that she honestly believed she needed to act as she did to protect herself, and in that case excessive self-defence (if available) would also have failed.

307 Supplementary Submission 27 (Criminal Bar Association).

308 *R v Calway* [2003] VSC 297 (Unreported, Teague J, 18 August 2003). See also *R v Gazdovic* [2002] VSC 588 (Unreported, Teague J, 20 December 2002) in which the sentencing judge found that the accused’s actions were ‘marginally excessive self-defence’. In that case, the accused had killed her abusive husband with a saucepan and his walking stick. She pleaded guilty to manslaughter on the basis of an unlawful and dangerous act.

309 Once self-defence is raised, in order to negate it the Crown must establish beyond reasonable doubt either that the accused did not honestly believe that it was necessary to do what he or she did, or that the accused’s response was not reasonable in the circumstances.

THE COMMISSION'S VIEW AND RECOMMENDATIONS

SHOULD EXCESSIVE SELF-DEFENCE BE REINTRODUCED IN VICTORIA?

3.103 The Commission has considered arguments for and against the reintroduction of excessive self-defence and on balance is in favour of its reintroduction in Victoria. It is the Commission's view that a person who acts honestly, albeit unreasonably, to protect himself, herself or another person by using a level of force that is grossly excessive or otherwise unreasonable, should not be convicted of murder. However, such a person is not entirely free of moral blame and is deserving of some form of punishment.

3.104 The Commission's position in recommending the reintroduction of excessive self-defence may be seen as somewhat inconsistent with its approach to partial defences. In general, we have taken the view that matters that reduce culpability should normally be taken into account at sentencing rather than form the basis of separate partial defences. In recommending a partial excuse of excessive self-defence we wish to recognise that the circumstances of those who honestly believe their actions are necessary to defend themselves but overstep the mark are qualitatively different from circumstances giving rise to issues of provocation or diminished capacity. As the New Zealand Law Commission noted in its recent report on criminal defences, an accused who kills due to provocation or diminished responsibility 'intends to do something that is unlawful'. An accused who resorts to the use of force in self-defence, which is later judged to be excessive or otherwise unreasonable, 'intends to do something that is lawful within limits'.³¹⁰ Unlike the New Zealand Law Commission, which recommended that this be taken into account at sentencing, we believe the intention of the accused to act lawfully in self-defence should be reflected in the crime for which he or she is convicted.

3.105 The circumstances in which a person may have an honest belief, but where his or her actions are grossly unreasonable or excessive in the circumstances, are likely to be uncommon. In our view, regardless of the frequency in which excessive self-defence may arise, such cases are deserving of a partial defence.

310 New Zealand Law Commission (2001), above n 202, para 67.

EXCESSIVE SELF-DEFENCE AND PEOPLE WHO KILL IN RESPONSE TO FAMILY VIOLENCE

3.106 In the absence of provocation, the reintroduction of excessive self-defence may also give women and others who kill in response to family violence a possible partial defence, should they be unable to successfully argue self-defence. While some women may be able to argue a lack of intention to kill or cause serious injury, in some cases it will be clear that serious injury was intended. The lack of a halfway house for women and others who kill in these circumstances may result in convictions for murder where manslaughter would have been the more appropriate result.

3.107 Excessive self-defence would seem to better fit the circumstances of women who kill in this context than either the existing partial defence of provocation or a new defence of diminished responsibility. There is no need, as for provocation, to establish that the accused acted due to a ‘loss of self-control’ and, unlike diminished responsibility, women’s actions are not treated as if they arise from a mental condition.³¹¹

3.108 In this context, it is worth noting that many women plead guilty to manslaughter. This may in part be due to a reluctance to go to trial and risk a conviction for murder. The availability of excessive self-defence may in fact give women more confidence in going to trial on self-defence, knowing that it is no longer an ‘all or nothing’ defence. In cases where, for whatever reason, women prefer to negotiate a plea, the existence of excessive self-defence may provide some additional flexibility in plea negotiations.³¹²

3.109 We acknowledge concerns that should excessive self-defence be reintroduced, juries may chose to convict women who kill in response to ongoing violence of manslaughter on the basis of excessive self-defence rather than considering whether a woman’s response was necessary and reasonable in the circumstances. Some jurors might find it very difficult to understand why the use of fatal defensive force by a person subjected to abuse may have been reasonably necessary in the circumstances. Excessive self-defence may provide an attractive

311 This point was made in submissions to the New Zealand Law Commission in its review of defences to homicide: New Zealand Law Commission (2001), above n 202, para 66.

312 Since its reintroduction in NSW in 2002, there have been a number of pleas accepted on the basis of excessive self-defence, including in circumstances where women have killed abusive partners. See, for example, *R v Scott* [2003] NSWSC 627 (Unreported, Whealy J, 10 July 2003) and *R v Trevenna* [2004] NSWCCA 43 (Unreported, Santow JA, James and Barr JJ, 4 March 2004).

option to jurors in such cases. Where there is disagreement among jurors as to whether to acquit on the basis of self-defence, there is an added danger of compromise verdicts.³¹³

3.110 It is possible that this is already occurring through the use of lack of intention to kill or cause serious injury as a basis for a manslaughter verdict.³¹⁴ The reintroduction of excessive self-defence of itself, in our view, is unlikely to bring about this result. However, we share concerns that reforms intended to assist women to overcome current barriers to arguing self-defence should not be undone through the reintroduction of the defence. We believe this possibility is best guarded against through the provision of clear jury directions on self-defence, and the introduction of expert evidence on family violence. Our recommendations on evidence are discussed in Chapter 4.

3.111 We also note concerns that there is a danger in calling the partial defence ‘excessive self-defence’. While we are sympathetic to these views, this term is already in use in South Australia and New South Wales, and has a well understood meaning in the legal community. We believe any misunderstandings concerning the scope of the partial defence can be adequately addressed through the judge’s charge to the jury. Under the proposed formulation of self-defence, juries will need to be directed that the use of force by a person may be reasonable in the circumstances, even if the force used exceeds the force used against him or her. Where excessive self-defence is raised, the trial judge should direct that if a jury believes the accused has done only what he or she honestly thought was necessary, this will often be the strongest evidence that his or her actions were in fact a reasonable response in the circumstances. It is only in those cases in which the Crown has proved beyond reasonable doubt that the conduct of the accused was *not* a reasonable response in the circumstances as he or she perceived them, but the jury believes the person genuinely believes his or her actions were necessary, that a finding of excessive self-defence, rather than an acquittal, will be appropriate.

313 Of course, another possible outcome is that disagreement among jurors could lead to a retrial. This may increase the suffering both for the accused, and the friends and family of the homicide victim.

314 In Rebecca Bradfield’s study of 76 cases of women who killed their spouses across Australia between 1980 and 2000, there were 22 pleas and eight manslaughter verdicts on the basis of lack of intention to kill: Bradfield (2002), above n 196, 27. Bradfield notes that in many cases it appeared that the intention was to kill or cause serious injury to the deceased and concludes ‘from my reading of these cases...lack of intent was being used as a defacto defence of “domestic violence”’: ibid 114.

3.112 As an added protection, we recommend that the operation of the defence and its interaction with self-defence be reviewed by the Department of Justice following its introduction. The review should include investigation of how the defence is being used (eg as the basis for plea negotiations or at trial), by whom and with what outcome. The review should also explore its effect on plea and trial practices, and how judicial interpretations of the scope of the defence may have affected outcomes. The Commission has suggested five years as an appropriate period of time to allow the defence to operate before carrying out the review. This has been provided as a guide only and may need to be reconsidered in light of the number of cases in which self-defence is raised over this period.

THE TEST FOR EXCESSIVE SELF-DEFENCE

3.113 The decision by a majority of the High Court in *Zecevic v Director of Public Prosecutions (Vic)*³¹⁵ to abolish excessive self-defence was based, to some extent, on the difficulties with the previous test and a desire to simplify the law of self-defence. We believe it is possible to overcome the complexity of the previous test through a clear articulation in legislation of the principles to be applied, supported by clearly worded jury directions.

3.114 The excessive self-defence provision introduced in the *Crimes Act 1900* (NSW) was developed to operate in conjunction with the Model Criminal Code formulation of self-defence (now adopted in a slightly modified form in NSW). As we have also recommended that the Model Criminal Code provision be introduced in Victoria, and in the interests of promoting consistency in the law between jurisdictions, it makes good sense for the Victorian provision to be based on the NSW formulation. A draft provision appears in Appendix 4. Although the NSW provision has only been in force a short time, we are not aware of any substantial difficulties with the operation of the defence to date.

3.115 We note that jury directions based on the NSW self-defence and excessive self-defence provisions have been developed in New South Wales and included in the *Criminal Trials Bench Book*.³¹⁶ No bench book is currently in use in the Supreme Court of Victoria. Should one be developed in the future, we recommend consideration be given to including similar guidance on appropriate

315 (1987) 162 CLR 645.

316 *Criminal Trial Courts Bench Book* NSW Judicial Commission <www.judcom.nsw.gov.au/publications/bench_books.php> at 11 August 2004.

directions. We would also encourage the use of written directions or visual aids wherever possible to assist the jury in its task.

! RECOMMENDATION(S)

9. The partial defence of excessive self-defence should be reintroduced in Victoria. The partial defence should apply:
 - if a person uses force that causes or contributes significantly to the death of another; and
 - the conduct is not a reasonable response in the circumstances as the person perceives them; but
 - the person believes the conduct is necessary to:
 - (a) defend himself or herself or another person; or
 - (b) prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.

In these circumstances the person is not criminally responsible for murder, but on a trial for murder is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.

(Refer to draft s 322K *Crimes Act 1958* in Appendix 4)

10. A review of the operation of excessive self-defence should be carried out by the Department of Justice after the provision has been in force for a period of five years. The review should include investigation of how the defence is being used, in what circumstances, by whom and with what outcome.

CHARGING PRACTICES, PLEA NEGOTIATIONS AND SELF-DEFENCE

CURRENT TRENDS

3.116 In the Commission's homicide prosecutions study, the majority of homicide accused were presented for murder (66.5%), with about a third presented for manslaughter (30.8%). A higher proportion of women were presented for manslaughter (41.4% compared with 28.8% of men). This may reflect the different contexts in which men and women kill, and the fact that a

higher proportion of female accused than male accused plead guilty to manslaughter.³¹⁷ Overall, a third of accused (37.9%) pleaded guilty to murder or manslaughter at, or prior to trial.³¹⁸ A slightly higher proportion of female accused (41.4%) than of male accused (37.3%) pleaded guilty to murder or manslaughter.³¹⁹

3.117 As we suggested in Chapter 1, unless there is a very clear case of self-defence, the OPP will usually view the issue of whether the accused acted in self-defence as one to be decided by a jury at trial. In some cases the OPP may accept an offer by the defence to plead guilty to a lesser charge (in the case of murder, usually manslaughter)—often on the basis of an unlawful and dangerous act.

PROBLEMS WITH THE CURRENT APPROACH

3.118 One of the concerns that has been raised in relation to self-defence is that women who kill their partners in the context of a history of abuse may plead guilty to manslaughter, rather than going to trial and risking a conviction for murder. As a result, the limits of self-defence are not being tested. So too are women losing the chance of being acquitted, and having their actions interpreted as actions carried out in self-defence. As Julie Stubbs and Julia Tolmie recognised in a recent review on legal responses to battered women who have killed their abusers:

Plea bargaining may spare women the trauma of the criminal process but does not necessarily result in a more favourable outcome. It also diminishes opportunities for the legal interpretation and application of self-defence in ways consistent with the life circumstances faced by some battered women who use lethal self-help to protect their lives or physical integrity (or that of their children).³²⁰

³¹⁷ See further Victorian Law Reform Commission (2003), above n 196, paras 2.65–2.68, Tables 7 and 8.

³¹⁸ Accused who pleaded guilty at some stage during the trial were counted as pleas, as the trial was not completed.

³¹⁹ Only one of the 12 women who pleaded guilty, pleaded guilty to murder, compared with 19 of the 57 men who pleaded guilty. Eleven of the 12 women who pleaded guilty did so to manslaughter: Victorian Law Reform Commission (2003), above n 196, para 2.68.

³²⁰ Julie Stubbs and Julia Tolmie, 'Defending Battered Women on Charges of Homicide: The Structural and Systemic Versus the Personal and Particular' in Robert Menzies (ed) *Forthcoming in Women, Mental Disorder and the Law* (2004), 8.

3.119 This situation may be somewhat alleviated should excessive self-defence be reintroduced, as self-defence will no longer be an ‘all or nothing’ defence.³²¹ Some women may still choose to plead guilty to manslaughter rather than go to trial, as an acquittal or verdict of manslaughter will not be assured.

3.120 As noted in Chapter 4 of the Options Paper, there are a number of considerations that may affect an accused person’s decision to plead guilty. These include: the potential pressures and trauma of going to trial, which may be a significant consideration where the accused has experienced long-term abuse; and a desire, particularly if the accused has children, to get the process over as quickly as possible, and minimise the risk of a long custodial term.³²²

3.121 Indigenous women and women from different cultural backgrounds may experience added difficulties as a result of being unable to access culturally appropriate and good quality legal advice, a general fear and distrust of the legal system and communication issues.³²³ These problems are well illustrated by the Queensland case of Robyn Kina. Robyn killed her de facto partner after having been subjected to horrific sexual and physical abuse. She was convicted of murder in 1988 in a trial lasting less than a day. At the time, Robyn had felt unable to communicate to her legal representatives about threats made prior to the killing that the deceased would rape her 14-year-old niece if Robyn did not agree to anal sex with him. On appeal to the Queensland Court of Appeal five years later, it was held that her trial involved a miscarriage of justice.³²⁴ While Robyn’s case did go to trial, Indigenous women charged with murder or manslaughter often plead

321 Of course, in the past women could argue that they were provoked into killing or did not intend to kill or cause serious injury to the deceased which, if successful, would result in a manslaughter verdict. Excessive self-defence, however, has the advantage of being consistent with an argument by the accused that they acted in self-defence. If lack of intention was raised with self-defence, the accused would need to argue that he or she intentionally killed the deceased in self-defence, or in the alternative, that he or she did not intend to cause serious injury or death. If provocation was raised with self-defence, the accused would need to argue that either he or she intentionally killed the deceased in self-defence, or if this argument is rejected, that he or she lost self-control due to the conduct of the deceased.

322 See further Victorian Law Reform Commission (2003), above n 196, para 4.202. See, for example, *R v MacKenzie* [2002] 1 Qd R 410. In *MacKenzie* the accused, a woman who shot her violent husband and pleaded guilty to manslaughter, appealed her conviction on the basis that her plea was not freely and voluntarily given, and made with a proper appreciation of the consequences. Her appeal on this ground was dismissed.

323 Stubbs and Tolmie (2004), above n 320, 10–11.

324 *R v Kina* (Unreported, Queensland Court of Appeal, Fitzgerald P, Davies and McPherson JJA, 29 November 1993).

guilty prior to, or at trial. In a review of recent cases involving Indigenous women who had killed violent partners, Stubbs and Tolmie report that they were unable to find any cases determined at trial.³²⁵

3.122 In the Options Paper, we suggested that one of the ways of encouraging more women to go to trial would be for prosecutorial guidelines to be developed which would impose a duty on the prosecution to exercise caution in dealing with homicide cases and to be aware of the possibility of such pleas. If the prosecution is of the view that there is evidence that may support self-defence, then under these guidelines the prosecutor could be encouraged to consider withdrawing the murder charge and proceeding with a manslaughter charge. We consider this possibility at [3.126].

3.123 A more general criticism of plea and charging practices has been the lack of transparency and accountability in decision-making. One of the dangers of plea negotiations is seen to be that they shift decisions about guilt and criminal responsibility from the public realm of courts and juries, to the private realm of prosecutorial and police discretion.³²⁶ While decisions made at trial take place in the public view, decisions made by police and prosecutors are not subject to the same scrutiny. It can be argued that, at the very least, there is an important public interest in proper records being kept of these negotiations to allow the basis on which these decisions are made to be better understood. In the Commission's study of homicide prosecutions, in many cases the basis for the decision made by the OPP was unable to be determined from the OPP's files. It was also unclear in the case of matters that proceeded to trial whether a prior plea offer had been made by the defence.

3.124 *The Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales* now require written records to be kept of all plea negotiations in the interests of transparency of process and probity. The Guidelines provide:

The progress of negotiations and connected requirements must be recorded, step by step, by the ODPP lawyer and Crown Prosecutor involved at the time by notes on the file made as soon as practicable after the event...Any offer by the defence must be

325 Stubbs and Tolmie (2004), above n 320, 11.

326 See, for example, *ibid* 8.

recorded clearly, including any offer that is rejected. Any written offers or representations by the defence must be filed.³²⁷

THE COMMISSION'S VIEW AND RECOMMENDATIONS

3.125 Charging and plea practices may have a significant impact on decisions by an accused person to plead guilty, or to proceed to trial. Where an accused has killed in response to prior abuse, there may be additional pressures to plead guilty, rather than to risk a conviction for murder—even if there is evidence to support an argument that his or her actions were carried out in self-defence. In some cases, the evidence may justify the prosecution being discontinued. In many cases, however, it will be appropriate to have this evidence properly tested at trial.

3.126 The reintroduction of excessive self-defence will provide the OPP with added flexibility in such cases to accept a plea of manslaughter, or to charge the accused with manslaughter on the basis of excessive self-defence. Allowing a person to be charged with manslaughter on the basis of excessive self-defence will allow the intentional nature of the killing to be recognised, while leaving the question of whether the accused's actions were reasonable in the circumstances to be determined by the jury at trial. This would clearly not be appropriate in all cases. However, we would encourage the adoption of guidelines, should excessive self-defence be reintroduced, which would allow a person to be charged with manslaughter on the basis of excessive self-defence in circumstances where there is strong evidence to suggest the person honestly believed his or her actions were necessary in self-defence. This would limit the issues in the trial to whether the accused's actions were reasonable in the circumstances, and avoid the prospect of a murder conviction.

3.127 In this context, we also see an important role for professional legal education (see further Chapter 4, 4.157–4.176). A better understanding of the nature and dynamics of family violence will assist the OPP in making decisions on appropriate charges and pleas, and the accused's legal representatives in identifying possible defences, evaluating their client's chances of acquittal at trial, and supporting their client to make informed decisions about the management of their case. Services, such as the Women's Legal Service and Women's Domestic Violence Crisis Service, which have particular expertise in dealing with people

327 New South Wales Office of the Director of Public Prosecutions, *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales* (2003) Office of Public Prosecutions NSW <www.odpp.nsw.gov.au/guidelines/guidelines.html> at 30 July 2004.

who have experienced family violence, may also provide a valuable source of assistance and advice for legal practitioners.³²⁸

3.128 In our view there is also a need—particularly in the case of charges as serious as murder or manslaughter—for better accountability and transparency in the plea negotiation process. We therefore recommend the OPP adopt written guidelines requiring the documentation of all plea negotiations in homicide cases, including written and verbal offers or representations by the defence. While this recommendation is made in the context of self-defence, this practice should apply more generally to all matters involving charges of murder, manslaughter or infanticide. We hope this may promote greater public confidence in how these matters are dealt with, and a better understanding of the basis upon which these important decisions are made.

!**RECOMMENDATION(S)**

11. The Office of Public Prosecutions should develop guidelines that allow a person to be charged with manslaughter on the basis of excessive self-defence in homicide cases where there is strong evidence to suggest the accused had a genuine belief his or her actions were necessary in self-defence.
12. The Office of Public Prosecutions should develop guidelines requiring the documentation of all plea negotiations in homicide cases, including written and verbal offers or representations by the defence.

DURESS AND NECESSITY

3.129 The first part of this Chapter explained that self-defence is an example of a broader criminal law principle that a person who acts out of necessity should not be held culpable. In this section we discuss two related defences, necessity and duress, which may also apply to relieve people from criminal liability. We

328 Women's Information, Victoria keeps up-to-date information on family violence and legal services. See further <www.wire.org.au>. A listing of family violence and sexual assault services operating in Victoria is also available on the Office of Women's Policy, Department for Victorian Communities website <www.women.vic.gov.au> (under 'our publications'), Brochure *Making Women Safer* (2003).

recommend changes to the law to make these defences available to a person charged with murder or attempted murder.

CURRENT LAW

DURESS AND MARITAL COERCION

3.130 If a person commits a criminal offence because another person has threatened them with harm, they can usually rely on the defence of duress. An example is the case of *R v Hudson*,³²⁹ in which it was held that the jury should have been directed to consider the defence of duress in a perjury trial of two women who gave false evidence because they had been threatened with injury if they told the truth.³³⁰ Similarly, a cashier who hands over money to an armed robber who holds a gun at his or her head would be able to rely on duress as a defence if charged with theft.³³¹

3.131 In Victoria, there is also a statutory defence of marital coercion, which allows a woman to be acquitted of a criminal offence which she committed because her husband coerced or threatened her to do so, if the coercion ‘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’.³³²

NECESSITY

3.132 A person who commits an unlawful act because circumstances (rather than another person) force them to do so to avoid a greater harm will usually be able to rely on the defence of necessity. For example a truck driver who deliberately drives into a building when his brakes fail, in order to avoid colliding with another car and killing the passengers, could rely on the defence of necessity to avoid criminal culpability.

329 *R v Hudson* [1971] 2 QB 202.

330 For the requirements which must be satisfied see *R v Hurley and Murray* [1967] VR 526.

331 See also *R v Richards* (Unreported New Zealand Court of Appeal, 15 October 1998) cited in New Zealand Law Commission (2001), above n 202, para 176, where a woman charged with selling cannabis raised the defence of duress in a situation where her partner would have beaten her had she not done so.

332 *Crimes Act 1958* (Vic) s 336.

AVAILABILITY OF DURESS, NECESSITY AND MARITAL COERCION AS DEFENCES TO MURDER

3.133 Although necessity and duress are available as defences to most crimes, the common law rule is that they cannot be relied upon as defences to murder³³³ (and possibly attempted murder). In *R v Howe*³³⁴ Lord Hailsham said the reason that duress (and by implication necessity)³³⁵ did not apply to murder was that:

the overriding objects of the criminal law must be to protect innocent human lives and to set a standard of conduct which ordinary men and women are to observe if they are to avoid criminal responsibility.³³⁶

3.134 In Lord Hailsham's view, a person confronted with the choice of killing an innocent person or being killed or seriously injured themselves should choose to sacrifice their own life. If they do not do so they should be convicted of murder, although duress may be taken into account in determining an appropriate sentence.³³⁷ In England it has been held that duress is not a defence to attempted murder either.³³⁸

3.135 The common law rule that duress is not a defence to murder³³⁹ continues to apply in most Australian jurisdictions. In a recent Victorian case, Justice

333 For Australian cases to this effect see *R v Harding* [1976] VR 129; *R v Brown and Morley* [1968] SASR 467; *R v Darrington and McGauley* [1980] VR 353; English authority is found in *R v Howe* [1987] 1 All ER 771.

334 *R v Howe* [1987] 1 All ER 771. For a time, English law was that while a principal in the first degree to murder (ie someone who actually took part in the killing) could not rely on duress, a principal in the second degree (eg a person who helped the murderer escape) could do so, see *DPP for Northern Ireland v Lynch* [1975] AC 653. In *R v Harding* [1976] VR 129 the Victorian Supreme Court declined to follow *Lynch* and held that a principal in the second degree could not rely on duress, but a different Full Court in *R v Darrington and McGauley* [1980] VR 353 suggested that the defence might be available to a principal in the second degree. In *R v Howe* [1987] 1 All ER 771 the House of Lords abolished this distinction so that duress became unavailable to those directly or indirectly involved in a killing.

335 *R v Dudley and Stephens* (1884) 14 QBD 273.

336 [1987] 2 WLR 568, 578.

337 [1987] 2 WLR 568, 581.

338 *R v Gotts* [1992] 2 AC 412.

339 The common law rule applies in South Australia and New South Wales as well as in Victoria. In the Queensland, Western Australia and Tasmanian codes, which deal specifically with duress as a defence, murder is excluded; see *Criminal Code Act 1899* (Qld) s 31(2); *Criminal Code Compilation Act 1913* (WA) s 31(4); *Criminal Code Act 1924* (Tas) s 20 (note that duress is excluded as a defence for some other offences as well).

Redlich said it was not clear whether duress was available as a defence to attempted murder in Australia. As a consequence, the issue of whether the accused was subjected to duress should be left to the jury.³⁴⁰ As we discuss below, duress is now available as a defence to murder and attempted murder under the Commonwealth and ACT Criminal Codes.³⁴¹

3.136 Whether necessity is available as a defence to murder is less clear. The famous case of *R v Dudley and Stephens*³⁴² is usually cited as authority for the proposition that a person who kills intentionally cannot rely on the defence of necessity. In that case, a group of sailors who were shipwrecked and marooned in a life boat killed and ate the cabin boy so that some of them would have a chance of surviving. After they were saved, and returned to England, the two survivors were convicted of murder. It was held that they could not rely on the defence of necessity.

3.137 In the recent decision of *In re A (Children)(Conjoined Twins: Surgical Separation)*³⁴³ the English Court of Appeal suggested that necessity might be a defence for murder in some situations. Brooke LJ gave some examples. They included the situation where the commander of a ship sealed off the engine room, inevitably killing the people inside, in order save the rest of the crew from fire, and the situation where a mountaineer cut a rope holding his fellow climber in order to save his own life.³⁴⁴ In *Re A* the Court authorised surgery to separate twin girls, in circumstances where both children would die if they were not separated, and it was inevitable that the weaker girl would be killed by the operation.³⁴⁵

3.138 The Criminal Codes of Western Australia, Queensland and the Northern Territory³⁴⁶ recognise necessity in their defence of 'extraordinary emergency'.

340 *R v Goldman* [Ruling No 4] [2004] VSC 291 (Unreported, Redlich J, 18 March 2004).

341 See n 361.

342 (1884) 14 QBD 273.

343 [2001] 2 WLR 480.

344 [2001] 2 WLR 480, 559–560, Brooke LJ.

345 [2001] 2 WLR 480, 558–571, Brooke LJ; 586–588, Robert Walker LJ.

346 The *Criminal Code Act 1899* (Qld) s 25; *Criminal Code Act Compilation Act 1913* (WA) s 25; *Criminal Code Act 1983* (NT) s 33. The common law governs the position in New South Wales, South Australia and Victoria. The Tasmanian *Criminal Code Act 1924* does not refer to necessity or emergency as a defence. While the common law defence of necessity may apply to Tasmania, it is equally possible that it may not apply. The common law defence of duress has been specifically excluded as a defence in Tasmania: see *R v Clark* (1980) Tas R 48; *Smith v R* (Unreported, Supreme Court of Tasmania, Court of Criminal Appeal, Cosgrove, Crawford and Nettlefold JJ, 6 March

Under these provisions, a person is not criminally responsible for an act done ‘under circumstances of such sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not be reasonably expected to do otherwise’. The defence is applicable to murder.

3.139 Section 336(2) of the Victorian *Crimes Act 1958*, which recognises the defence of marital coercion, explicitly excludes marital coercion as a defence to murder.

LAW REFORM PROPOSALS

3.140 The rule that the defences of duress and necessity do not apply to murder has been criticised by many academic writers.³⁴⁷ Law reform bodies which have considered the issue have also generally³⁴⁸ recommended that these defences should be extended to murder.³⁴⁹

3.141 The Law Commission for England and Wales in 1977 recommended that duress should apply to all offences including murder³⁵⁰ and that the elements of the defence should be codified.³⁵¹

1979) as cited in Butterworths, *Halsbury's Laws of Australia*, (13 April 2004) Criminal Law, General Doctrines [130–7850] note 3.

347 See for example Kenneth Arenson, 'Expanding the Defences to Murder: A More Fair and Logical Approach' (2001) 5 (2) *Flinders Journal of Law Reform* 129; Sir Rupert Cross, 'Murder Under Duress' (1978) 28 *University of Toronto Law Journal* 369; Ian Dennis, 'Duress, Murder and Criminal Responsibility' (1980) 96 *Law Quarterly Journal* 208; Miriam Gur-Arye, 'Should the Criminal Law Distinguish Between Necessity as Justification and Necessity as an Excuse?' (1986) 102 *Law Quarterly Review* 71; Stanley Yeo, 'Necessity Under the Griffith Code and the Common Law' (1991) 15 *Criminal Law Journal* 17. See also the summary of academic opinions in *In re A (Children) (Conjoined Twins: Surgical Separation)* [2001] 2 WLR 480, 562–564, Brooke LJ.

348 Interestingly the Queensland Taskforce on Women and the Criminal Code did not recommend that duress be extended to murder: Office for Women, Department of the Premier and Cabinet, Queensland Government (2000), above n 194, 170. Nor did the New Zealand Law Commission; see New Zealand Law Commission (2001), above n 202, paras 209–215, although it regarded the issue as finely balanced. The Law Commission expressed the view that in cases where an accused's decision to kill is seen as justifiable, the issue should be dealt with 'by sensible use of the prosecutorial discretion': *ibid* 214.

349 For a summary of various English law reform proposals see *In re A (Children) (Conjoined Twins: Surgical Separation)* [2001] 2 WLR 480, 558–562, Brooke LJ.

350 Law Commission, *Criminal Law Report on Defences of General Application [Great Britain]* Law Com No 83 (1977), para 2.46. At that stage the law in England was that the defence was available to an aider and abettor, but not to the actual perpetrator of a murder; see *Abbott v R* [1976] 3 WLR 462. This distinction was overruled by the House of Lords in *R v Howe* [1987] 1 All ER 771. See also Law Commission, *Legislating the Criminal Code: Offences Against the Person and General Principles [Great Britain]* Consultation Paper No 122 (1992), paras 18.14–18.20; Law Commission, *Criminal Law:*

3.142 In the same Report, the Law Commission recommended against the adoption of a general defence of necessity because of the difficulties of defining in advance the circumstances in which it should apply and because of the implications such a defence would have for ‘sensitive questions of ethics and social responsibility’.³⁵² It suggested that parliament should create the defence of necessity to deal with specific situations.

3.143 The Law Commission’s recommendation that there should be no general defence of necessity was criticised by many eminent criminal lawyers.³⁵³ In its 1993 report *Legislating the Criminal Code*,³⁵⁴ the Law Commission changed its view and recommended that the defence of necessity (described as duress of circumstances) should apply to murder. It confirmed its earlier recommendation that duress in the form of a threat of death or serious injury should be available as a defence to murder and proposed that the accused should have the burden of proving, on the balance of probabilities, that the defence was made out.³⁵⁵

3.144 In relation to the burden of proof, the Law Commission conceded that the principle that the accused should have the burden of proof was inconsistent with the general rule that the burden lies on the prosecution to prove the case against the accused. However, the Report argued that duress was more likely than any other defence to depend on assertions ‘that were peculiarly difficult for the prosecution to investigate or subsequently to disprove’.³⁵⁶

3.145 In his 1980 report *Duress, Necessity and Marital Coercion*, the Law Reform Commissioner of Victoria also recommended that the defences of duress and

Legislating the Criminal Code: Offences Against the Person and General Principles [Great Britain] Law Com No 218, Cm 2370 (1993), paras 30.1–34.1.

351 Law Commission (1977), above n 350, para 2.22.

352 Ibid para 4.31.

353 See for example Sir Rupert Cross, ‘Murder Under Duress’ (1978) 28 *University of Toronto Law Journal* 369; Glanville Williams, ‘Defences of General Application. The Law Commission’s Report No. 83—part (2) Necessity’ [1978] *Criminal Law Review* 128.

354 Law Commission (1993), above n 350, paras 35.1–35.12.

355 Ibid paras 33.1–33.16. In the 1993 report the Law Commission maintained its view that the test should be subjective. The test should be whether the person in question believed there was a threat and could not reasonably be expected to have resisted the threat: paras 29.11–29.14.

356 Law Commission, *Criminal Law: Legislating the Criminal Code: Offences Against the Person and General Principles [Great Britain]* Law Com No 218, Cm 2370 (1993), 60, para 33.6.

necessity should apply to homicide.³⁵⁷ The LRCV made a similar recommendation in 1991.³⁵⁸

3.146 The defences of duress and ‘sudden or extraordinary emergency’ (which covers similar grounds to necessity) were recently considered by the Model Criminal Code Officers Committee. The Committee recommended that duress should apply to murder.³⁵⁹ The defence of sudden or extraordinary emergency under the Model Criminal Code would also apply to murder.³⁶⁰ The Commonwealth and ACT Criminal Codes now include provisions based on the recommendations of the Model Criminal Code Officers Committee.³⁶¹

DURESS UNDER THE MODEL CRIMINAL CODE

3.147 Under these provisions, duress applies where a person reasonably believes:

- a threat has been made that will be carried out unless an offence is committed;
- there is no reasonable way that the threat can be rendered ineffective; and
- the conduct is a reasonable response to the threat.

The test proposed in the section is an objective one. It is not sufficient to show the person subjectively believed he or she would be harmed if he or she did not commit the offence, if this belief is unreasonable.

3.148 The section makes provision to ensure people who commit offences when they are already voluntarily involved in a criminal enterprise cannot rely on duress. It provides:

The person does not carry out conduct under duress if the threat is made by or on behalf of a person with whom the person is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.

357 Law Reform Commissioner of Victoria, *Duress, Necessity and Coercion* Report No 9 (1980), para 2.15 (duress) and para 3.33 (necessity). The example given of necessity was the situation where following a hijack there was a shoot-out to free passengers, in a situation where some passengers will almost certainly be killed.

358 Law Reform Commission of Victoria (1991), above n 263, para 244, Recommendation 31.

359 Criminal Law Officers Committee of the Standing Committee of Attorneys-General (1992), above n 256, 64–67.

360 Ibid 68–69.

361 *Criminal Code Act 1995* (Cth) ss 10.2, 10.3; *Criminal Code 2002* (ACT) ss 40, 41.

This provision would prevent a person who agreed to be involved in an armed robbery later relying on duress to avoid criminal responsibility for shooting a witness.

EXTRAORDINARY EMERGENCY UNDER THE MODEL CRIMINAL CODE

3.149 Under the Commonwealth and ACT Criminal Codes the defence of sudden or extraordinary emergency is available where the person reasonably believes:

- circumstances of sudden or extraordinary emergency exist;
- committing the offence is the only reasonable way to deal with the emergency; and
- the conduct is a reasonable response to the emergency.³⁶²

ARGUMENTS FOR APPLYING DURESS AND NECESSITY TO HOMICIDE

DURESS

3.150 The arguments in favour of recognising duress as a defence to homicide were clearly stated in the LRCV report.³⁶³ A person who does not act voluntarily should not be convicted of murder. Where a person kills an innocent third person to avoid being killed or seriously injured it cannot be said they have acted voluntarily. ‘To convict as murderers those who kill while a gun is at their own head devalues the concept of murder.’³⁶⁴ A person who sacrifices his or her life in these circumstances may be morally superior to someone who does not resist the threat. However, the criminal law should not stigmatise as a murderer a person who does not meet this standard of heroism as a murderer.

3.151 It cannot be argued that the threat of a murder conviction deters a person from killing someone as a result of the duress. If a person is really in a desperate situation, it is unlikely he or she will resist the immediate threat because of the prospect of a murder conviction at some time in the future.³⁶⁵ Most people who

362 *Criminal Code Act 1995* (Cth) ss 10.2, 10.3.

363 Law Reform Commission of Victoria (1991), above n 263, para 239. See also Law Commission (1992), above n 350.

364 Law Reform Commission of Victoria (1991), above n 263, para 239.

365 Law Reform Commissioner of Victoria (1980), above n 357, para 2.34.

act under duress are unlikely to be aware of a rule which says this relieves them from criminal liability.

3.152 Concerns that duress will be raised in situations which do not justify it can be met by restrictions on the availability of the defence. We examine this below.

Necessity

3.153 The arguments in favour of recognising necessity as a defence are similar. A person faced with an extraordinary emergency, in which he or she is faced with an agonising choice between evils, should not be criminally liable if he or she acts reasonably. For example, a pilot who must decide whether to cause a small number of deaths by crashlanding his plane, in order to save a much larger number of people if the plane crashed elsewhere, should not be categorised as a murderer.

THE COMMISSION'S VIEW AND RECOMMENDATIONS

The Commission recommends that the Crimes Act should be amended to make it clear that duress and extraordinary necessity are defences to murder and attempted murder. The tests for applicability of these defences should be the same as those in the Commonwealth and ACT Criminal Codes, which are set out at [3.147]–[3.149]. These requirements are briefly discussed below.

LIMITATIONS ON DURESS

Should the Nature of the Threat be Specified?

3.154 The Law Commission for England and Wales proposed that duress should only be available where the accused believed he or she would be threatened with death or serious injury if the crime was not committed.³⁶⁶ The Law Reform Commissioner also recommended that in the case of murder, where the person intended or expected that death would result from his or her acts, duress should only be available where the person expected that death or serious personal injury (mental or physical) would result to himself or herself or someone closely connected to him or her.³⁶⁷

366 Law Commission for England and Wales (1977), above n 350, paras 2.25, 2.27; Law Commission for England and Wales (1993), above n 350, para 29.1.

367 Law Reform Commissioner of Victoria (1980), above n 357, para 4.19. In other cases of murder, presumably where the accused knew that death or serious injury was a probable consequence of the

3.155 By contrast the Model Criminal Code Officers Committee report, which dealt generally with the defence of duress, said such a limitation was not required.³⁶⁸

Once a person is under the influence of a threat, whatever he or she does depends on what the threatener demands. The crime demanded may be trivial or serious but it has no necessary connection with the type of threat confronting the accused. Policy reasons would, however, insist on a requirement that the accused's response was reasonably appropriate to the threat.³⁶⁹

3.156 The Commission agrees with this view, which is consistent with the approach applicable to self-defence. It is most unlikely that a jury would acquit a person of murder on the basis that he or she acted under duress, except where that person was threatened with very serious harm.

Duress Should Not be Available to People Involved in Criminal Enterprises

3.157 We recommend that a person should not be able to rely on duress if the threat is made by, or on behalf of, a person with whom the accused person is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out. This will ensure that people involved in criminal or terrorist activities cannot rely on duress if they kill an innocent person in the course of carrying out their criminal activity. Our recommendation is consistent with the Commonwealth Criminal Code provisions which already apply in the ACT and under Commonwealth law.³⁷⁰

A SUBJECTIVE OR AN OBJECTIVE TEST?

3.158 The 1977 Law Commission for England and Wales report recommended that duress should only be available where the accused believed that:

- they or a person close to them was under threat of death or serious injury if they did not commit the criminal act;
- the threat would be carried out immediately, or if not immediately before the person could seek official protection; and

act, it was proposed that the harm threatened should be torture, rape, buggery or unlawful imprisonment.

368 Criminal Law Officers Committee of the Standing Committee of Attorneys-General (1992), above n 256, 65.

369 Stanley Yeo, 'Private Defences, Duress and Necessity' (1991) 15 *Criminal Law Journal* 139, 143.

370 *Criminal Code Act* 1995 (Cth) s 10.2(3); *Criminal Code* 2002 (ACT) s 40(3).

- the threat was one which the accused in all the circumstances of the case (including personal characteristics which affect the gravity of the threat) could not reasonably be expected to resist.³⁷¹

3.159 This test includes both subjective elements (the belief of the accused) and an objective reasonableness requirement in relation to the accused's response.

3.160 These requirements, with minor modifications, were also proposed in the English Law Commission's 1993 Report.³⁷² The LRCV recommended that in addition to the restrictions proposed in England, the jury should be asked to consider whether the accused should be regarded as morally culpable and if this was not the case should be acquitted of murder.³⁷³

3.161 The Model Criminal Code provisions in relation to duress (see [3.147]) and necessity (see [3.149]) instead provided that an objective test of reasonableness be applied. We also recommend that a reasonableness requirement should apply to these defences to murder. A person will only be able to rely on these defences if he or she subjectively believes the conduct is necessary to defend himself or herself or another person or as a reaction to an emergency, and if the conduct is an objectively reasonable response to the circumstances as the person perceives them. The latter requirement allows community standards of reasonableness to be taken into account in assessing the culpability of the accused.

3.162 We have taken this approach for two main reasons. First, where an accused relies on self-defence, the behaviour of the homicide victim is alleged to justify the killing. By contrast, if an accused relies on duress or extraordinary emergency, the homicide victim will usually have no responsibility for the circumstances which have brought about his or her death. Because these defences apply in cases where the victim is entirely innocent, the test for their application should reflect community standards of reasonableness.

3.163 Second, if the defences of duress and extraordinary emergency are to be extended to murder, stringent controls should be imposed on their applicability. Requiring the accused to meet objective tests of reasonableness will ensure these defences apply only in extreme situations, and prevent them from being raised too readily.

³⁷¹ Law Commission for England and Wales (1977), above n 350, para 2.46.

³⁷² Law Commission for England and Wales (1993), above n 350, pt IV, paras 28.1–35.12.

³⁷³ Law Reform Commissioner of Victoria, *Duress, Necessity and Coercion* Report No 9 (1980), para 4.19. This was proposed to apply to circumstances of necessity as well.

3.164 We recognise, however, that there may be some situations in which a person's response to a threat is affected by the prior history of the parties. The South Australian case of *Runjajic and Kontinnen v R*³⁷⁴ may be an example of this situation. In that case, two women who had lived with a very violent man claimed they had been acting under his duress when they seriously injured and falsely imprisoned another woman. The South Australian Court of Criminal Appeal held that the women should have been allowed to rely on expert evidence on battered women's syndrome (BWS) to support their claim of duress. The Court explained that in assessing whether the defence of duress applied, it was necessary to consider whether a woman of reasonable firmness in the domestic situation of the accused women would have acted in the way they did. Expert evidence of BWS was held to be admissible in answering this question.

3.165 In Chapter 4 of this Report we recommend legislative changes to encourage the admission of expert evidence about the factors which commonly affect people in violent relationships.³⁷⁵ The new provision on evidence which we propose allows for the admission of evidence of the parties' relationship to assist the jury in assessing whether the reaction of a woman who kills a third person, because of duress applied by her partner, is reasonable in the circumstances. It is intended that recommendations 25 and 34 relating to the admission of evidence should allow it to be admitted in the context of a defence of duress.

ONUS OF PROOF

3.166 The English Law Commission proposed that an accused should have the persuasive burden of proving he or she killed as the result of duress or extraordinary emergency.³⁷⁶ We do not recommend this approach. Our proposal that an objective test should apply to these defences will limit their availability. We do not consider it necessary to depart from the general principle that the prosecution has the burden of proving the case against the accused.

3.167 Under the Commonwealth and ACT Criminal Codes, the accused has the burden of adducing some evidence when the defence of duress or extraordinary emergency is raised. Once such evidence is adduced, the prosecution

374 (1991) 53 A Crim R 362.

375 The recommendations are not limited to evidence about BWS, but include a range of factors which may be relevant to the jury's assessment of whether the accused acted in self-defence or under duress. See further 4.29–4.35, 4.125–4.136.

376 See para 3.144.

must prove beyond reasonable doubt that the defence does not apply. We recommend this approach be adopted. This is consistent with the approach which is taken in the case of self-defence. In our view, the same principle should apply to self-defence, duress and extraordinary emergency.

MARITAL COERCION

3.168 It is beyond the terms of reference for this project to make recommendations for changes to the defence of marital coercion, which currently applies to most crimes other than murder.³⁷⁷ Retention of the defence may be justified because of the high rate of violence by men against their partners³⁷⁸ and the difficulties which women experience in seeking effective protection against such violence.³⁷⁹ The Commission acknowledges that some women who are subjected to psychological and physical abuse may be forced to commit crimes by their husbands, although we note that it is anomalous that the defence currently applies only to married women and not to women in de facto relationships.

3.169 We do not recommend that the defence should be extended to cover murder. In our view, the more rigorous requirements which we recommend should apply to duress should be satisfied where a woman kills as the result of threats by her husband.

IMPLICATIONS FOR OTHER OFFENCES

3.170 It is outside the Commission's terms of reference to consider the applicability of duress and extraordinary emergency to non-homicide offences. The *Attorney-General's Justice Statement* proposes a review of the *Crimes Act 1958*.³⁸⁰ The general applicability of the defences of duress and necessity should be considered as part of this review, in order to ensure that consistent criteria for duress and extraordinary emergency apply to all offences.

377 *Crimes Act 1958* (Vic) s 336(2) excludes treason, murder or an offence specified under ss 4, 11, 14.

378 The 1996 ABS Women's Safety Survey found that 23% of women who had ever been married or in a de facto relationship experienced violence by a partner during the relationship. See Australian Bureau of Statistics, *Women's Safety Australia Catalogue 4128.0* (1996), 50.

379 Stanley Yeo, 'Coercing Wives into Crime' (1992) 6 (3) *Australian Journal of Family Law* 214, 215.

380 Department of Justice, *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (2004).

!	RECOMMENDATION(S)
13.	Duress and extraordinary emergency should be available as defences to murder and manslaughter in Victoria.
14.	A person should not be held criminally responsible for murder or manslaughter if the person believes that: <ul style="list-style-type: none">• a threat has been made that will be carried out unless the person kills another person;• there is no other way the threat can be rendered ineffective;• the belief is reasonable in the circumstances; and• the person's conduct is a reasonable response to the threat. (Refer to draft s 322L(1)–(2) <i>Crimes Act 1958</i> in Appendix 4)
15.	The person does not carry out conduct under duress if the threat is made by or on behalf of a person with whom the person is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out. (Refer to draft s 322L(3) <i>Crimes Act 1958</i> in Appendix 4)
16.	A person should not be held criminally responsible for murder or manslaughter if the person's conduct is a response to circumstances of sudden or extraordinary emergency. (Refer to draft s 322M(1) <i>Crimes Act 1958</i> in Appendix 4)
17.	The defence of extraordinary emergency only applies if: <ul style="list-style-type: none">• circumstances of sudden or extraordinary emergency exist;• committing the offence is the only reasonable way to deal with the emergency; and• the conduct is a reasonable response to the emergency. (Refer to draft s 322M(2) <i>Crimes Act 1958</i> in Appendix 4)
18.	An accused who wishes to rely on the defence of duress or sudden or extraordinary emergency has an evidential burden in relation to the matter.

!

RECOMMENDATION(S)

19. In any criminal proceeding for murder or manslaughter in which duress or sudden or extraordinary emergency has been raised, the prosecution has the onus of proving beyond reasonable doubt that the person did not carry out the conduct under duress or in response to circumstances of sudden or extraordinary emergency.

(Refer to draft s 322H(2)–(3) *Crimes Act 1958* in Appendix 4)

INTOXICATION**THE CURRENT POSITION: INTOXICATION AND THE REQUIREMENT OF 'REASONABLENESS'**

3.171 In this section we consider the relevance of self-induced intoxication to the operation of defences.³⁸¹ The relevance of the accused's self-induced intoxication to the assessment of the reasonableness of the accused's belief or response under self-defence, duress and necessity under the common law is unclear. In the NSW judgment of *R v Conlon*, the trial judge held that intoxication was relevant at common law both as to whether the accused had a belief in the need to use force, and whether the accused had reasonable grounds for that belief.³⁸²

3.172 This issue was reconsidered by Justice Howie of the NSW Supreme Court in the decision of *R v Katarzynski*,³⁸³ which examined the relevance of intoxication

381 We note that at common law, self-induced intoxication in some circumstances may lead to a finding that the accused is not guilty of an offence on the basis that his or her actions were not voluntary or were unintentional (see *R v O'Connor* (1980) 146 CLR 64). In the ACT (*Criminal Code 2002* (ACT) s 15(5)), NSW (*Crimes Act 1900* (NSW) s 428G), and under the Commonwealth *Criminal Code Act 1995* (Cth) s 4.2(6), evidence of self-induced intoxication may not be taken into account in considering whether the accused's conduct was voluntary. Evidence of self-induced intoxication also may not be considered in deciding whether a fault element of basic intent exists: *Criminal Code 2002* (ACT) s 31(1); *Crimes Act 1900* (NSW) ss 428D, 428E, which specifically excludes self-induced intoxication from being taken into account in determining whether the person had the requisite *mens rea* for manslaughter; *Criminal Code Act 1995* (Cth) s 8.2(1). As this is a matter that has implications beyond this reference, we make no recommendations on this issue. However, we recommend this issue be considered as part of the broader review of the *Crimes Act 1958* (Vic) recently announced by the Attorney-General. See Department of Justice (2004), above n 380.

382 *R v Conlon* (1993) 69 A Crim R 92, Hunt CJ.

383 [2002] NSWSC 613 (Unreported, Howie J, 9 July 2002).

to self-defence under section 418 of the *Crimes Act 1900* (NSW). It was held that the accused's self-induced intoxication should be taken into account by the jury in assessing whether the accused believed that his actions were necessary in defence of himself and the circumstances as he perceived them, but not in assessing whether his response was reasonable.³⁸⁴ In making this ruling, Justice Howie commented that section 418 was not intended to be a codification of the common law, and that the adoption of an interpretation that allowed intoxication to be taken into account in considering the objective reasonableness of the accused would create 'an illogical and unacceptable inconsistency' in the criminal law of NSW, as to the relevance of intoxication to criminal responsibility.³⁸⁵

3.173 The Model Criminal Code, now adopted by the Commonwealth and in the ACT, provides that where 'a defence is based on reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated'. If, however, the accused's intoxication is not self-induced, for instance because it came about involuntarily, or was accidental, the standard applied is that of 'a reasonable person intoxicated to the same extent as the person concerned'.³⁸⁶

THE COMMISSION'S VIEW AND RECOMMENDATIONS

3.174 To allow self-induced intoxication to be taken into account in determining the reasonableness of the accused's actions would be to risk absolving a person of criminal responsibility simply on the basis that he or she was drunk, or under the influence of drugs, at the time of the offence. Self-defence, duress and necessity are complete defences to murder. In the Commission's view, this justifies a requirement that where an accused kills while intoxicated and that intoxication is self-induced, the reasonableness of his or her actions should be considered against that of a person who is not intoxicated. We therefore recommend that the

384 [2002] NSWSC 613 (Unreported, Howie J, 9 July 2002) para 28.

385 [2002] NSWSC 613 (Unreported, Howie J, 9 July 2002) para 27. Under pt 11A of the *Crimes Act 1900* (NSW), a number of limitations are put on the purposes for which self-induced intoxication may be relied upon to avoid criminal responsibility. For example, s 428F provides: 'If, for the purposes of determining whether a person is guilty of an offence, it is necessary to compare the state of mind of the person with that of a reasonable person, the comparison is to be made between the conduct or state of mind of the person and that of a reasonable person who is not intoxicated'. See also above n 381 and accompanying text.

386 Criminal Law Officers Committee of the Standing Committee of Attorneys-General (1992), above n 256, Cl 8.4; *Criminal Code 2002* (ACT) ss 30, 33; *Criminal Code Act 1995* (Cth) ss 8.1, 8.4.

approach in *Kataryzynski*, and under the Model Criminal Code, be adopted in Victoria.

3.175 Under our proposed formulation, modelled on section 30 of the *Criminal Code 2002* (ACT), intoxication is defined as intoxication due to the influence of alcohol, a drug or any other substance. The draft provision also adopts the ACT definition of self-induced intoxication, with some slight modifications. The provision makes clear that intoxication is not self-induced if it came about:

- involuntarily; or
- because of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force; or
- from the use of a drug for which a prescription is required and that was used in accordance with the directions of the authorised person who prescribed it; or
- from the use of a drug for which no prescription is required and that was used for a purpose, and in accordance with the dosage level, recommended by the manufacturer.

3.176 The section does not apply to drugs prescribed or used in accordance with the manufacturer's instructions if the person knew, or had reason to believe, the drug would significantly impair the person's judgment or control.

!**RECOMMENDATION(S)**

20. If the accused was intoxicated at the time of the offence, if any part of a defence is based on actual knowledge or belief, evidence of intoxication may be considered in determining whether that knowledge or belief existed.

(Refer to draft s 322O(1) *Crimes Act 1958* in Appendix 4)

21. If the accused was intoxicated at the time of the homicide, and that intoxication was self-induced, in determining whether any part of a defence based on reasonable belief exists, or whether the accused's response in the circumstances was reasonable, regard must be had to the standard of a reasonable person who is not intoxicated.

(Refer to draft s 322O(2)–(3) *Crimes Act 1958* in Appendix 4)

! RECOMMENDATION(S)

22. If the accused was intoxicated at the time of the homicide, but his or her intoxication was not self-induced, in determining whether any part of a defence based on reasonable belief or a reasonable response exists, regard must be had to the standard of a reasonable person intoxicated to the same degree as the accused.

(Refer to draft s 322O(4) *Crimes Act 1958* in Appendix 4)

23. Intoxication means intoxication because of the influence of alcohol, a drug or any other substance.

(Refer to draft s 322N(1) *Crimes Act 1958* in Appendix 4)

24. Intoxication should be taken as being self-induced unless it came about:

- involuntarily;
- as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force;
- from the use of a drug for which a prescription is required and that was used in accordance with the directions of the authorised person who prescribed it; or
- from the use of a drug for which no prescription is required and that was used for a purpose, and in accordance with the dosage level, recommended by the manufacturer.

However, if the person using the drug knew, or had reason to believe, when the person took the drug that the drug would significantly impair the person's judgment or control, his or her intoxication is taken as being self-induced.

(Refer to draft s 322N(2)–(3) *Crimes Act 1958* in Appendix 4)

Chapter 4

Evidence of Relationship and Family Violence

INTRODUCTION

4.1 In Chapter 1, we discussed the importance of taking the social context of homicides into account when considering the operation of defences and options for reform. In a criminal trial, the ‘context’ is communicated by the evidence introduced by the prosecution and the defence. When the accused person is charged with a homicide offence, evidence introduced at trial will assist the jury. This includes assessing the accused’s state of mind at the time of the killing, and in the case of self-defence and duress, considering whether the accused’s actions were reasonable in the circumstances. At sentencing, information about the broader context of the homicide will also be important to allow the judge to determine the appropriate penalty to be imposed.

4.2 This Chapter focuses on what evidence should be admissible, and how this evidence should be considered where there is a history of prior violence between the accused and the deceased. In this Chapter we explore:

- what evidence may be relevant when a homicide takes place in the context of an abusive, intimate or family relationship;
- how this evidence may be taken into account at trial and sentencing; and
- potential barriers to its admission and use.

4.3 We make a number of recommendations aimed at ensuring evidence that may assist the jury in its task is recognised as relevant and is not excluded or its use unnecessarily limited.

4.4 We also consider the important role judges may play in assisting juries to recognise the significance of evidence of prior violence, and to make the necessary connections between expert evidence and the issues at trial. Finally, we discuss current developments in professional education and training offered to judges, legal practitioners and police and suggest programs to improve current

understanding of the relationship between domestic homicides and family violence.

THE COMMISSION'S APPROACH

4.5 When the accused and the deceased have been in a violent relationship, evidence that may substantiate abuse prior to the homicide may include:

- evidence given by the accused about the abuse, including prior complaints made by the accused to others;
- evidence of friends, family, neighbours and professionals (such as doctors, social workers and counsellors) and others who have witnessed or heard the violence, have seen physical signs of it (such as cuts or bruising), or have been told about it by the accused or the deceased;
- documentary evidence, including previous or existing intervention orders or criminal court proceedings; and
- evidence given by expert witnesses.³⁸⁷

4.6 While some of this evidence will be admissible, other evidence may either be excluded altogether, or the judge may direct the jury that it is permitted to consider it for a particular purpose only. At trial, what evidence is admissible and for what purpose is governed by the law of evidence. The law in this area is complex. As the Queensland Taskforce on Women and the Criminal Code commented in considering similar issues:

The artificial way in which the law isolates pieces of evidence as inadmissible and removes them from the picture is incomprehensible to most ordinary people who encounter the criminal justice system. The jury is often asked to decide what happened in a situation when they have only been given some of the jigsaw pieces. And they do not even know what proportion of the pieces they have!³⁸⁸

4.7 The most comprehensive review of the Australian law of evidence was carried out by the Australian Law Reform Commission (ALRC) and led to the development of the Uniform Evidence Act. In its Final Report, released in 1987, the ALRC noted that factors such as the adversarial and accusatorial nature of the

³⁸⁷ Office for Women, Department of the Premier and Cabinet, Queensland Government, *Report of the Taskforce on Women and the Criminal Code* (2000), 120.

³⁸⁸ Office for Women, Department of Premier and Cabinet, Queensland Government (2000), above n 387, 133.

criminal trial proceedings, a desire to minimise the risk of wrongful convictions, and concerns to protect the rights of the individual have all played a significant role in the way the law of evidence has developed.³⁸⁹ The ALRC emphasised that a criminal trial should be seen as ‘an attempt to establish facts’, rather than as a ‘search for truth’.³⁹⁰ Finding the ‘truth’ is far from a straightforward exercise:

In the practical context of the trial...the view reached at the end of proceedings about the guilt or innocence of the accused may not be the truth. A number of factors can cause this—the frailty of human testimony, the attractiveness or unattractiveness of the victim or the accused, how witnesses and the accused perform under cross examination, the assessment of the demeanour of witnesses and the accused, the relative resources of all the parties, the quality of legal representation, the availability of evidence to the parties, the approach taken by the judge. Even if we had the fullest and most complete examination of all the evidence, it is likely that the complete truth will not emerge and there will remain the real risk of the tribunal arriving at a wrong decision as to guilt or innocence. We therefore have to decide what risks are acceptable—the risk of convicting the innocent or the risk of acquitting the guilty?³⁹¹

4.8 Establishing the facts in a homicide trial, including where there is a history of prior violence between the accused and the deceased, poses particular challenges for both the prosecution and the defence as one of the most important witnesses to the event is dead. In this context perhaps more than any other, it could be argued that the existing rules of evidence may unfairly limit the use of evidence and prevent evidence that may have a high degree of probative value from being considered.

4.9 In considering our recommendations in this area, the Commission has been guided by the principles adopted by the ALRC in its review of evidence, including: the need to facilitate the fact-finding function of the jury by enabling the accused and the prosecution to produce **probative evidence**; the need to keep in mind the purposes of the criminal trial, including the importance of ensuring that the accused is protected from wrongful conviction; and considerations of costs and time.³⁹² We have been particularly concerned to ensure that evidence which has a direct bearing on the determination of **facts in issue** is able to be

389 Australian Law Reform Commission, *Evidence*, Volume 1, Interim Report 26 (1985) ch 3.

390 Australian Law Reform Commission, *Evidence*, Report 38 (1987), ch 3, para 35.

391 Ibid, ch 3, para 38.

392 Ibid, ch 3, para 46.

taken into account by the jury, and that the rights of the accused to a fair trial are protected.

4.10 Many of the issues and problems we discuss in this Chapter are considered in more detail in the ALRC's *Interim Report* and *Final Report*³⁹³ on evidence, and we believe would be substantially addressed through the adoption in Victoria of the Uniform Evidence Act, now in operation in the Commonwealth, NSW, Tasmania and the ACT.³⁹⁴ Ideally, reforms to the law of evidence should be considered as part of a broader review of the rules of evidence applying in Victoria. The current Attorney-General, the Hon Rob Hulls, has recently announced the Government's proposals to implement legislation in Victoria consistent with the Uniform Evidence Act.³⁹⁵ However, we believe there is a more pressing need for reforms concerning hearsay evidence and use of prior consistent statements in homicide matters, and therefore have made a number of recommendations about the admission and use of this evidence in this context. Due to the complex issues that may arise where there is a history of prior violence between the accused and the deceased, we further recommend that some clarification is provided on what evidence may be relevant in these circumstances to support a defence of self-defence or duress.

RELEVANCE OF A HISTORY OF PRIOR VIOLENCE

4.11 Evidence of the pre-existing relationship, including a relationship of prior violence between the deceased and the accused, is generally admissible if it is found to be relevant to the facts in issue in the trial. Evidence is 'relevant' in a legal sense if it tends to make a fact in issue more probable.³⁹⁶

393 Australian Law Reform Commission (1985), above n 389; Australian Law Reform Commission (1987), above n 390.

394 *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas). *Evidence Act 1995* (Cth) s 4(1) applies the Commonwealth Act provisions to proceedings in ACT courts.

395 Department of Justice, *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (2004), 26.

396 *Martin v Osborne* (1936) 55 CLR 367 and *O'Leary v R* (1946) 73 CLR 566. But see Heydon who suggests that rather than applying a set formula, there is a modern trend to treating 'relevance' as 'a type of hidden discretion': J D Heydon, *Cross on Evidence* (6th ed) (2000), 85. See also McHugh J in *Palmer v R* (1998) 193 CLR 1, 24 who held that: '[i]n general, evidence of a relevant fact is excluded only when it infringes some policy of the law, one of which...is that evidence of the relevant fact is not admissible if the probative value of that fact is so low that it cannot justify the time, convenience and cost of litigating its proof'.

WHERE THE PERPETRATOR OF PRIOR VIOLENCE IS THE ACCUSED

4.12 When allegations have been made that the accused had been abusive to the deceased in the past, the Crown may seek to introduce evidence for a number of reasons, including ‘to prove motive or to establish the intent of the accused, or to negative a defence of accident, self-defence or provocation’.³⁹⁷ This evidence, which is commonly referred to as ‘relationship evidence’,³⁹⁸ is often admitted to assist the jury to understand the state of the relationship between the accused and the deceased. Relationship evidence may also be used to allow the jury to assess how the accused and the deceased might have acted and their state of mind at the time of the homicide. For example, evidence relating to a deceased woman’s fear of her partner, the accused, was introduced in a recent Victorian trial to assist the jury to assess the likelihood she initiated a wrestle with the accused, and used the type of words intended to provoke him.³⁹⁹ While this evidence may be considered for this purpose, the jury will often be directed that they are not permitted to take it into account as evidence of a propensity of the accused for violence.⁴⁰⁰

4.13 Justice Menzies explained the rationale for admitting this evidence in *Wilson v R*:

Any jury called upon to decide whether they were convinced beyond reasonable doubt that the applicant killed his wife would require to know what was the relationship between the deceased and the accused. Were they an ordinary married couple with a good relationship despite differences and disagreements, or was their relationship one of enmity and distrust?...The evidence is admissible not because the wife’s statements were causally connected with her death but to assist the jury in deciding whether the wife was murdered in cold blood or was the victim of mischance. To shut the jury off

³⁹⁷ *R v Anderson* (2000) 1 VR 1, 12, Winneke P. See also *Ratten v R* [1972] AC 378; *Walton v R* (1989) 166 CLR 283; and *R v Frawley* (1993) 69 A Crim R 208, 222, Gleeson CJ.

³⁹⁸ Some have questioned whether the term ‘relationship evidence’ is particularly helpful in this context as it is not every situation that will justify the admission of this evidence. The evidence must be relevant to a fact in issue in the trial; see *R v Frawley* (1993) 69 A Crim R 208, 222–3 (NSW CCA) in which Gleeson CJ remarked ‘[i]n my view the preferable approach in a case such as the present is not to consider the matter in terms of generality as to “relationship” but, rather, to consider whether the evidence in question is direct evidence of any fact relevant to a fact in issue.’

³⁹⁹ *R v Gojanovic* (2002) 130 A Crim R 179; [2002] VSC 118. See also *R v Parsons* (2000) 1 VR 161. In *Parsons*, evidence of the deceased’s wife’s fear of the accused was held to be of significant probative value as it bore on the probability of her having smiled and laughed and verbally taunted the accused immediately prior to her death.

⁴⁰⁰ On the rules relating to propensity evidence, see paras 4.36–4.37.

from any event throwing light upon the relationship between this husband and wife would be to require them to decide the issue as if it happened in a vacuum rather than in the setting of a tense and bitter relationship between a man and a woman who were husband and wife.⁴⁰¹

WHERE THE VICTIM OF PRIOR VIOLENCE IS THE ACCUSED

4.14 Evidence of prior violence may also be relied upon by a person subjected to violence who has killed his or her abuser, for instance to support a defence of self-defence or duress, and to support or explain an argument of lack of intention.

4.15 In Chapter 3 of this Report at [3.8]–[3.13] we noted that self-defence is most usually associated with a response to an immediate attack or threat of serious injury, involving two people of relatively equal strength who may or may not know one another. The difficulty for women in raising self-defence is that their actions are more likely to be in response to an ongoing threat of serious injury by someone with whom they have an abusive relationship, rather than an immediate response to a physical attack. In circumstances in which women respond with fatal force to a physical assault, women are also likely to use a weapon. Many homicides by women in circumstances involving prior violence take place in non-confrontational circumstances, such as when the deceased is asleep or has his guard down,⁴⁰² and almost all involve the use of a weapon of some kind.⁴⁰³

4.16 For jurors, the application of force or use of a weapon by those who are subjected to abuse, particularly in non-confrontational circumstances, may raise issues about the reasonableness of the accused's belief in the need to use fatal force. Jurors may believe there were other options available to the accused to escape the violence, or that the use of a weapon was out of proportion to the nature of the threat. Jurors may also have questions about the honesty of the accused's belief in the need to use force to defend himself or herself because of the apparently

401 (1970) 123 CLR 334, 344, Menzies J, McTiernan and Walsh JJ concurring. This statement of principle has been referred to and applied in a number of subsequent cases. See, for example, *R v Hissey* (1973) 6 SASR 280; *Harriman v R* (1989) 167 CLR 590, 630, McHugh J; *R v Frauley* (1993) 69 A Crim R 208, 220, Gleeson CJ; *R v Vollmer* [1996] 1 VR 95, 132, Southwell and McDonald JJ; *R v Mala* (Unreported, Victorian Court of Appeal, Ormiston JA, 27 November 1997); *R v Ritter* (Unreported, NSW Court of Criminal Appeal, Gleeson CJ, 31 August 1995); *R v Lock* (1997) 91 A Crim R 356, 364, Hunt CJ; *R v Anderson* (2000) 1 VR 1, 12, Winneke P.

402 See n 195.

403 See n 196.

planned nature of her actions. The broader context of prior violence will often be critical to the jury's evaluation of whether the accused acted in self-defence.

4.17 A number of submissions and those consulted on the Options Paper emphasised the importance of introducing evidence of prior abuse in such cases to allow the accused's actions to be considered in their broader context.⁴⁰⁴ The Federation of Community Legal Centres' Violence Against Women and Children Working Group recognised this evidence may be particularly important in supporting a woman's claims to self-defence:

The cumulative effects of a history of violence and other forms of abuse need to be acknowledged. It is usually not possible to get a clear understanding of women's self-protective violence by looking at the events immediately leading up to the killing. The whole history of the relationship and the woman's experience of abuse and coercive control are relevant to understanding her actions.⁴⁰⁵

4.18 Dr Rebecca Bradfield also saw it as critical that reforms to self-defence be linked to reforms to evidence:

As a result of the time I have spent reading cases, commentary and thinking about the issues associated with women who kill their abusive partners, the more convinced I am that the key for the development of self-defence is an acceptance and comprehension of what it must really be like to live in a situation of ongoing violence.⁴⁰⁶

4.19 Evidence of prior violence may be necessary to assist the jury to properly assess the nature of the threat the accused faced, his or her state of mind, and the reasonableness of the accused's response. Evidence may include:

- evidence of prior acts of violence against the accused and threats made;
- evidence demonstrating the ongoing nature and extent of abusive behaviour and escalation of the violence over time; and
- evidence of the accused and others to explain how the threat was the same or different from other threats the deceased had made in the past.

4.20 Many jurors may also find it difficult to understand why a person who has been subjected to abuse might have remained in an abusive relationship, or

404 Submissions 11, 14, 16, 17 and 19; Forum 5 December 2003; Roundtables 24 February and 1 March 2004; 'No Way Out?' Workshops 29 March and 6 May 2004.

405 Submission 16.

406 Submission 17.

resorted to lethal force rather than seeking outside help.⁴⁰⁷ To assist the jury to properly assess the reasonableness of the accused's actions, evidence which might be introduced could include:

- the accused's level of knowledge about avenues for escaping the abuse;
- the number of times the accused had called the police and the outcome;
- the number of previous attempts by the accused to enlist the assistance of other service providers and the result;
- previous assistance the accused had sought from family and friends and the outcome;
- the number of times the accused had tried to leave in the past and the outcome;
- if the accused returned, the factors which influenced that decision;
- what had happened on previous occasions when the accused had tried to fight back;
- the accused's personal circumstance, including whether the accused was employed and had a means to support herself, and the availability of a safe and affordable place to go.⁴⁰⁸

⁴⁰⁷ This is supported by research. For example, in a 1995 study of community attitudes carried out by the Office of the Status of Women found that most of the respondents (77%) agreed that it was hard to understand why women stay in violent relationships: Office of the Status of Women, Department of the Prime Minister and Cabinet, *Community Attitudes to Violence Against Women Executive Summary* (1995), 30. See also Reddy et al, in a study using vignettes of women who killed violent partners, who reported that '[w]hile few people directly stated that [the battered woman] was responsible for her own injuries, there seems to be a struggle for most people to understand why the battered woman would stay in such a relationship' and there was still an 'underlying belief that the battered woman is somehow responsible because she continues to stay in a situation where she knows she will be beaten and hurt': Prasuna Reddy, Ann Knowles, Julie Mulvany et al, 'Attributions About Domestic Violence: A Study of Community Attitudes' (1997) 4 (2) *Psychiatry, Psychology and Law* 125, 141.

⁴⁰⁸ Julie Stubbs and Julia Tolmie, 'Battered Woman Syndrome in Australia: A Challenge to Gender Bias in the Law?' in Julie Stubbs (ed) *Women, Male Violence and the Law* (1994), 194. See also: Bradfield (2002), above n 403; Canadian Association of Elizabeth Fry Associations, *Response to the Department of Justice Re: Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property* (1998); and Department of Justice, Canada, *Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property* Consultation Paper (1998).

TAKING CULTURE AND PERSONAL BACKGROUND INTO ACCOUNT

4.21 A person's cultural background, together with his or her personal circumstances and social support structures, may have a significant impact on that person's experiences of violence and his or her options to escape the abuse. Where the abuse ends in homicide, this has obvious implications for the jury's assessment of whether the accused had other options, and whether his or her actions were therefore reasonable in the circumstances. In some cases, the relevance of a person's cultural background may not be properly appreciated, which may have implications for that person's claims to self-defence. This point has been made by Julia Tolmie who, reporting on her research on two cases involving Pacific-Asian immigrant and refugee women who had killed their violent partners, concluded:

... race and gender in each case converged to make the accused's circumstance more frightening and to narrow her options for dealing with that danger by peaceful means. Because the court in each case failed to examine the effect that this convergence had on the accused's circumstances, and her presentation of her defence at trial, it failed to realistically assess her self-defence claim.⁴⁰⁹

4.22 The issue of culture was explored at two workshops held by the Commission with representatives from culturally and linguistically diverse communities and Indigenous communities—the 'No Way Out?' workshops. Participants in the Indigenous workshop identified a number of barriers likely to be faced by an Indigenous woman in disclosing abuse and accessing effective assistance including:

- shame and fear about disclosing the abuse, including fear of possible repercussions from her partner's family and friends if she reports the violence;
- fear about the consequences of reporting the violence to official agencies, such as the police or one of the mainstream domestic violence agencies, including that her children could be removed by child protection services;
- a perception that the police will not offer sympathetic or effective assistance, perhaps as a result of her own previous experiences or based on the experiences of others who have had a negative experience;

409 Julia Tolmie, 'Pacific-Asian Immigrant and Refugee Women Who Kill Their Batterers: Telling Stories that Illustrate the Significance of Specificity' (1997) 19 *Sydney Law Review* 472, 512–513.

- social isolation and lack of support, particularly if she is living in her partner's community. As family violence is not well understood in some Indigenous communities, other members of the community might be reluctant to take any action to help a woman in a violent relationship; and
- a lack of culturally appropriate services in her region and/or fear of using existing services (for example, that the information will not be kept confidential or, if her partner's relatives are managing or employed at the local Aboriginal Cooperative, that her partner or others in the community will find out).⁴¹⁰

4.23 Similar problems were identified for women from culturally or linguistically diverse backgrounds including:

- a lack of knowledge about how to access information and services, including domestic violence and legal services due to, for example, language barriers, literacy levels and education levels;
- if they have recently arrived in Australia, fear of using government run services or of calling the police, due to their experiences in their home country;
- social isolation as a result of having few family members or friends in Australia to support them;
- a belief that it is their responsibility to keep the problem within the family; and
- fear of disclosing the abuse, including others in the community finding out, and possible repercussions.⁴¹¹

4.24 Women from rural areas,⁴¹² women with disabilities⁴¹³ and people in same-sex relationships⁴¹⁴ may also face particular difficulties in obtaining effective and appropriate assistance.

⁴¹⁰ 'No Way Out?' Workshop 6 May 2004. The issues identified by workshop participants are consistent with the finding of research on barriers commonly experienced by Indigenous women in accessing services. For a discussion of research in this area, see Partnership Against Domestic Violence, *Indigenous Family Violence Phase 1 Meta-Evaluation Report* (2004), 42–43.

⁴¹¹ 'No Way Out?' Workshop 29 March 2004. See also Submission 30 (prepared for the workshop by the Vietnamese Community in Australia Victorian Chapter). For a discussion of the barriers faced by women from non-English speaking backgrounds to accessing assistance, see, for example, Dale Bagshaw, Donna Chung, Murray Couch et al, *Reshaping Responses to Domestic Violence* (2000), ch 3.5.

4.25 Evidence concerning the particular cultural and personal barriers faced by the accused in accessing assistance may assist a jury to understand why the accused might have believed there was no other way to protect himself or herself than to kill his or her abuser, and to better assess the reasonableness of his or her actions in the circumstances.

SUBMISSIONS AND CONSULTATIONS

4.26 The Commission held a roundtable with legal practitioners, judges and legal academics on 19 February 2004 to explore evidentiary issues, including the admission and use of relationship evidence. The general view expressed at this and other consultations was that evidence concerning the relationship between the accused and the deceased, including prior violence, is routinely admitted by the courts in homicide cases, including where self-defence has been raised.⁴¹⁵

4.27 A recent example is the Victorian trial of a woman who was accused of killing her husband by throwing a heavy crystal vase at him when he attempted to prevent her from leaving the house. Evidence was admitted at trial of prior abuse the accused had been subjected to over the period of her marriage to the deceased, in support of an argument that she acted in self-defence. The trial judge ruled that

412 The Women's Domestic Violence Crisis Service note 'there are not enough referral vacancies in the largest regions of Melbourne and refuges are not equally distributed across regions...While government policy is supportive of women staying in their homes where possible and, if not, staying in their communities where possible, the policy is difficult to achieve under the current physical structure and resourcing of domestic violence services in Victoria'. Women's Domestic Violence Crisis Service, *What's Love Got To Do With It?: Victorian Women Speak About Domestic Violence* Annual Report 2001-2002 (2003), 22; see also Bagshaw, Chung, Couch et al (2002), above n 411, ch 3.4.

413 Difficulties faced by such women include finding accommodation to fit their specific needs and the possibility of highly dependent relationships with abusive carers. In addition, women with disabled children often return home due to the stress suffered by the child during relocation: Women's Domestic Violence Crisis Service (2003), above n 412, 20.

414 Barriers include: fear of 'coming out' if he or she discloses the violence; a lack of appropriate services; a lack of understanding and support from extended family; and fear that due to homophobia, he or she will not be believed and/or receive sympathetic advice and assistance from service providers in the mainstream community: see Bagshaw, Chung, Couch et al (2002), above n 411, 117–119; and Lee Vickers, 'The Second Closet: Domestic Violence in Lesbian and Gay Relationships: A Western Australian Perspective' (1996) 3 (4) *ELaw—Murdoch University Electronic Journal of Law* [24] <www.murdoch.edu.au/elaw/issues/v3n4/vickers.html> at 1 July 2004.

415 Roundtables 19 February, 24 February and 1 March 2004. See also Submission 27, para 4.23.1. Note that this evidence may be introduced by the prosecution to challenge a plea of self-defence, and by the defence to substantiate the accused's belief in the need to use defensive force, and the reasonableness of his or her actions in the circumstances.

evidence of prior violence and knowledge of violence towards others by the deceased may be relevant, where self-defence is raised, to the accused's state of mind and the reasonableness of his or her actions.⁴¹⁶

4.28 In submissions, some support was given to ensuring that the relevance of a history of abuse and the accused's background and personal circumstances in supporting a claim of self-defence is properly recognised.⁴¹⁷

THE COMMISSION'S VIEW AND RECOMMENDATIONS

4.29 Evidence of prior abuse is generally accepted by the courts as relevant and admissible, including when self-defence is raised by an accused person. However, the importance of this evidence in supporting a plea of self-defence has persuaded us that its status should be clarified in legislation. This will avoid any unnecessary arguments concerning its relevance and ensure the range of factors which may be necessary to represent the reality of the accused's situation are readily identified. As this evidence is likely to be equally relevant where duress is raised as a defence and there is a history of prior abuse, we recommend this provision apply to both self-defence and duress.

4.30 A broader understanding by jurors of what it must be like for a victim of abuse to live in a situation of ongoing and serious violence is crucial to the further development of self-defence. Without a proper appreciation of the circumstances of the accused, including the nature of the threat he or she faced, and other personal circumstances, juries are unlikely to be able to make an informed assessment of whether the accused acted in self-defence.

4.31 Evidence recognised as relevant should include:

- the history of the relationship between the accused and deceased, including prior violence;
- evidence about the cumulative effects of violence, including its psychological effects;⁴¹⁸ and

416 *R v Besim* [Ruling No1] [2004] VSC 168 (Unreported, Supreme Court of Victoria, Redlich J, 17 February 2004). The deceased's first wife was also permitted to testify that the deceased had become violent towards her during their relationship when she had threatened to call the police. The evidence of the first wife, as 'similar fact' evidence was accepted as relevant as 'it relate[d] to the issues of whether the deceased acted as the accused claim[ed] and may throw light upon the accused's state of mind': para 15. Ms Besim was acquitted.

417 Submissions 16, 18 and 19.

- social, cultural and economic factors that were relevant to the accused and affected the options realistically available to him or her to respond to, or escape the violence.

4.32 The aim of this evidence should be to build as complete a picture as possible of the situation of the accused prior to the homicide so jurors can put themselves as far as possible in his or her position. To ensure the relevance of this evidence is properly understood by jurors, we recommend that this evidence is supplemented wherever possible with expert evidence on family violence. This evidence may include both general expert evidence, about the nature and effects of family violence, and also case-specific expert evidence which would place the situation of the accused and his or her reactions into the framework of current knowledge about family violence. We discuss this approach, and some of the possible barriers to the admission of this evidence at [4.82]–[4.138].

4.33 Further, we believe legal practitioners may benefit from consulting with a person with expertise in working with victims of family violence, such as a counsellor or social worker, in preparing these matters for trial and identifying relevant evidence. Even the most skilled advocate is likely to experience difficulties negotiating the complexities and range of factors that may lead a person to kill his or partner or a family member, understanding the dynamics of a violent relationship and considering how best to represent these to a jury. If the accused is Indigenous, from another cultural background or was in a same-sex relationship, those who are likely to provide the most effective assistance are family violence workers with direct experience of working with these communities.

4.34 Taking Robyn Kina's case as an example, discussed at [3.121], if Robyn's legal representatives had involved someone experienced with working with Indigenous women who had experienced family violence, it might have assisted Robyn's legal representatives to communicate with her in an appropriate way, and ensured relevant evidence was identified prior to, rather than following her trial. We note that in at least two Australian cases where a woman who had been subjected to prolonged abuse was successful in arguing self-defence without the introduction of expert evidence on battered woman syndrome, counsel engaged the services of a social worker to assist in preparing the matter for trial.⁴¹⁹

418 Evidence on the psychological effects of violence on the accused is best given by an expert witness. The Commission's recommendations on expert evidence, and some of the barriers to the admission of expert opinion evidence are discussed at paras 4.82–4.138.

419 *R v Stephenson* (Supreme Court Queensland 1992) and *R v Stjernqvist* (Supreme Court Queensland, Cairns Circuit Court, 18 June 1996, Derrington J). These two Queensland cases were identified by

4.35 Referrals to appropriate qualified experts to provide this advice could readily be made to Victorian legal practitioners through organisations such as the Domestic Violence and Incest Resource Centre, the Women's Domestic Violence Crisis Service, and the Women's Legal Service.⁴²⁰

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RECOMMENDATION(S)

25. A provision should be introduced to clarify that where self-defence or duress is raised in criminal proceedings for murder or manslaughter and a history of family violence has been alleged, evidence on the following may be relevant:
 - the history of the relationship between the person and the family member, including violence by the family member towards the person or any other person;
 - the cumulative effect, including psychological effect, on that person of that violence; and
 - the social, cultural and economic factors that impact on that person.

(Refer to draft s 322P(1)(a)–(c) *Crimes Act 1958* in Appendix 4)

OTHER POSSIBLE BARRIERS TO THE ADMISSION OF EVIDENCE OF PRIOR VIOLENCE

As discussed above, when the accused and the deceased have been in a violent relationship, evidence that may substantiate the prior abuse may include evidence given by the accused and others about the abuse, including prior complaints of violence, documentary evidence, and evidence given by expert witnesses.

4.36 While some of this evidence will be admissible, other evidence may either be excluded altogether, or the judge may direct the jury that it is permitted to consider it for a particular purpose only. Possible barriers to the admission or use of this evidence include:

the Taskforce on Women and the Criminal Code in its Final Report: Office for Women, Department of Premier and Cabinet, Queensland Government (2000), above n 387, 121.

420 In the US, the value of this approach has been more formally recognised through the establishment of the Battered Women's Defense Office—an agency which provides technical advice to battered women and their defence teams. The Battered Women's Defense Office is operated by the National Clearinghouse for the Defence of Battered Women.

- the hearsay rule, which may prevent the admission, or restrict the use of out of court statements made by the deceased or the accused;
- the rule against prior consistent statements, which may prevent the accused giving evidence about prior complaints he or she made about the violence, or others giving evidence to substantiate the fact these complaints were made;⁴²¹
- rules governing the admission of expert opinion evidence, including the need to demonstrate this evidence is not within the ‘common knowledge’ of the jury and that the person giving evidence is an expert in a recognised area of expertise;⁴²² and
- the rules controlling the admissibility of **propensity evidence**,⁴²³ which may prevent a party (usually the prosecution) from leading evidence which tends to show the accused has been guilty of other criminal acts (such as other assaults) if that evidence tends to show the accused had a propensity to ‘commit crime, or crime of a particular kind, or was the sort of person likely to have committed the crime charged’.⁴²⁴

4.37 While a potential barrier to the admission of evidence of prior violence, the propensity rule does not generally appear to prevent the admission of this evidence in Victoria. Under Section 398A(2) of the *Crimes Act 1958* (Vic), the court may allow this evidence to be admitted if it ‘considers that in all the circumstances it is just to admit it despite any prejudicial effect it may have on the

421 This is sometimes referred to as ‘the rule against narrative’ or ‘the rule against self-corroboration’. If evidence is given by others the accused had told to establish the truth of its contents, it would also offend against the hearsay rule. However the rule against prior consistent statements ‘exists independently of the hearsay rule’: J D Heydon, *Cross on Evidence* (6th ed) (2000), 439.

422 For a discussion of ‘the opinion rule’, see *ibid* ch 15. See also Ian Freckleton and Hugh Selby (eds) *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed) (2002).

423 For example, Section 398A *Crimes Act 1958* (Vic). The rules governing the admissibility of propensity evidence have also been commonly referred to as the ‘similar fact’ rule although Heydon notes the use of this terminology is somewhat misleading as it describes the rule in terms ‘more apt to describe one of the principal exceptions to it’ and ‘suggests a unifying factor between the situations in this area which they do not necessarily possess’: Heydon (2000), above n 421, 566. See also *Pfennig v R* (1995) 182 CLR 461 in which the High Court suggested there is no one satisfactory term for evidence admitted despite its disclosure of other offences: ‘It is always propensity evidence, but it may be propensity evidence which falls within the category of similar fact evidence, relationship evidence or identity evidence. These categories are not exhaustive, and are not necessarily exclusive’: *Pfennig v R* (1995) 182 CLR 461, 465, Mason CJ, Deane and Dawson JJ.

424 Heydon (2000), above n 421, 567.

person charged with the offence'. However, once admitted, a direction will generally be given to the jury as to the use of the evidence.⁴²⁵

4.38 The hearsay rule, the rule against prior consistent statements, and rules governing the admission of expert evidence, pose significant barriers for both the prosecution and the defence in introducing relevant evidence. We consider each of these below.

HEARSAY RULE AND RULE AGAINST PRIOR CONSISTENT STATEMENTS

HEARSAY RULE

4.39 Under the current law, the hearsay rule usually prevents the jury from hearing evidence of out of court statements made by witnesses.⁴²⁶ In some circumstances out of court statements may be admissible if the purpose is not to prove the truth of what was said. Here it can only be considered by the jury for that limited purpose. For instance, a statement made by a deceased person to another person may be admissible as 'relationship evidence', to prove the state of mind of the deceased or state of the relationship between the accused and the deceased, so long as it is relevant to a fact in issue.⁴²⁷

4.40 The hearsay rule applies in both civil and criminal trials. The reasons for excluding this evidence include:

- out of court statements are usually not on oath—it is argued that in many situations direct evidence given on oath is more likely to be reliable than evidence given by a third person about a statement which was made to them out of court;
- where the person who made the statement is not called as a witness, the evidence is not capable of being properly tested by cross-examination;⁴²⁸

425 On the importance of the trial judge's directions to the jury on the use of this evidence, see *R v Best* [1998] 4 VR 603 and *R v Grech* [1997] 2 VR 609.

426 Heydon (2000), above n 421, 847.

427 *R v Walton* (1989) 166 CLR 283. On the issue of relevance, see paras 4.11–4.25.

428 The ALRC suggests that this rationale does not justify exclusion of evidence where the maker of the statement is called to give evidence: Australian Law Reform Commission (1985), above n 389, para 663.

- the evidence may not be the best evidence—for instance because it is not based on personal knowledge of the facts asserted by the maker of the statement;
- there are dangers of inaccuracy in repetition and a risk of fabrication—the third person may not have remembered the statement accurately or may have a motive for fabricating it; and⁴²⁹
- to admit hearsay evidence can add to the time and cost of litigation and unfairly catch the other party by surprise.⁴³⁰

RULE AGAINST PRIOR CONSISTENT STATEMENTS

4.41 Evidence by a witness that he or she had previously made a similar statement to someone else is also excluded because it is regarded as ‘self-serving’. That is, the witness may have made such an out of court statement in an attempt to bolster his or her evidence.⁴³¹ Evidence given by others of prior statements made by a witness is generally inadmissible for similar reasons. Where the statement is sought to be admitted not as to credit, but as to the truth of the assertions made, it is inadmissible as hearsay.⁴³²

4.42 This rule means that where the accused alleges the deceased was violent towards him or her in the past, he or she is generally not permitted to give evidence that he or she told others about the abuse or have others testify that these statements were made.

4.43 Previous consistent statements may be admitted as to credibility only, not to support the truth of the statement, under limited exceptions to this general rule. For instance, exceptions allow the admission of statements to rebut an assertion made by the prosecution that the witness’s account has been concocted or is of recent invention in order to rebut this assertion. The exception does not

429 For a discussion of the history and modern justification of the rule see Heydon (2000), above n 421, 848–849. See also Australian Law Reform Commission (1987), above n 390, 72.

430 Australian Law Reform Commission (1985), above n 389, paras 673–674. See also Australian Law Reform Commission (1987), above n 390, para 126.

431 Heydon (2000), above n 421, 438–440. Heydon describes it as ‘the rule against narrative’ or ‘the rule against self-corroboration’. Heydon points out that the argument that such evidence can be manufactured should go to the weight and not the admissibility of the evidence and in any case is only relevant where the witness is a party, but suggests the rule saves time by eliminating unnecessary evidence.

432 Andrew Ligertwood, *Australian Evidence* (3rd ed) (1998), 480. Although the prior admissions of an accused are admissible.

allow evidence of a prior consistent statement to be given in every situation where a witness's story is attacked, but is limited to the situation where the defence suggests why the witness invented or was mistaken about the alleged fact and the prior consistent statement rebuts that suggestion.⁴³³

PROBLEMS WITH THE CURRENT LAW

4.44 The hearsay rule and its exceptions have been widely criticised as being complex, overly technical, confusing, artificial, 'inadequate, arbitrary and anomalous'.⁴³⁴ While the rule may sometimes ensure the court has access to the 'best evidence', in other cases it may require juries to restrict the use of this evidence, or exclude evidence that is likely to be both reliable⁴³⁵ and helpful to the jury or other fact-finder. Limiting the use of this evidence is likely to be particularly confusing for jurors who are required to make fine distinctions between the purposes for which they may consider the evidence, and those for which they must ignore it.⁴³⁶ It could be argued that the possible unreliability of this evidence is better dealt with as a question of weight.

4.45 In homicide cases, hearsay evidence in some cases may be the best evidence available to the prosecution to prove prior violence or threats made by the accused against the deceased, or to the accused to support his or her account of the violence. The high rate of underreporting of family violence may make it unlikely that a person who has been abused will have taken any formal action against the abuser prior to the homicide taking place.⁴³⁷ As family violence usually takes place in private, there are also unlikely to be any witnesses to the abuse. The evidence of

433 Heydon (2000), above n 421, 453–457 and see *Nominal Defendant v Clements* (1960) 104 CLR 476. Such statements also may be admissible under the doctrine of *res gestae*, if they are made contemporaneously with the occurrence of an act or event that is relevant to the issues being decided. For an explanation of the *res gestae* doctrine, see Heydon (2000), above n 421, ch 19.

434 Australian Law Reform Commission (1987), above n 390, 81. See also Australian Law Reform Commission (1985), above n 389, paras 329–345.

435 Ligertwood (1998), above n 432, 528.

436 See, for example, Australian Law Reform Commission (1985), above n 389, 170–172.

437 See, for example: Office of the Status of Women, *Against the Odds: How Women Survive Domestic Violence: The Needs of Women Experiencing Domestic Violence Who Do Not Use Domestic Violence and Related Crisis Intervention* (1998), 9, which reported that less than 20% of the women interviewed (num=23/122) had contact with domestic violence crisis services while they were in the abusive relationship, and only about 25% had contact with police while they were in the abusive relationship; Australian Bureau of Statistics, *Women's Safety Australia Catalogue 4128.0* (1996), 28, this survey found that while only 19% of women who were physically assaulted in the previous 12 months had contacted the police, 58% had discussed their experiences with a friend or neighbour.

those the deceased or the accused may have told about the abuse, such as friends, neighbours and other family members, may be the only available evidence to establish the nature and extent of the violence and to challenge, or support, the accused's version of the events surrounding the homicide.

4.46 In circumstances in which prior statements made by the deceased are admitted as 'relationship evidence', but prevented from being considered as evidence of the truth of what the deceased asserted, the accused's version of the truth may remain largely uncontested. This is because the deceased is not available to give his or her side of the story; or to borrow a phrase from Professor Jenny Morgan, 'dead women tell no tales, tales are told about them'.⁴³⁸ This may not only affect the jury's assessment of the accused's actions, but may also misrepresent what has occurred and be deeply upsetting for friends and family members of the victim.⁴³⁹

4.47 There have been limited circumstances in which a court has allowed evidence that would otherwise be considered hearsay to be considered as evidence of the truth of what the deceased person has asserted. For example, in a recent Victorian trial evidence of an incident recounted by the deceased to others in which the accused had held her by the throat and threatened to hit her head with a hammer was admitted by the judge as evidence the incident had taken place. In that case there was considerable direct evidence of physical injury to the deceased, and an admission by the accused about the prior assault. On this basis, the allegation of assault was considered to have a high level of reliability.⁴⁴⁰ The admission of prior representations made by the deceased for this purpose remains, however, the exception rather than the rule.

438 Jenny Morgan, 'Critique and Comment: Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them' (1997) 21 *Melbourne University Law Review* 237.

439 This may be an issue particularly in cases in which the accused claims the victim was somehow to blame for the homicide, by provoking the accused and causing him to lose self-control. See Women's Coalition Against Family Violence, *Blood on Whose Hands? The Killing of Women & Children in Domestic Homicides* (1994), 108–114. The Coalition interviewed family and friends of nine women and three children killed by their partners and fathers and observed families were 'extremely angry that an accused would claim his actions were entirely premeditated when clearly there had been a long history of violence'. See also, Phil Cleary, *Just Another Little Murder* (2002) in which Phil Cleary gives his personal account of the trial of his sister's killer.

440 *R v Gojanovic (No 2)* (2002) 130 A Crim R 179, Coldrey J. Justice Coldrey further justified its admission on the basis that the truth of the allegation was not dependent on the statement itself, as the accused had made admissions concerning the incident. He concluded in the circumstances that to prevent the deceased's statement being placed before a jury, therefore, 'would be an exercise in legal artificiality': 184.

MODIFICATION OF THE HEARSAY RULE IN OTHER JURISDICTIONS

4.48 The ALRC's 1987 *Report on Evidence* recommended the hearsay rule should be retained but that legislation should be enacted to permit the admission of some first-hand hearsay evidence in criminal proceedings. The requirements which must be satisfied before the evidence is admitted were intended to cover situations in which such evidence was likely to be reliable. The Report also proposed various safeguards to ensure fairness to the accused in cases where hearsay evidence was admitted.⁴⁴¹

4.49 The Commonwealth, New South Wales, Tasmania and the ACT⁴⁴² have enacted uniform legislation (known as the Uniform Evidence Act) based on the recommendations in the ALRC's Report.

4.50 The Uniform Evidence Act creates a number of exceptions to the hearsay rule as it applies in criminal proceedings.⁴⁴³ Under section 59(1) of the Uniform Evidence Act, the hearsay rule is defined as follows:

59(1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.

4.51 A distinction is made between circumstances in which the maker of a statement is available to give evidence of an asserted fact, and those in which the maker is unavailable to give evidence, including because he or she is dead.⁴⁴⁴

441 Australian Law Reform Commission (1987), above n 390, 81. These include a requirement that notice be given to the other party where the maker is unavailable and cannot be called to give evidence; limiting representations where the maker of the statement is called to give evidence to those made when the facts asserted were fresh in the memory; a power to direct that documents and witnesses be produced; and disclosure of related representations where the maker is unavailable or not to be called. See also Australian Law Reform Commission (1985), above n 389, ch 13.

442 *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas). *Evidence Act 1995* (Cth) ss 4(1), 8(4)(a) applies the Commonwealth Act provisions to proceedings in ACT courts, except to the extent they are excluded by regulation.

443 *Evidence Act 1995* (Cth) ss 60, 65, 66; *Evidence Act 1995* (NSW) ss 60, 65, 66; *Evidence Act 2001* (Tas) ss 60, 65, 66. *Evidence Act 1995* (Cth) ss 4(1), 8(4)(a) applies the Commonwealth Act provisions to proceedings in ACT courts, except to the extent they are excluded by regulation.

444 *Evidence Act 1995* (Cth) Dictionary, pt 2, s 4(1); *Evidence Act 1995* (NSW) Dictionary, pt 2, s 4(1); *Evidence Act 2001* (Tas) s 3B.

Maker Unavailable

4.52 Section 65(2) of the Uniform Evidence Act provides that where the maker of the statement is unavailable to give evidence, including because he or she is dead:

The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation was:

- (a) made under a duty to make that representation or to make representations of that kind, or
- (b) made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication, or
- (c) made in circumstances that make it highly probable that the representation is reliable, or
- (d) against the interests of the person who made it at the time it was made.

4.53 This section may be relied upon by the prosecution to introduce evidence of a previous representation as to the truth of the asserted fact, provided one of the conditions set out in (a)–(d) ensuring a minimum standard of reliability is met.

4.54 Section 65(8) allows evidence of a representation of a person who is unavailable to give evidence to be introduced by a defendant as proof of the facts asserted. The evidence of the representation must be given by a person who saw, heard or otherwise perceived the representation being made, or be contained in a document.

65(8) The hearsay rule does not apply to:

- (a) evidence of a previous representation adduced by a defendant if the evidence is given by a person who saw, heard or otherwise perceived the representation being made; or
- (b) a document tendered as evidence by a defendant so far as it contains a previous representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

4.55 Where evidence of representations is admitted, the prosecution is allowed to introduce other evidence about the same matter if it is given by a person who ‘saw, heard or otherwise perceived’ the representation being made, as an exception to the hearsay rule. The prosecution does not have to satisfy the additional requirement under section 65(2)—for instance, that the representation was made in circumstances that make it highly probable that the representation is reliable.

- 65(9) If evidence of a previous representation about a matter has been adduced by a defendant and has been admitted, the hearsay rule does not apply to evidence of another representation about the matter that:
- (a) is adduced by another party; and
 - (b) is given by a person who saw, heard or otherwise perceived the other representation being made.

Maker Available

4.56 Representations made by an accused person, and other witnesses who are available to give evidence, may also be admitted under a limited exception to the hearsay rule in section 66(2) which provides that:

- If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:
- (a) that person; or
 - (b) a person who saw, heard or otherwise perceived the representation being made; if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

4.57 Under section 66(4), a document containing a representation to which subsection (2) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

Other Exceptions to the Hearsay Rule

4.58 If representations are not admitted under either sections 65 or 66 of the Uniform Evidence Act, they may still be admitted for another purpose (for instance, to demonstrate the state of the relationship). Section 60 of the Act provides a broad exception to the hearsay rule which allows evidence of a previous representation admitted for a purpose other than proof of the fact intended to be asserted by the representation, to be considered also as proof of the fact asserted. For example, this provision would allow a history of abuse recounted by the accused to a professional (such as a doctor or counsellor), and which forms part of

the basis for that professional's opinion (for example an opinion about the accused's mental state) to be considered as evidence of the history of abuse.⁴⁴⁵

APPLICATION OF THE UNIFORM EVIDENCE ACT TO FAMILY VIOLENCE HOMICIDES

4.59 In a homicide trial in Victoria, the hearsay rule may currently prevent the admission of hearsay evidence in three main situations:

1. The accused, who is the victim of the prior abuse, is seeking to introduce evidence that the deceased had admitted to others (such as friends or family members) that he or she had been violent towards the accused, and details of those incidents.
2. The accused is the perpetrator of the prior abuse and the prosecution is seeking to introduce evidence that the deceased told other people (such as friends or family members) that the accused had been violent towards him or her.
3. The accused, who is the victim of the prior abuse, is seeking to give evidence that he or she told other people (such as friends or family members) that the deceased had been violent towards him or her, and/or to have those people give evidence of what the accused had told them.

4.60 As noted above, some of this evidence may be admissible as proof of the state of the relationship, or state of mind of the accused or deceased at the time of the homicide, but not as evidence of the truth of what was asserted.

4.61 The Uniform Evidence Act overcomes the hearsay problem by introducing a number of exceptions to the hearsay rule.

Scenario 1: Admissions by the Deceased of Past Violence

4.62 In the first scenario, section 65(8) of the Uniform Evidence Act allows the accused to introduce, as evidence of the facts asserted, a previous representation—such as an admission of violence—made by his or her violent partner. It is

445 At common law, a history taken by a doctor is admissible in evidence as establishing the basis upon which the doctor as an expert has formed the opinion which the expert is called to give. *Ramsay v Watson* (1961) 108 CLR 642. Under s 60 of the Uniform Evidence Act, this evidence is now also accepted as evidence of its truth: *R v Welsh* (1996) 90 A Crim R 364. See also *R v Hilder* (1997) 97 A Crim R 70 and *R v Lawson* [2000] NSWCCA 214 (Unreported, Supreme Court of NSW, Court of Criminal Appeal, Stein JA, Dunford and Sperling JJ, 14 June 2000).

necessary for the evidence to be given by ‘a person who saw, heard or otherwise perceived the representation being made’. The accused may also tender a document which contains a previous representation made by the deceased (such as a letter, or diary entry).

Scenario 2: Complaints by the Deceased of the Accused’s Violence Towards Him or Her

4.63 In the second scenario, section 65(2) allows the prosecution to introduce evidence of a representation made by the deceased, and given by ‘a person who saw, heard or otherwise perceived the representation being made’ as evidence of the facts asserted, provided certain conditions ensuring the reliability of the evidence are met.⁴⁴⁶ For example, the prosecution would need to establish the representation was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication, or that make it highly probable that the representation is reliable. However, if the representation were contained in a diary or a letter, for example, it would not be admissible under this exception, as the evidence would not be given by ‘a person who saw, heard or otherwise perceived the representation being made’. To qualify as an exception under section 65(2), a person who, for instance, saw the deceased writing the letter, would have to be available to give evidence.⁴⁴⁷

Scenario 3: Complaints by the Accused of the Deceased’s Violence Towards Him or Her

4.64 In the final scenario, the witness (the accused) is available to give evidence. Ordinarily the rule against prior consistent statements would prevent the accused giving evidence that he or she told others about the violence. The evidence of those the accused had told about the violence would also be inadmissible as proof that what the accused had told them happened did in fact happen.

4.65 Under section 66(2) of the Uniform Evidence Act, the accused could give evidence that he or she told others about the violence, provided that when the representation was made, the occurrence of the asserted fact was fresh in his or her

⁴⁴⁶ Sections 65(2)(b) and 65(2)(c) have been relied upon in a number of homicides involving the killing of intimate partners to introduce evidence of representations made by the deceased. See, for example, *R v Mankotia* [1998] NSWSC 295, Sperling J; *R v Polkinghorne* (1999) 108 A Crim R 189, Levine J; *R v Serratore* (1999) 48 NSWLR 101; *R v Jang* [1999] NSWSC 1040, Bell J; *Conway v The Queen* (2000) 98 FCR 204; and *R v Toki (No.3)* (2000) 116 A Crim R 536, Howie J.

⁴⁴⁷ See *Conway v R* (2000) 98 FCR 204.

memory. The evidence of others of what the accused told them would also be admissible as proof of the truth of what the accused said, provided the condition of it being made while ‘fresh in the memory’ of the person who made it, could be satisfied. In both cases, the evidence could be considered as evidence of the violence.

4.66 If the evidence could not satisfy the ‘fresh in the memory’ requirement, but is admitted for another purpose, it could still be taken into account as proof of the truth of what was asserted. This is because section 60 of the Uniform Evidence Act provides a broader exclusion to the hearsay rule, where the evidence is admitted for a purpose other than to prove the truth of the facts asserted.

SUBMISSIONS AND CONSULTATIONS

4.67 Participants at the roundtable held by the Commission to discuss evidentiary issues agreed that, while a basis could often be found to admit evidence of previous representations made to others, the rule against hearsay might limit its use.⁴⁴⁸

4.68 There was general support for the approach taken under the Uniform Evidence Act, including the introduction of an exclusion to the hearsay rule in circumstances in which evidence is admitted for a purpose other than as proof of the facts asserted. The risk of such evidence being unreliable was felt by many participants to be adequately dealt with by an appropriate warning to the jury concerning its use, and the possibility of exclusion under existing discretions, including on the basis that it would cause unfair prejudice to the accused.

4.69 The Federation of Community Legal Centres’ Violence Against Women and Children Working Group in its submission specifically argues for an exception to be made to the hearsay rule to allow prior consistent statements of an accused supporting the existence of prior abuse to be admitted:

Given the private nature of domestic violence, evidence of complaint to others may be the only form of evidence available. Direct witnessing of assaults, other than by the victims, is unlikely to occur. This situation is consistent with sexual assault and yet the law allows some evidence of (recent) complaint in those cases.⁴⁴⁹

448 Roundtable 19 February 2004.

449 Submission 16. The submission makes reference to the exclusion of prior consistent statements made by Heather Osland that she was fearful of the deceased in her trial in Bendigo in 1996. See *R v Osland* [1998] 2 VR 636.

THE COMMISSION'S VIEW AND RECOMMENDATIONS

4.70 The Commission believes that substantial reforms to the laws of evidence, including legislated exceptions to the hearsay rule, are warranted in Victoria. However, we recognise that such reforms may not be made for some time. This has made it necessary for us to consider whether we should recommend the introduction of exceptions to the hearsay rule in homicide cases prior to the introduction of more extensive reforms.

4.71 After giving this matter careful consideration, we believe there are compelling reasons to recommend the introduction of limited exceptions to the hearsay rule in criminal proceedings for murder or manslaughter. Where the prosecution seeks to introduce such evidence, existing discretions to exclude or limit the use of this evidence should continue to operate to ensure fairness to the accused.

4.72 In the context of a homicide trial, some out of court statements are already admissible for purposes other than the truth of the facts asserted. However, artificial and often illogical distinctions are made between the uses for which juries may or may not consider the evidence. This has led one commentator, in discussing the application of the hearsay rule to prior inconsistent statements, to describe it as 'an area of choice Gobbledygook'.⁴⁵⁰ We consider the approach under section 60 of the Uniform Evidence Act, which allows evidence admitted for a purpose other than proof of the fact asserted to be considered as proof of the fact asserted, subject to discretions to exclude, to be an eminently sensible one.

4.73 In other cases, the rule against hearsay statements and prior consistent statements may result in evidence relevant to the accused's defence being excluded altogether. Where the accused has not made a formal complaint of prior abuse, there may be significant implications for the jury's assessment of his or her credibility. We believe there is a particularly strong argument for the admission of this evidence in this context. In our view, the possible risks of a wrongful conviction if this evidence is not admitted more than outweigh the risks. Any questions concerning the reliability of this evidence, we believe, should simply be dealt with as a question of weight for the jury.

450 A Roden, 'Criminal Evidence: The Law and the Gobbledygook', in Proceedings of the Institute of Criminology No 48, *Criminal Evidence Law Reform* (1981) University of Sydney 24 as cited in Australian Law Reform Commission (1985), above n 389, para 334.

4.74 We are persuaded that the Uniform Evidence Act provisions substantially address many of the difficulties, outlined above, that might be experienced in introducing evidence of prior representations where a history of violence is alleged. We therefore recommend their adoption, subject to the addition of a minor extension to section 65(2).

4.75 Currently under section 65(2), the prosecution cannot introduce, as evidence of its truth, a representation of a deceased person made in a document that others did not see him or her make. For instance, if the deceased had written in her diary that the accused had told her if she went to the police to complain about the violence he would kill her, this entry could not be introduced into evidence as proof the accused had threatened her. This is because evidence of the representation must be given by someone who saw, heard or otherwise perceived it being made.⁴⁵¹

4.76 Where this evidence is, or may be, the best evidence of what has occurred, the Commission can see no good reason to exclude it unless its probative value is outweighed by its prejudicial effect. For this reason we recommend the exception extend to a documentary representation.

4.77 As is the case under section 62 of the Uniform Evidence Act, the proposed exceptions to the hearsay rule should apply only to first-hand hearsay. The prosecution and defence will still need to demonstrate that the evidence is relevant to a fact in issue. The prosecution will also need to show that its probative value outweighs its prejudicial effect when its admission may disadvantage an accused person.

4.78 We acknowledge there are certain dangers associated with the admission of hearsay, including that it cannot be tested by cross-examination where the maker of the statement is not or cannot be called. We therefore recommend that, consistent with the approach in the Uniform Evidence Act, in all cases where such evidence is admitted, appropriate warnings should be given to the jury that hearsay evidence may not be as reliable as direct evidence. The attention of the jury should also be directed to factors that may affect the reliability of this

451 See *Conway v R* (2000) 98 FCR 204. In *Conway* a diary entry containing the deceased's accounts of a conversation between the deceased and the accused in which he admitted to drugging her coffee to 'calm her down', was held on appeal to have been wrongly admitted by the trial judge on the basis that the evidence was not given by a person who 'saw or otherwise perceived' the representation being made. Although two people had been shown the diary by the deceased prior to her murder, neither had seen her make the diary entry in question.

evidence. In addition, the party seeking to adduce it should also be required to give reasonable notice—including notice of the facts in issue to which the evidence is relevant—to the other party.

4.79 Should our proposals be accepted, consideration should be given to the adoption of related provisions defining the scope of admissible hearsay evidence and general exclusionary provisions, including:

- Section 59—which defines the rule against hearsay evidence;
- Section 61—which excludes evidence of a representation made while a person was not competent to give evidence;
- Section 62—which restricts the exceptions in the Act to the admission of hearsay to first-hand hearsay;
- Section 108A—which excludes evidence relevant only to the credibility of the person who made the representation where he or she is unavailable to give evidence, unless the evidence has substantial probative value;
- Section 135—which gives a court a general discretion to refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party; or be misleading or confusing; or cause or result in undue waste of time;
- Section 136—which gives a court a general discretion to limit the use to be made of evidence if there is a danger that a particular use of the evidence might be unfairly prejudicial to a party; or be misleading or confusing; and
- the Dictionary—which defines relevant terms including ‘previous representation’, ‘prior consistent statement’, ‘prior inconsistent statement’, ‘probative value’, ‘representation’ and ‘representation in documents’.

4.80 The provisions allowing for the admission of hearsay evidence to prove facts in issue are not intended to detract from or modify common law rules allowing for the admission of evidence of statements made as proof of the fact intended to be asserted by the representation (such as the *res gestae* exception),⁴⁵² or for another purpose (such as to demonstrate the person’s state of mind).⁴⁵³ General exclusionary rules, such as the discretion to exclude evidence where its

⁴⁵² See Glossary and n 433.

⁴⁵³ For a discussion of some of the circumstances in which relationship evidence may be admitted, see paras 4.12–4.13.

probative value is outweighed by the danger of unfair prejudice to the accused, should also be taken as continuing to apply.

4.81 We note that the limiting of these provisions to the context of proceedings for murder and manslaughter will give rise to anomalies. As our terms of reference are confined to the context of homicide, we make no recommendations on this issue. Nevertheless, we urge the Victorian Government to consider extending the operation of these provisions beyond the context of these two offences.



RECOMMENDATION(S)

26. A provision should be introduced in Victoria, based on section 65(2) of the Uniform Evidence Act, to provide an exception to the hearsay rule to allow admission of evidence of a previous representation made by a person who is not available, to give evidence where the evidence is:

- given by a person who saw, heard or otherwise perceived the representation being made; or
- contained in a document.

This exception should apply:

- in criminal proceedings for murder or manslaughter;
- where the representation satisfies one of the following criteria:
 - (a) it was made under a duty to make that representation or to make representations of that kind; or
 - (b) it was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or
 - (c) it was made in circumstances that make it highly probable that the representation is reliable; or
 - (d) it was against the interests of the person who made it at the time it was made.

!

RECOMMENDATION(S)

27. A provision should be introduced, based on sections 65(8) and 65(9) of the Uniform Evidence Act, to provide an exception to the hearsay rule to allow evidence of a previous representation made by a person who is not available to give evidence, to be adduced by the accused. This exception should apply in criminal proceedings for murder or manslaughter to:
 - evidence of a previous representation given by a person who saw, heard or otherwise perceived the representation being made; or
 - a statement contained in a document tendered as evidence by the accused, so far as it contains a previous representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.
28. Where evidence of a previous representation adduced by the accused has been admitted, the hearsay rule should not apply to evidence of another representation about the matter that is:
 - adduced by another party; and
 - given by a person who saw, heard or otherwise perceived the other representation being made.
29. A provision should be introduced, based on section 66 of the Uniform Evidence Act, to provide a specific exception to the hearsay rule to allow admission of evidence of a previous representation, where a person who made a previous representation is available to give evidence and that person has been or is to be called to give evidence. This exception should apply to evidence of the representation that is given by:
 - that person; or
 - a person who saw, heard or otherwise perceived the representation being made;

if when the representation was made the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

This exception should apply in criminal proceedings for murder or manslaughter.

! RECOMMENDATION(S)

30. A provision should be introduced, based on section 60 of the Uniform Evidence Act, to provide an exception to the hearsay rule where evidence of a previous representation is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation.

This exception should apply in criminal proceedings for murder or manslaughter.
31. A provision should be introduced, based on section 165 of the Uniform Evidence Act, providing that where evidence is admitted under provisions allowing for the admission of evidence of representations as proof of facts in issue asserted by those representations, the judge should be required to:
 - warn the jury the evidence may be unreliable;
 - inform the jury of matters that may cause it to be unreliable; and
 - warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.
32. A party should not be allowed to adduce evidence of a representation as proof of facts in issue asserted by those representations unless that party has given reasonable notice in writing to the other party of his or her intention to adduce the evidence and the facts in issue to which it is relevant.
33. Provisions allowing for the admission of hearsay evidence to prove facts in issue should not detract from or modify common law rules allowing for the admission of evidence of statements made as proof of the fact intended to be asserted by the representation, or for another purpose.

EXPERT EVIDENCE AND THE RULE AGAINST OPINION EVIDENCE

INTRODUCTION

4.82 While evidence about prior violence, including evidence given by the accused and others, may assist judges and jurors to understand the circumstances of the accused, there is still a danger they may misinterpret what has occurred. This is because, without additional information, jurors are likely to draw inferences about the accused's behaviour based on their own limited understanding of the nature and dynamics of family violence.

4.83 For example, when self-defence is raised in circumstances in which there has been a prior history of abuse, jurors will be forced to rely on their own knowledge and understanding of violent relationships to assess the reasonableness of the accused's actions and what 'normal' behaviour might be for a victim of abuse. There also is a danger judges will not take appropriate account of a history of violence when considering the accused's level of culpability at sentencing.

4.84 As we suggested in Chapter 4 of the Options Paper, one way to address the risk of reliance on misconceptions about family violence is to introduce expert evidence on family violence. Expert evidence might be either evidence of fact used to inform the judge or jury of a matter that is beyond their expertise, or evidence of opinion. To be admissible, opinion evidence must meet a number of requirements. These are discussed at [4.105]–[4.117].

4.85 Expert evidence is generally seen as unnecessary if the court determines ordinary people (such as members of a jury) are able to form a sound judgment, without needing the assistance of a person who has specialised knowledge and experience in the relevant area. In this section, we discuss some of the common myths and misconceptions about family violence that may make this evidence necessary. Currently expert evidence on family violence is generally confined to evidence given by a psychologist or psychiatrist on 'battered woman syndrome evidence' (BWS). We consider some of the problems with this evidence, and an alternative form of expert evidence which focuses on the social context of family violence, as well as some of the possible barriers to the greater use of this evidence. Finally, we set out our recommendations for reform.

UNDERSTANDING THE NEED FOR EXPERT EVIDENCE ON FAMILY VIOLENCE

The following material was prepared for the Commission by Dr Rhonda Cumberland (BA, DipEd, Grad Dip, MA, PhD). Dr Cumberland is currently the Director of the Women's Domestic Violence Crisis Service Victoria (WDVCSV). This is one of the largest women's non-government organisations in Australia which provides 24 hours crisis support services to women living in or escaping domestic violence. WDVCSV works in partnership with refuges and an extensive volunteer network to house 3000 Victorian women and children in crisis accommodation each year. Dr Cumberland also spent three years working at the Centre Against Sexual Assault at the Royal Women's Hospital Victoria. Contributions were also made by Ms Libby Eltringham (Legal Education Worker, Domestic Violence and Incest Resource Centre), Ms Joanna Fletcher (Law Reform and Policy Officer, Women's Legal Service) and Ms Catherine Plunkett (Manager, Inner South Domestic Violence Service).

The purpose of this material is to illustrate some of the common myths and misconceptions held by community members about family violence and the sort of information that may assist a judge and jury at trial in assessing the actions of a person who has killed in the context of prior abuse. What evidence may be relevant in a particular case will depend on the individual circumstances of the accused and the events leading up to the homicide.



MYTH 1: All he did was hit her every now and again. The violence was not that bad.

Family violence is not just a one-off incident of physical or sexual abuse. It usually involves a combination of physical, psychological, emotional, social and financial abuse. Physical violence is generally only one way used by a perpetrator to maintain power and control in the relationship.

A commonly reported pattern of abuse is the limited use of physical assaults, with daily threats of physical abuse and verbal abuse. The threats of physical violence are often as powerful in maintaining control over a victim as the actual incidents of violence. Once the perpetrator has shown they are capable of carrying out the threats made, there is no need to resort to physical assaults.⁴⁵⁴ The often unpredictable nature of abusive outbursts leaves some women in a state of constant fear for their lives.

The long-term effects of abuse should not be underestimated. For many women it is the emotional abuse that is most damaging—a broken bone heals, but a woman's self-esteem may be irreparably harmed.

⁴⁵⁴ See Bagshaw, Chung, Couch et al (2002), above n 411 24.



MYTH 2: Women's fear of future violence or the consequences of leaving violent relationships is irrational or unreasonable.

Research tells us that a woman's level of fear is the most reliable predictor of her partner's future violence towards her.⁴⁵⁵ Leaving a relationship provides no guarantee the violence will stop. Women are often at a high risk of injury and death during the period when they first separate from an abuser.⁴⁵⁶ Their fear is real.

Fear is central in understanding women's responses to violence. From what the WDVCSP has been told by women escaping violence, fear has three main purposes. First, it is intended or desired that the woman is fearful. This is achieved by threatening not just the woman herself, but all things loved or valued by her: her children, her family, her friends, and her pets. Second, fear is built on power over her. This is usually physical, it often includes sexual assault, and is reinforced by weapons and physical violence. Third, fear is built on attacking her as a woman. This calls into play the social situation of women and women's inequality. Attacks can range from using degrading, humiliating and personal violations to comments about her sexual identity, physical appearance, and intelligence. These attacks build a unique fear in women, a fear he will carry out his threats, a fear to move outside the relationship because he will follow, a fear she is 'used goods' or unattractive, a fear she won't be able to make ends meet, and a fear that if she rocks the boat the violence will escalate.

455 Alex Heckett and Edward Gondolf, *Predicting Levels of Abuse and Reassault Among Batterer Program Participants* (Final Report); and A Weisz, R Tolman and D Saunders, 'Assessing the Risk of Severe Domestic Violence: The Importance of Survivors' Predictions' (2000) 15 *Journal of Interpersonal Violence* 75.

456 Alison Wallace, *Homicide: The Social Reality* (1986); M Wilson and M Daly, 'Spousal Homicide Risk and Estrangement' (1993) 8(1) *Violence and Victims* 3.



MYTH 2: Women's fear of future violence or the consequences of leaving violent relationships is irrational or unreasonable.

Women have reported to the WDVCSV that after a while the different causes of fear become interchangeable. Many of the realities for women experiencing violence that are explored here occur concurrently. For example, a woman may fear the consequences of leaving at the same time as she is trying to get help to leave, and all the while finding it difficult to ask for help as she feels ashamed and fears the violence may be her fault. Searching for a violent episode as the precursor to murdering a violent partner misses the impact of constant fear in a violated woman's life.



MYTH 3: Women in violent relationships could just leave if they wanted to, or get outside help.

One of the most common questions asked in relation to domestic violence is 'Why do women stay?' or 'Why do they put up with it?' In a 1995 survey of community attitudes, 77% of the respondents found it hard to understand why women stay with violent partners.⁴⁵⁷ Australian Bureau of Statistics data tells us that one in five women have been abused in an intimate relationship, past or present.⁴⁵⁸ This shows that staying is the norm.

Barriers to women leaving a violent relationship are many and include:

- fear (for their own safety or the safety of children or other family members);
- denial or disbelief;
- emotional attachment to or love for their partners;
- hope that their partners' behaviour will change;
- shame and embarrassment;
- staying for the sake of the children;

⁴⁵⁷ Office of the Status of Women, Department of the Prime Minister and Cabinet (1995), above n 407, 30.

⁴⁵⁸ Australian Bureau of Statistics (1996), above n 437.



MYTH 3: Women in violent relationships could just leave if they wanted to, or get outside help.

- depression and stress;
- isolation (social, physical or geographic);
- a lack of faith in other people's ability to help; and
- a belief in the value of self-reliance and independence.⁴⁵⁹

Women commonly stay because they want the relationship, not the violence. This means they see their relationship in two parts: the part they want, and the part they want to escape. When women decide the violence in the relationship is increasing, other factors may discourage them from leaving. Women feel ashamed, they fear the violence will escalate and they fear they won't be believed if they leave, all of which is justified given research findings.⁴⁶⁰ They often fear losing the children, as perpetrators commonly threaten to take the children away or harm the children. The period immediately following separation is frequently the most dangerous, as violence often does escalate when a woman leaves. Recent murder-suicides committed by perpetrators against their children and themselves attest to this as a reasonable fear for any woman.

Social isolation is also a strategy often used by violent men to maintain their control. This can be overt (forbidding or actively preventing women from contacting their family and friends) or covert (behaving in an anti-social way or humiliating women in front of their family and friends so either the woman or the friends and family cease contact over time). When women have no opportunity to access support or opinions from anyone other than their abuser, they are susceptible to psychological abuse and may begin to believe repeated assertions of their inadequacy.

Legal services that provide advice to women in these circumstances report their clients often start to believe it is no use seeking outside help, such as taking out an intervention order, as their partner will find a way around it. Women come to believe that their partner is 'all powerful'.⁴⁶¹

459 Office of the Status of Women (1998), above n 437, xi.

460 Lesley Laing, *Working with Women: Exploring Individual and Group Work Approaches* (2001).

461 Women's Legal Service Victoria.: Personal Communication, Joanna Fletcher, Law Reform and Policy Lawyer, 23 July 2004.



MYTH 4: A person's cultural background or language is no barrier to accessing help.

Members of the general community do not have a good understanding of how culture can impact on a person's experiences of violence and access to services. Women of non-English speaking backgrounds and Indigenous women often face additional obstacles to seeking help, including a lack of social and economic resources, language barriers, racism, and inappropriate responses from police and other services.

About a third of women in Victoria who use domestic violence services are from non Anglo-Celtic backgrounds.⁴⁶² These women want the violence to stop but want to keep their cultural identity, their families, friends and networks. Women may feel they are betraying their role and their culture if they speak out or leave the violent relationship or their community.

Some immigrant women may have had negative experiences with police in their home country and are fearful that if they contact police their migration status will be questioned. This fear and distrust means these women may be especially reluctant to contact police.

When immigrant and Indigenous communities are regularly subjected to racist attitudes, the concept of loyalty to one's own family and community becomes particularly important. Many women fear that in speaking out about domestic violence, they will be cut off from the support of their own community. Indigenous women often want the violence to stop but cannot imagine life without 'family'.⁴⁶³ For women whose first language is not English, the expectation that they speak about personal experiences through an interpreter is a serious limitation to getting outside help.⁴⁶⁴

⁴⁶² Women's Domestic Violence Crisis Service, *What's Love Got To Do With It?: Victorian Women Speak About Domestic Violence* Annual Report 2001–2002 (2003), above n 412, 20–21.

⁴⁶³ See further Partnerships Against Domestic Violence (2004), above n 410, 42–43.

⁴⁶⁴ This issue was also raised by the Vietnamese Community in Australia (Victorian Chapter) in its submission to the Commission. It was suggested that Vietnamese interpreting services are not true and accurate for a variety of reasons. Women may also be reluctant to disclose the problem to others outside the family due to a fear that they will be viewed negatively if they disclose the abuse: Submission 30.



MYTH 5: Women who stay in violent relationships are 'bad mothers' who don't care about the wellbeing of their children.

Women with children are often placed in a 'no-win' situation. They are often judged bad mothers by the community if they stay in a violent relationship, but bad mothers if they leave and take the children with them.

Women in violent relationships often put the ideal of a nuclear family above their wellbeing and safety (eg they don't want to deny their children time with their father by ending the relationship) and reflect a commonly held view that any father who is living with his children is better than none at all. Other family members may blame women for taking children from their fathers.⁴⁶⁵ If they are financially dependent on their husband, women may also fear they will not be able to support themselves and their children. Just as fear about the safety of their children or the impact of abuse is often a reason why women leave violent relationships, concerns for the wellbeing of their children may sometimes be a reason why women stay.⁴⁶⁶ Women are also often told by their abuser they are a 'bad mother' and come to believe they would be unable to cope alone in a parenting role. What is most reported to WDVCSS is that women feel responsible for their children, even when they are not the violent parent.

465 Michael White and David Epston, *Literate Means to Therapeutic Ends* (1989).

466 In a study conducted by Keys Young of 122 women who had experienced family violence, the needs of the women's children, including concerns for stability and financial security, were of central importance to them in making decisions about how they should respond to the abuse: Office of the Status of Women (1998), above n 437, 27.



MYTH 6: If a woman stays in a violent relationship or does not complain to others about it, the violence must not be that bad, or it must not have affected her.

Common community attitudes follow the thinking that the violence could not have been so bad because the woman involved did not use a women's support service or she did not have an intervention order. Whether women seek outside help is often not a measure of the violence in their relationship. When women are murdered in domestic violence circumstances in Victoria, the WDVCV often checks to see if they have ever used the crisis service. Most women have not. Women murdered were most at risk and yet often they did not report. The relevance to women who kill is clear. These women too are at risk.

The research also shows that women are not likely to disclose violence, nor report it to the police.⁴⁶⁷ Women report to the WDVCV how they kept others from knowing about their violent partners, and similar statements have been reported in research findings.⁴⁶⁸ National research has found that less than 20% of women exposed to violence report to authorities.⁴⁶⁹ Outside help including police, courts, crisis services and counselling services all break the rule of secrecy. Domestic violence is less likely to be dealt with in the court and women are less likely to seek support than if they were violated in public by a stranger. A woman's decision to stay or leave bears no relationship to the incidence or the severity of the violence she has experienced. Reporting the violence to others is also no guarantee the abuse will not continue, and if the abuser finds out, may result in an escalation of the violence.

467 Melanie Heenan and Jill Astbury, 'The Prevalence and Health Effects if Intimate Partner Violence' (Paper presented at The 18th World Conference on Health Promotion & Health Education, 26–30 April 2004, Melbourne).

468 Lora Lempert, 'Women's Strategies for Survival: Developing Agency in Abusive Relationships' (1996) 11 *Journal of Family Violence* 269.

469 Australian Bureau of Statistics (1996), above n 437, 28.



MYTH 6: If a woman stays in a violent relationship or does not complain to others about it, the violence must not be that bad, or it must not have affected her.

It has also been wrongly assumed that if a woman does not disclose violence, or seek help, then it is not happening. A woman who is asked directly whether she is experiencing violence, and denies it, may do so as part of her safety strategy. Not unreasonably, many women are afraid of the repercussions if violence is disclosed, including an escalation of the violence. This can complicate a woman's defence if she has murdered her partner. In these cases the denial should be seen in context. The motivation for masking violence is as strong as, and often part of, a woman's motivation to stay safe. It is part of surviving a violent relationship and is not inconsistent with her circumstances.⁴⁷⁰



MYTH 7: If a woman returns to her partner, he must not be violent or she must have been partly to blame.

Women often report to domestic violence services that they reconcile with their partners in response to promises the violence will stop and their partner's behaviour has changed. These women are often socially isolated and lack support from family and friends. When a woman returns to a violent partner it is often thought her actions prove he is not violent or she was in the wrong. The WDVCV works with women who leave and return. It is a common decision to return to a violent relationship.⁴⁷¹ It cannot be underestimated how hard it is to leave a family home, relationships and lifestyle, especially if children are involved. Women have reported to the WDVCV that rebuilding life after domestic violence can take from three to ten years.

470 Lempert (1996), above n 468.

471 Donileen Loseke and Spencer Cahill, 'The Social Construction of Deviance: Experts on Battered Women' (1984) 31 *Social Problems* 296.



MYTH 8: She was violent towards her partner so her fear was not real.

Community attitudes that construct women as 'mad' or 'bad' affect women who live with violence and women who kill. Women are stereotyped as emotional, irrational, unstable and depressed. When women are violent they are noticed more for breaking with the stereotype of passivity, rather than consideration being given to what might cause such behaviour.⁴⁷² Women's mental health status and aggression or violence must be seen in context. When women use violence, they are often using it as a strategy to protect themselves from further abuse.⁴⁷³

Similarities have been recognised between women living with domestic violence and political prisoners who have been tortured.⁴⁷⁴ Given the absolute control some perpetrators have over women (social, emotional, financial, physical) an act of retaliation can be seen as necessary for the woman's survival—far from being 'mad' or 'bad', a woman's behaviour can be seen as the only 'reasonable' way out.

BATTERED WOMAN SYNDROME

4.86 Evidence addressing some of the issues outlined above may ensure that juries do not draw inferences about the accused's behaviour based on their own limited knowledge and understanding about family violence.

4.87 As we mentioned above, expert evidence on family violence is generally confined to expert evidence about battered woman syndrome (BWS) given by a psychiatrist or psychologist. In Chapter 4 of the Options Paper we suggested that it was largely to address possible barriers to the admission of evidence of family violence that BWS evidence was first introduced.⁴⁷⁵ BWS was first used by American psychologist Dr Lenore Walker to describe typical patterns of violence in abusive relationships and the psychological impact of this violence on women

472 Donna Chung, 'Questioning Domestic Violence Orthodoxies' (2001) 2 *Frontlines: A Newsletter on Violence* 3.

473 Office of the Status of Women (1998), above n 437, 16–17.

474 See, for example, Ohio Domestic Violence Network, *Information is Power: A Sourcebook for Victims of Domestic Violence* (2003) <www.odvn.org>, developed from Biderman's Chart of Coercion in Amnesty International, *Report on Torture* (1975) 53.

475 Victorian Law Reform Commission (2003), above n 403, paras 4.57–4.58.

who had been abused.⁴⁷⁶ The syndrome incorporates the theory of a ‘cycle of violence’ pattern of abusive behaviours and responses, and the theory of ‘learned helplessness’, which is used to explain the inability of the woman to escape from the violent relationship.

4.88 In recent years BWS has come under increasing attack on a number of grounds,⁴⁷⁷ including that it:

- medicalises women’s responses to domestic violence and portrays women as psychologically impaired;⁴⁷⁸
- can distort the legal issues if the dispute centres not upon the justification for the accused’s use of defensive force but upon whether she suffered from the syndrome;⁴⁷⁹
- can create a new stereotype of the typical ‘battered woman’, who is helpless, passive and demoralised;
- may disadvantage those who don’t fit the stereotype, including Indigenous women, women from non-English speaking backgrounds and women with criminal histories;⁴⁸⁰ and
- lacks scientific support.⁴⁸¹

476 Lenore Walker, *The Battered Woman* (1979).

477 For a more detailed discussion of criticisms of battered woman syndrome, see Victorian Law Reform Commission (2003), above n 403, paras 4.78–4.84.

478 See, for example, 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, 384–5; Nan Seuffert, ‘Battered Women and Self-Defence’ (1997) 17 *New Zealand Universities Law Review* 292, 296, 303; Tolmie (1997), above n 409, 509; Patricia Weiser Easteal, ‘Battered Woman Syndrome: What is “Reasonable”?’ (1992) 17 (5) *Alternative Law Journal* 220, 222.

479 Robert Schopp, Barbara Sturgis and Megan Sullivan, ‘Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse’ (1994) *University of Illinois Law Review* 45, 46–7.

480 Seuffert (1997), above n 478, 296, 327–8. See also Julie Stubbs, ‘Battered Women Syndrome, Advancing Women’s Interests or Reinforcing Orthodoxy’ (1996) *Women Against Violence: An Australian Feminist Journal* 5, 8; Tolmie (1997), above n 409, 511; Stubbs and Tolmie (1994), above n 408, 211.

481 Walker’s study has been criticised for relying on self-report survey data elicited from a self-selected sample, with no control group. It is also seen to lack proper statistical analysis testing for the significance of some findings. There is also seen to be a lack of clear support in the data for the conclusions drawn: Ian Leader-Elliott, ‘Battered But Not Beaten: Women Who Kill in Self Defence’ (1993) 15 (4) *Sydney Law Review* 403, 412–418; Schopp, Sturgis and Sullivan (1994), above n 479, 54–6.

4.89 Research conducted with mock jurors has confirmed that the use of BWS evidence may lead jurors to assess a woman as psychologically unstable and distorted in her thinking.⁴⁸²

4.90 A number of submissions shared these concerns.⁴⁸³ The Victims Referral and Assistance Program in its submission argued that in addition to the above problems, BWS could be criticised on the basis of its 'gender specificity':

Battered woman syndrome may exclude, for example, an adolescent male who kills an abusive father to defend himself, his mother or a sibling against further violence.⁴⁸⁴

4.91 Justice Kirby in *Osland v The Queen* was similarly critical of confining BWS to women as victims or women who are married and in heterosexual relationships, suggesting that:

What is relevant is not the sex or marital status of the victim of long-term abuse...It is whether admissible evidence establishes that such a victim is suffering from symptoms or characteristics relevant in the particular case to the legal rules applicable to that case.⁴⁸⁵

4.92 The validity of the continued use of BWS in US criminal cases was reviewed in a report prepared by Dr Mary Ann Dutton for the US Department of Justice and Department of Health and Human Services in 1996.⁴⁸⁶ The report was, for a number of reasons, strongly critical of the continued use of the term 'battered woman syndrome'. Those reasons included that it fails to adequately reflect the current breadth of knowledge around battering and its range of effects and is 'imprecise and, therefore, misleading'.⁴⁸⁷ It also fails to take into account the social and psychological context of women's responses to violence,⁴⁸⁸ including the sorts of issues discussed above.⁴⁸⁹

482 For a review of this research, see Regina Schuller, Elisabeth Wells and Sara Rzepa, 'Re-Thinking Battered Woman Syndrome Evidence: The Impact of Alternative Forms of Expert Testimony on Mock Jurors' Decisions' (2004) 36 (2) *Canadian Journal of Behavioural Science* 127.

483 Submissions 10, 16, 23.

484 Submission 23.

485 (1998) 197 CLR 316, 372, Kirby J.

486 Mary Ann Dutton, 'Validity of "Battered Woman Syndrome" in Criminal Cases Involving Battered Women' in *The Validity and Use of Evidence Concerning Battering and its Effects in Criminal Trials: Report Responding to Section 40507 of the Violence Against Women Act* (1996).

487 Ibid 17.

488 Ibid 19.

489 See pages 161–69.

4.93 These views were reflected by participants of the Commission's Defences to Homicide in the Context of Violence Against Women forum.⁴⁹⁰ Participants felt the use of the word 'syndrome' was particularly objectionable because it implied women had a mental condition which distorted their thinking.

USE OF BATTERED WOMAN SYNDROME IN AUSTRALIA

4.94 In Australia, expert evidence on BWS has been introduced in a number of different contexts in which women have killed violent partners;⁴⁹¹ to support self-defence and provocation⁴⁹² and in mitigation of sentence.⁴⁹³

4.95 In a comprehensive review of the use of BWS in Australia, Julie Stubbs and Julia Tolmie make the observation that BWS has generally been conceptualised in Australian cases in a fairly narrow way. When BWS has been introduced, the focus has been on the individual psychology or pathology of the accused and his or her subjective beliefs, rather than on the broader context of the accused's actions and their objective reasonableness.⁴⁹⁴

REDEFINING THE SCOPE OF EXPERT EVIDENCE ON FAMILY VIOLENCE

4.96 The problematic nature of BWS has led researchers both overseas and in Australia to call for an acceptance of expert evidence which places greater emphasis on the social realities of a woman's situation and reflects the current state of

490 Forum 5 December 2003.

491 Although BWS has most commonly been relied upon by women who have killed their violent partners, there have been some cases in which people who have killed same-sex partners have sought to rely on the syndrome. See, for example, Lee Vickers, 'The Second Closet' (1996) 3(4) E-Law—Murdoch University Electronic Journal of Law [24] <www.murdoch.edu.au/elaw/issues/v3n4/vickers.html> at 1 July 2004, paras 1–2 for a discussion of a 1994 Western Australian case in which a man accused of the murder of his same-sex partner of 14 years argued BWS as a basis for his defence.

492 See, for example, *R v Kontinnen* (Unreported, South Australian Supreme Court, Legoe J, 30 March 1992); *R v Hickey* (Unreported, New South Wales Supreme Court, Slattery AJ, 14 April 1992); *R v Raby* (Unreported, Victorian Supreme Court, Teague J, 22 November 1994); *R v Taylor* (Unreported, South Australian Supreme Court, Olsson J, 16 June 1993); *DPP v Secretary* (1995) 129 FLR 39; and *R v Osland* [1998] 2 VR 636.

493 See, for example, *R v Taylor* (Unreported, Supreme Court of South Australia, Olssen J, 3 February 1994); *R v Bradley* (Unreported, Supreme Court of Victoria, Coldrey J, 14 December 1994); and *R v McEwen* (Unreported, Supreme Court of Western Australia, Walsh J, 18 March 1996).

494 Julie Stubbs and Julia Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' (1999) 23 *Melbourne University Law Review* 709, 727.

knowledge about the nature and dynamics of abusive relationships and their effects.⁴⁹⁵ This evidence, commonly referred to as 'social framework evidence',⁴⁹⁶ would address the sorts of myths and misconceptions judges and jurors might have about family violence discussed above.

4.97 There is now some support for the view that this evidence may overcome some of the problems with BWS evidence, while still retaining the beneficial effects of introducing expert evidence to explain the actions of a person who has been subjected to abuse.⁴⁹⁷

4.98 In the Canadian Supreme Court case of *R v Malott*, Justice L'Heureux-Dubé, discussing the earlier Canadian decision of *R v Lavallee*,⁴⁹⁸ recognised the value of conceptualising women's experiences in a way that encourages the broader social and legal context to be considered.

To fully accord with the spirit of *Lavallee*, where the reasonableness of a battered woman's belief is at issue in a criminal case, a judge and jury should be made to appreciate that a battered woman's experiences are both individualized, based on her own history and relationships, as well as shared with other women, within the context of a society and a legal system which has historically undervalued women's experiences. A judge and jury should be told that a battered woman's experiences are generally outside the common understanding of the average judge and juror, and that they should seek to understand the evidence being presented to them in order to overcome the myths and stereotypes which we all share. Finally, all of this should be

495 See, for example, Dutton (1996), above n 486; Stubbs and Tolmie (1999), above n 494; Patricia Easteal, *Less than Equal: Women and the Australian Legal System* (2001); Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (Unpublished PhD Thesis, University of Tasmania, 2002), ch 7; Holly Maguigan, 'Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals' (1991) 140 *University of Pennsylvania Law Review* 379; Robbin Ogle and Susan Jacobs, *Self-Defense and Battered Women Who Kill, A New Framework* (2002); Elizabeth Schneider, 'Resistance to Equality' (1996) 57 (3) *University of Pittsburgh Law Review* 477; Zoe Rathus, *There Was Something Different About Him That Day: The Criminal Justice System's Response to Women Who Kill Their Partners* (2002), 7–8.

496 See further Victorian Law Reform Commission (2003), above n 403, paras 4.85–4.87.

497 See Schuller, Wells and Rzepa (2004), above n 482. This research suggests that social framework evidence may be more effective than battered woman syndrome evidence in explaining the actions of a woman who kills in non-confrontational circumstances.

498 [1990] 1 SCR 852. The Canadian Supreme Court in this decision accepted the need for expert evidence on the effects of abusive relationships in order to properly understand the context in which an accused woman had killed her abusive partner in self-defence.

presented in such a way as to focus on the reasonableness of the woman's actions, without relying on old or new stereotypes about battered women.⁴⁹⁹

4.99 As some commentators have acknowledged, 'social framework evidence' is not a new concept.⁵⁰⁰ Evidence on the social context of homicides, including a prior history of violence, is commonly introduced in homicide cases as relationship evidence. The difficulty, in cases in which the accused has killed in the context of a history of prior violence, is that it cannot be assumed that all judges and jurors have a good understanding of the nature and effects of family violence and some may therefore misinterpret what has occurred. In these circumstances it may be necessary to supplement the case-specific evidence with expert 'social framework evidence' to assist judges and jurors to understand the accused's experiences of violence and her beliefs and perceptions about the nature of the threat, and options for responding.⁵⁰¹

4.100 The principal focus of this expert evidence would be on the social circumstances of the accused. Evidence on the psychological effects of abuse would also be relevant in some cases. Research has shown that while there is no single profile of a battered woman,⁵⁰² women who are subjected to violence experience a range of emotional and psychological problems as a result of the abuse.⁵⁰³ These include high rates of depression, 'suicidality',⁵⁰⁴ post-traumatic stress disorder, alcohol abuse and dependence, and drug abuse and dependence.⁵⁰⁵

499 *R v Malott* [1998] 1 SCR 123, para 43, L'Heureux-Dubé and McLachlin JJ.

500 Sue Osthoff, Preface to Janet Parrish, 'Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases' in *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials: Report Responding to Section 40507 of the Violence Against Women Act* (1996), iv. The CBA and VLA also recognise this in their joint submission, noting that: "social framework" evidence is presently introduced into criminal trials by both prosecution and defence as relationship evidence. Courts commonly allow such evidence to be led so as to provide a context for the alleged acts': Submission 27.

501 Osthoff (1996) above n 500, iv.

502 Mary Ann Dutton, 'Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Women Syndrome' (1993) 21 *Hofstra Law Review* 1191, 1195. Dutton concludes that although some women meet the criteria for a diagnosis of post-traumatic stress disorder, this diagnosis characterises only a subset of some women's experiences. 'Like other trauma victims, battered women differ in the type and severity of their psychological reactions to violence and abuse, as well as in their strategies for responding to violence and abuse': *ibid* 1225.

503 For a review of studies in this area, see Regina Schuller and Sara Rzepa, Chapter 4: Part B: 'Scientific Status of Research on Domestic Violence Against Women' in David Kaye, David Faigman, Michael Saks, Joseph Sanders (eds) *Science in the Law: Social and Behavioral Science Issues* (2002), 206–239.

4.101 Psychological evidence may assist, for example, to explain a woman's behaviour following a homicide that may 'create an impression of culpability', such as an inability to remember what has happened, a lack of an emotional reaction to the homicide, or a hostile or angry response.⁵⁰⁶ Similarly, there may be circumstances in which a woman may experience a situation as dangerous due to a particular psychological reaction rather than the objective reality of the situation. This can be distinguished from the far more common situation in which a woman's appraisal of the danger may only be properly understood in the context of the pattern of prior violence and abuse and her ability to read cues that may signal she is at risk.⁵⁰⁷

4.102 As with expert opinion evidence more generally, the evidence given by an expert witness would be either general evidence or case-specific evidence. General expert evidence might include evidence given on the nature and dynamics of family violence and its effects on victims of abuse, without an opinion being expressed about the circumstances of the particular accused. Case-specific expert evidence would place the situation of the accused and their reactions into the framework of current knowledge about family violence.⁵⁰⁸

Submissions and Consultations

4.103 The introduction of social framework expert evidence in cases involving family violence received strong endorsement in a number of submissions and

504 'Suicidality' is a general term used to describe attempted suicide and thoughts about committing suicide.

505 See Jacqueline Golding, 'Intimate Partner Violence as a Risk Factor for Mental Disorders: A Meta-Analysis' (1999) 14 (2) *Journal of Family Violence* 99. Across 18 studies that included measures for depression, the weighted mean prevalence of depression was 47.6% (with rates across the studies ranging from 15% to 83%). Across 13 studies that included measures for suicidality, the weighted mean prevalence was 17.9% (with rates across the studies ranging from 4.6% to 77%). Across 11 studies that assessed post-traumatic stress disorder the mean prevalence rate was 63.8% (with rates varying from 31% to 84.4%). Across 10 studies that assessed alcohol abuse or dependence, the weighted mean was 18.5% (6.6% to 44%). The weighted mean across four studies examining drug abuse was 8.9% (ranging from 7% to 25%). See also Angela Taft, *Promoting Women's Mental Health: The Challenges of Intimate/Domestic Violence Against Women* (2003).

506 Dutton suggests these reactions are common following a traumatic event. Dutton (1996), above n 486, 10–12.

507 Ibid 11–12.

508 Mary Ann Dutton, 'Impact of Evidence Concerning Battering and Its Effects in Criminal Trials Involving Battered Women' in *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials: Report Responding to Section 40507 of the Violence Against Women Act* (1996), 2.

during consultations on the Options Paper.⁵⁰⁹ This evidence was seen to have a number of advantages over BWS evidence—most notably, that it focuses on the broader context of abuse, rather than its individual psychological effects.

4.104 In consultations it was suggested that social framework evidence might have a number of potential applications—including, for example, explaining aspects of a person's culture with which judges and juries might be unfamiliar. Due to the particular myths and misconceptions in the community concerning family violence, and the significant impact of this on an accused's claims to self-defence, the majority of those consulted, however, favoured the introduction of a provision specifically aimed at ensuring this evidence may be led in homicide cases where the accused has made allegations of prior violence.⁵¹⁰

BARRIERS TO THE INTRODUCTION OF EXPERT EVIDENCE ON FAMILY VIOLENCE

4.105 Evidence given by someone with expertise in a particular area may be either evidence of fact, or evidence of opinion.⁵¹¹ To be admissible, evidence of fact must be relevant to a fact in issue in the trial. Additional exclusionary rules apply in the case of expert opinion evidence. The operation of these rules may affect the admission of social framework evidence on family violence by the courts. In the Options Paper we explored four possible barriers to the introduction of this evidence:

- establishing that expert evidence on family violence is relevant to a fact in issue;
- the common knowledge rule;
- identifying suitably qualified experts; and
- the recognition of family violence as an area of expertise.

509 Submissions 10, 11, 14, 16, 18, 23; Forum 5 December 2003; Roundtables 19 February, 24 February and 1 March 2004; 'No Way Out?' workshops 29 March and 6 May 2004.

510 This was justified on the basis it would address a current inadequacy in the operation of the law, as community members generally do not have a good understanding of the nature and dynamics of family violence. This evidence may therefore assist in explaining behaviour to jurors that might otherwise be seen as quite curious. For example, killing an abuser rather than attempting to leave the relationship or seeking outside assistance: Roundtables 24 February and 1 March 2004.

511 Heydon suggests the distinction between evidence of fact and opinion is often blurred. A person with particular expertise may be called upon to give evidence of fact on a matter beyond the court's expertise (which is evidence of fact), and non-expert witnesses have been allowed in some instances to give evidence of tendency based on observations of fact: Heydon (2000), above n 421, paras 29,020–29,025.

We discuss each of these below.

EXPERT EVIDENCE ON FAMILY VIOLENCE AS RELEVANT TO A FACT IN ISSUE

4.106 Expert evidence about the dynamics of abusive relationships has been accepted by Australian courts as admissible—provided it is relevant to facts in issue in the trial and established by a qualified expert. While this evidence has generally been confined to BWS evidence, the same factors that qualify BWS as relevant apply to expert evidence about family violence.

4.107 In the recent High Court decision of *Osland v The Queen*, Justice Kirby appears to have been leaving the way open for a broader conceptualisation of expert evidence on family violence to be accepted in Australia,⁵¹² suggesting that while BWS does not enjoy universal support:

there is considerable agreement that expert testimony about the general dynamics of abusive relationships is admissible if relevant to the issues in the trial and proved by a qualified expert.⁵¹³

4.108 The Supreme Court of Canada in *R v Malott* suggested that where an accused person has killed his or her abuser expert evidence may be relevant to issues such as:

- why the victim might have remained in an abusive relationship—to explain some of the reasons and dispel some of the common misconceptions about why victims remain in abusive relationships;
- the impact of violence on the accused;
- the accused's ability to perceive danger from his or her abuser—to explain, for example, the ability of victims to read subtle cues and to perceive imminent danger; and
- whether the accused believed on reasonable grounds that he or she could not otherwise preserve himself or herself from death or grievous bodily

512 Stubbs and Tolmie (1999), above n 494, 729–730.

513 (1998) 197 CLR 316, 376, Kirby J. Justice Kirby discusses the number of criticisms of BWS, and states that he has ‘some sympathy for the appellant’s criticism of the word “syndrome” in BWS’. He recognises that BWS ‘appears to be an “advocacy related construct” designed to “medicalise” the evidence in a particular case in order to avoid the difficulties which might arise in the context of a criminal trial from a conclusion that the accused’s motivations are complex and individual: arising from personal pathology and social conditions rather than a universal or typical pattern of conduct sustained by scientific data’: 372. However, he concludes that as it was the appellant who raised BWS at trial, ‘[i]t is too late in this case to adopt a change of course’: 374.

harm—to assist the jury in assessing the reasonableness of the accused's belief that killing the deceased was the only way to protect himself or herself from death or serious injury.⁵¹⁴

4.109 Justice Kirby in *Osland v The Queen* held that:

These considerations, accepted in *Malott*, are equally applicable in Australia where expert evidence is received to describe common features of the conduct of people in abusive relationships and where provocation or self-defence are put in issue.⁵¹⁵

4.110 Expert evidence may also be useful to explain:

- the nature and cumulative effects of violence—in consultations, the range and patterns of behaviour, and the systematic nature of family violence was considered important in understanding the nature of the threat and the reasonableness of women's responses to it;⁵¹⁶
- why an accused, for his or her own protection, might have had to plan the killing or wait until his or her partner was asleep or had his or her guard down to act;⁵¹⁷
- the particular difficulties faced by women in the accused's situation in gaining access to legal protection and the effectiveness of this in protecting women from future violence;⁵¹⁸ and
- the use of violence by the accused in the past—such evidence may put in context evidence from other witnesses that the accused 'was the violent one' or that it was a relationship of mutual violence, which may affect the accused's credibility.⁵¹⁹

514 [1998] 1 SCR 123, para 20.

515 (1998) 197 CLR 316, 378, Kirby J.

516 Roundtables 24 February and 1 March 2004.

517 In a small number of cases, women may not feel able to leave a battering relationship, or feel able to end the violence. Evidence which assists to explain this would be relevant to the question of whether the accused honestly believed she needed to do what she did in self-defence, and the reasonableness of her actions in the circumstances.

518 This would be relevant to the question of why the accused did not leave the relationship, and the reasonableness of believing that there was no other way to escape the violence than to kill her abuser.

519 It is not uncommon for victims of violence to resist the perpetrator's violence. Evidence of a woman's use of physical or verbal aggression therefore does not necessarily mean that she was the main aggressor or that the violence was mutual. See, for example, US Department of Justice, *Violence Against Women: A National Crime Victimization Survey Report* NCJ-145325 (1994), which reported

FAMILY VIOLENCE AS A MATTER OF COMMON KNOWLEDGE

4.111 The ‘common knowledge rule’ generally excludes the giving of expert evidence on matters about which ordinary people are able to form a sound judgment, without needing the assistance of a person who has specialised knowledge and experience in the relevant area.⁵²⁰ This rule may pose a potential barrier to the admission of social framework evidence as it could be argued that this information is within the common understanding of jurors.

4.112 The common knowledge rule has been abolished in jurisdictions adopting the Uniform Evidence Act.⁵²¹ Expert opinion evidence, where it is relevant to a fact in issue, may now be given in these jurisdictions, regardless of whether it may be considered a matter of common knowledge.

WHO IS AN EXPERT AND IS FAMILY VIOLENCE AN AREA OF EXPERTISE?

4.113 There is a general rule that those who give expert opinion evidence must, on the basis of their qualifications, training and experience, be experts (the expertise rule).⁵²² A potential problem with leading expert evidence on family violence is that those who may be best qualified to give this evidence, such as family violence workers and researchers, may not be recognised as ‘experts’ where their expertise is principally based on experience rather than formal qualifications.

4.114 In states adopting the Uniform Evidence Act, the test applied is whether a person has ‘specialised knowledge based on the person’s training, study or experience’. In Victoria, under Order 44 of the *Supreme Court (General Civil Procedure) Rules 1996*, a similar approach is taken allowing an expert witness to

that 40% of battered women fought back physically, and another 40% fought back verbally. See also Office of the Status of Women (1998), above n 437, 16–17.

520 *Clark v Ryan* (1960) 103 CLR 486, 491, Dixon CJ. This rule has also been expressed in terms of matters ‘which may be competently approached’ or dealt with by the tribunal of fact: *R v Smith* [1987] VR 907, 909, Vincent J; *Smith v The Queen* (1990) 64 ALJR 588. For a further discussion of this rule and its possible application to expert evidence on family violence, see Victorian Law Reform Commission (2003), n 403, paras 4.98–4.101. BWS has qualified as an appropriate subject for expert evidence as the reactions of battered women have been accepted as outside the ordinary understanding of jurors. See, for example, *R v Runjanjic* (1991) 53 A Crim R 362, 368–369, King CJ.

521 *Evidence Act 1995* (Cth) s 80; *Evidence Act 1995* (NSW) s 80; *Evidence Act 2001* (Tas) s 80. *Evidence Act 1995* (Cth) s 4(1) applies the Commonwealth Act provisions to proceedings in ACT courts. See above n 394 and accompanying text.

522 For a discussion of this rule, see Ian Freckleton, ‘Chapter 3—The Expertise Rule’ in Freckleton and Selby (2002), above n 422, 20–52.

give evidence in the civil jurisdiction if their expertise is based on experience alone.⁵²³

4.115 Expert evidence admitted by Australian courts in circumstances in which a woman has killed her violent partner has generally been confined to psychiatrists or psychologists giving evidence on BWS, or perhaps the accused's general practitioner expressing his or her opinion about the accused's state of mind. There have, however, been some notable exceptions.⁵²⁴ For instance, in *R v Gadd* a social worker, who had extensive experience working with women who experienced family violence, and had worked as a coordinator of a women's health centre, at a domestic violence resource centre and at a women's refuge, as well as doing counselling or crisis intervention work, was permitted to give evidence. In her evidence she explained the general nature and dynamics of violence, the difficulty women might experience in leaving violent relationships, and women's tendency to hide the abuse.⁵²⁵

4.116 As well as requiring the person who gives evidence to be an expert, there must be a relevant area of expertise.⁵²⁶ Under section 79 of the Uniform Evidence Act, the test is whether the person has 'specialised knowledge', which may allow a more flexible approach.

4.117 In a recent review of the scientific status of research on domestic violence against women, Regina Schuller and Sara Rzepa concluded that there are a number of areas of agreement among researchers on family violence.⁵²⁷ There is an established and growing body of research on family violence conducted at a state,

523 Order 44.01 defines 'expert' as 'a person who has specialised knowledge based on the person's training, study or experience'. This definition was inserted by rule 8 of the *Supreme Court (Chapter I Amendment No 23) Rules 2003*, and came into operation on 1 August 2003.

524 Stubbs and Tolmie (1999), above n 494, 730–731.

525 Transcript of Proceedings (Unreported, Supreme Court of Queensland, Moynihan J, commencing 27 March 1995) 189–198 cited in Stubbs and Tolmie (1999), above n 494, 731. The accused was acquitted.

526 But see Freckleton, who suggests that the question of whether a rule of exclusion exists to prevent expert evidence being introduced on areas not recognised as ones of expertise in Australia has yet to be definitively resolved: Ian Freckleton, 'The Area of Expertise Rule' in Freckleton and Selby (2002), above n 422, 53–89.

527 Schuller and Rzepa (2002), above n 503, 236–237. Areas of agreement include: the dynamics of male violence against women within intimate relationships; the nature and extent of violence in intimate relationships; controlling behaviour on the part of the abuser and range of abusive behaviours, including psychological and emotional abuse, restrictions on her finances and behaviour, destruction of property and potential for the use of fatal force when attempts to separate from the abuser are made; and the considerable psychological impact of violence on women who have been abused.

national and international level, which could form the basis of this evidence.⁵²⁸ It can therefore be argued that family violence, as distinct from BW S, would already qualify as an appropriate area of expertise.

SUBMISSIONS AND CONSULTATIONS

4.118 Submissions and participants in consultations were overwhelmingly supportive of the introduction of expert evidence that focuses on the broader social context of family violence. It was generally felt that this evidence would already be relevant and admissible under current rules of evidence, although there is a danger that judges or practitioners might mistakenly believe that an understanding of family violence is within the ‘common knowledge’ of jurors.⁵²⁹

4.119 In their joint submission, the Victorian Women’s Trust and the Heather Osland Support and Action Group, in recommending the admission of this evidence, suggested :

Despite the increasing knowledge people have of the nature of family violence, there is still the misconception that women have a viable choice of leaving the relationship.

The community at large has difficulty understanding the downward and complex spiral of low self-esteem, fear, humiliation and helplessness that too often iron grips a woman to the extent that the notion of leaving a relationship is impossible.

...While the problem of family violence is widespread, the nature of it is still not ‘commonly known’ to many people.⁵³⁰

4.120 Similarly, the Victims Referral and Assistance Service argued, ‘[a]n understanding of the nature and impact of domestic violence cannot be assumed to be within the general public knowledge’.⁵³¹ As a woman who had been in a violent relationship said in her submission to the Commission, ‘A lot of people say “I understand” [what it is like to be subjected to family violence]... If you haven’t gone through it, then you don’t understand’.⁵³²

528 A comprehensive database of relevant research and publications is maintained by the Australian Domestic and Family Violence Clearinghouse <www.austdvclearinghouse.unsw.edu.au>

529 Roundtables 19 February, 24 February and 1 March 2004.

530 Submission 10.

531 Submission 23. Submission 19 also expressed this view.

532 Submission 32.

4.121 Dr Patricia Easteal, quoting her conclusions in her publication *Less Than Equal: Women and the Australian Legal System*, also supported the admission of this evidence:

Crucially, the application of any definition that uses an objective or subjective standard must be prefaced with the court's receipt of relevant information. Jurors and judges must be educated so as to be placed, as much as possible, in the 'multi-faceted shoes of the accused'.⁵³³ Experts can perform this task by providing instant, 'on the spot' education and assist decision-makers assess their own unconscious perceptual biases. Through showing the court exactly how an action which intuitively seems alien, does in fact fit within someone else's reality, the expert can redefine what is 'reasonable' or 'ordinary' behaviour for specific individuals.⁵³⁴

4.122 A number of participants at the roundtable held by the Commission on evidentiary issues who were supportive of the need for this evidence were concerned the common law might be too restrictive, or applied too restrictively, and exclude this evidence from being considered. The approach taken under the Uniform Evidence Act, which abolishes the common knowledge rule and simply requires that a person have 'specialised knowledge based on the person's training, study or experience', was seen as overcoming some of these barriers.

4.123 Those best qualified to give this evidence were identified as people with direct experience of working with victims of family violence—including, where the person is from an Indigenous or culturally diverse background, experience working on violence issues with these communities.⁵³⁵ Others nominated as possessing relevant expertise included family violence researchers.⁵³⁶ The Federation of Community Legal Centres' Violence Against Women and Children Working Group suggested further consultations take place with the domestic violence sector in Victoria and other stakeholders to develop guidelines for this evidence, including who should provide it.⁵³⁷

⁵³³ Peter Papathanasiou and Patricia Easteal, 'The "Ordinary Person" in Provocation Law: Is the "Objective" Standard Objective?' (1999) 1 (1) *Current Issues in Criminal Justice* 53, 64 as cited in Easteal (2002), above n 495, 234.

⁵³⁴ Easteal (2002), above n 495, 234 as cited in Submission 29.

⁵³⁵ Submissions 16, 18, 19; Roundtables 24 February and 1 March 2004; No Way Out? workshops 29 March and 6 May 2004.

⁵³⁶ Submissions 16, 19; Roundtables 24 February and 1 March 2004; No Way Out? workshops 29 March and 6 May 2004.

⁵³⁷ Submission 16.

4.124 There was some support for introducing a provision to clarify that expert evidence on family violence is relevant and admissible where allegations of prior violence are made.⁵³⁸ This would both clarify the status of this evidence, and assist legal practitioners to more easily identify the range of issues about which expert evidence might be led.⁵³⁹

THE COMMISSION'S VIEW AND RECOMMENDATIONS

Is There a Need for Expert Evidence?

4.125 Evidence about the violence given by the accused and others on its own may be insufficient to allow the jury to interpret the accused's actions. Community awareness and knowledge about family violence is improving.⁵⁴⁰ However, there is still widespread misunderstanding about the nature and dynamics of abusive relationships and their impact. For this reason, the Commission believes that defence counsel should, wherever possible, supplement case-specific evidence with expert evidence on family violence. Expert evidence provided by researchers, family violence workers and others with expertise in this area can assist jurors to identify their own biases and reconsider what may be reasonable from the perspective of a victim of abuse.

BWS and Expert Evidence on the Social Context of Family Violence

4.126 BWS evidence has a number of limitations. For this reason, we encourage the introduction of expert evidence that focuses on the broader social context in which violence occurs. Some of the particular myths and misconceptions this evidence might be used to counter have been discussed above. The evidence given by an expert witness could be either general evidence on the nature and dynamics of abusive relationships, its effects on victims and barriers to disclosure and leaving a violent relationship, or case-specific evidence that situates the experiences of the

538 See, for example, Submission 10 and Roundtable 1 March 2004.

539 Roundtable 1 March 2004.

540 See, for example Office of the Status of Women, Department of the Prime Minister and Cabinet (1995), above n 407, which concluded there was a far better understanding of domestic violence by participants in the 1995 survey, than in an earlier survey conducted in 1987. More recently, research funded through Partnerships Against Domestic Violence has found that 'participants across the research appear to have a sound level of understanding of domestic violence': Partnerships Against Domestic Violence, *Attitudes to Domestic and Family Violence in the Diverse Australian Community: Cultural Perspectives* (2000), 2.

accused within those of people who have experienced family violence more generally.

Admissibility of Expert Evidence on Family Violence

4.127 Consistent with views expressed in consultations, we believe this evidence is already admissible under current rules of evidence. However, we believe the significant probative value of this evidence in supporting a plea of self-defence or duress warrants its status being clarified in legislation. This will resolve any residual doubts that may exist about its relevance and admissibility. It may also encourage greater recognition by judges, lawyers and jurors of the range of issues that will be relevant to a plea of self-defence where the homicide has taken place against a background of prior abuse.

4.128 The expert evidence that might be relevant will vary from case to case. The matters the provision identifies should therefore be regarded as indicative only of the issues that are likely to be relevant in circumstances in which a history of violence has been alleged. It will be a matter for counsel to determine whether this evidence will, if called, be of assistance and if so, to what matters it may be of most assistance. The admission of this evidence will be subject to existing provisions requiring that the defence provide notice of any expert witnesses they intend to call, and the scope of the evidence.⁵⁴¹

4.129 While we have not made any specific recommendations to support the introduction of social framework evidence in other contexts, there is no reason why a basis could not be found to introduce this evidence in appropriate cases. For example, in circumstances in which the perpetrator of the abuse has killed his or her partner, the prosecution may wish to introduce expert evidence on family violence to explain the actions of the accused. This evidence might be introduced, together with evidence of prior violence, to challenge claims by the defendant that the harm caused was unintentional or due to a loss of self-control.

541 Under s 9 of the *Crimes (Criminal Trials) Act 1999*, the defence must, if intending to call a person as an expert witness at the trial, serve on the prosecution and file in court a copy of a statement of the expert witness at least 14 days before the day on which the trial is due to commence. The statement must contain the name and address of the witness; describe the qualifications of the witness to give evidence as an expert; and 'set out the substance of the evidence it is proposed to adduce from the witness as an expert, including the opinion of the witness and the acts, facts, matters and circumstances on which the opinion is formed'.

Clarifying Who is an Expert

4.130 Who may qualify as an ‘expert’ and what that person may give evidence about will depend on the qualifications and experience of the individual witness. We therefore do not propose to attempt to define who might be an ‘expert’ for the purposes of giving this evidence; but we would encourage the courts to give recognition to the broad range of individual and professional backgrounds that may qualify a person as an expert for these purposes.

4.131 The Commission endorses views of those consulted that people best qualified to give expert evidence on family violence are likely to include those with direct experience of working with people who have experienced family violence and with knowledge of current research in the field. If the accused is Indigenous, from another cultural background or was in a same-sex relationship, those who are likely to provide information of most use to a jury are likely to be people with direct experience of working with these communities.

Resources for Legal Practitioners and Expert Witnesses

4.132 The development of resources by relevant agencies and professional associations, such as the Office of Public Prosecutions (OPP), VLA and the Law Institute of Victoria, may also assist practitioners to identify: who might qualify as an expert on family violence; the sorts of questions that may be useful to establish a witness’s expertise at trial; and what kind of information should be provided to assist those who may not previously have prepared an expert report or appeared as an expert witness understand the nature of the evidence they are permitted to give, and what the emphasis of this evidence should be. The American Prosecutors Research Institute has developed an excellent resource on the use of experts in prosecutions of domestic violence crimes,⁵⁴² which may provide a possible model.

Abolition of the Common Knowledge Rule

4.133 Abolishing the common knowledge rule in Victoria would have significant implications beyond this reference. The CBA and VLA in their joint submission specifically opposed the abolition of the common knowledge rule in Victoria.⁵⁴³

542 The guidelines are available from the American Prosecutors Research Institute at <www.ndaa-apri.org/apri/programs/vawa/use_of_experts.html>.

543 Submission 27. The CBA and VLA suggested that the rule ‘prevents the prolongation of trials by the calling of unnecessary and irrelevant (or only marginally relevant) evidence’ and noted the use had not been a barrier to the admission of BWS evidence. The Commission believes family violence is a

We note views expressed in the roundtable evidence⁵⁴⁴ that the abolition of the rule under the Uniform Evidence Act has not caused any significant problems to date in the jurisdictions in which it operates, and may overcome some of the current barriers to the admission of this evidence. We recommend this be considered as part of the broader review of the law of evidence in Victoria recently announced by the Victorian Government in the *Attorney-General's Justice Statement*.

Implications of Introducing Expert Evidence at Trial

4.134 Some concerns were expressed in consultations that the introduction of expert evidence on family violence may lengthen trials and open the way for criminal trials for murder and manslaughter to become battlegrounds for experts. Expert evidence on BWS is already admitted in many cases in which women have killed their violent partners. In our view, the danger that without this evidence jurors will make decisions based on their misconceptions about the nature of family violence outweighs this risk.

4.135 The use of court-appointed experts, as suggested by some consulted, offers a possible solution. On the other hand, this approach carries with it certain risks. Importantly, it may prevent this evidence and its relevance to the circumstances of the accused from being properly tested. For this reason, we believe the introduction of social framework evidence should be left to the discretion of counsel.

Funding Issues

4.136 As a general concern, we are aware that the use of expert evidence about family violence in the context of a trial will raise funding issues. While some experts may be willing to provide their services on a *pro bono* basis, this will not always be possible or appropriate. It is a reality that many homicide accused are not able to privately fund their defence and therefore must rely on legal aid funding. Private practitioners are currently required to seek the written approval of VLA prior to engaging the services of an expert to prepare a report.⁵⁴⁵ Currently, the *VLA Handbook*, which sets out standard fees payable to experts for the preparation of a report and court attendance, refers only to fees payable to

matter outside of the experience of many people and therefore regardless of the common knowledge rule should already be admissible.

544 Roundtable 19 February 2004.

545 Victoria Legal Aid, *VLA Handbook* (12th ed) (2004) para 7.2, 112.

psychologists and psychiatrists.⁵⁴⁶ In our view, there should be a more expansive view taken of the sort of professionals who may qualify as an expert for these purposes. We would also encourage agencies such as the VLA and the OPP to establish arrangements with suitably qualified people working in the family violence sector so their expertise may readily be called upon in appropriate cases.

Use of Expert Reports at Sentencing

4.137 Finally, we see an important role for this evidence, not only at trial, but also at sentencing. For a number of reasons, many accused will choose to plead guilty to the charges, rather than proceed to trial.⁵⁴⁷ Just as jurors cannot be expected to intuitively know what it may be like for a victim of abuse and the nature and dynamics of violent relationships, judges may benefit from receiving information that will assist them to make sense of what has occurred when deciding on what sentence should be imposed.

4.138 A possible model is provided by NSW Legal Aid. Social workers in NSW Legal Aid's Client Assessment and Referral Unit are regularly engaged to prepare psycho-social reports and sentencing submissions for clients involved in criminal matters. In two recent cases involving women who killed their partners in the context of a prior history of violence and who chose to plead guilty to manslaughter, the manager of the unit, who has 17 years experience working in the social welfare field, including five years as a domestic violence counsellor, prepared reports for use in sentencing.⁵⁴⁸ Both reports included information on the nature and dynamics of violent relationships, the barriers to disclosure and the impact of violence on the individual defendants and their immediate families.

546 Ibid Fee Schedule 5.

547 See Chapter 3, paras 3.116–3.117.

548 Personal communication, Danielle Castles, NSW Legal Aid, 13 May 2004. The two cases for which these reports were prepared were *R v Yeoman* [2003] NSWSC 194 (Unreported, Supreme Court of NSW, Buddin J, 21 March 2003) and *R v Mercy* [2004] NSWSC 472 (Unreported, Supreme Court of NSW, Adams J, 19 April 2004). Justice Buddin in *Yeoman* commented that he found the psycho-social report prepared by Ms Castles of ‘considerable assistance’ (para 32), and quoted from it extensively in his sentencing remarks.

!

RECOMMENDATION(S)

34. A provision should be introduced to clarify that where self-defence or duress is raised in a criminal proceeding for murder or manslaughter and the accused alleges a history of family violence, the court should recognise that the following expert social context evidence may be relevant:
- the nature and dynamics of abusive relationships, including the possible consequences of separation from the abuser;
 - the psychological effects of abuse; and
 - social and economic factors that impact on people who are or have been in an abusive relationship.

(Refer to draft s 322P(1)(d)–(e) *Crimes Act 1958* in Appendix 4)

THE JUDGE'S CHARGE TO THE JURY**INTRODUCTION**

4.139 When a jury is dealing with complex issues, such as family violence, in addition to case-specific evidence, general information may also be provided to assist the jury. This information may be provided by the prosecution or defence calling an expert witness to give evidence,⁵⁴⁹ and referred to by the trial judge as part of his or her charge to the jury.

4.140 Those with expertise in family violence are clearly best placed to provide information on the nature and dynamics of family violence, and can tailor their evidence to the facts in issue and the individual circumstances of the accused. The trial judge can assist the jury to understand the relevance of the expert evidence to the facts in issue at the trial. In cases in which expert evidence is not led, the judge's charge to the jury will take on increased significance as a means of addressing jurors' possible misconceptions concerning family violence. Judges cannot give evidence, and generally must not intrude into the jury's fact-finding process. They cannot, therefore, stand in the shoes of the expert witnesses—and could not, even if they had the expertise. Keeping in mind these limitations, there may be a role for judges to play at trial in ensuring that the jury takes into account matters relevant to the facts in issue, and is not distracted by irrelevant issues.

549 For a discussion of the use of expert witnesses in this context, see paras 4.84–4.105.

TAKING VIOLENCE INTO ACCOUNT

4.141 In circumstances in which a person has killed in response to prior violence, one of the critical issues will be whether the judge directs the jury in such a way that allows the jury to take the cumulative effect of violence into account, rather than just the last attack or threat. In their submission, the Victorian Aboriginal Legal Services refer to an argument put by the former Chief Justice of the Victorian Supreme Court, Justice Phillips, in the *Inaugural Lesbia Harford Oration*:

In such cases where there is satisfactory evidence that the accused was involved with the deceased in a battering or abusive relationship, in my opinion, the focus of the Judge's directions ought to change. The last attack or threat should be dealt with as simply a component of the sum total of conduct directed against the accused by the deceased so that the accused is regarded as defending herself against the accumulation, the sum total, of the deceased's violence and abuse.⁵⁵⁰

4.142 This approach has been adopted in some cases. For example, Justice Derrington in *R v Stjernqvist*, a case involving a woman who had killed her violent partner after years of abuse, in his charge to the jury commented:

[W]hat emerges is necessarily a very sad picture of serious violence—not violence that has caused any great physical harm at any particular time, but violence of such a nature that, you might think, would be virtually intolerable, particularly if one had the view that it was going to be never-ending. To live in an atmosphere where there is a constant threat of violence, you might think, is a very hard thing and must be very emotionally wearing. And, of course, after a while it becomes a case where not only is there physical violence, but the mere endurance of the threat of violence also becomes a form of psychological violence as well.⁵⁵¹

4.143 The facts in *Stjernqvist* supported the view that the accused had shot her husband in the back following an argument. There was some question concerning whether her husband had made a particular threat prior to the shooting.⁵⁵² Justice

550 Justice John Harber Phillips, *Inaugural Lesbia Harford Oration* (1999) as cited in Submission 20.

551 Transcript of Proceedings (Unreported, Cairns Circuit Court, Derrington J, 18 June 1996) 153.

552 Under section 271(1) of the *Criminal Code Act 1899* (Qld), in order to raise self-defence, it is necessary to show that the accused was unlawfully assaulted. Section 245(1) defines an assault as the application of force without consent or an attempt or threat to apply force by a bodily act or gesture without consent, 'under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect the person's purpose'.

Derrington specifically left open the possibility that an ongoing threat might be sufficient to support the conclusion that the accused acted in self-defence:

...if you accept the evidence that he was making these threats [to kill the accused] over the years, not infrequently. Well, in that particular case, when we look at the occasion when she shot him, you then consider whether you feel that there was an existing threat by him.⁵⁵³

4.144 Justice Derrington also drew the jury's attention to the nature of the threat and alternative options to escape the abuse:

...ultimately in respect of the matter of self-defence, you are going to have to consider whether or not she could have avoided that [the threat of him finding her and killing her if she left] by simply staying with him; or whether the position was in effect becoming intolerable, where she could not really hope to survive in a fit state of physical and mental health if she had remained with him. In that case the threat of being killed would be very real. That is the way the reasoning goes. The extent to which you accept it is a question for you.⁵⁵⁴

4.145 In Chapter 3 we discussed some of the problems posed by preconceptions juries might have of who is 'deserving' of a defence. In the context of discussing problems with battered woman syndrome, Justice L'Heureux-Dubé in the Canadian case of *R v Malott* commented:

It is possible that those women who are unable to fit themselves within the stereotype of the victimized, passive, helpless, dependent, battered woman will not have their claims to self-defence fairly decided. For instance, women who have demonstrated too much strength or initiative...or women who might have fought back against their abusers on previous occasions, should not be penalized for failing to accord with the stereotypical image of the archetypal battered woman.⁵⁵⁵

4.146 There is some research to suggest that jurors may view a woman who has fought back against her abuser or behaved aggressively in the past less sympathetically.⁵⁵⁶ Judges may therefore in some cases play an important role in

⁵⁵³ Transcript of Proceedings (Unreported, Cairns Circuit Court, Derrington J, 18 June 1996) 173.

⁵⁵⁴ Transcript of Proceedings (Unreported, Cairns Circuit Court, Derrington J, 18 June 1996) 177.

⁵⁵⁵ [1998] 1 SCR 123, para 40.

⁵⁵⁶ See, for example, Regina Schuller and Sara Rzepa, 'Expert Testimony Pertaining to Battered Woman Syndrome: Its Impact on Jurors' Decisions' (2002) 26 (6) *Law and Human Behavior* 655, 669. This research found that participants who were presented with case scenarios in which the woman had fought back physically and/or verbally were less likely to believe her claim that she feared for her life

encouraging juries not to place undue emphasis on stereotypes—such as victims of abuse being passive—which may disadvantage an accused person who has killed in the context of prior violence in arguing self-defence.

SUBMISSIONS AND CONSULTATIONS

4.147 The Federation of Community Legal Centres' Violence Against Women and Children's Working Group were in favour of mandated directions to support a plea of self-defence. The joint submission of the Victorian Women's Trust and the Heather Osland Support and Action Group also supported the inclusion of directions in judges' bench books in cases involving family violence. Both submissions suggested the model direction provided in the Women Who Kill in Self-Defence Campaign submission to the Model Criminal Code Officers' Committee review of fatal offences as providing a good starting point. The model direction seeks to address many of the same myths and misconceptions about family violence discussed above.⁵⁵⁷ The Women's Legal Service Victoria favoured reference being made to factors which may impact on a victim of family violence and the linking of expert evidence to the elements of self-defence in the judge's charge to the jury.⁵⁵⁸

4.148 Support for the provision of some guidance to judges on relevant issues was also expressed during consultations, although the majority of those consulted did not favour the introduction of prescribed directions.⁵⁵⁹ In particular, it was considered that the way in which the trial judge might relate expert evidence to the facts in issue might be quite complex and, therefore, retaining some degree of flexibility in how this is approached in an individual case was desirable.⁵⁶⁰

and she believed the force was necessary, and more likely to believe she had other options than in the passive response scenarios. Jurors also rendered harsher verdicts in these cases. Cf Regina Schuller and Patricia Hastings, 'Trials of Battered Women Who Kill: The Impact of Alternative Forms of Expert Evidence' (1996) 20 (2) *Law and Human Behavior* 167, in which it was found: 'Overall, the woman's prior response to the violence in her relationship (passive vs active) had little impact on the decision process': at 184.

557 Submission 16 citing Women Who Kill in Self-Defence Campaign, 'Submission to the Model Criminal Code Officers Committee Review of Fatal Offences Against the Person' (August 1998) and Submission 14, which supported the factors listed at para 4.131 of Victorian Law Reform Commission's Options Paper (2003), above n 403, together with reference to 'the accused's knowledge of the available legal protections for him or her and their likely effectiveness to protect him or her from the violence'.

558 Submission 14.

559 Roundtables 24 February and 1 March 2004.

560 Roundtable 1 March 2004.

THE COMMISSION'S VIEW AND RECOMMENDATIONS

JURY DIRECTIONS ON VIOLENCE

4.149 The Commission does not favour legislating to require a set jury direction to be delivered when a history of violence is raised. The Commission accepts that a ‘one size fits all’ approach to jury directions will not allow sufficiently flexibility. Moreover, we think that a standard charge suffers from the fundamental difficulty of the trial judge intruding into territory which belongs exclusively to the jury. But it is in many cases vital, if the trial is to be fair, that relevant matters be brought to the jury’s attention. In our view, this should be the role of social framework evidence, and of the experts who are appropriately qualified to give it. The trial judge will play an important role in highlighting the relevance of a history of abuse, and of the social framework evidence, to the particular facts in issue in the case. However, in the absence of such evidence, the trial judge may usefully make reference, where a history of violence has been alleged and self-defence is raised at trial, to issues such as:

- the immediacy of the threat—alerting the jury that an ongoing threat of serious harm may be sufficient to support self-defence;
- the availability of alternative options to escape the abuse—highlighting the options realistically available to escape the abuse, and the accused’s perceptions of how effective they might be in preventing future harm;
- the proportionality of the response—taking into account any disparity in size and strength between the accused and the deceased and the cumulative effect of the violence, and reinforcing that a person is justified in using such force as is reasonably necessary to protect himself or herself, regardless of whether it is strictly proportionate to the threatened harm;
- the coexistence of emotions such as hate and fear—explaining that many victims of abuse may experience mixed emotions, and that the relevant issue is whether the person at the time was also acting out of fear for his or her life;
- the irrelevance of the existence of behaviours that are inconsistent with the stereotype of a typical helpless battered woman to the issue of whether the accused acted in self-defence—for instance, many women who are subjected to physical violence may fight back but this does not mean their actions were not carried out in self-defence.

JURY DIRECTIONS ON EXPERT EVIDENCE

4.150 Where expert evidence is introduced, the trial judge should also assist the jury to make the connections between the expert evidence and the issues at trial. We note the Canadian Supreme Court has held that once self-defence is raised and expert evidence is introduced,⁵⁶¹ the jury must be informed by the trial judge as to how that evidence may be of use in understanding:

1. Why an abused woman might remain in an abusive relationship...
2. The nature and extent of the violence that may exist in a battering relationship...
3. The accused's ability to perceive danger from her abuser...
4. Whether the accused believed on reasonable grounds that she could not otherwise preserve herself from death or grievous bodily harm.⁵⁶²

4.151 We see no need to mandate such a requirement, but would encourage the adoption of this approach as a matter of good practice.

4.152 The Commission notes that the issues discussed above are not addressed in any bench book or similar resource currently available to Victorian judges. This seems to us to be regrettable. We recommend that consideration be given to incorporating, in an appropriate publication, some guidance on these issues. For example, broad principles might usefully be included in the *Victorian Trial Manual*, currently being updated by the Judicial College of Victoria (JCV), or included as a resource page on the JCV's website.

561 The expert evidence in this case was of BWS.

562 *R v Malott* [1998] 1 SCR 123, para 20. Cf *Osland v The Queen* (1998) 197 CLR 316, 338, Gaudron and Gummow JJ and 381, Kirby J, in which the High Court rejected an argument that the trial judge should have given more detailed directions to the jury on the relevance of expert evidence on BWS. Justices Gaudron and Gummow commented: 'It need hardly be said that there is an obligation on counsel to make clear to the jury and the trial judge the precise manner in which they seek to rely on expert evidence of battered wife syndrome and to relate it to the other evidence and the issues in the case. In circumstances where evidence of battered wife syndrome is given in general terms, is not directly linked to the other evidence in the case or the issues and no application is made for any specific direction with respect to that evidence, it cannot be concluded that the trial judge erred in not giving precise directions as to the use to which that evidence might be put': 338.

FAMILY VIOLENCE AWARENESS AND EDUCATION

INTRODUCTION

4.153 While community knowledge and awareness about family violence is improving,⁵⁶³ there is still widespread misunderstanding about the nature of violent relationships. A number of participants in consultations with the Commission identified the diversity of abusive behaviours, patterns of abuse and continuum of violence as some of the more commonly misunderstood aspects of family violence. It was suggested that many people think of family violence simply in terms of physical violence, and as a discrete series of incidents involving physical violence rather than a pattern of abuse and control.⁵⁶⁴ Some of the commonly held myths and misconceptions concerning family violence have been discussed above.

4.154 In Chapter 3 of our Options Paper we suggested that one way of addressing misconceptions about what self-defence ‘really’ is would be through the provision of education for members of the judiciary and legal profession, to assist them to understand the dynamics of family violence.⁵⁶⁵ A proper understanding by police, legal practitioners and judges of family violence and its interrelationship with the use of fatal force would have a significant impact at a number of stages in the legal process, including:

- at the preliminary interview and investigation stage—investigators who understand the relationship between family violence and homicide are more likely to identify the relevance of a prior history of abuse between the accused and the deceased, ask the accused relevant questions, and ensure proper supporting evidence is gathered, including statements from those who have witnessed, or been told about, the violence;
- pre-trial—to assist both defence counsel and prosecutors in the preparation of matters for trial and to support the making of decisions by the OPP relating to charges and pleas;
- at trial—ensuring evidence of prior abuse and other relevant issues is introduced, that appropriate rulings are made by the trial judge concerning

563 See n 540.

564 See, for example, Roundtable 24 February 2004.

565 Victorian Law Reform Commission (2003), above n 403, para 4.217.

- its admissibility and use, and that the relevance of this evidence is properly communicated to the jury;
- at sentencing—allowing the judge to better assess how a history of abuse and the circumstances of the killing may affect the accused's level of culpability, and take this into account in setting the appropriate penalty.

EXISTING PROFESSIONAL DEVELOPMENT AND EDUCATION PROGRAMS

JUDGES

4.155 The three bodies that are principally concerned with ongoing professional development of judicial officers in Victoria are the National Judicial College of Australia (NJCA), the Australian Institute of Judicial Administration (AIJA) and the Judicial College of Victoria. Both the NJCA and JCV were established in 2002. Professional development is also offered through annual conferences and regular meetings of committees established within the courts.

4.156 Under the Women's Safety Strategy released in 2002, a commitment was made by the Department of Justice to work in partnership with the JCV to develop gender-related and inter-cultural training programs and resource materials for judicial officers in Victoria.⁵⁶⁶ The JCV's program for 2004 includes a workshop on sexual offences, a Vietnamese cultural awareness workshop and an Indigenous cultural awareness two-day residential program.⁵⁶⁷ Attendance at these workshops is not compulsory.

4.157 The programs offered by the JCV are set by the college board on recommendations made by the Syllabus Advisory Committee. Submissions to the committee are made by education committees in each jurisdiction, comprising judicial officers with an interest in judicial education.

LEGAL PRACTITIONERS

4.158 A continuing professional development scheme has been introduced for solicitors in Victoria, and a continuing legal education scheme for barristers.⁵⁶⁸

566 Office of Women's Policy, *Acting on the Women's Safety Strategy* (2002), 11.

567 A Vietnamese cultural awareness session took place on 21 May 2004. An Indigenous cultural awareness program was scheduled for 22–24 October 2004. The program is being run in conjunction with the Judicial Officers' Aboriginal Cultural Awareness Committee.

568 *Continuing Professional Development Rules 2004* were introduced in Victoria for solicitors by the Victorian Lawyers RPA Ltd (now the Law Institute of Victoria Limited) under s 72 of the *Legal*

Practitioners are required to accumulate units, which can be earned by participating in approved seminars, workshops and conferences.⁵⁶⁹ Seminars and workshops are offered by a range of approved bodies.

4.159 VLA provides induction training and professional development for all staff and solicitors, including on issues related to family violence. While much of this training is run in-house by the VLA, on occasion staff have attended external training and other organisations, including the Domestic Violence and Incest Resource Centre and Centre Against Sexual Assault, have been invited to participate in training sessions. The VLA ran a half-day workshop on family violence in November 2003 facilitated by a clinical practice leader with Relationships Australia (Victoria). This training was aimed at assisting lawyers to deal appropriately with clients affected by family violence, communicate more effectively with alleged perpetrators and victims of violence, and deal with referral issues. A professional legal education seminar on family violence intervention orders was planned for September 2004.⁵⁷⁰

4.160 The OPP also regularly runs professional development activities and encourages staff to participate in other activities—in 2003 OPP staff attended a session on the management of cases involving family violence. As part of its bi-monthly seminars on recent Court of Appeal decisions, issues relating to family violence are discussed in the context of decisions relating to homicides and serious assaults between family members. Other workshops and conferences held throughout the year, such as the forum on Homicides in the Context of Violence Against Women held by the Commission in December 2003, also qualify as part of the OPP's continuing professional development program.⁵⁷¹ A continuing legal education seminar program is also offered to barristers through the Victorian Bar association, with a focus on practice related issues.

Practice Act 1996. The Bar Council introduced similar rules requiring barristers to participate in professional development activities, the *Compulsory Continuing Legal Education Rules 2004*, also pursuant to s 72.

- 569 A number of other activities also qualify for the award of professional development and legal education points; see Rule 1.1–1.11 in the *Continuing Professional Development Rules* and Rules 3–9 in the *Compulsory Continuing Legal Education Rules 2004*.
- 570 Personal Communications, Chris Thwaites, Training Manager, Victoria Legal Aid (18 May 2004 and 31 August 2004).
- 571 Personal Communication, Brett Sonnet, Manager, Continuing Professional Development, Office of Public Prosecutions (2 June 2004).

VICTORIA POLICE

4.161 Victoria Police offers a range of training and professional development activities on family violence.⁵⁷² New recruits undertake four six-hour units on family violence and a one-day practical assessment in responding appropriately to family violence incidents. Ongoing professional development training offered includes one day of specialist training by the Family Violence and Sexual Offences and Child Abuse Unit; operational and tactics training, which includes a two-hour segment on family violence policy and procedures; and training delivered by the Family Violence Unit for Family Violence Liaison Officers and operational Sergeants. A two-week training course is also being developed to meet the recommendations in the *Violence Against Women Strategy: A Way Forward*.⁵⁷³ The strategy recommended that training in the management of family violence be reviewed and broadened by Victoria Police, including to 'educate members in the dynamics of family violence situations' and 'enhance members' evidence gathering and investigative techniques in family violence incidents'.⁵⁷⁴

4.162 One of the important recommendations in the strategy was the development of a code of practice aimed at improving police responses to family violence.⁵⁷⁵ The code was launched in August 2004. It places increased emphasis on documenting initial attendances, recording what the victim has reported, interviewing witnesses and collecting other evidence which may assist in the investigation.⁵⁷⁶ This could help to prevent violence escalating to the point where someone is killed. It also has the potential to improve the quality of information about prior complaints available to police investigating homicide matters.⁵⁷⁷

4.163 In consultations on the Options Paper, representatives of the Victoria Police Homicide Squad said the current practice in the squad is to investigate all issues relevant to the homicide to present a more balanced picture of what has

572 The information in this section of the report was sourced from a report prepared by Wendy Clancy on behalf of the Domestic Violence and Incest Resource Centre for the Professional and Community Education Subcommittee of the Victorian Statewide Steering Committee to Reduce Family Violence: Domestic Violence and Incest Resource Centre, *Mapping and Evaluation of Family Violence Education and Training for Key Occupational Groups Part A Report* (2004).

573 Victoria Police, *Violence Against Women Strategy: A Way Forward* (2002).

574 Ibid 6, Recommendation 4.

575 Ibid 6, Recommendation 7.

576 Victoria Police, *Code of Practice: For the Investigation of Family Violence* (2004).

577 This observation was made at the forum held on 5 December 2003 and the Roundtable held on 1 March 2004.

occurred.⁵⁷⁸ In circumstances in which allegations of prior violence had been made by the accused or the deceased's family or friends, they said all efforts are made to ensure that supporting evidence, including statements from witnesses and those the accused or deceased may have told about the violence, are included in the brief of evidence provided to the OPP.

SUBMISSIONS AND CONSULTATIONS

4.164 Many of those consulted by the Commission stressed the need for legal practitioners and members of the judiciary to have a better understanding of the nature and dynamics of family violence and its effects.⁵⁷⁹ Without this knowledge, practitioners and judges may be in danger of relying on the same myths and misconceptions about family violence as the broader community, and so may fail to recognise the relevance and importance of evidence that is necessary if the actions of the accused are to be understood.

4.165 Dr Patricia Easteal, referring to her conclusions in *Less Than Equal: Women and the Australian Legal System*, submitted:

It is clear...that changing practitioners' attitudes has to be a part of the process of law reform...Law school (and College of Law) curriculum must mainstream gender and other intersectionality issues into their core subjects. Further, workshops on these subjects should be a part of ongoing accreditation programs with mandatory attendance.⁵⁸⁰

4.166 The Women's Legal Service Victoria, in its submission on the Options Paper, considered education essential:

From our experience the dynamics of family violence are outside the understanding even of judicial officers who deal with family violence cases on a daily basis...Judicial and professional education should...be undertaken regarding the realities of family violence so that lawyers preparing cases will be more likely to 'pick up on' the appropriate defence to run in a case arising from family violence (i.e. generally self-defence) and ensure that proper evidence is led to substantiate the defence. Judicial education will ensure that judges hearing social framework evidence are already aware

578 Roundtable 11 December 2003.

579 For example, Forum 5 December 2003.

580 Easteal (2001), n 495, 234–235 as cited in Submission 29.

of the likely content of the evidence and can give it proper weight in their charge to the jury.⁵⁸¹

4.167 The Federation of Community Legal Centres' Violence Against Women and Children Working Group also saw a need for training and professional education on domestic violence for police, prosecutors and members of the judiciary:

Victoria Police and public prosecutors should be trained about domestic violence and in particular domestic homicides. They should be trained about the social context of these phenomena... Given that research shows that the problems for women in using self-defence in trials is the application of the law by trial judges, it is critical that judges first be educated about domestic violence before then be */sic/* required to provide information to the jury about domestic violence.⁵⁸²

4.168 However, the CBA and VLA in their joint submission were of the view that:

Defence lawyers need no education in understanding [the] interrelationship [between domestic violence and self-defence]. It is part of the job of defence counsel to consider all available defences on behalf of clients and no encouragement is needed to do such. The wider response to the question is that the community at large needs to be educated about the problem of domestic violence. Governments should provide adequate resources for battered women and ensure appropriate police responses. Society should abhor domestic violence, and the criminal justice system should be the last stop in solving the problem.⁵⁸³

THE COMMISSION'S VIEW AND RECOMMENDATIONS

Is PROFESSIONAL EDUCATION ON FAMILY VIOLENCE NECESSARY?

4.169 We believe that professional education on the broader social context in which homicide occurs is essential to the effective operation of defences and informed decisions being made concerning pleas and sentencing. The issue of legal education goes beyond whether defence lawyers and members of the judiciary understand the relevance of a history of violence to self-defence—the dynamics

581 Submission 14.

582 Submission 16. See also Submissions 10, 11, 18, which support some form of professional legal and community education on family violence and to improve women's access to self-defence.

583 Submission 27, para 4.52.1.

and nature of family violence, and social circumstances of people in violent relationships, are generally not well understood. Professional education may assist to overcome the myths and stereotypes that we all share, and increase understanding by legal practitioners and judges about the nature of violent relationships and their long-term effects.

PROFESSIONAL EDUCATION FOR JUDGES AND LEGAL PRACTITIONERS

4.170 Some positive steps have already been taken towards better professional education and training for judges and legal practitioners in Victoria. The JCV has only been operating for a short period of time and has already instituted some important programs. We congratulate it for the work done to date and support the continuation of the program. We recommend that consideration be given in future programs to sessions exploring issues related to gender and ethnicity, including the impact of family violence. The JCV may be assisted in developing these programs by consulting with organisations with expertise in working in the area of family violence, including organisations with a good understanding of the additional issues that may be faced in culturally and linguistically diverse communities, Indigenous communities, and rural communities, by people with disabilities and those in same-sex relationships.

4.171 We note that the AIJA is undertaking preliminary work for a research project on jury directions. When this research is completed, findings on the effectiveness of jury directions could also usefully be included in the information provided to judges in the JCV program.

4.172 The introduction of a formal continuing professional development scheme for solicitors, and a continuing legal education scheme for barristers, in Victoria is also a promising development. We acknowledge that as programs are developed by individual training providers, it is up to them to determine what is offered. However, the Commission would like to encourage all bodies which offer seminars and lectures for continuing professional development purposes to include sessions on issues related to family violence. Such sessions might be run by engaging consultants with relevant expertise or by forming partnerships with organisations with direct experience of working in the area of family violence, who could participate in the development of these programs. For instance, the Domestic Violence Incest and Resource Centre provides a variety of family violence training to workers in the community and health sectors across Victoria, including a nationally accredited Introduction to Domestic Violence course. Such seminars could also explore how expert evidence on family violence might be

introduced at trial to support a plea of self-defence, and the use of expert reports on family violence and its effects in sentencing.

PROFESSIONAL EDUCATION FOR POLICE

4.173 The Commission also commends Victoria Police on the leadership and commitment it has demonstrated to improving current responses to family violence, including through ongoing professional education and training. It is important that current practices adopted by the Homicide Squad when investigating homicides between intimate partners are supported, and that all members of the squad continue regular training on the nature and dynamics of family violence, and the close association between domestic homicides and family violence. The Commission encourages Victoria Police to include in any future training a discussion of both the general nature and dynamics of abusive relationships, and the particular barriers and issues faced by people experiencing violence from different cultural backgrounds, people with disabilities, people in same-sex relationships and people living in rural and remote regions of Victoria in disclosing abuse and accessing effective assistance.

OTHER RECOMMENDATIONS

4.174 We further encourage all training providers to adopt a continuous improvement approach to ensure the nature of family violence is properly understood and taken into account. Ideally this training should be ongoing and regular, rather than ad-hoc.

4.175 We understand that the Professional and Community Education Subcommittee of the Victorian Statewide Steering Committee to Reduce Family Violence⁵⁸⁴ has recently completed a project to map family violence education and training available to key occupational groups in Victoria.⁵⁸⁵ We believe this work may play an important role in informing the implementation of the recommendations made below.

584 This committee has been established under the Women's Safety Strategy, coordinated by the Office of Women's Policy, Department for Victorian Communities. The Statewide Steering Committee to Reduce Family Violence is co-chaired by Victoria Police and the Office of Women's Policy.

585 The first report was completed by Wendy Clancy on behalf of the Domestic Violence and Incest Resource Centre for the Professional and Community Education Subcommittee of the Victorian Statewide Steering Committee to Reduce Family Violence in February 2004: Domestic Violence and Incest Resource Centre, *Mapping and Evaluation of Family Violence Education and Training for Key Occupational Groups Part A Report* (2004).

4.176 Clearly the prevention of domestic homicides through improving responses and resources and broader community education is a priority. The Commission will be exploring these issues further in the context of our reference on the *Crimes (Family Violence) Act 1987*.

!**RECOMMENDATION(S)**

35. Bodies which offer continuing professional development or judicial education, including Victoria Legal Aid, the Law Institute of Victoria, the Office of Public Prosecutions, the Victorian Bar and the Judicial College of Victoria should include sessions on family violence.
36. Professional legal education sessions on family violence should aim to assist judges and lawyers practising in criminal law to understand the nature of family violence and could include discussion of issues such as:
 - common myths and misconceptions about family violence;
 - the nature and dynamics of abusive relationships;
 - the social context in which family violence occurs;
 - barriers to disclosure of abuse and seeking the assistance of police and other service agencies, including the additional barriers faced by persons who are Indigenous, from a culturally and linguistically diverse background, who live in a rural or remote area, who are in a same-sex relationship, who have a disability and/or have a child with a disability;
 - the emotional, psychological and social impact of family violence;
 - the relationship between family violence and other offences, including murder and manslaughter;
 - how expert evidence about family violence may assist in supporting a plea of self-defence or duress;
 - the use of expert reports on family violence in sentencing.

Chapter 5

People with Mentally Impaired Functioning who Kill

INTRODUCTION

5.1 In the *Defences to Homicide Options Paper*, the Commission recognised the difficulties which arise in determining the criminal responsibility of people with mentally impaired functioning. There are problems in ensuring that the law can accurately identify cases where an accused person's mental condition has removed or reduced the criminal responsibility for his or her actions, while also ensuring that those who should be held criminally responsible are not able to abuse the law to exculpate themselves. The kinds of mental conditions which should be regarded as sufficient to excuse a person from criminal responsibility are a matter for ongoing debate. The nature of mental condition defences also varies from jurisdiction to jurisdiction.

5.2 In relation to the insanity defence, the majority of formulations still focus upon cognition—that is, whether an accused's mental condition affected his or her ability to understand what he or she was doing. For some critics this cognitive requirement is too restrictive. In the jurisdictions which recognise a partial excuse of diminished responsibility, the focus has been on 'substantially impaired capacity' due to 'abnormality of mind'. Both are imprecise concepts open to interpretation and abuse. In cases of insane and non-insane automatism, there are a number of tests that distinguish conditions which are symptomatic of a mental condition from those which are not—many argue these tests are complex and unhelpful and that consequently the law in relation to automatism is flawed.

5.3 Throughout this reference, the Commission has tried to encourage discussion about current and prospective mental condition defences to better understand the key practical and conceptual issues in relation to reforming the law. A range of options for mental condition defences were discussed during our consultations. The Commission held four roundtable discussions between the end of 2003 and beginning of 2004. The roundtables were attended by a range of

participants, including advocates for people with mental illness, forensic psychiatrists, academics and barristers.⁵⁸⁶

5.4 In this Chapter we set out the Commission's final recommendations in relation to mental impairment, diminished responsibility and automatism, along with the Commission's reasons for reaching these recommendations. We also set out a brief overview of each defence, a review of reform options and a summary of the arguments and views which emerged through the consultation process. We look first at mental impairment.

MENTAL IMPAIRMENT

5.5 Four main questions have emerged over the course of the reference in relation to the mental impairment defence.

- Should the current formulation of the mental impairment defence be changed?
- Should the nominal term for disposition of mentally ill offenders be removed or reduced?
- Should the current 'by consent' procedure for dealing with mental impairment cases be reformed?

Each of these questions will be dealt with in turn.

CHANGING THE FORMULATION OF MENTAL IMPAIRMENT

5.6 The Commission has decided to leave the current defence of mental impairment substantially unchanged. Before we explain why we have taken this approach we first outline the defence of mental impairment and discuss the principal criticisms of its current formulation and the views which emerged through consultations.

THE CURRENT FORMULATION OF MENTAL IMPAIRMENT

5.7 The current mental impairment defence was introduced in 1997 as part of the Crimes (Mental Impairment and Fitness to be Tried) Act (CMIA). The CMIA replaced the old common law defence of insanity and the governor's pleasure system of indefinite detention of people who commit crimes while mentally ill, with a new mental impairment defence and a new regime for

586 A full list of participants is available at Appendix 1.

managing mentally ill offenders.⁵⁸⁷ The current mental impairment defence is contained in section 20 of the CMIA and requires the following elements to be proven on the balance of probabilities:

- that the accused was suffering from a mental impairment; and
- that the mental impairment affected the accused so he or she either did not understand the nature and quality of his or her conduct, or did not know that it was wrong.

5.8 This statutory test is similar to the old common law defence of insanity, which required an accused to be suffering from a 'defect of reason from disease of the mind' such that he or she did not know the nature and quality of his or her act or that it was morally wrong.⁵⁸⁸

5.9 Under the CMIA, if the defence does not raise the defence of mental impairment it is open to the prosecution, with the leave of the trial judge, to raise it. It is also possible for the trial judge to put the defence to the jury if there is sufficient evidence, regardless of whether it has been raised by either of the parties.⁵⁸⁹

5.10 Because there is a general presumption of sanity,⁵⁹⁰ the onus of proof is on the party who raises the defence. This would ordinarily mean that the defence would bear the burden of rebutting the presumption with evidence of a mental impairment. If the prosecution raises the issue of mental impairment it must call expert evidence in support of it. The question of whether an accused was suffering from a mental impairment is determined by the jury on the balance of probabilities.⁵⁹¹

587 Part 5 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (hereafter CMIA) deals with disposition of mentally ill offenders, and the operation of these provisions is discussed below in relation to the operation of the nominal term see 5.50–5.55.

588 This formulation was set out by the House of Lords following the trial of Daniel M'Naghten (1843) 8 ER 718 and consequently the formulation is often called the M'Naghten test. The two-stage requirement that the accused be unable to know the nature and quality of his actions or that they were wrong is often called the 'M'Naghten elements'.

589 CMIA ss 22(1), (2).

590 CMIA s 21.

591 CMIA s 21.

CRITICISMS OF THE CURRENT FORMULATION OF MENTAL IMPAIRMENT

5.11 A number of criticisms have been made of the current mental impairment defence:

- There is currently no definition of the term ‘mental impairment’. This makes it unclear which mental conditions fall within the scope of the defence.
- The current defence means that some people who had a mental condition when they committed the crime are excluded.
- The defence does not reflect medical understanding of mental illness and the way that it can affect people.

Each of these criticisms requires a brief explanation.

No DEFINITION OF MENTAL IMPAIRMENT

5.12 The lack of a definition of mental impairment in the legislation creates a lack of clarity about what kinds of illnesses the term might include. To date, the tendency has been to interpret the term restrictively by reference to the common law defence of insanity and the notion of a ‘disease of the mind’.⁵⁹² This is in spite of the fact that the legislation itself explicitly abolishes the common law defence of insanity.⁵⁹³ There have been attempts to interpret the meaning of mental impairment more broadly in relation to non-homicide offences, as well as in relation to homicide offences.⁵⁹⁴ However, it seems that even if the scope of mental impairment were to be expanded, the other requirements of the defence would continue to ensure it had a narrow application.

592 In Australia, an early statement of the defence was set out in *R v Porter* [1933] 55CLR 182. Recent cases have confirmed the preference of the court to interpret the term ‘mental impairment’ by reference to the common law defence of insanity: see *The Queen v R* [2003] VSC 187 (Unreported, Supreme Court of Victoria, Teague J, 5 March 2003). In *The Queen v R* the court drew upon the Attorney-General’s second reading speech in relation to the Crimes (Mental Impairment) Bill to support the position that the mental impairment defence was intended to be a restatement of the common law and that the definition of ‘mental impairment’ should therefore be based on the common law notion of a ‘disease of the mind’. This was also the view expressed in *R v Sebalj* [2003] VSC 181 (Unreported, Supreme Court of Victoria, Smith J, 5 June 2003). *Sebalj* is discussed in detail at para 5.36.

593 CMIA s 25.

594 This occurs rarely. See, however the case of *The Queen v Gemmill* [2004] VSC 30, in which it was argued, albeit unsuccessfully, that a major depression suffered by the accused was a mental impairment sufficient to raise the defence.

THE CURRENT FORMULATION IS TOO NARROW

5.13 However broadly the term ‘mental impairment’ might be interpreted, the defence will continue to be narrowly applied due to the remaining requirements of the defence. The requirement in section 20 of the CMIA, that the accused either not understand the nature and quality of what was done or that it was wrong, codifies the so-called ‘M’Naghten elements’ which form part of the common law defence of insanity.⁵⁹⁵ Although these requirements have been modified to some degree in their legislative form,⁵⁹⁶ they nevertheless operate to restrict the defence significantly. The result is that the defence is mainly available to accused who were suffering from psychosis at the time of the killing. It was clear from the Commission’s homicide prosecutions study that there were many more accused who had some form of mental illness than raised the defence of mental impairment.

DEFENCE DOES NOT REFLECT MEDICAL UNDERSTANDING ABOUT MENTAL ILLNESS

5.14 The view that the mental impairment defence is too narrow stems from an argument that it does not properly reflect medical understandings of mental illness. The criticism has existed since the insanity defence was first developed and has been made by both lawyers and psychiatrists. Mental illness covers a broad range of individual conditions which are not reflected within the strict requirements of the legal test. A person may be severely mentally ill and yet be able to understand and reason about what they are doing. Indeed, it is arguable that in certain cases even persons suffering from psychosis may understand what they are doing and that it is wrong. Individuals suffering from command hallucinations, for example, may be able to understand what they are doing and that it is wrong, and yet be so driven by particular delusions that they are unable to stop themselves from committing a murder.

CONSULTATIONS AND SUBMISSIONS

5.15 The Commission’s Options Paper set out a number of possible options for reform of the mental impairment defence. Options included providing a clearer

595 See para 5.7 and above, n 588.

596 The defence of mental impairment requires that the offender be unable to reason ‘with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people was wrong’. This additional wording is essentially a legislative enactment of the Australian test for insanity as set out in *R v Porter* [1933] 55 CLR 182, 190.

definition of mental impairment and/or altering or abolishing the M'Naghten elements. Another option was to keep the current definition and add a 'volitional element' which would excuse an accused where it could be shown that due to mental impairment the accused was unable to control himself or herself. We set out the response to these options in consultations below.

DEFINING MENTAL IMPAIRMENT

5.16 The Commission considered a number of possible definitions in the Options Paper. The definitions fit into two broad categories—those which are based upon the common law and those which attempt to provide more precise, clinical or diagnostic criteria.⁵⁹⁷

5.17 The Mental Health Legal Centre argued strongly for a definition of mental impairment to be added to the defence in order to extend its availability. The Centre favoured definitions which listed conditions or particular diagnostic indicators of disorders.⁵⁹⁸ The overwhelming view expressed through consultations, however, was that mental impairment should not be defined. This view was held for a number of reasons. The Commission found two particularly persuasive.

The Lack of Definition Provides Flexibility

5.18 It was argued in roundtables and written submissions that the lack of formal definition provides the defence with considerable flexibility.⁵⁹⁹ In contrast, having a list of prescribed illnesses or characteristics of illnesses may restrict the defence unnecessarily.⁶⁰⁰ It was also pointed out that it was the M'Naghten elements of the defence, rather than the meaning of mental impairment, that determines the boundaries of the defence and not the particular features of any mental illness.⁶⁰¹

597 Victorian Law Reform Commission (2003), above n 3, Table 17, 188.

598 The definitions supported by the Mental Health Legal Centre included the ACT definition, the Victorian Mental Health Act definition and the definition suggested by the Community Development Committee in its review of the governor's pleasure system. See *ibid*, 188 for a table summarising the various definitions of mental illness and impairment.

599 Submission 26; Roundtable 25 November 2003.

600 Submission 21.

601 Submission 26.

Use of Diagnostic Criteria is Inappropriate

5.19 There was strong opposition to the introduction of a diagnostic definition of mental impairment since medical knowledge about mental illness is constantly changing.⁶⁰² For example, using such tools as the Diagnostic and Statistical Manual of Mental Disorders (DSM IV) to develop a list of diagnostic criteria would be misguided since these are not designed to be used in the legal context, as the manual points out.⁶⁰³ Such diagnostic tools evolve and change over time.⁶⁰⁴ The Commission agrees it would be foolish to base a legal definition on such mutable sources.

ABOLISHING OR REFORMING THE M'NAUGHTEN ELEMENTS OF THE DEFENCE

5.20 Two main approaches were considered by the Commission in relation to the M'Naughten elements. The first was the abolition of the elements in favour of a completely reformulated defence, the second was to retain but reform the elements.

5.21 Associate Professor McSherry, argued in her submission to the Commission, that the inability to reason should be the focus of a mental condition defence rather than the capacity to distinguish between right and wrong or understand the nature and quality of an act. She argued that people who experience a ‘significant disturbance of thought or perception’ should be excused and that the focus should be on an ‘inability to engage reality’. She proposed the following alternative formulation:

A person is not criminally responsible for an offence if he or she was suffering from mental impairment at the time of the commission of the offence such that his or her ability to reason was substantially impaired.⁶⁰⁵

5.22 According to Professor McSherry, this formulation has the advantage of excluding psychopathy and personality disorder—something which she views as a distinct advantage. Professor McSherry argued that mental impairment ought not

602 Submission 21, Roundtables.

603 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed) (2000), xxxii–xxxiii.

604 Indeed, as mentioned by Forensicare in its submission to the Commission (Submission 21), the manual’s fifth edition is due to be published soon.

605 Submission 12.

and need not be defined because setting out specific symptoms may not take into account the changing nature of diagnostic criteria.

5.23 The overwhelming response from submissions and consultations, however, was that the M'Naghten elements should be retained unchanged.⁶⁰⁶ There were a number of reasons put forward for this view. The Commission found three particularly convincing.

The Formulation Works Well In Practice

5.24 In consultations and roundtables, the view was expressed that the M'Naghten rules worked well in practice. Although the gap between legal and psychiatric conceptions of mental illness was acknowledged, it was argued that the current tests provide relatively clear guidance as to the stage at which mental illness removes culpability. This is understood by both psychiatrists and lawyers.⁶⁰⁷ To broaden the defence would make it very difficult to decide where to draw the line between culpability and lack of culpability.⁶⁰⁸

The Formulation Is More Flexible Than It Appears

5.25 It was also pointed out that the M'Naghten elements are more flexible than they first appear. The requirement in the CMIA that the accused be unable to reason 'with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong'⁶⁰⁹ has in practice allowed the M'Naghten elements to be applied and interpreted flexibly.⁶¹⁰ The example of a person experiencing command hallucinations who understood what he or she

606 One other submission, prepared by Dr Stephen Matthews, also argued for the abolition of the M'Naghten elements: Submission 1. Dr Matthews proposed an alternative test of 'failed agency'. The test retains M'Naghten-like cognitive elements and adds a volitional component, but rather than connecting them with a particular mental illness, uses them as elements to establish the test for a failure of agency. Dr Matthews argued that it is the failure of agency rather than the empirical cause of that failure, ie mental illness, which should be the focus of the defence, as it is this and not the particular illness which forms the basis of moral exculpation. Although Dr Matthews sets out his alternative as a replacement for the M'Naghten elements, in practice it seems more like an argument for the removal of any mention of or definition of mental impairment or insanity.

607 Submission 21.

608 Roundtable 2 December 2003.

609 CMIA s 20(1)(b).

610 Roundtable 25 November and 2 December 2003.

was doing and that it was wrong was used to illustrate the point. It was argued that such a person would probably still come within the defence.⁶¹¹

Changing The Defence Is Unlikely To Make A Difference In Practice

5.26 Forensicare's submission pointed to research done in the United States which demonstrated that the formulation of the insanity defence had no impact upon the frequency of successful insanity pleas.⁶¹² A variety of different studies have been done in the United States comparing acquittal rates between juries provided with different insanity instructions. The research revealed that while there was a difference in acquittal rate between different types of cases—that is, the particular disorder which had affected the accused—the difference between significantly different insanity standards was minimal.⁶¹³

ADDING A VOLITIONAL ELEMENT TO THE DEFENCE OF MENTAL IMPAIRMENT

5.27 There was limited and generally qualified support for the introduction of a volitional element during consultations.⁶¹⁴ There was a general view that volition would always be too difficult distinguish between an accused who could not, and an accused who would not, control his or her actions. In addition, it was argued by some participants that those people whose delusions have taken away their capacity to control their actions would be very likely to succeed in a mental impairment defence in any case.⁶¹⁵ Some forensic psychiatrists said it would be very difficult to give any kind of expert opinion about volition. It was also argued that introducing volition to the mental impairment defence would mean introducing it for both homicide and non-homicide offences. This was thought by some to be broadening the defence far more than was appropriate.⁶¹⁶

611 Roundtable 25 November 2003.

612 Submission 21 citing James Ogloff, Anton Schweighofer, Susan Turnbull et al, 'Empirical Research Regarding the Insanity Defense: How Much Do We Really Know?' in James Ogloff (ed) *Law and Psychology: The Broadening of the Discipline* (1992).

613 James Ogloff, Anton Schweighofer, Susan Turnbull et al., above n 612, 194.

614 Roundtable 25 November 2003. The Mental Health Legal Centre was strongly in favour of the inclusion of a volitional element. See Submission 25.

615 Roundtable 2 December 2003.

616 Roundtable 25 November 2003.

THE COMMISSION'S VIEW AND RECOMMENDATIONS

5.28 The Commission has considered the arguments in relation to the current formulation of mental impairment and, subject to one qualification which is discussed below, finds the arguments for the retention of the current mental impairment defence persuasive.

5.29 Despite criticisms of the current defence, including the perception there is a mismatch between the formulation of mental impairment and what is known about mental illness generally, the overwhelming response during consultations from psychiatrists and lawyers alike has been that the current defence works well in practice and is well understood and appropriately applied. Because it is so difficult to define precisely the kind of mental condition or particular aspect of mental illness which removes responsibility, it is not at all clear that any other definition would be any less problematic or less subject to criticism.

5.30 There is evidence to support leaving the defence unchanged. The homicide prosecutions study revealed there were many more people with diagnosed mental illness than raised the defence of mental impairment. However, the mere claim of a mental illness is not sufficient to establish a lack of criminal responsibility. It is very difficult to assess whether any of these cases might have come within one of the broader models of mental impairment discussed. A number of participants in consultations argued that people are discouraged from raising the defence because of the 25-year nominal term.⁶¹⁷ Again, it is difficult to assess with any certainty the extent to which this claim is true on the basis of the available data.

5.31 The Commission does not believe there is a compelling reason for the addition of a volitional element to the existing defence of mental impairment. Those involved in the practical implementation of the defence claim it is already sufficiently flexible to allow at least some cases where the accused was unable to control his or her actions to raise the defence (where they also meet the other requirements) and there is no justification for broadening it further.

5.32 The Commission is conscious of the fact that the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* is the result of a recent and comprehensive review of the legislation. No obvious shortcomings have been identified but the Act has not been in operation long enough for its effectiveness

617 The nominal term is discussed in detail at para 5.49.

to be properly evaluated. To change the legislation so soon after its introduction without clear evidence of a need to do so would be inappropriate.⁶¹⁸

5.33 The Commission recommends below that the operation of the CMIA should be monitored by the Department of Human Services in collaboration with the Department of Justice to assess how the defence is operating in practice.

CLARIFYING THE CURRENT SCOPE OF MENTAL IMPAIRMENT

5.34 The Commission believes that the lack of a definition of mental impairment provides for flexibility in the application of the defence, which is appropriately limited by the M'Naghten elements. Nevertheless, we are aware that one of the views expressed in consultations was that the current formulation of mental impairment is merely a legislative restatement of the common law and as such was not uncertain and did not need to be defined.⁶¹⁹ This has been the favoured interpretation in the Supreme Court of Victoria in the recent cases of *The Queen v R*⁶²⁰ and *The Queen v Sebalj*.⁶²¹ In both cases the court interpreted the meaning of 'mental impairment' by reference to the Attorney-General's second reading speech of the Crimes (Mental Impairment and Unfitness to be Tried) Bill. In both cases the court found that 'mental impairment' has the same meaning as the common law insanity defence.⁶²²

5.35 The Commission disagrees with this interpretation of the legislation. We note that this approach appears to ignore the fact that the common law defence is abolished by the legislation.⁶²³ We are also of the view that adopting a common law definition of mental impairment will not provide a sufficient level of flexibility in the application of the defence. The recent case of *R v Sebalj* provides an example of the possible consequences of the current interpretation.

5.36 In *Sebalj*, the accused was found guilty of the murder of his girlfriend despite the fact that he committed the murder while in a psychotic state. The accused had been a drug addict and was trying to treat this addiction. His

618 Submissions 21, 26. It was said in Forensicare's submission that any review of the definition of mental impairment should be done in the context of a comprehensive review of the way mentally ill offenders are dealt with under the Sentencing Act.

619 This was one of the arguments made by Forensicare, see Submission 21.

620 [2003] VSC 187 (Unreported, Supreme Court of Victoria, Teague J, 5 March 2003).

621 [2003] VSC 181 (Unreported, Supreme Court of Victoria, Smith J, 5 June 2003).

622 See n 620, para 12; and n 621, para 19.

623 CMIA s 25.

psychosis occurred due to drug withdrawal. Prior to the murder, the accused had tried to seek help for his condition. After murdering his girlfriend, the accused was found by a psychiatric nurse who was a member of the Crisis Assessment Team sent to visit him. Because the accused's psychosis had arisen due to drug withdrawal, the court found that it did not fit within the definition of mental impairment which, following the common law, required the illness to be a 'disease of the mind'. Since the accused's illness was not a disease but the result of drug withdrawal, Justice Smith held that he could not use the defence of mental impairment. The accused was sentenced to 15 years imprisonment.⁶²⁴ The Commission believes that this interpretation of mental impairment is unnecessarily narrow. In part, this approach has been driven by a concern that without a specific definition of mental impairment, the defence would be far too broad in its potential application. The following quote from *Sebalj* illustrates this concern:

Unless some limits are imposed on the term 'a mental impairment', the statutory defence and statutory regime would apply wherever the mind of a person charged with an offence had been adversely impaired to a material degree by alcohol or drugs. This would be a dramatic and extremely wide-ranging change to the law and vast numbers of the accused people could seek to rely on and be made subject to the statutory regime.⁶²⁵

5.37 There are two reasons why it may be considered inappropriate for a person whose psychosis is induced by alcohol or drugs to rely on mental impairment. First, the condition may be very short term and the person likely to recover quickly, and second, there is a moral argument that a person ought not to be able to raise the mental impairment defence if they were responsible for causing their condition. The Commission believes both of these reasons for restricting the application of defence available are ill-founded.

Temporary Illnesses and Mental Impairment

5.38 The common law interpretation of insanity includes diseases of the mind whether they are 'temporary or of long standing'.⁶²⁶ There are also many mental illnesses which can resolve after relatively short periods of time with appropriate treatment. The Commission is not convinced that the mere duration of a

⁶²⁴ *R v Sebalj* [2004] VSC 212 (Unreported, Supreme Court of Victoria, Williams J, 11 June 2004).

⁶²⁵ [2003] VSC 181 (Unreported, Supreme Court of Victoria, Smith J, 5 June 2003) para 10.

⁶²⁶ See n 592.

particular illness should be used to assess whether or not it provides a suitable basis for the defence of mental impairment. It is worth noting that in the case of *Sebalj*, the accused's drug withdrawal induced psychosis subsequently developed into a schizophrenic illness requiring ongoing treatment.⁶²⁷ The Commission also believes that those who have simply had an adverse reaction to a particular drug on one occasion are unlikely to raise mental impairment, given the 25 year nominal term. Furthermore, we think it unlikely that a forensic psychiatrist would be likely to classify such a reaction as a mental impairment for the purposes of the defence.

5.39 The Commission also believes that the concern about opening the defence to undeserving accused is unfounded because of the strict limits on the defence provided by the elements requiring an understanding of the nature and quality of conduct, or the wrongness of the conduct. These elements make it unlikely that people who are merely 'adversely impaired to a material degree' by alcohol or drugs would be able to use the defence.

The Accused's Responsibility for the Mental Illness

5.40 The Commission understands the moral concern that a person should not be allowed to benefit as a result of a condition which they have been responsible for producing. Nevertheless, we do not think this should be a consideration in applying the defence of mental impairment. It is already established legal principle that a person who is grossly intoxicated to the extent that he or she is incapable of forming an intention to commit a crime must be acquitted.⁶²⁸

5.41 The Commission is aware that many people find this principle—the so-called *O'Connor* principle—difficult to accept. However, Australian law reform bodies that have reviewed *O'Connor* have generally recommended its retention.⁶²⁹

627 In the analysis of the psychiatrist who assessed Sebalj it was even suggested that many psychiatrists would have judged the accused to have had schizophrenia from the outset. See above n 624, para 24.

628 The principle was established in the case of *The Queen v O'Connor* (1980) 146 CLR 64.

629 For example see Law Reform Committee, Parliament of Victoria, *Criminal Liability for Self-Induced Intoxication Report* (1999), 1141, Recommendation 3; Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility Report No 34* (1990), paras 218–219; Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2, General Principles of Criminal Responsibility* Discussion Draft (1992), 51; South Australian Criminal Law and Penal Methods Reform Committee, *The Substantive Criminal Law: Fourth Report* (1977) 48. The New Zealand Law Reform Committee and the Law Commission of England and Wales have also said the *O'Connor* approach to evidence of intoxication conforms best to general principles of criminal law: New Zealand Criminal Law Reform Committee, *Report on Intoxication as a Defence to a*

For example, in 1999 the Parliament of Victoria Law Reform Committee recommended that *O'Connor* should continue to be the law in Victoria.⁶³⁰

5.42 The current approach in Victorian courts means that people who are so intoxicated that they cannot form an intention to do the criminal act cannot be held criminally responsible, but people who are so intoxicated or affected by drugs that they experience a psychotic episode, such that they are either unable to understand what they are doing or that it is wrong, may be held criminally responsible. The Commission believes this inconsistency is unjust and people ought not to be excluded from the defence of mental impairment, solely because they contributed in some way to the impairment through the abuse of drugs or alcohol.⁶³¹

5.43 The Commission notes that the notion of ‘responsibility’ in this context is a difficult one to limit. In the case of *Sebalj* for example, the accused was responsible for his mental state as he had chosen to withdraw from drugs and that withdrawal had brought on a psychotic episode.

5.44 The Commission is also concerned that the interpretation of mental impairment in *Sebalj* runs counter to the underlying conceptual purpose of the mental impairment defence. If the purpose of the defence is to ensure that people are excused from criminal responsibility when their cognitive functions are so affected that they are unable to understand what they are doing or that it is wrong, then it should not matter what the cause of the particular impairment was.

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RECOMMENDATION(S)

37. The current mental impairment defence should be retained.

Criminal Charge: (1984) para 45; Law Commission for England and Wales, *Legislating the Criminal Code: Intoxication and Criminal Liability* (London: HMSO, 1995) cited in Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2001), 251.

630 Law Reform Committee, Parliament of Victoria (1999), above n 629.

631 This is consistent with the Commission’s view on how self-induced intoxication should be taken into account for defences to homicide more generally. That is, self-induced intoxication should be relevant to an assessment of any subjective elements of the defence (such as, in the case of self-defence, the accused’s belief in the need to act in self-defence), but should not be relevant to any objective element (such as the objective reasonableness of the accused’s response or belief in the circumstances). See further [3.173]–[3.175].

!

RECOMMENDATION(S)

38. A provision should be added to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* which specifies that the term 'mental impairment' includes but is not limited to the common law notion of a 'disease of the mind'.
*(Refer to draft definition s 3(1) *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* in Appendix 4).*
39. The Department of Human Services, in conjunction with the Department of Justice, should conduct an ongoing evaluation of the effectiveness of the legislation. Evaluation should include data showing how often the defence is raised, how often the defence is successful and the kinds of illnesses which do and do not form a successful basis for the defence.

LACK OF TREATMENT AND RESOURCE CONSIDERATIONS

5.45 It is important to note the lack of access to treatment occurs not only because of the exclusion of people from the definition of mental impairment, but also because of lack of available facilities to treat mentally ill offenders. Where people are found guilty of an offence, but are nevertheless suffering from a mental illness of some kind, they may be given a hospital security order under section 93(1)(e) of the *Sentencing Act 1991*. This means they will be treated in a mental health facility instead of being sent to prison. However, such an order is contingent upon there being available space in a relevant facility to treat that person. In the case of *Sebalj*, a hospital security order was recommended which would have permitted the accused to be treated as a mental health patient at Thomas Embling Hospital. However, at the hearing the psychiatrist who made this recommendation told the court that due to a lack of space at the hospital treatment was unable to be offered.⁶³²

5.46 The Commission acknowledges that lack of treatment may be due to a lack of available resources. If there was greater capacity at Thomas Embling Hospital, Mr Sebalj could have been given a hospital security order under the Sentencing Act. The Commission views this lack of resources as a matter of serious concern and notes that any legislative framework, no matter how

632 *R v Sebalj* [2004] VSC 212 (Unreported, Supreme Court of Victoria, Williams J, 11 June 2004) para 25.

treatment focused, will be of limited benefit while facilities for treatment are unable to meet demand.

5.47 While it was acknowledged during consultations that resource concerns ought not to influence decisions about law reform, it was nevertheless pointed out by representatives from Forensicare and the Department of Human Services that law reform which resulted in a significant broadening of the mental impairment defence would mean a greater number of people would be dealt with in the forensic mental health system. Currently there are not enough resources to deal with such an increase.⁶³³ The Commission is concerned that support for a narrow interpretation of mental impairment may be driven in some cases by a lack of existing resources to care for mentally ill offenders. The Commission's recommendations about mental impairment have not been influenced by resource considerations.

5.48 Having considered the formulation of mental impairment and set out the Commission's recommendations and reasons for leaving the defence as it is currently formulated, we now turn to look at the nominal term under the CMIA and its effect on the operation of the mental impairment defence.

NOMINAL TERM

BACKGROUND

5.49 The Commission touched very briefly upon the outcomes of a successful mental impairment defence in the *Defences to Homicide Options Paper*. During consultations it became clear that the operation of the nominal term is regarded by some as a problem because it is not well understood and operates in practice to discourage people from raising the defence of mental impairment.

WHAT IS THE NOMINAL TERM?

5.50 Under the CMIA regime, a person who has been found not guilty of murder by reason of mental impairment is likely to be made subject to a custodial supervision order.⁶³⁴ Supervision orders, whether custodial or non-custodial, are

633 Submissions 26, 21.

634 CMIA s 23. See also s 26 allowing for the making of custodial and non-custodial supervision orders. The Act allows for an accused person to be released on a non-custodial supervision order (23(a)) or released unconditionally (23(b)), but this has never happened in the case of a homicide and in practice would be very unlikely to occur.

for an indefinite term⁶³⁵ but the Act requires the court to set a nominal term for the supervision order. In the case of homicide, the nominal term is 25 years.⁶³⁶ The reason for the introduction of the nominal term was to ensure that supervision orders were reviewed to avoid people being detained or otherwise subjected to orders unnecessarily.⁶³⁷ Nevertheless, at the end of the nominal term, patients may not necessarily have their orders revoked. The end of the nominal term merely triggers a ‘major review’, the purpose of which is to determine whether the relevant orders should continue to apply.⁶³⁸ The legislation provides that a person on a custodial supervision order should receive a non-custodial supervision order unless the court considers the person would be a danger to the community if released.⁶³⁹ Those on non-custodial supervision orders may have those orders confirmed, varied or revoked.⁶⁴⁰

5.51 It is also possible under the CMIA to have supervision orders varied or revoked before the expiration of the nominal term.⁶⁴¹ In practice this means it is possible for people to be either on non-custodial supervisions orders or to have their orders revoked prior to the expiration of the nominal term. People may also remain subject to custodial or non-custodial supervision orders long after the expiration of the nominal term if the court considers them a danger to the community.

TREATMENT AND DETENTION SINCE THE INTRODUCTION OF THE CMIA

5.52 The CMIA creates a very detailed regime for dealing with mentally ill offenders. It seeks to move patients gradually from the custodial to the non-custodial context, to ensure their illness is being managed appropriately. This

635 CMIA s 27(1).

636 CMIA s 28(1).

637 Community Development Committee, Parliament of Victoria, *Report Upon the Review of Legislation Under Which Persons are Detained at the Governor’s Pleasure in Victoria Report No 57* (1995) 127–134. The report talks about a ‘limiting term’ this subsequently became the ‘nominal term’ when the CMIA was introduced.

638 CMIA s 35(2).

639 CMIA 35(3)(a)(i).

640 CMIA 35(3)(b).

641 CMIA ss 31–35.

regime needs to be understood before the appropriateness of the nominal term can be assessed.⁶⁴²

5.53 Once a person has been made subject to a custodial supervision order under the CMIA, he or she is detained and treated at Thomas Embling Hospital in Fairfield. People who are subject to a custodial supervision order can apply for leave to the Forensic Leave Panel.⁶⁴³ This generally begins with short periods of ‘off ground’ leave escorted by staff, either to attend appointments or to visit local services or shops. Depending on the success of this leave, patients will then progress to longer periods and eventually unescorted leave off the hospital grounds between the hours of 6 am and 9 pm. The panel is also able to grant leave of up to six month periods, but these grants of leave must be for a rehabilitative purpose and a detailed leave plan is required from the person’s treating psychiatrists and clinical team. Over time, the patients who are regarded as low risk will gain access to overnight leave periods of up to three out of every seven nights. This generally will involve the patient staying in accommodation organised through the Office of Housing, or with family.

5.54 Providing all the preceding leave goes well, the patient may eventually apply to the sentencing court for extended leave.⁶⁴⁴ The Court may grant the application if it is satisfied that the leave will not endanger the patient or the community.⁶⁴⁵ Extended leave may be granted for up to 12 months after which the patient must return to the court for an extension.⁶⁴⁶ Eleven people have moved from hospital to the community on extended leave since the introduction of the CMIA.⁶⁴⁷ Generally, patients on extended leave are supervised by Forensicare’s Community Forensic Mental Health Service.

5.55 Patients who are already on extended leave can apply to the court to have their custodial supervision order varied to a non-custodial supervision order.⁶⁴⁸ Patients must have been on extended leave for at least 12 months and if their application is unsuccessful, they will be unable to make another application for a

642 This regime is set out in pt 7 of the CMIA. The Commission is indebted to Tom Dalton from Forensicare (Submission 21) for the very useful explanation of how the regime works in practice.

643 This type of leave is dealt with under pt 7 of the CMIA.

644 CMIA ss 56–58A.

645 CMIA s 57(2).

646 CMIA s 56. See also s 57(3).

647 Submission 21.

648 CMIA s 31.

non-custodial supervision order for another three years.⁶⁴⁹ Since the introduction of the CMIA, nine people have progressed from extended leave on custodial orders to non-custodial supervision orders.

CRITICISMS OF THE NOMINAL TERM

5.56 The nominal term was criticised by a number of people in submissions and during consultations. Criticisms were focused on the length of the term. It was said that the existence of a nominal term creates the impression of a sentence and discourages people from raising mental impairment as a defence.

5.57 Some of the participants in roundtable discussions pointed out that, where there is an alternative to mental impairment available (such as self-defence or lack of intention), the defence will often prefer to rely on other defences because they do not want their clients to be subjected to an indefinite supervision order.⁶⁵⁰ The consistent view was that many legal professionals did not fully understand the implications of the CMIA for their clients. Some believe the new regime to be effectively the same as the old governor's pleasure system and that people will remain subject to orders for very long periods of time and possibly never be fully released from them. Others believe that the nominal term is equivalent to a 25 year sentence.⁶⁵¹ Even those with a clear understanding of the operation of the term argued that it was very hard to convince clients to plead not guilty by reason of mental impairment because there is no certainty about the outcome.

5.58 There are only limited statistics available about the operation of the CMIA. Forensicare provided some of these during the consultation process.⁶⁵² The statistics which are available seem to suggest that patients whose illness responds well to treatment can potentially progress through the system from custodial to non-custodial orders relatively quickly. For those who are resistant to treatment, or whose illnesses are unlikely to resolve, the perception of indefinite detention is (for appropriate reasons) closer to the truth.⁶⁵³ What also emerged from the available statistics was that a significant number of people remain on orders after

649 CMIA s 31(2)—the Court can allow an application sooner than this and has in practice been relatively flexible.

650 Roundtable 2 December 2003.

651 Roundtable 25 November 2003; Submission 20.

652 Submission 21. Forensicare also participated in roundtable discussions.

653 Roundtable 25 November 2003.

the expiration of the 25 year term.⁶⁵⁴ To date, no major review under the legislation has resulted in a person's orders being revoked, despite this being the intention of the legislation.⁶⁵⁵

ALTERNATIVES TO THE NOMINAL TERM

5.59 Those who were in favour of abolishing the nominal term suggested that the trial judge should instead set the appropriate term for the detention of the person, based on the expert evidence available at the time. Reference was made to the Northern Territory where the dispositional term must be set by the sentencing judge and be equivalent to the prison term which would have been imposed if the person had been found guilty.⁶⁵⁶ The Mental Health Legal Centre argued in favour of leaving the term to be set by the sentencing judge with provision for interim dates for review during that period. It was argued that this would provide a less oppressive marker of time and allow the person to have some hope of release.⁶⁵⁷ Reference was also made to the Canadian system, where there were initially plans to include a nominal term in the criminal code provisions dealing with the disposition of people with mental disorder (as it is called in Canada).⁶⁵⁸ According to roundtable participants, these provisions were never proclaimed and it was argued that the system of disposition has operated well regardless.⁶⁵⁹

654 Although this may be on non-custodial supervision orders and the person may be living a relatively unrestricted existence in the community.

655 Roundtable 26 February 2004. Although the CMIA has only been in operation since 1997, the transitional arrangements in the Act converted everyone who was a detained subject under the governor's pleasure system to a person subject to a custodial supervision order under the Act. See CMIA sch 3(2).

656 Roundtable 25 November 2003. See *Criminal Code Act* (NT) s 43ZG. In consultations it was asserted that the Northern Territory legislation also required an application to be made at the end of a dispositional term to allow for ongoing detention and that there was a presumption in favour of release. In fact, the legislation provides for a review to be conducted towards the end of the term of disposition to assess whether or not release is appropriate. In other words, the provisions in relation to release are quite similar to the Victorian provisions relating to major reviews. The difference is that where the Victorian legislation states the supervision must be changed to non-custodial unless the person is regarded as a danger to themselves or others (see CMIA s 35(3)(i)), the Northern Territory states that the person must be released unconditionally unless the person is regarded as a danger to themselves or others, see *Criminal Code Act* (NT) s 43ZG(6).

657 Submission 25.

658 See *Criminal Code* (Canada) Part XX.1.

659 Roundtable 26 February 2004. The Canadian Code provides for a disposition hearing to be held when a finding of not guilty by reason of mental disorder is made, see *Criminal Code* (Canada) s 672.45.

5.60 The criticism of allowing a judge to set the term in mental impairment cases was that it reintroduced the notion of a tariff or penalty which is at odds with the treatment focus of the CMIA.⁶⁶⁰

NEED FOR EDUCATION

5.61 Those in favour of retaining the nominal term and those advocating its abolition argued that education of the legal profession about the operation of the CMIA and the nominal term was crucial. It was felt that at least some of the problems with the operation of the defence were caused by misconceptions about the operation of the legislation and that this could be addressed, to some extent, by education.⁶⁶¹

THE COMMISSION'S VIEW AND RECOMMENDATIONS

5.62 The Commission has considered arguments for and against the retention of the nominal term for mental impairment and ultimately finds the arguments for the retention of the term persuasive.

5.63 Because the CMIA has only been in force since 1997, it is too early to tell what the effect of the term has been on the operation of the mental impairment defence. The Commission is indebted to Forensicare for providing data on the early effects of the CMIA, but is of the view that more monitoring of the impact of the nominal term provisions is necessary before making a decision about whether to retain or change the term.

5.64 There are two principal alternatives to the nominal term. One would be to impose a sentence equivalent to that which would be imposed if the person had been found guilty of the offence rather than not guilty due to mental impairment. This, however, would be infected with a degree of unreality, since the fact of mental impairment could neither be ignored nor taken into account as it would be if the accused were a convicted offender. Another problem with imposing a sentence is that it creates the impression of disposition as punishment. This is not

660 In its review of the governor's pleasure system, the Community Development Committee acknowledged the risk of nominal terms (or as they referred to them, limiting terms) being interpreted as tariffs, but ultimately were of the view that 'clearly stated criteria for the assessment and release of patients...would ensure that the term was viewed as the maximum period of detention and not a minimum period'. Community Development Committee, Parliament of Victoria (1995), above n 637, 130.

661 Roundtable 2 December 2003; Submission 25.

consistent with the conceptual underpinnings of the mental impairment defence, which is that those who are mentally impaired at the time of the act are not criminally responsible for their behaviour. It also does not fit with the treatment-focused model of the forensic mental health system in Victoria.

5.65 The other alternative would be not to impose a fixed term and to allow people to progress through the forensic mental health system and be released into the community as soon as they have recovered. The problem with not having a specified period for the disposition of mentally impaired homicide offenders is that such uncertainty may cause anxiety among the general community. The lack of a specified term may lead to an impression that community safety is not being treated seriously by mental health services.

5.66 The Commission recognises that there is a good deal of misunderstanding among the legal profession about the operation of the nominal term. The nominal term is *not* a 25 year sentence, though it is often misinterpreted as such. People subject to orders under the CMIA may be released into the community and have their orders revoked in under 25 years, or they may remain in hospital after the 25 year period. It is important that lawyers understand the implications of the term and are able to explain these clearly and accurately to their clients.

5.67 It is also important that data be collected which tracks how long people are subjected to orders under the CMIA. The legislation provides for the revocation of forensic orders prior to the expiration of the nominal term, but it has not been in force long enough to judge whether or not these provisions are being used appropriately. The operation of these provisions should be monitored in order for the effects of the CMIA, and more particularly the nominal term, to be assessed accurately in the future.

!**RECOMMENDATION(S)**

40. The nominal term for mental impairment should be retained.
41. Bodies which offer seminars and lectures for continuing professional development purposes should include material on the operation of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* and more specifically on the operation of the nominal term.

! RECOMMENDATION(S)

42. The Department of Justice and the Department of Human Services should coordinate an ongoing evaluation of the operation of the nominal term and related provisions of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*. Data should be collected on the following:
- the kinds of mental illnesses which result in a successful mental impairment defence and those which do not;
 - the average period of time people managed under the Act are subject to hospital or community based orders;
 - how many people are released from hospital prior to the end of the nominal term (but remain subject to some kind of community based order);
 - how many people succeed in having their orders revoked prior to the expiration of the nominal term; and
 - how many people continue to be subject to orders (both hospital based and community based) after the expiration of the nominal term.

BY CONSENT HEARINGS

5.68 Another issue which was discussed in some detail during consultations was the 'by consent' process for dealing with people who plead not guilty by reason of mental impairment.

WHAT IS A 'BY CONSENT' HEARING?

5.69 The majority of homicide cases involving mentally ill offenders are dealt with 'by consent'. This means that both the prosecution and the defence agree that the accused should be found not guilty by reason of mental impairment. The agreement occurs after each party has obtained their own psychiatric report and both reports support the finding of not guilty by reason of mental impairment. Despite there being agreement between the parties as to the preferred outcome, a hearing is still held and a jury empanelled. The jury hears evidence about the homicide and expert evidence about the mental impairment and the defence. The prosecution will generally present the evidence and will make it clear to the jury that neither the facts nor the issue of mental impairment are in dispute. Often the

defence will say very little other than to support the evidence presented by the prosecution. In some cases the jury is asked to reach its verdict without leaving the courtroom. In most cases the trial is a very short one.

5.70 The process is, in short, a formality. While the members of the jury are not instructed to return a verdict of not guilty by reason of mental impairment, it is made very clear that this is what they are expected to do. Indeed it is likely that a court would regard any other verdict as perverse, given the evidence presented and the agreement between the parties.

5.71 This process was criticised in early discussions with Victorian Supreme Court judges. In the *Defences to Homicide Options Paper* and in consultations, the Commission discussed a number of possible options in response to the 'by consent' issue:

- the introduction of a plea of 'guilty but mentally impaired';
- the introduction in Victoria of a mental health court—a separate specialist court with the specific task of examining cases involving fitness to stand trial and mental impairment cases; and
- the introduction of special judge-alone hearings for 'by consent' cases.

A brief explanation of each of these options and the response to them in consultations is discussed below.

INTRODUCTION OF A NEW PLEA OF GUILTY BUT MENTALLY IMPAIRED

5.72 The introduction of a plea of guilty but mentally impaired would mean that an accused could proceed immediately to have his or her disposition under the CMIA considered. There would be no need for a trial of any kind and no need, therefore, for the 'by consent' hearing.

CONSULTATIONS AND SUBMISSIONS

5.73 The unanimous view expressed in consultations and submissions was that a plea of guilty but mentally impaired would be inappropriate.⁶⁶² It was felt very strongly that it was wrong to label someone who was mentally impaired as 'guilty'. Someone affected by a mental impairment ought not to be found criminally responsible.⁶⁶³ It was also argued that for mentally impaired offenders a plea that

662 Submissions 25, 27, 21.

663 Submissions 25, 27.

labelled them guilty would make it much harder for them to come to terms with what they had done.⁶⁶⁴

INTRODUCTION OF A SPECIALIST COURT

5.74 If all matters involving mental impairment were heard not by a jury but by a specialist mental health court, the problems of the ‘by consent’ hearing would be avoided. The Commission considered the introduction of a mental health court similar to that which exists in Queensland. This would remove mentally ill offenders from the criminal justice system entirely and establish a process that was suited to their particular circumstances and needs. The Queensland Mental Health Court makes determinations in cases involving mental impairment,⁶⁶⁵ fitness to stand trial and diminished responsibility.⁶⁶⁶

5.75 The Court is open to members of the general public to observe and is comprised of a Supreme Court judge assisted by two psychiatrists.⁶⁶⁷ The psychiatrists’ role is to explain clinical evidence, examine material received and make recommendations to the Court on the basis of the evidence.⁶⁶⁸ Assisting psychiatrists have no decision-making powers and their functions are limited to matters which are within their professional expertise.⁶⁶⁹ The decision on whether the defence of unsoundness of mind or diminished responsibility is applicable is left to the judge.

5.76 The Court will not hear a matter unless there is agreement on the facts of the case. If the facts are disputed—that is, if there is disagreement about whether or not the accused committed the offence—the matter is dealt with within the criminal justice system.⁶⁷⁰

5.77 If the Mental Health Court determines there was no mental impairment, the accused can still return to the normal criminal process and raise either unsoundness of mind or diminished responsibility as part of the normal trial

664 Submission 21.

665 In Queensland the relevant term is ‘unsoundness of mind’.

666 *Mental Health Act 2000* (Qld) s 267.

667 *Mental Health Act 2000* (Qld) s 382.

668 *Mental Health Act 2000* (Qld) s 389.

669 *Mental Health Act 2000* (Qld) s 389(2).

670 *Mental Health Act 2000* (Qld) s 268.

process.⁶⁷¹ Evidence of the Mental Health Court's determination is inadmissible at the trial.

CONSULTATIONS AND SUBMISSIONS

5.78 The general view which emerged from consultations and submissions was that a mental health court should not be introduced in Victoria.⁶⁷² There was a concern that a specialist court would 'lead to a lack of independence and bias from the bench'.⁶⁷³ It was also felt that criminal responsibility was a legal rather than a medical concept and that the Queensland model puts clinicians in an inappropriately prominent role. Interestingly, this view was shared by psychiatrists and non-psychiatrists alike. Psychiatrists were wary of being put in such a key role, since ultimately they are only giving an opinion.⁶⁷⁴ Despite the fact that the Mental Health Court is an open court, there was a concern that a specialist court model would lead to outcomes which were less just.⁶⁷⁵

A JUDGE-ALONE HEARING FOR 'BY CONSENT' CASES

5.79 A judge-alone hearing is held without a jury being empanelled. At the end of the process the judge makes a decision about the criminal responsibility of the accused. Holding a judge-alone hearing in 'by consent' cases would ensure a jury is not empanelled unnecessarily, while still ensuring all the relevant evidence is heard in an open court.

CONSULTATIONS AND SUBMISSIONS

5.80 Those in favour of the judge-alone hearing argued that the current process was unnecessary⁶⁷⁶ and made a mockery of a very serious process.⁶⁷⁷ It was also argued that the relevant decision in a mental impairment hearing was not the

671 *Mental Health Act 2000* (Qld) s 311.

672 Submissions 21, 27, 25; Roundtable 25 November 2003.

673 Submission 25.

674 Roundtable 25 November 2003.

675 Roundtable 25 November 2003. The Mental Health Legal Centre said that in their experience these issues were 'adequately explored in an adversarial setting': Submission 25.

676 Submission 25.

677 Roundtable 25 November 2003.

question of whether the person was not guilty, but what the appropriate disposition ought to be.⁶⁷⁸

5.81 While some participants felt that empanelling a jury in a case where there would effectively be nothing to decide was 'silly'⁶⁷⁹ and would possibly bring the criminal justice system into disrepute,⁶⁸⁰ others felt that the jury should be retained in such cases in order to retain the openness and transparency of the process.⁶⁸¹

5.82 The forensic psychiatrists consulted by the Commission were of the view that the presence of the jury was important to bring 'common sense' to the proceedings and also to keep the experts 'on their mettle'.⁶⁸² It was also felt by other consultation participants that since the general public very rarely attended these kinds of proceedings, the jury was being exposed to information about mental illness and to the processes for dealing with mentally ill offenders. This contributed, albeit in a small and piecemeal way, to building community knowledge and understanding about mental illness.⁶⁸³

5.83 There was a suggestion that the process could be made less ceremonial and perfunctory by the development of standard jury charges which explained what the role of the jury was and the reason for the special nature of the process.⁶⁸⁴

THE COMMISSION'S VIEW AND RECOMMENDATIONS

5.84 The Commission has considered the views in relation to 'by consent' mental impairment hearings and considers that the empanelling of a jury in such cases is both unnecessary and inappropriate.

5.85 In cases where the evidence supports a verdict of not guilty by reason of mental impairment and both prosecution and defence agree that this is the appropriate outcome, the role of the jury becomes problematic. Juries in such cases are not being asked to make a choice but are being asked to confirm the view

678 Roundtable 25 November 2003.

679 Roundtable 17 February 2004.

680 Roundtable 25 November 2003.

681 Roundtable 2 December 2003. This concern was expressed on a number of occasions, despite the evidence presented by the Commission that the Queensland model did provide an open process.

682 Roundtable 17 February 2003.

683 Ibid.

684 Submission 21.

of the defence and the prosecution. The Commission believes this process undermines the role of the jury and is concerned it may lead to a loss of faith in the jury system.

5.86 It is the Commission's impression from its consultations with people who have been involved in such cases, that 'by consent' hearings often last a short time and the jury is sometimes even asked to reach its verdict in the courtroom. It may be argued in support of such a process that keeping the process as short as possible means the accused and his or her family, as well as the family of the deceased, do not have the strain of a long hearing and that the appropriate disposition for the accused can be focused upon. In the Commission's view, however, such a process only highlights the perfunctory nature of the process and adds to the perception that the role of the jury in such hearings is ceremonial only.

5.87 Nevertheless, the Commission believes that hearing evidence in 'mental impairment by consent' cases in open court is very important. The Commission acknowledges concerns expressed by the legal and psychiatric professions that evidence supporting the mental impairment defence should be heard as part of an open and transparent process, and should be exposed to public examination in some way, even in cases where both the defence and the prosecution agree.

5.88 The Commission believes the families of victims should be able to witness the process and hear the psychiatric evidence and reasons for dealing with the accused within the mental health system rather than the prison system. The Commission recognises there is a lack of awareness and understanding of people with mental illness generally, and that these kinds of processes can help the parties involved, and the public, to understand why the law deals differently with people who are mentally impaired.

5.89 If the evidence supported a verdict of not guilty by reason of mental impairment, allowing the expert evidence to be heard before a jury is empanelled would allow it to be heard in an open court, and would allow the judge to determine that a jury trial was unnecessary because the court would accept the plea of not guilty by making a finding that the accused is not guilty of the offence because of mental impairment. If at any time the judge determined the matter would be more appropriately dealt with by a jury, he or she would be able to direct that the issue be dealt with by a jury.

5.90 Procedurally, this could happen by way of a hearing on the expert evidence once a plea of not guilty by reason of mental impairment has been

entered by the accused and the decision to go to trial has been made.⁶⁸⁵ Where the prosecution and the defence agree that the accused should be found not guilty by reason of mental impairment, a judge could hear the expert evidence in support of this finding. If the judge was satisfied, on the basis of this evidence, that it would not be possible for a jury to find the accused guilty of murder, then the judge would make a finding that the person is not guilty on the grounds of mental impairment and the disposition of the accused could then be determined without the need to empanel a jury. As would be the case for a jury trial, the hearing could be held in open court. In cases where the issue of mental impairment arises after the jury is empanelled and the trial has begun, the jury would determine the issue of whether the accused was mentally impaired.



RECOMMENDATION(S)

43. If a judge, having heard such expert evidence as may be called on the issue, is satisfied that no jury properly instructed could find the accused guilty of murder because of the accused's mental impairment, and the prosecution and the defence agree that the accused was mentally impaired at the time of the killing, then the judge should make a finding that the accused is not guilty of the offence because of mental impairment. This evidence should be heard in a hearing before a judge alone. The judge should have a discretion to direct that the matter be dealt with by a jury.

(Refer to draft section 21(4) Crimes (*Mental Impairment and Unfitness to be Tried Act 1998* in Appendix 4).

44. Where the matter is not proceeding on a 'by consent' basis, that is, where there is disagreement as to whether or not the accused should be found not guilty by reason of mental impairment, the matter should proceed to trial and a jury should be empanelled. As is currently the case, a judge may remove the matter from the jury during the trial if he or she decides that, based on the evidence provided, no jury properly instructed could properly find the accused guilty of the offence.

685 At the moment that decision may be made following a full committal hearing, or as the result of a much shorter process in the Magistrates' Court, where all of the depositions are included in a hand-up brief and the magistrate makes a decision about whether to go to trial based on that documentary evidence alone.

DIMINISHED RESPONSIBILITY

5.91 In the previous section we referred to the view that the mental impairment defence may be too narrow to cover some mental conditions which may affect the culpability of a person charged with murder. In some jurisdictions diminished responsibility has been introduced to broaden the mental conditions which can be taken into account for this purpose.

5.92 This section summarises the elements of the diminished responsibility defence and some of the possible consequences of its introduction. We then consider the principal arguments for and against the defence which were made in consultations, as well as some of the suggestions made about the form of the defence if it were to be introduced. Finally, we set out the Commission's views and recommendations.

5.93 The Commission's view and final recommendations in relation to diminished responsibility have been influenced by its views about partial excuses generally—that is, that there must be compelling reasons for making them available at all instead of allowing partial culpability to be taken into account in sentencing.

WHAT IS DIMINISHED RESPONSIBILITY?

5.94 Diminished responsibility is a partial defence to homicide which originated in Scotland, was later introduced in England, and is now available in four Australian jurisdictions.⁶⁸⁶ The defence of diminished responsibility was developed as part of the common law in Scotland as a response to the purely cognitive elements of the M'Naghten insanity defence⁶⁸⁷ and to provide an alternative to the death penalty in murder cases.⁶⁸⁸

5.95 Diminished responsibility was introduced into English law in 1957 and is set out in section 2(1) of the *Homicide Act 1957* (UK) as follows:

686 These are the ACT, NSW, the Northern Territory and Queensland. See n 690 for specific provisions.

687 Lawrie Reznek, *Evil or Ill? Justifying the Insanity Defence* (1997), 22.

688 Ibid 24.

Where a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts or omissions in doing or being party to the killing.⁶⁸⁹

5.96 This formulation forms the basis of diminished responsibility as it has developed in the ACT, the Northern Territory, Queensland and, until recently, NSW.⁶⁹⁰

5.97 Each state that has a defence of diminished responsibility expresses the test in slightly different terms. There are, however, three common elements:

- the accused must have been suffering from an abnormality of mind;
- the abnormality of mind must have arisen from a specified cause; and
- the abnormality of mind must have substantially impaired the accused's mental responsibility for the killing.

Each of these elements must be proven on the balance of probabilities by the defence.⁶⁹¹

5.98 A common criticism of the defence of diminished responsibility is that it is too broad and vague in its formulation. 'Abnormality of the mind' is not defined in the legislation in any of the jurisdictions in which diminished responsibility is available. In Australia, the term has developed to include a range of conditions including psychosis, organic brain disorder, schizophrenia, psychopathy, epilepsy, hypoglycaemia, depression (both reactive and endogenous), post-traumatic stress disorder, anxiety, personality disorder and pre-menstrual tension.⁶⁹² 'Abnormality of mind' is not a psychiatric term and therefore the development of its meaning has depended upon individual cases where the defence has been raised. The 'specified causes' from which the abnormality of mind may arise are also

689 *Homicide Act 1957* (England) s 2.

690 *Crimes Act 1900* (ACT) s 14; *Crimes Act 1900* (NSW) s 23A; *Criminal Code* (NT) s 37; *Criminal Code Act 1899* (Qld) s 304A. NSW reformed its diminished responsibility defence in 1997. The new defence of 'substantially impaired capacity' is discussed below.

691 The content of each of the elements of the defence is discussed in some detail in Victorian Law Reform Commission (2003), above n 597, paras 5.104–5.111.

692 New South Wales Law Reform Commission, *Provocation, Diminished Responsibility and Infanticide* Discussion Paper 31 (1993), para 4.11.

numerous and have included brain injury resulting from long-term alcohol use and stress sufficient to cause post-traumatic stress disorder.⁶⁹³

5.99 The breadth of the defence has attracted criticism because it is felt by some that the illnesses that are attached, and some of the circumstances in which the defence is argued, are inappropriate. Suzanne Dell, for example, notes in her review of the operation of the defence in the UK that the majority of diminished responsibility offenders were diagnosed with psychosis, personality disorders and depression.⁶⁹⁴ The categories of personality disorder and depression seemed to cover a wide range of conditions, including cases where Dell felt the accused would 'hardly have attracted a label had it not been for the defence'.⁶⁹⁵

DISPOSITION

5.100 In all Australian jurisdictions where the defence of diminished responsibility exists, successfully raising the defence results in a verdict of manslaughter. What, if any, psychiatric care the accused then receives will depend upon the sentencing and mental health provisions in the particular jurisdiction. In NSW, for example, the court can recommend that a person be imprisoned somewhere that has psychiatric facilities, but it cannot commit a person to a mental hospital instead of sentencing them to a prison term. In contrast, in England the *Mental Health Act 1983* empowers the court to make hospital orders. Those who succeed in raising the defence of diminished responsibility may be committed to hospitals for the mentally ill.

5.101 There is provision under the Sentencing Act in Victoria for people found guilty of offences to be given hospital dispositions. The Victorian Sentencing Act provides for the imposition of a hospital order or a hospital security order in place of a sentence.⁶⁹⁶ A hospital order takes the place of a sentence and results in a

693 Desmond O'Connor and Paul Ames Fairall, *Criminal Defences* (3rd ed) (2001), 303.

694 Susanne Dell, *Murder into Manslaughter: The Diminished Responsibility Defence in Practice* (1984), 33.

695 Ibid.

696 Following the Vincent review (Victorian Government, *Report of the Review Panel Appointed to Consider Leave Arrangements for Patients at the Victorian Institute of Forensic Mental Health Justice* Frank Vincent, Chair (2001)), it is possible that the law may be changed so that serious offenders can only be given hospital security orders. The possibility of removing hospital orders in the context of serious offenders is also discussed in the recent discussion paper released by the Department of Human Services: Mental Health Branch, Department of Human Services, *Treatment and Care of Mentally Ill Offenders Pursuant to Part 5 of the Sentencing Act 1991 and Part 3–4 of the Mental Health Act 1986* Discussion Paper (2003).

person being detained in a mental health service as an involuntary patient.⁶⁹⁷ A hospital security order requires a person to be detained in an approved mental health service as a security patient and is itself a kind of sentence. If the person's mental illness resolves before their sentence has been served, then that person will be transferred to the prison system to serve the remainder of the term.⁶⁹⁸

OTHER FORMULATIONS OF THE DEFENCE

5.102 Although there have been proposals for narrowing the defence of diminished responsibility, none have been implemented. In England, for example, the Butler Committee recommended the defence be abolished and replaced with a sentencing discretion for murder.⁶⁹⁹ Failing this, however, the Committee recommended replacing the concept of 'abnormality of mind' with that of 'mental disorder' as defined in the *Mental Health Act* (UK). The Committee also recommended replacing the requirement of 'substantially impaired capacity' with the requirement that 'in the opinion of the jury, the mental disorder was such as to be an extenuating circumstance which ought to reduce the offence to manslaughter'.⁷⁰⁰

5.103 The NSWLRC reviewed the operation of the defence in 1993 and recommended its retention with a few minor changes.⁷⁰¹ The changes were an attempt to reformulate the defence of diminished responsibility broadly while trying to take account of the principal criticisms of it.

5.104 In 1997 the *Crimes Amendment (Diminished Responsibility) Act 1997* implemented the NSWLRC's recommendations, changing the defence to 'substantially impaired capacity' which is formulated as follows:

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

697 *Sentencing Act 1991* (Vic) s 93(1)(d).

698 *Sentencing Act 1991* (Vic) s 93(1)(e). See also the Mental Health Branch, Department of Human Services (2003), above n 696, 29.

699 Committee on Mentally Abnormal Offenders, *Report of the Committee on Mentally Abnormal Offenders* (1975), 251.

700 *Ibid* 247.

701 New South Wales Law Reform Commission, *Partial Defences to Murder: Diminished Responsibility* Report No 82 (1997), para 3.43.

- (b) judge whether that person's actions were right or wrong; or
 - (c) control himself or herself
- was so substantially impaired by an abnormality of mental functioning arising from an underlying condition as to warrant reducing murder to manslaughter.
- (2) For the purposes of subsection (1)(b), evidence of an opinion that an impairment was so substantial as to warrant liability for murder being reduced to manslaughter is not admissible
- ...

23A(3) If a person was intoxicated at the time of the acts or omissions causing the death concerned, and the intoxication was self-induced intoxication (within the meaning of section 428A), the effects of that self-induced intoxication are to be disregarded for the purpose of determining whether the person is not liable to be convicted of murder by virtue of this section

...

- (8) In this section *underlying condition* means a pre-existing mental or physiological condition, other than a condition of a temporary kind.⁷⁰²

5.105 This new defence of substantially impaired capacity replaces the concept of 'abnormality of mind' with 'abnormality of mental functioning' which conforms to the terminology used in the *Mental Health Act 1990* (NSW). In theory, this makes it easier for professionals to apply the definition to particular contexts.

5.106 The inclusion of the requirement that the abnormality arise from an 'underlying condition' is an attempt to prevent the defence being used in circumstances which merely involve heightened emotions. According to the NSWLRC, this formulation would in practice exclude cases involving extreme anger, for example 'road rage', but could include violence resulting from a severe depressive illness, despite the fact that that illness was not permanent.

CONSULTATIONS AND SUBMISSIONS

5.107 In the Options Paper, we invited comments on whether the diminished responsibility defence should be introduced in Victoria and if it were to be introduced what form it should take. The Paper set out, in some detail, the

702 *Crimes Amendment (Diminished Responsibility) Act 1997* (NSW) s 23A.

arguments for and against the introduction of the defence, as well as providing some of the models which have been used or proposed in other jurisdictions.⁷⁰³ The Commission received a small number of written submissions which addressed the question of diminished responsibility, and also held four roundtable discussions on mental condition defences which included consideration of the operation of the defence and the potential implications of its introduction. Most of the submissions and discussions focused on whether to introduce the defence. There were also some contributions about the form of the defence if it were to be introduced. In this section we set out the principal arguments for and against the introduction of the defence and the comments made in relation to the form it might take.

ARGUMENTS IN FAVOUR OF DIMINISHED RESPONSIBILITY

5.108 The majority of written submissions were in favour of introducing the partial defence of diminished responsibility.⁷⁰⁴ This support for the partial defence was also reflected in the early roundtable discussions on mental condition defences, held in December 2003. The principal reasons, cited in both written submissions and roundtable discussions, for introducing the defence are:

- diminished responsibility reflects the continuum of mental illness;
- murder is not the appropriate label where an offender was mentally ill; and
- diminished responsibility would provide an alternative for people not wanting to raise the defence of mental impairment.

These are summarised below.

Diminished Responsibility Reflects the Continuum of Mental Illness

5.109 A number of the individuals and groups consulted were concerned that the current mental impairment defence was effectively only available to people with psychotic illness, whereas in reality mental illness ranges on a continuum from the less serious to the more serious cases. There was a feeling among these people that diminished responsibility would cover ‘inbetween’ cases—that is those who are not sufficiently unwell to raise the mental impairment defence but are nonetheless mentally ill.⁷⁰⁵

703 See Victorian Law Reform Commission (2003), above n 597, paras 5.115–124, 5.148–168.

704 Submissions 24, 25, 27. There was also limited support from Forensicare: Submission 21.

705 Roundtable discussions 2 December 2003, 26 February 2004; Submissions 21, 27.

Murder Is Not the Appropriate Label Where an Offender Was Mentally Ill

5.110 It was felt very strongly by some that people affected by a mental illness at the time they killed ought to be found guilty of manslaughter and not murder. The view was that it was unjust to assign the label of murderer to a person who was affected by mental illness, because in such cases the law ought to recognise that they were not criminally responsible for their actions.⁷⁰⁶ It was also argued that it was important for the state of mind of accused persons, and for their family's ability to come to terms with their actions, that there be explicit recognition of their reduced culpability.⁷⁰⁷

Diminished Responsibility Would Provide an Alternative Plea

5.111 The Commission heard from barristers and mental health providers alike that people tended to be reluctant to rely on the mental impairment defence because of the 25 year nominal term.⁷⁰⁸ People may also be concerned about the stigma of being found to be mentally impaired and may not rely on it for this reason, even though the defence may have been successful. Diminished responsibility could provide an option for those people who do not want to rely on mental impairment but nonetheless ought not to be found as culpable as a person who was not suffering from a mental condition at the time they killed.⁷⁰⁹

ARGUMENTS AGAINST THE INTRODUCTION OF DIMINISHED RESPONSIBILITY

5.112 There were two written submissions which were firmly opposed to the introduction of diminished responsibility. There was also a general feeling during the second set of roundtables on mental condition and criminal responsibility that diminished responsibility ought not to be introduced, or at least that its introduction would be problematic. The principal arguments which came out of consultations are summarised below.

706 Submission 25; Roundtables 17 February and 26 February 2004.

707 Roundtable 17 February 2004.

708 See para 5.56.

709 Roundtable 26 February 2004.

'Abnormality of Mind' Is Too Vague

5.113 There was a concern that the concept of 'abnormality of mind' was too vague and that this made it problematic both to understand and to apply. It was argued that this would lead to a lack of consistency across cases.⁷¹⁰

Diminished Responsibility Will Be Used to Replace Mental Impairment

5.114 There was a concern in roundtable discussions that if introduced, diminished responsibility would become the new mental impairment defence. This was due both to the perceived stigma of a not guilty verdict by reason of mental impairment outcome and also to the aversion many mentally impaired offenders have to the 25 year nominal term.⁷¹¹ In this context it was felt that diminished responsibility would be an attractive option for many people. It is true that in jurisdictions where both diminished responsibility and mental impairment or insanity exist, there is a preference for diminished responsibility. The consequences of this could be that people who really should have pleaded mental impairment and would have been assured hospital care may not receive the same system of care.⁷¹²

Diminished Responsibility Will Be Used in Contexts of Family Violence

5.115 One of the concerns about the introduction of the partial defence of diminished responsibility is its effect on homicides in the context of family violence. There are two different contexts in which the partial defence may be relevant—cases where women kill their partners in response to domestic violence and cases where men kill their female partners due to reactive depression. Often this occurs when the women have ended the relationship.

5.116 In the case of women who kill in response to domestic violence, it has been argued that introducing diminished responsibility would only serve to entrench misleading stereotypes of women. The temptation in such circumstances might be to argue that the killing occurred as the result of a psychological disturbance rather than a defensive reaction to ongoing and severe domestic violence. This may misrepresent women's experiences. There is also a concern that the availability of diminished responsibility would mean that women will plead

710 Roundtables 17 and 26 February 2004; Submission 12.

711 Roundtable 17 February 2004; Submission 25.

712 Roundtables 17 February and 26 February 2004.

guilty to manslaughter on this ground rather than relying on self-defence.⁷¹³ BWS has been used as the basis of a diminished responsibility defence in England.

5.117 Another concern about the introduction of diminished responsibility in the context of family violence is that it may provide a defence for depressed husbands who kill their partners when they end the relationship. Depression is among the most common diagnoses forming the basis of the defence in the UK. In our homicide prosecutions study depression was the most common diagnosis among the set of cases which were not mental impairment, but which had a psychiatric report attached to the file.

5.118 In his submission, Dr Jeremy Horder referred the Commission to research in the UK to support the argument that diminished responsibility operates in

if anything an even more gender-biased way than provocation, favouring men who have (typically) killed their spouses.⁷¹⁴

5.119 Dr Horder not only refers to the repercussions of introducing diminished responsibility in a jurisdiction where provocation has been abolished, but also talks about the problems of diminished responsibility and provocation being run together in cases where men have killed their wives at the end of a relationship.⁷¹⁵ The data cited by Dr Horder suggests that the defence is often run in the context of family homicides and typically by men who have killed their partners or wives.⁷¹⁶

5.120 There was also a concern that if provocation were to be abolished as a result of recommendations made by the Commission, diminished responsibility would replace provocation as a partial excuse.⁷¹⁷ It was agreed by roundtable participants that this could potentially be problematic in relation to homicides in the context of family violence.⁷¹⁸

5.121 Dr Horder also suggested that, if diminished responsibility were to be introduced, there should be a clear statement made to the jury that evidence of

713 New Zealand Law Commission, *Battered Defendants, Victims of Domestic Violence Who Offend* Preliminary Paper 41 (2000), 40. See also Fran Wright, 'Does New Zealand Need a Diminished Responsibility Defence?' (1998) 2 *Yearbook of New Zealand Jurisprudence* 109, 123–124.

714 Submission 2.

715 Ibid.

716 Ibid.

717 Roundtable 17 February 2004; Submission 2.

718 Roundtable 17 February 2004.

provocation should be irrelevant to the plea; that is, the law should actively prevent diminished responsibility and provocation from being run together.⁷¹⁹

There Is No Reason to Introduce Diminished Responsibility in Victoria

5.122 Given all the problems mentioned, it was felt by some people that there were no compelling reasons for the introduction of the defence. There was no evidence in Victoria, a jurisdiction which has neither the death penalty nor a mandatory minimum sentence for murder, supporting its introduction.

Diminished Responsibility Is Better Dealt With at Sentencing

5.123 In later roundtable discussions, and in submissions opposed to diminished responsibility, there was a strongly held view that mental condition should be taken into account at sentencing.

5.124 It was suggested at one of the roundtables that there should be some judicial education about the range of available sentencing options in cases involving mentally ill offenders.⁷²⁰ People also said the courts do not have a good framework for sentencing mentally impaired offenders because of the current sentencing provisions. It was felt there needed to be better, more flexible options for sentencing, including diversionary schemes and more realistic options for treatment.

THE COMMISSION'S VIEW AND RECOMMENDATIONS

5.125 The Commission has considered the submissions and arguments in favour of the introduction of diminished responsibility but ultimately does not find them persuasive. The Commission's reasons for not supporting the introduction of diminished responsibility are set out below.

MITIGATING FACTORS SHOULD BE TAKEN INTO ACCOUNT AT SENTENCING

5.126 The Commission believes the role of the jury should be to establish the guilt or innocence of an accused person. Degrees of criminal responsibility are better assessed during the sentencing process by a judge rather than a jury. There are many factors and circumstances which should be taken into account when assessing levels of criminal responsibility. It would be impossible to legislate

719 Submission 2.

720 Roundtable 17 February 2004.

individual defences for them all, and it is inconsistent to legislate for some factors or circumstances and not others. Assessing these factors at sentencing is a fairer and more consistent approach.

5.127 Juries do not have to give reasons for their decisions, while judges do. These reasons can be scrutinised and can form the basis of an appeal. The development of the law requires reasons to be discernible in order to avoid a ‘wilderness of single instances’.⁷²¹

5.128 Introducing diminished responsibility could mean a change in judicial practices in relation to sentencing—that is, there might be a significant increase in the number of hospital orders made at the conclusion of diminished responsibility cases. This would have implications for already very limited hospital resources.

5.129 Flexibility in relation to sentence lengths and dealing with mentally ill offenders makes the introduction of diminished responsibility unnecessary and undesirable. While diminished responsibility results in a manslaughter outcome and therefore a reduced prison sentence, the Victorian Sentencing Act provides flexibility in sentencing and also gives courts scope to order hospital dispositions where necessary.

5.130 A reduced sentence will not always be the appropriate outcome in cases of diminished responsibility. In some cases a hospital disposition will be more appropriate. In other cases it may be that a longer sentence is appropriate, particularly where community safety is an issue. It is therefore important to have the full range of sentencing options available to a judge, rather than restricting the range to manslaughter.

DIMINISHED RESPONSIBILITY CONFLICTS WITH THE COMMISSION’S RECOMMENDATIONS TO ABOLISH PROVOCATION

5.131 If provocation were to be abolished, in accordance with the Commission’s recommendations, diminished responsibility could be used as a replacement defence. This may be of particular concern in the cases involving men who kill their female partners at the end of a relationship. Since the Commission’s view is that provocation should be abolished, in part because of the inappropriate use of the defence by men who kill in the context of sexual intimacy, it would be illogical to create a new defence which might have many of the same defects to take its place.

721 Alfred Lord Tennyson, *Aylmer’s Field* (1793).

NO SATISFACTORY WAY OF REFORMULATING DIMINISHED RESPONSIBILITY DEFENCE

5.132 The current formulations of diminished responsibility are not satisfactory and it would be too difficult to reformulate the defence in a way that would adequately resolve the current problems. Not only is the current formulation vague and therefore open to manipulation, the defence of diminished responsibility mixes two separate concepts which do not sit easily together. These include the notion of the ‘mind’ which may be the subject of expert psychiatric opinion, and ‘responsibility’ which is essentially an ethical notion which psychiatrists have no special expertise in.

! RECOMMENDATION(S)

45. The partial excuse of diminished responsibility should not be introduced in Victoria. As is currently the case, mental disorder short of mental impairment, which may have a mitigating effect, should be taken into account in sentencing.

AUTOMATISM

INTRODUCTION

5.133 Strictly speaking, automatism is not a defence. Rather, it is a denial of a key element of homicide and other serious offences, that is, the requirement that the actions of the accused be voluntary. With other defences to homicide the prosecution leads evidence to prove the elements of the crime. It is then up to the defence to bring evidence of some reason which makes the accused not responsible for his or her actions. In the case of automatism, the defence alleges that the elements of the crime are not proved. In practice, however, the doctrine of automatism operates in a similar way to other defences.

5.134 Automatism is rarely raised in Victoria. Nevertheless, in certain circumstances the result of a finding of automatism will be a supervision order under the CMIA.⁷²² Changes to the law in relation to mental condition defences

722 Supervision orders under the CMIA are discussed in more detail at paras 5.50–5.55. As mentioned in the Commission’s Options Paper, there were no cases where automatism was raised in the

generally could therefore affect the operation of the doctrine. It is for this reason that the Commission decided to review automatism alongside mental impairment and diminished responsibility.

5.135 The Commission recommends that the doctrine of automatism remain unchanged. We do not think the available options for reform will resolve the problems with the doctrine and do not believe the problems are significant enough to warrant reform. This section sets out a brief explanation of the doctrine of automatism⁷²³ before discussing the principal criticisms which have been made of it. We then summarise the main options considered by the Commission and discussed during consultations, before setting out the Commission's view and recommendation in relation to automatism.

WHAT IS AUTOMATISM?

5.136 There is a range of mental conditions which the courts have held can cause a person to act in an involuntary or unconscious way, including epilepsy,⁷²⁴ sleep disorders,⁷²⁵ physical blows to the head⁷²⁶ and dissociative episodes resulting from extreme emotional stress.⁷²⁷ The law in relation to automatism has developed to divide these conditions into two broad categories: insane automatism and non-insane automatism. The effect of a finding of insane automatism is that sufferers are treated in the same way as if they were mentally impaired. The effect of a finding of non-insane automatism is a complete acquittal. Obviously, the distinction is an important one from the perspective of the accused. It is therefore hardly surprising that a considerable amount of case law has developed around the distinction between non-insane and insane automatism.

DISTINGUISHING BETWEEN INSANE AND NON-INSANE AUTOMATISM

5.137 A number of different legal tests have emerged to distinguish between insane and non-insane automatism. Each test attempts to define more clearly the difference between insane and non-insane automatism. These are:

Commission's homicide prosecutions study: Victorian Law Reform Commission (2003), above n 597, 211.

723 A more detailed explanation of the doctrine can be found in *ibid*, 5.178–5.187.

724 *Bratty v Attorney-General (Northern Ireland)* [1962] AC 78.

725 *R v Burgess* [1991] 2 QB 92 (CA).

726 *R v Scott* [1967] VR 276.

727 *R v Falconer* (1990) 171 CLR 30.

- the ‘recurrence test’;
- the ‘internal/external’ test and
- the ‘sound/unsound mind’ test.

5.138 The ‘recurrence test’ classifies behaviour which was caused by a condition likely to recur as insane automatism.⁷²⁸ The ‘internal/external test’ classifies insane automatism as behaviour which is caused by an internal factor and non-insane automatism as behaviour which is caused by an external factor.⁷²⁹ The ‘sound/unsound’ mind test attempts to assess the reactions of a particular individual to a particular stress or trauma.⁷³⁰ If the trauma is seen to have been something the ordinary person could have withstood, then the behaviour will be regarded as a consequence of insane automatism. If the trauma or context is seen as something the ordinary person would not have withstood, then the behaviour will be regarded as a consequence of non-insane automatism.⁷³¹ Automatism caused by psychological trauma is also known as ‘psychological blow’ automatism.

5.139 All of these tests have been criticised to a greater or lesser extent, in the main because they fail to distinguish between sane and insane automatism with any clarity, and in some cases cause even greater confusion about the distinction.⁷³² It is arguably this difficulty in distinguishing between insane and non-insane automatism which is the source of most of the criticisms, particularly since this leaves the doctrine open to abuse.

CRITICISMS OF AUTOMATISM

5.140 The principal concern in relation to automatism is that it is so susceptible to abuse. It has been described by the courts as ‘the last refuge of a scoundrel’.⁷³³ In particular, cases involving so-called ‘psychological blow’ automatism are problematic because there is no reliable way of verifying whether a particular trauma was the cause of the unconscious or unwilling state. In the case of

728 *Bratty v Attorney-General (Northern Ireland)* [1962] AC 78.

729 *R v Falconer* (1990) 171 CLR 30, para 20.

730 Ibid. see also *R v Radford* (1987) 11 Crim LJ 231, 276.

731 *R v Radford* (1987) 11 Crim LJ; see also Bernadette McSherry, ‘Getting Away with Murder? Dissociative States and Criminal Responsibility’ (1998) 21 (2) *International Journal of Law and Psychiatry* 163, 173–174.

732 McSherry argues, for example, that the distinction in Australia between non-insane and insane automatism can be very arbitrary particularly when compared with the Canadian approach: ibid.

733 *R v Szymusiak*, [1972] 3 OR 602, 608 (CA), Schroeder JA.

individuals with epilepsy, diabetes or sleep disorders,⁷³⁴ it is possible, to some extent, to independently verify the particular condition which is claimed to have been the cause of the behaviour and to argue coherently that there is a link between the condition and the behaviour. In the case of ‘psychological blow’ automatism, a traumatic or shocking event will generally be identified as the trigger for what is generally termed a dissociative state. It will always be difficult to say with any certainty whether the person was suffering from a dissociative state or whether the particular shock or trauma was sufficient to have caused it. This was certainly the concern of the psychiatrists involved in consultations. In addition, the criticism was made that psychiatrists giving evidence in cases involving ‘psychological blow’ automatism tended to give evidence about the dissociative state, but make no attempt to draw a connection between the state and the elements required to show non-insane automatism.⁷³⁵ If juries have a reasonable doubt about whether someone was suffering from a dissociative state at the time they killed, they must acquit the person.

5.141 Typically, a person who claims non-insane automatism will also claim that he or she has no recollection of the events leading up to and including the homicide. This claim is both very easy to make and very difficult to disprove. When this is considered in addition to the fact that, in some cases, it was clear that the accused actually had reason to kill the deceased and perhaps even had made prior threats towards the deceased, scepticism about dissociative states and automatism is not surprising.⁷³⁶ This was certainly a recurrent theme through the Commission’s consultations.

5.142 In addition to general scepticism, there is also the possibility that the amnesia typically experienced by the person who then argues automatism due to a dissociative episode is not due to dissociation at all but rather to the trauma of the killing itself. Research suggests that between one-third and one-half of people who kill in a domestic situation have no memory whatsoever of the actual killing. This

734 Sleepwalking cases have proven to be a controversial basis for automatism in some instances. See for example the case of *R v Parks* (1990) 56 CCC (3d) 449, in which the accused Kenneth Parks drove 23 kilometres and killed his mother-in-law and seriously injured his father-in-law. Parks was acquitted of murder on the basis of evidence brought by five separate medical experts that he was unconscious at the time of the murders.

735 Roundtable 2 December 2003.

736 See for example the case of *Falconer* (1990) 171 CLR 30, where the accused killed her husband after many years of violent abuse. Just before the accused killed her husband he had sexually assaulted her and she had become aware of facts which made her suspect him of sexually abusing her foster daughter.

is because the memory is so traumatic people block it from their memory to protect themselves.⁷³⁷ There are therefore three possibilities to consider for each case of automatism based on a dissociative episode: first, the accused was fabricating a loss of memory; second, the loss of memory was a reaction to the killing and is therefore no evidence that the relevant actions were unwilled or unconscious; or third, the accused was experiencing a dissociative episode which meant what he or she did was not conscious or willed. There is no medical way of determining which of these scenarios is true and so it is ultimately up to the members of the jury to determine which possibility they accept.

5.143 Some of the psychiatrists consulted by the Commission also felt that actions that are both purposeful and have direction cannot properly be described as unwilled or unconscious and are an insufficient basis for an automatism argument. It was acknowledged that there was some disagreement within the profession about this view, but for participants in consultations it was felt that this area of psychiatry fell into the category of 'pseudo-science' because so little is really known about it. Given that the defence need only create a reasonable doubt as to whether an act was willed or conscious, the use of this so-called 'pseudo-science' in the courtroom was very worrying.⁷³⁸

OPTIONS FOR REFORM

5.144 In considering the doctrine of automatism, the Commission has considered the problem of so-called 'psychological blow' where a person kills while in a dissociative state. The Commission's concern in relation to the use of dissociative states is that it is very difficult (if not impossible) to verify a person's claim that they were acting in such a state. The claim may be made in circumstances where the person has been extremely upset or traumatised because

737 Professor Mullen made comments to this effect in the case of *Leonboyer* [2001] VSCA 149, para 49 and also in early discussions with the Commission. See also Stephen Porter, Angela Birt, John Yuille et al, 'Memory for Murder: A Psychological Perspective on Dissociative Amnesia in Legal Contexts' (2001) 24 *International Journal of Law and Psychiatry* 23, 24. This article cites research showing that amnesia is reported in a significant proportion (up to 65% in some studies) of cases involving murder or attempted murder.

738 Roundtable 17 February 2004. Concern was also expressed about the use of automatism in such cases at the roundtable held on 2 December 2003.

of something which has been done by the person they subsequently kill, that is, they generally had a clear motive for the killing.⁷³⁹

5.145 This concern has led the Commission to consider three options for automatism:

- removing the doctrine of automatism;
- excluding dissociative states from the doctrine of automatism; and
- leaving the doctrine of automatism unchanged.

The arguments for each of these options are outlined below.

REMOVE THE DOCTRINE OF AUTOMATISM

5.146 Removing the doctrine of automatism entirely could help to simplify the law. Those who would have raised insane automatism will still be able to argue mental impairment and those who might have raised non-insane automatism will be able to argue lack of intention.

5.147 Removing automatism would mean the complexities surrounding the distinction between non-insane and insane cases of automatism would be resolved. Rather than basing an argument for non-insane automatism upon one of the existing (and unsatisfactory) legal tests, the accused would simply use evidence of his or her condition to argue there was no intention to kill.

5.148 While theoretically involuntary or unconscious action is not the same as an unintentional action, in practical terms all accused who claim to have acted in an unwilling or unconscious manner would have a lack of intention argument open to them.

5.149 In theory, arguing lack of intention in a case of unwilling or involuntary action should result in a full acquittal. In practice, however, a jury may also return a verdict of manslaughter in such cases. This means that, practically speaking, there is some degree of flexibility with a lack of intention argument which does not exist with a non-insane automatism argument.

The Commission's View

5.150 The Commission believes the removal of the doctrine of automatism could clarify and simplify the law of homicide. This would not prevent an accused

739 See, for example, the cases of *Falconer* (1990) 171 CLR 30; *Leonboyer* [2001] VSCA 149; and *Hawkins v the Queen* (1994) 179 CLR 500.

whose actions were not intended relying on lack of intention or mental impairment. However, removal of automatism for homicide alone would not be appropriate and it is beyond the scope of this reference to consider the application of automatism to other offences. Further, it is arguable that removal of automatism for all offences would be unjust to people who are charged with offences which do not require proof of intention for the prohibited act (strict liability offences).⁷⁴⁰ In such cases, people who act involuntarily because they are in a state of automatism would not be able to rely on their lack of intention to escape conviction. For these reasons the Commission does not support removal of automatism for homicide alone.

EXCLUDE DISSOCIATIVE STATES FROM THE DOCTRINE OF AUTOMATISM

5.151 There were a number of submissions made to the Commission recommending reforms which would address the issue of dissociative states and automatism. The Commission was interested in two in particular, both of which were suggested by Associate Professor Bernadette McSherry.⁷⁴¹ The first suggested reform was to broaden the mental impairment defence to include cases of automatism. The second suggestion was to define automatism more narrowly to effectively exclude cases of dissociation. These suggestions are explained in more detail below.

INCLUDE AUTOMATISM WITHIN A BROADENED MENTAL IMPAIRMENT DEFENCE

5.152 The possibility of introducing a broader mental impairment defence was suggested by Professor McSherry as a way of ensuring that cases involving dissociative states would be dealt with as a category of mental disorder. A definition of mental impairment which could cover situations of automatism would effectively mean all cases of automatism were dealt with as cases of insane automatism. The definition suggested by Professor McSherry and outlined in paragraph 5.21 is based on that suggested by the Canadian Psychiatric Association's definition. As McSherry points out in her submission to the Commission, the Canadian approach⁷⁴² has been to treat cases involving

740 It was also suggested by Professor McSherry that problems could arise in cases of negligent manslaughter, if automatism were abolished.

741 Dr Stephen Matthews also made a submission recommending that the existing defence of mental impairment be replaced by a defence of 'failed agency'. Dr Matthews argues that the new defence would cover situations of automatism: Submission 1.

742 See *R v Stone* [1999] 2 SCR 290.

psychological blow automatism as a category of mental disorder automatism which attracts a mental disorder disposition.⁷⁴³ The advantage of this approach is that it would discourage false claims of automatism.

DEFINE AUTOMATISM MORE NARROWLY

5.153 The other suggestion made by Professor McSherry was to delineate what is meant by automatism in the psychological sense so it cannot be used inappropriately. The definition suggested by Professor McSherry is as follows:

Automatism means involuntary behaviour that occurs in an altered state of consciousness and which is compulsive, repetitive and simple. It does not mean goal-directed or purposive behaviour performed when in an altered state of consciousness.⁷⁴⁴

5.154 This definition would operate to exclude cases involving dissociative states, since actions done while in a state of dissociation are almost always purposive and goal-directed.

5.155 The Commission has considered the option of reforming automatism either to exclude dissociative states or to bring them within a broader defence of mental impairment, but believes that such a reform is unnecessary and it would be unlikely to achieve the desired outcome.

5.156 The Commission believes that dealing with automatism by including it within a broader definition of mental impairment would not be desirable for two reasons. First, the Commission has decided, for a variety of reasons set out earlier in this chapter, to leave the existing mental impairment defence unchanged. Second, the Commission believes it would not be just to deal with all cases of involuntary killing as falling within a defence of mental impairment, for although the line between the mentally impaired and the non-mentally impaired is very difficult to draw, it is nevertheless an important conceptual and legal distinction which should be maintained. We are concerned that such a reform would result in

743 Submission 12. See also Bernadette McSherry, 'Getting Away with Murder? Dissociative States and Criminal Responsibility' (1998) 21 (2) *International Journal of Law and Psychiatry* 163, where McSherry suggests that the definition of 'mental impairment' in the revised defence could include mental illness, severe intellectual disability or a condition of severely impaired consciousness. Severely impaired consciousness would ensure that states of dissociation could be included. The possibility of including automatism within the definition of mental impairment was also discussed at the roundtable held on 2 December 2003.

744 Submission 12.

people who do not have a condition which requires institutionalised treatment being subject to ongoing orders under the CMIA. An epileptic who killed while suffering from a seizure, for example, would be subject to the nominal term provisions of the CMIA if such a reform were introduced. Such an outcome would in the Commission's view be inappropriate.

5.157 The Commission believes that redefining automatism to exclude dissociative states would not be desirable, because it would not achieve the desired outcome. In reality the effect of either of the proposed reforms would be that people would be more likely to argue lack of intention rather than automatism in their defence. An epileptic wanting to avoid a nominal term would certainly be tempted to raise lack of intention. Similarly, a person who claims to have been in a dissociative state would have lack of intention available, even if the definition of automatism were changed to exclude dissociative states.

5.158 The recent South Australian case of *R v Singh*⁷⁴⁵ is an example of a case where lack of intention rather than automatism was relied upon in the context of an alleged dissociative state. In *Singh* the accused shot his wife when she refused to hand over his daughter on a contact visit. The accused went to the boot of his car, retrieved a gun and shot his wife. He claimed he had no memory of getting the gun or of shooting his wife. Singh raised provocation and lack of intention at his trial and was ultimately acquitted.

RETAIN AUTOMATISM UNCHANGED

5.159 The other option considered by the Commission was to retain the current doctrine of automatism. The main arguments put in favour of the retention of automatism during consultations came from the CBA and the Mental Health Legal Centre.⁷⁴⁶ The CBA was in favour of retaining automatism and the distinction between non-insane and insane automatism. They argued that where a person suffered from a transitory or temporary loss of voluntariness, it was a different consideration to those that currently exist under the CMIA. It was argued that in the rare cases where an accused's actions are unwillful, these acts should not attract criminal responsibility and consequent punishment. It was also felt this was understood by the general community.⁷⁴⁷

745 [2003] SASC 344 (Unreported, Supreme Court of South Australia, Mullighan, Debelle and Gray JJ, 2 October 2003).

746 Submissions 25, 27.

747 Submission 27.

THE COMMISSION'S VIEW AND RECOMMENDATIONS

5.160 The Commission believes the doctrine of automatism should remain unchanged, despite its problems. The Commission is aware of the controversy and debate which continues to surround the doctrine of automatism and that it can be very difficult to distinguish between cases of non-insane and insane automatism. We are also aware that the law which has developed to clarify the distinction has instead further complicated the issue. Nevertheless, the Commission believes the question of whether or not a person acted involuntarily while suffering from a disease of the mind, or acted involuntarily for some other reason, is ultimately a question for the jury to determine based on the available expert evidence.

5.161 The concern that automatism is open to abuse is, in the Commission's view, a theoretical concern rather than one based on reality. Automatism is rarely raised, and where it is raised it is rarely successful. In the very few cases where a dissociative state is used as the basis of automatism, the Commission believes the jury is best placed to determine whether or not the acts of the accused were involuntary, based on the evidence presented.

5.162 While it would be possible in theory to remove lack of intention as an option in cases involving dissociative episodes, the Commission believes this would be inappropriate and likely to lead to unjust outcomes. In the absence of any just way of limiting the use of 'lack of intention', any change to the doctrine of automatism would be of limited benefit.

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RECOMMENDATION(S)

46. The doctrine of automatism should remain unchanged.

Chapter 6

Infanticide

INTRODUCTION

6.1 In the Commission's Options Paper we discussed the offence and defence of infanticide and explained how the existing law relates to the social reality of child killing. Infanticide has been criticised because it is based on the problematic presumption that women who kill young children are necessarily mentally disturbed. This presumption does not take into account the complex factors which can lead to maternal child killings and does not reflect the range of circumstances in which children are killed by their mothers.

6.2 During consultations the Commission explored the merits of retaining infanticide, as compared with allowing women to raise mental impairment or diminished responsibility (if this partial defence were introduced in Victoria). The Commission also sought views on whether infanticide should be retained, and if so whether changes should be made to it.

6.3 In this Chapter we set out the Commission's final recommendations for infanticide and the reasons behind them. The Chapter describes the present law and explains the main criticisms which have been made of it. We then outline the various options for reform, and explain why the Commission recommends retention of the offence of infanticide with some changes.

WHAT IS INFANTICIDE?

6.4 In Victoria, infanticide describes a particular kind of child killing. Unlike the other defences to homicide, infanticide is both an offence and an alternative verdict to murder, which in practice has led infanticide to be treated as a partial defence. This means the prosecution can charge a woman with infanticide and a woman who has been charged with murder can raise infanticide in her defence at trial. The offence of infanticide occurs where a woman kills her child when the

child is under 12 months old, due to a disturbance of mind which is caused by the effects of either childbirth or lactation.⁷⁴⁸ Where a woman has not been charged with infanticide but with murder, a jury may return a verdict of infanticide instead of murder if they are satisfied the killing of the child occurred due to a disturbance of mind caused by childbirth or lactation.⁷⁴⁹

ALTERNATIVE VERDICTS AND THE ONUS OF PROOF

6.5 Commentators often refer to infanticide as both an offence and a defence in Victoria and NSW and as an offence only in Western Australia and Tasmania.⁷⁵⁰ Despite this apparent difference, infanticide is both an offence and an alternative verdict to murder in all of these states. In Tasmania and Western Australia the provisions dealing with alternative verdicts are part of a separate general provision on alternative verdicts and in NSW and Victoria, they are included in the infanticide provisions themselves and are worded differently. The Victorian infanticide provisions state the following:

Where upon the trial of a woman for the murder of her child, being a child under the age of twelve months, the jury are satisfied that she by any wilful act or omission caused its death, but that at the time of the act of omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then the jury may, notwithstanding that the circumstances were such that but for the provisions of this section they might have returned a verdict of murder, return in lieu thereof a verdict of infanticide.⁷⁵¹

748 *Crimes Act 1958* (Vic) s 6—Offence of Infanticide.

(1) Where a woman by a wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child, or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for this section the offence would have amounted to murder, she shall be guilty of the indictable offence of infanticide and be liable to level 6 imprisonment (5 years maximum).

749 See para 6.5.

750 Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, *Model Criminal Code, Chapter 5, Fatal Offences Against the Person* Discussion Paper (1998), 131. See also Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2001), 283.

751 *Crimes Act 1958* (Vic) s 6(2).

The NSW provisions are very similar.⁷⁵²

6.6 It is unclear whether the provisions in NSW and Victoria shift the burden of proof from the prosecution to the defence. On one view the effect of the legislation in all four jurisdictions is the same and the onus of proving the woman committed infanticide remains on the prosecution.⁷⁵³ This means it is up to the prosecution to prove the elements of infanticide.⁷⁵⁴ Another view is that the words 'the jury are satisfied...' in the Victorian and NSW provisions shift the burden of proof to the accused, so that if the woman is charged with murder and the defence argues she should be convicted of infanticide instead, it becomes necessary for the defence to prove the elements of infanticide on the balance of probabilities.⁷⁵⁵ There is a significant difference between requiring the accused merely to raise a reasonable doubt as to her guilt, and requiring her to satisfy the jury of the specific elements of infanticide. Nevertheless, the position is unclear and a variety of approaches have been taken to the question in the literature and the case law.

HISTORICAL CONTEXT

6.7 Historically, infanticide was created by the *Infanticide Act 1922* (UK) to save women from the death penalty. The public pressure which led to the introduction of infanticide was founded not only on psychiatric theories about the link between childbirth and insanity, but also on a recognition of the particular social context of child killing. The offenders were typically unmarried, young and

752 See *Crimes Act 1900* (NSW) s 22A(2). Compare these provisions with the alternative verdict provisions in the *Criminal Code Act 1924* (Tas) s 332(2) which says:

Where pursuant to this chapter a person may, on indictment for any crime, be convicted of any other crime it is intended that, if the jury find him not guilty of the crime with which he is charged, he may be convicted of that other crime if it is established by the evidence to have been committed by him.

Under s 333, upon an indictment for murder a person may be found guilty of infanticide. The Western Australian provision is very similar, see *Criminal Code Act Compilation Act 1913* (WA) s 595.

753 See Butterworths, *Halsbury's Laws of Australia*, (19 August 2004) Criminal Law, Homicide [130-3335]. See also Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility Report No 34* (1990), 61.

754 According to *Halsbury's Laws of Australia*, even where there is no evidence of infanticide raised by the defence the trial judge has a duty to direct the jury as to the alternative verdict of infanticide if there is evidence to support such a verdict: *ibid*.

755 The principle is set out in a Victorian case involving a suicide pact, *R v Sciretta* [1977] VR 139. That case involved a suicide pact but the *Crimes Act 1958* (Vic) s 6B uses the same wording as the infanticide provisions, ie 'Where upon a trial for murder, the jury is satisfied that...'

often servant girls who had either been raped or seduced by their employers.⁷⁵⁶ The consequences of bearing and trying to raise a child in such circumstances would have been disastrous for them both socially and economically.⁷⁵⁷ Prior to the introduction of the offence, reformers had argued for a range of factors to be taken into account when assessing a mother's state of mind, including poverty and abandonment by the father.⁷⁵⁸ The focus of the law itself has, however, always been upon the medical/psychiatric aspects of the woman's condition rather than upon the social or economic aspects of her plight.

CRITICISMS OF INFANTICIDE

6.8 There are four main criticisms of infanticide:⁷⁵⁹

- there is no need for a separate offence or defence of infanticide;
- the medical basis of infanticide is flawed;
- infanticide only applies to the biological mother of the child; and
- the current limitation of infanticide to children aged under 12 months is unjust.

Each of these arguments is explained briefly below.

THERE IS NO NEED FOR A SEPARATE OFFENCE OR DEFENCE OF INFANTICIDE

6.9 The retention of infanticide is inconsistent with the Commission's criticism of partial defences and view that mitigating circumstances should be taken into account at sentencing. The retention of infanticide as an offence is similarly unnecessary because of the existing defence of mental impairment. Those women who can establish that they did not understand what they were doing at the time of the killing, or that it was wrong, ought to raise mental impairment and

756 Ania Wilczynski, *Child Homicide* (1997), 150. See also Elaine Showalter, *Women, Madness and English Culture 1830–1980* (1987) 58, cited in Nicola Lacey, Celia Wells and Dirk Meure, *Reconstructing Criminal Law: Text and Materials* (1990), 223.

757 Wilczynski, (1997), above n 756, 150.

758 Robyn Lansdowne, 'Infanticide: Psychiatrists in the Plea Bargaining Process' (1990) 16 (1) *Monash University Law Review* 41, 45.

759 See Victorian Law Reform Commission (2003), above n 3, paras 6.9–6.44, for a more detailed discussion of the criticisms of infanticide.

be subject to a supervision order until their illness has resolved rather than be imprisoned or, as is often the case, given a non-custodial sentence.

6.10 To create a unique offence with a lesser penalty for women who were suffering from a disturbance of mind less than mental impairment also appears to devalue the life of the child killed. Factors affecting a woman who kills her baby can be taken into account at sentencing. On this view, there is no coherent basis for retaining the law.

THE MEDICAL MODEL

6.11 Infanticide is based on the belief that childbirth and lactation can cause mental disturbance which can result in some women killing their children. However, there is a great deal of debate about the nature and extent of the connection between childbirth, lactation and mental disturbance.⁷⁶⁰ It is also increasingly recognised that social, economic and other stresses can play as much, if not more, of a role in maternal child killings.⁷⁶¹ The argument against the medical focus of infanticide is that it distorts the reality of child killing and ignores the complex factors which can lead to the killing of a child. This criticism is closely linked to the criticism that the defence/offence is gender biased.

INFANTICIDE ONLY APPLIES TO BIOLOGICAL MOTHERS

6.12 Infanticide is only available to the biological mother of the child who is killed. This means that other primary carers including adoptive, foster and step-parents, whether male or female, may not raise the defence. There are two main criticisms of this limitation. Some feminists argue that the limited application of infanticide tends to treat women as suffering from a medical condition rather than trying to understand their behaviour in the context of the social and economic pressures of childbearing.⁷⁶² It is also argued that it is unjust not to extend the defence to other carers, including fathers, stepfathers and adoptive parents because

760 Bernadette McSherry, 'The Return of the Raging Hormones Theory: Premenstrual Syndrome, Postpartum Disorders and Criminal Responsibility' (1993) 15 *Sydney Law Review* 292, 293. See also Wilczynski (1997), above n 756, 155.

761 Wilczynski (1997), above n 756, 156.

762 Wilczynski (1997), above n 756, 155–156.

the pressures of caring for young babies apply to all parents, whether or not they are biological parents and regardless of gender.⁷⁶³

THE CURRENT AGE LIMIT

6.13 The current formulation of infanticide means that it can only be raised in relation to children aged 12 months or less. There are two criticisms of this restriction. First, 12 months is an arbitrary period and since there are child killings which occur over the age of 12 months, deserving cases where the mother's culpability is substantially reduced could be excluded due to the limitation. In addition, where a mother kills more than one of her children due to a disturbance of mind resulting from childbirth or lactation, she may only argue infanticide in relation to the child aged less than 12 months and will be charged with murder in respect of older children. This is unjust and illogical.⁷⁶⁴

OPTIONS FOR REFORM: AN OVERVIEW

6.14 In this section, we look at the main options for changes to infanticide and explain the Commission's view in relation to each. We considered:

- whether infanticide should be retained; and
- if infanticide were retained, whether it should be reformed.

6.15 In considering possible reforms to infanticide, the Commission considered the following questions:

- Should the connection between childbirth, lactation and disturbance of mind be removed?
- Should the age limit for infanticide be extended?
- Should infanticide be available where a woman kills an older child as well as her baby?
- Should infanticide be available to men and non-biological parents?

763 Jane Ussher, 'Reproductive Rhetoric and the Blaming of the Body' in Paula Nicolson and Jane Ussher (eds) *The Psychology of Women's Health and Health Care* (1992), citing the research of Jenkins, 'Sex Differences in minor psychiatric morbidity' (1985) *Psychological Medicine* Mono Suppl 7. Ussher points to research showing that men may also suffer from depression when they are the sole parents of children or the sole carers of elderly parents or other family members.

764 Law Reform Commission of Victoria (1990), above n 753, 55.

SHOULD INFANTICIDE BE RETAINED OR ABOLISHED?

ARGUMENTS IN FAVOUR OF ABOLITION

6.16 There are a number of arguments against the retention of infanticide. The medical basis of the law has been criticised as over-simplifying women's responses to childbirth.⁷⁶⁵ The belief that childbirth or lactation actually cause women to become mentally disturbed is contested.⁷⁶⁶ In some cases, for example postnatal psychosis, it may be more appropriate for a woman who kills her baby to be found not guilty by reason of mental impairment and to receive treatment under the CMIA, than to be convicted and sentenced for infanticide. If diminished responsibility were to be introduced in Victoria, this would also provide a potential alternative defence if the mother were able to show she had been suffering from an 'abnormality of mind' at the time of the killing. Diminished responsibility could equally mean that biological fathers and non-biological parents, who do not come within the scope of infanticide, could be convicted of manslaughter rather than murder if they are able to establish they were suffering from an 'abnormality of mind' at the time of the killing.

6.17 Another important criticism of infanticide raised in consultations is that it devalues the lives of young children. It has been argued that the law in relation to the killing of very young children by their mothers has as much to do with the devaluing of the life of an infant as with theories about female mental instability.⁷⁶⁷ Those taking this view argue that the limit of 12 months reflects the fact that as a community we find it more acceptable to kill a child under that age—because very small children are seen as not quite human or not human in the same way as an adult or a more fully developed child. This view would be consistent with an approach under which a mother who killed her baby as a result of medical or psychological factors would be convicted of murder, but such factors would be taken into account in sentencing.

6.18 The abolition of infanticide has been recommended in a number of jurisdictions. Abolition was recommended in the UK by the Butler Committee

765 See para 6.11.

766 This is discussed in more detail, para 6.32.

767 Roundtable 12 February 2004; Catherine Damme, 'Infanticide: The Worth of an Infant Under Law' (1978) 22 *Medical History* 1.

Report in 1975.⁷⁶⁸ In Australia, the NSWLRC recommended the abolition of infanticide on condition that the defence of diminished responsibility was retained.⁷⁶⁹ The Model Criminal Code recommends against the inclusion of infanticide on the basis it is both unnecessary and conceptually problematic.⁷⁷⁰

ARGUMENTS FOR THE RETENTION OF INFANTICIDE

6.19 It appears that although cases of infanticide are quite rare, jurisdictions which have an offence or defence of infanticide have been reluctant to remove it. The LRCV recommended retention of infanticide, recognising it as a 'distinctive kind of human tragedy' which required a distinctive response.⁷⁷¹ And despite the NSWLRC's recommendations that infanticide be abolished, the provisions still exist in that state.

6.20 The overwhelming response in consultations and submissions was that infanticide should be retained.⁷⁷² A number of different arguments were put forward in support of retention. It was argued that simply leaving women to argue mental impairment or diminished responsibility would not cover all cases of infanticide and that in certain cases it might be difficult to find a diagnostic label which would bring a woman within the requirements of either mental condition defence, despite the fact she was sufficiently disturbed to warrant a reduction in her criminal responsibility.⁷⁷³

6.21 It was also argued that the labelling of infanticide contexts as 'murder' was inappropriate. Very often mothers who kill their babies are traumatised by their actions. Women who are already deeply emotionally disturbed and grieving the loss of their child may be further distressed by being labelled as murderers.

768 Committee on Mentally Abnormal Offenders, *Report of the Committee on Mentally Abnormal Offenders* (1975), 251.

769 New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide* Report No 83 (1997), Recommendation 3.

770 Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, *Model Criminal Code, Chapter 5, Fatal Offences Against the Person* Discussion Paper (1998), 139.

771 Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility* Discussion Paper No 14 (1988), 69.

772 Submissions 27, 25, 16; Roundtable 12 February 2004.

773 Roundtable 12 February 2004; Submission 25.

Convicting such women of infanticide, rather than murder, may assist them to come to terms with their actions.⁷⁷⁴

THE COMMISSION'S VIEW AND RECOMMENDATIONS

6.22 The Commission has considered these arguments and has ultimately decided that retaining infanticide in some form is necessary. If infanticide were to be abolished, mothers who intentionally killed their young children would, most likely, be convicted of murder. While these women could argue that they were suffering from a mental impairment at the time of the offence, due to the high level of impairment required under the current test, it is unlikely this argument would be successful. We agree with the view expressed by the LRCV that infanticide recognises a 'distinctive kind of human tragedy'⁷⁷⁵ which should be reflected in the offence for which the accused is convicted. Infanticide avoids the labelling of a woman as a murderer which may be particularly damaging to her capacity to recover from and come to terms with what she had done.

6.23 The Commission disagrees that infanticide devalues the life of very young children. The law does not condone the killing of babies, but rather recognises the difficulties and complexities which may be present in a woman's relationship with her young child and the kind of factors which can influence maternal child killing.

6.24 It is unnecessary to have both an offence and a defence of infanticide. It is preferable to retain the offence of infanticide, and to make it clear it is a statutory alternative to murder if there is evidence to support a verdict of infanticide. Although the Commission notes that the position is unclear, the current Victorian infanticide provisions may shift the burden of proving infanticide onto the accused. In our view infanticide should be treated as an alternative verdict to murder *whether or not* the defence raise evidence of infanticide, and the burden of proving the elements of infanticide should remain with the prosecution.

6.25 Retention of infanticide as an offence means that women can be charged with infanticide initially, rather than murder, if there is sufficient evidence to support such a charge and where it is appropriate to do so. The Commission's suggested amendment will also allow the prosecution to charge a woman with murder initially and accept a plea of guilty to infanticide between the initial charge of murder and the trial.

774 Roundtable 12 February 2004.

775 Law Reform Commission of Victoria (1988), above n 771, 69.

!

RECOMMENDATION(S)

47. Infanticide should be retained as an offence and as a statutory alternative to murder.

(Refer to draft s 6(2) *Crimes Act 1958* in Appendix 4)

SHOULD INFANTICIDE BE REFORMED?

6.26 A number of the existing criticisms of infanticide concern the current formulation rather than its conceptual basis. The Commission believes many of these criticisms can be dealt with by reforming the elements of the offence of infanticide. In reaching this view the Commission considered a number of possible reforms. These are set out below.

THE CONNECTION BETWEEN BIOLOGY AND INFANTICIDE

6.27 Both the restriction of infanticide to the biological mother of a child and the fact that the current statutory provision connects the acts of childbirth and lactation with the required mental disturbance are features which have been criticised.

EXTENDING THE DEFENCE TO FATHERS AND NON-BIOLOGICAL PARENTS

6.28 One of the ways of resolving the gender and biology bias mentioned above would be to extend the defence so it applied to non-biological mothers, biological and non-biological fathers, and also to step-, adoptive and foster parents.

6.29 In consultations it was argued overwhelmingly that infanticide should be confined to the biological mother of the child. There were a number of reasons given for this. It was argued that a mother's relationship with her young baby is a unique one that could be distinguished from that of other kinds of parents. The relationship was described as symbiotic, with the mother and child interdependent for at least the first 12 months of the child's life.⁷⁷⁶

6.30 There was strong opposition to extending infanticide to include biological or non-biological fathers because men are the most common perpetrators of child abuse. Australian Institute of Criminology research on child killings has shown that where a child was killed by a parent that parent was most likely to be the

father.⁷⁷⁷ The Federation of Community Legal Centres cited research showing the significant differences between women who kill their children and men who kill their children. The Federation said:

While men kill to control or punish their children or their partner, women kill children because they cannot cope with the extreme difficulties they encounter in trying to care for their children.⁷⁷⁸

6.31 It was acknowledged that the social and economic stresses of parenthood might affect non-biological parents as much as biological parents. However, the view was that such factors were better taken into account at the sentencing stage rather than being included within an expanded formulation of infanticide.

REMOVING THE CONNECTION BETWEEN BREASTFEEDING, CHILDBIRTH AND MENTAL DISTURBANCE

6.32 Another of the key criticisms of infanticide is that the connection between breastfeeding, childbirth and disturbance of mind is problematic and misleading. Women can be affected by depression, deep anxiety or shock and in some cases psychosis following the birth of a child. However, the link between the act of childbirth itself and any of these disturbances is less than clear. There is a great deal of debate about the connection between childbirth, lactation and mental disturbance. There is general acceptance, for example, that there is no association between breastfeeding and mental disorder.⁷⁷⁹ There are, however, three mental conditions which are commonly associated with childbirth—the so-called ‘baby blues’, postnatal depression and post-puerperal psychosis. The ‘baby blues’ or maternal blues describe a series of transient and minor reactions to childbirth including tearfulness and anxiety, which usually occur in the days after birth and only last for 24 to 48 hours.⁷⁸⁰ Postnatal depression is a more serious condition which can occur in the months following the birth of a child and includes symptoms similar to those of clinical depression—anxiety, tearfulness, mood swings and a loss of energy.⁷⁸¹ Post-partum or post-puerperal psychosis occurs far

777 Heather Strang, *Children as Victims of Homicide* (1996), 3.

778 Submission 16. This view was also reflected in submission 25 and in the roundtable discussions on 12 February 2004.

779 Wilczynski, (1997), above n 756, 155.

780 Ibid. See also McSherry (1993), above n 760, 293–294.

781 McSherry (1993), above n 760, 293–294.

less frequently but often has a rapid onset. Symptoms include visual and/or auditory hallucinations, paranoid thoughts and mood swings.⁷⁸²

6.33 Although it is accepted that there is a range of conditions which can affect women following the birth of their children, there is considerable debate about whether any of these conditions are childbirth-specific disorders. Neither postnatal depression nor post-puerperal psychosis are recognised as separate disorders by the Diagnostic and Statistical Manual of Mental Disorders⁷⁸³ and some would argue that 'postnatal depression' is no different to other kinds of depression.⁷⁸⁴ Statistics on postnatal psychosis also reveal that in most cases the woman had some history of psychiatric illness.⁷⁸⁵ Others argue that the clear temporal connection between mental conditions and childbirth would seem to suggest there is an association between the condition and the birth.⁷⁸⁶

6.34 There is little doubt that some mothers do experience stress, depression and anxiety when they have children and that physiological and hormonal changes may play a part in this. However, it is now widely recognised that social, economic and other stresses can play as much, if not more, of a role in maternal child killings.⁷⁸⁷ The transition to parenthood is itself a difficult one to make because the reality of looking after a completely dependent infant and the consequent loss of independence does not often match the idealised perception of motherhood.⁷⁸⁸ Social or cultural factors may also affect a woman—she may be living in an abusive relationship or her family may disapprove of her having had a

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

783 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed) (2000).

784 Ussher (1992), above n 763, 49.

785 Christine Alder and Kenneth Polk, *Child Victims of Homicide* (2001), 58. See also P T d'Orban, 'Women Who Kill Their Children' (1979) 134 *British Journal of Psychiatry* 560, 562; John Harding, 'Postpartum Psychiatric Disorders: A Review' (1989) 30 (1) *Comprehensive Psychiatry* 109, 111.

786 Wilczynski, (1997), above n 756, 155.

787 Wilczynski cites English research showing that of a sample of women convicted of infanticide almost half were not suffering from mental disturbances, but rather from 'social stresses and personality problems': *ibid* 157.

788 For a discussion of the pressures associated with this transition to parenthood see Toni Antonucci and Karen Mikus, 'The Power of Parenthood: Personality and Attitudinal Changes During the Transition to Parenthood' in G Michaels and W Goldberg (eds) *The Transition to Parenthood: Current Theory and Research* (1988), 62–80.

child. There may also be economic factors—she may be a single parent with no financial support. These factors can combine to cause depression and anxiety.

6.35 In consultations it was argued that the law should require a clear connection between the disturbance and the child. It was suggested that this could be covered by linking the disturbance to ‘circumstances following childbirth’ rather than to the act of childbirth itself.⁷⁸⁹ Others argued that the words of the current formulation of infanticide should be left unchanged because it was possible to interpret them generously to take account of the cultural, physical and hormonal effects of childbirth.⁷⁹⁰

THE COMMISSION’S VIEW AND RECOMMENDATIONS

6.36 The Commission thinks infanticide should be restricted to use by biological mothers. The Commission’s recommendation that infanticide be retained recognises the unique relationship between a biological mother and her young child. Infanticide also recognises the particular role that women play in caring for and raising young children, and the fact that this role can be very isolating and may often be unsupported. Men are far less likely to be the primary carer during this early stage of a child’s life. The Commission recognises that there may be circumstances in which non-biological parents and fathers may have been affected by depression, causing anxiety and stress and mental disturbance as the result of the pressures of caring for a very young child. However, we believe that in such cases these factors are more appropriately considered at sentencing rather than incorporated within an expanded formulation of infanticide.

6.37 The current formulation of infanticide does not adequately reflect modern medical understanding because it creates the impression that childbirth and breastfeeding are activities which themselves cause mental disturbance. There is little evidence to suggest that emotional disturbances which may result in a mother killing a young child are principally due to chemical or hormonal imbalances resulting from the birth itself. Rather, research suggests there is a far more complex range of factors which can be related to a mother killing her young child. The Commission believes the offence of infanticide should take these complexities into account and that the removal of the nexus between the

789 Roundtable 12 February 2004.

790 Submission 25.

disturbance of mind and the act of childbirth and lactation will go some way to achieving this result.

! RECOMMENDATION(S)

48. Infanticide should apply where a woman has suffered from a disturbance of mind as the result of not having recovered from the effect of giving birth or any disorder consequent on childbirth.

(Refer to draft s 6(1) *Crimes Act 1958* in Appendix 4)

THE AGE LIMIT

6.38 The current 12 month age limit causes problems for two reasons. First, the 12 month limit excludes potentially deserving cases where a child is older than 12 months but has nevertheless been killed due to the mental disturbance of the mother. Second, infanticide is not available to a woman who, as the result of a disturbance of mind kills an older child or children as well as her newborn baby. A variety of views were expressed about the current age limit for infanticide. During the roundtable discussions the difficulties of setting an age limit were discussed. The medical profession is itself divided on this issue.

6.39 There was some discussion about the significance of the distinctive and symbiotic relationship between a mother and her child during the first 12 months when babies are entirely dependent upon their mothers. It was argued that the largest proportion of killings occurred within the first 12 month period and almost all child killings by mothers occurred where the child was five years old or younger. The vast majority of child killings occurred in the first two years. Most of those consulted were of the view that some kind of age limit should be set, but there were a variety of views as to whether this should be the existing limit of 12 months, two years or five years.

6.40 There was general agreement, however, that the law should allow infanticide to be used in cases where older children are killed owing to a disturbance caused by the birth of a younger child.

THE COMMISSION'S VIEW AND RECOMMENDATIONS

6.41 The Commission has sought the views of experts on the appropriate upper age limit for infanticide. The literature suggests that the vast majority of child killing by mothers occurs within the first 12 months of the child's birth. However, because there are cases where, due to mental disturbance, mothers kill children

who are older than 12 months it was felt that extending the age might ensure that all the deserving cases are given access to infanticide. Based on expert opinion and the statistics on child killing, the Commission believes the upper limit should be extended to two years. The Commission agrees that it is unjust that a woman who, due to a disturbance of mind, killed more than one child, can rely on infanticide for one child but not the other. The Commission recommends the law should be changed to rectify this anomaly.

! RECOMMENDATION(S)

49. The offence of infanticide should be modified by:

- extending the offence to cover the killing of an infant aged up to two years; and
- applying the offence to the killing of older children as the result of the accused not having recovered from the effect of giving birth or any disorder consequent on childbirth.

(Refer to draft s 6(1) *Crimes Act 1958* in Appendix 4)

Chapter 7

Sentencing

INTRODUCTION

7.1 In Chapter 1 we explained our approach to this reference. The recommendations in this Report are based on the principle that factors which reduce the culpability of the defendant should generally be taken into account when the defendant is sentenced, instead of reducing criminal liability for an intentional killing from murder to manslaughter. We propose an exception to this general rule for excessive self-defence, because this partial defence covers the situation where accused people were justified in defending themselves, although they used excessive force. We also recommend retention of the offence of infanticide, which applies to women who kill very young children as the result of a disturbance of mind developed as a consequence of childbirth. Our proposed reforms of the substantive law make it necessary to consider whether there should be consequent changes to sentencing. In this Chapter we focus on two areas where the approach taken to sentencing is likely to be particularly important.

7.2 First, the Chapter considers the sentencing implications of abolishing the partial defence of provocation. One of the arguments against this approach is that if provocation is abolished, offenders who have killed as the result of provocation may be convicted of murder and receive custodial sentences more severe than those which, had they been convicted of manslaughter under the present law, would have been imposed. Abolition of the partial defence of provocation will make it necessary for courts to consider when provocation has reduced the defendant's culpability and take this into account in sentencing.

7.3 In our consultations particular concern was expressed about the position of women who kill in response to prolonged violence. At present, some of these women will be sentenced for manslaughter, either because they plead guilty to

manslaughter in exchange for the murder charge against them being dropped⁷⁹¹ or because a jury accepts their provocation defence.

7.4 Our recommended changes to self-defence, combined with the admission of expert evidence on the dynamics of family violence, may result in some women who have killed in response to prolonged violence being acquitted of murder. However, other women will still choose to plead guilty to manslaughter and some may be convicted of manslaughter at trial, either on the basis of excessive self-defence or for some other reason.⁷⁹² In addition, some victims of family violence who kill will be convicted of murder because they do not satisfy the jury they have acted in self-defence, even though prior family violence was a significant contributing factor to their actions.⁷⁹³

7.5 One of the purposes of our recommendations for change to the substantive law is to overcome the gender bias which exists in the law relating to defences to homicide. It would defeat this purpose if abolishing provocation meant that women convicted of murder, in circumstances involving domestic violence, received longer sentences than they would under the present law if they successfully raise provocation. The purpose of reducing gender bias would also be undermined if men who kill their sexual partners were to receive significantly reduced murder sentences on the sole ground they were ‘provoked’ to kill because they suspected their partner was unfaithful or was threatening to leave the relationship.

7.6 This Chapter begins with a brief overview of the sentencing process and explains the sentencing principles which apply if an offender kills a person who has previously subjected her to domestic violence. It goes on to consider how provocation might be taken into account in sentencing in other types of cases, including cases where the killing is a culmination of prior violence by the offender against the deceased victim.

7.7 Secondly, the Chapter explains how mental conditions which do not amount to mental impairment may be taken into account in sentencing. In Chapter 6 we recommended against the introduction of a partial defence of diminished responsibility because such conditions could be considered at the sentencing stage. This requires us to examine whether current sentencing

791 This may be on the basis that they lacked the intention to kill.

792 See n 1 above.

793 Compare *R v Osland* [1998] 2 VR 636, where both self-defence and provocation were argued.

principles provide sufficient scope for such mental conditions to be taken into account.

7.8 The Chapter goes on to make recommendations which build on the recommendations in the Freiberg Sentencing Review⁷⁹⁴ and are intended to address concerns about sentencing in cases falling into the categories identified above.

SENTENCING PROCESS

7.9 After an offender pleads guilty to murder or manslaughter, or is convicted by a jury, a sentencing hearing will be held where the trial judge will determine the sentence. If the defendant was convicted at trial the jury will be discharged before the sentencing hearing.

7.10 At the sentencing hearing the prosecution will provide an oral summary of the facts.⁷⁹⁵ Sometimes there will be a dispute about the facts on which the sentence should be based. This is most likely to occur if the defendant has pleaded guilty, but it can also occur after a trial. For example, in a murder trial in which the defence raised provocation, a verdict of manslaughter may mean the jury was satisfied that the offender was provoked. On the other hand, a manslaughter verdict may mean the jury was not satisfied that the offender had the requisite intention to kill. In cases where the jury verdict is not clear as to all sentencing facts, the prosecutor and defence counsel are entitled to make submissions as to how the jury verdict should be interpreted.

7.11 During the sentencing hearing the prosecution will make a sentencing submission and defence counsel will make a plea in **mitigation** of sentence on behalf of the defendant. The prosecution's sentencing submission will refer to the sentencing principles which are relevant to the offender or the offence, and to facts which may aggravate the severity of the sentence. The prosecutor will usually file a victim impact statement which outlines the effect of the offence on the victim's family.⁷⁹⁶ Although prosecutors do not usually suggest a precise term of imprisonment they may submit that a life sentence with or without the possibility

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

795 If the offender has pleaded guilty, the prosecution summary is based on the depositions (the transcript of evidence at a committal proceeding and any statements tendered at committal). If there has been a guilty verdict following a trial, the prosecution summary is shorter as the sentencing judge has already had the benefit of seeing and hearing the witnesses.

796 *Sentencing Act 1991* (Vic) pt 6, Division 1A.

of parole is the only appropriate sentence because of the circumstances in which the killing occurred.⁷⁹⁷

7.12 In making the plea in mitigation, the defence will argue that various factors reduce the culpability of the defendant and will draw attention to sentencing principles that are relevant to the case. Reference will be made to the family, education, employment and social circumstances of the accused, and the defence may call character witnesses and tender any character or work references. An attempt will be made to explain the offender's motive in committing the offence and the judge's attention will be drawn to any mitigating circumstances, such as particular pressures the offender was under prior to or at the time of the offence. The defence may also tender reports on the offender's medical or psychological condition and call the author of some or all of the reports to give evidence.

7.13 The task of sentencing is based on well-established sentencing principles.⁷⁹⁸ The principles do not provide a formula for sentencing in particular categories of case but instead set out the factors which must be taken into account by the judge. The judge will take account of the prosecutor's submission, including any victim impact statement, and the defence plea in mitigation. If there are ambiguities about the basis of the jury verdict, the judge may have to determine the facts which underpinned the conviction.⁷⁹⁹

7.14 The trial judge will take into account information about any previous convictions the offender has, and may order a pre-sentence report to assist him or her in determining the sentence.⁸⁰⁰ Before making the formal sentencing order, the judge will set out the factual basis for the sentence and give an explanation for the sentence which is imposed.

7.15 A court must impose a sentence that is no more severe than is necessary to achieve the purposes for which it is imposed.⁸⁰¹ Depending upon the circumstances of a case, these purposes may include a combination of:

797 Kerri Judd, *Sentencing in the Supreme Court* Research Paper prepared for the Victorian Law Reform Commission (2004). This paper is available on the VLRC's website <www.lawreform.vic.gov.au>.

798 For a discussion of these principles, see Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed) (1999).

799 Judd (2004), above n 797, 12–13. If there is a dispute about the facts, the prosecution and defence may make submissions on this matter.

800 *Sentencing Act 1991*(Vic) s 96(1).

801 *Sentencing Act 1991* (Vic) s 5(3). This is known as the principle of parsimony.

- ensuring the offender receives a just punishment;
- deterring the offender from committing offences of the same or a similar character (this is known as specific deterrence);
- deterring other persons from committing similar offences (this is known as general deterrence);
- facilitating the rehabilitation of the offender;
- denouncing the conduct of the offender; and
- protecting the community from the offender.⁸⁰²

7.16 The judge must also keep in mind a number of other principles, including the principle that the sentence must be proportionate to the gravity of the crime (considered in the light of its objective circumstances); that like cases and like offenders should be treated equally; and that the court can mitigate an otherwise appropriate custodial sentence to prevent an offender being subject to a crushing sentence.⁸⁰³

7.17 Although the judge must take account of the principles set out in the Sentencing Act, sentencing involves the exercise of the judge's discretion to produce an 'instinctive synthesis'⁸⁰⁴ of all the relevant factors. The judge weighs all relevant factors, including the circumstances of the crime and of the offender, before reaching a decision. In other words, sentencing is not a mechanical process which leads to a single 'right' answer.⁸⁰⁵ There is seldom a single 'right' answer. Each offence, and each offender, has unique characteristics. In almost every case some relevant considerations will point towards severity, others in the opposite direction. In those circumstances, the mechanical application of rigid formulae is necessarily inappropriate.

802 *Sentencing Act 1991* (Vic) s 5(1).

803 Judd (2004), above n 797, 10.

804 For a discussion of the merits of the 'instinctive synthesis' approach, compared with the adoption of a more explicit framework and process, see Austin Lovegrove, 'Intuition, Structure and Sentencing: An Evaluation of Guideline Judgments' (2002) 14 (2) *Current Issues in Criminal Justice* 182.

805 *R v Williscroft, Weston, Woodleigh and Robinson* [1975] VR 292 at 300; *R v Young* [1990] VR 951; *R v Storey* [1998] 1 VR 359 at 366.

SENTENCING FOR HOMICIDE

7.18 Since 1986 the maximum sentence for murder has been life imprisonment, but this is imposed only in very serious cases⁸⁰⁶ such as multiple killings or murders which are particularly vicious.⁸⁰⁷ The court has a discretion to fix a non-parole period.

7.19 A murder conviction almost always results in a substantial period of imprisonment, irrespective of the circumstances in which the offence occurred. In most cases a period of imprisonment with a non-parole period will be fixed. The most recent sentencing statistics, which cover the years 1997/98 to 2001/02, show that most people convicted of murder received a total effective sentence⁸⁰⁸ in the range of 15–20 years,⁸⁰⁹ with a non-parole period of 10 years or more.⁸¹⁰ Ten per cent or less of offenders received a sentence of life imprisonment.⁸¹¹

7.20 The maximum sentence for manslaughter is 20 years imprisonment. As would be expected, sentences for manslaughter are usually lower than sentences for murder. The majority of those convicted of manslaughter received a total effective sentence of between 5 and 10 years.⁸¹² Non-parole periods varied widely, reflecting the diversity of situations which may result in a conviction for manslaughter. The lower sentences normally imposed for manslaughter may provide a strong incentive for defendants to plead guilty to manslaughter rather than defending a murder charge.

7.21 The principles in the *Sentencing Act 1991* are flexible enough to take account of differences in culpability arising out of the circumstances in which the killing occurs. However, the outcome of any particular case will reflect the way in

⁸⁰⁶ For a more detailed list of situations which may attract a sentence at the higher end of the range see Judd (2004), above n 797, 16.

⁸⁰⁷ See for example *R v Camilleri* (2001) 119 A Crim R 106, which was described by the Court of Appeal as one of the worst examples of murders to be found in Victoria.

⁸⁰⁸ The total effective sentence is ‘the aggregate of all sentence components taking into account the court’s directions about concurrent and cumulative sentences’: Department of Justice Court Services, *Victorian Higher Courts Sentencing Statistics: 1997/1998 to 2001/2002: Volume 2* (2003), 3.

⁸⁰⁹ Ibid Table 34.4. In each of the years except 2000/2001, only one person received a sentence in the range of 5–10 years. A small number of people received sentences of life imprisonment. The median total effective sentence in 2001/2 was 20 years.

⁸¹⁰ Ibid Table 34.5. The median non-parole period in 2001/2 was 192 months.

⁸¹¹ Ibid. The total number of defendants over this period was 131, of whom 9 were sentenced to life imprisonment.

⁸¹² Ibid Table 33.4. The median total effective sentence in 2001/2 was 69 months.

which the particular sentencing judge reaches his or her ‘instinctive synthesis’ of relevant factors. In the next section we use case studies to illustrate how these principles apply when provocation is said to reduce culpability or the offender has a mental condition which does not amount to a mental impairment.

CASE STUDIES

7.22 At paragraphs [7.2]–[7.6] we discussed why it was necessary to consider the sentencing implications of abolishing provocation and not introducing a partial defence of diminished responsibility. The case studies described below cover intentional homicides involving:

- a woman who kills her partner following a lengthy history of abuse;
- a man who kills his partner after she tells him she is leaving him; and
- a person who kills while suffering from a serious mental condition which does not amount to mental impairment.

The Case Studies illustrate possible limitations of current sentencing processes and provide the background to our recommendations for reform.

CASE STUDY 1—OFFENDER WAS A VICTIM OF FAMILY VIOLENCE



CASE STUDY 1

D was a 61-year-old woman who was charged with murder but pleaded guilty to manslaughter on the basis of provocation. She had killed her husband by shooting him twice in the head. D had lived in a violent household as a child and had been sexually abused by her brother. She married her husband partly because he was regarded as a strong man who was capable of standing up to her brother....

During her lengthy marriage, her husband was extremely controlling and jealous. He stopped her wearing make-up, would not let her go out of the house for lengthy periods, stopped her having friends, controlled all household expenditure and frequently assaulted her on parts of the body where this would not show. He also beat the children. D concealed the husband’s violence from her children, though they knew she was unhappy.



CASE STUDY 1

The killing occurred after D told her husband she had incurred some debts. The husband hit her, raped her and told her she was worthless and threatened to kill her. After he fell asleep D killed him. The court accepted that she had been terrified her husband would kill or seriously harm her. D buried the body and said her husband had left her. D was not charged with murder until 15 years later.

Medical evidence was that D was suffering from a depressive condition throughout the marriage and had BWS.⁸¹³ At the time of sentencing she suffered from serious ill health and her difficult life and the aftermath of the shooting had left her with 'devastating physical and psychological damage'.

COMMENTARY ON CASE STUDY 1

7.23 In this case, D pleaded guilty to manslaughter.⁸¹⁴ In sentencing the court must have regard to (among other things) the offenders' circumstances, including their age, health, previous character, the circumstances of the offence, their culpability and degree of responsibility for the offence, whether or not they pleaded guilty to the offence and whether their conduct in connection with the trial indicates remorse.⁸¹⁵

7.24 Mitigating factors in this case included the history of sustained abuse to which D had been subjected throughout the marriage, its psychologically demoralising effect and the fear, humiliation, demoralisation and anger she felt as a result of the assault occurring shortly before the shooting. Justice Coldrey said that her previous good character, combined with the circumstances surrounding the killing, made specific deterrence of little relevance. In other words, it was unnecessary to impose a long custodial sentence to prevent D from killing again. He also took account of D's lack of any prior criminal convictions, her age, her physical and mental ill health and the fact she had suffered a severe psychological toll as the result of concealing the husband's death, which 'had in itself constituted

813 For criticism of the concept of BWS see paras 4.88–4.93.

814 *R v Denney* [2000] (Unreported, Supreme Court of Victoria, Coldrey J, 4 August 2000).

815 *Sentencing Act 1991* (Vic) s 5(2), 6; see also Judd (2004), above n 797, 9–16.

a severe punishment',⁸¹⁶ particularly because D had interpreted the later death of her young son as a punishment for killing her husband.

7.25 Justice Coldrey acknowledged that '[t]here is no right to take the life of a person because their conduct may be regarded as despicable and the court must not appear to condone such action', but in this case the goals of denouncing D's act and deterring others could be reconciled with a suspended sentence.⁸¹⁷ D was sentenced to three years imprisonment, but the sentence was suspended.

7.26 A similar sentence was imposed in *R v Rogers*,⁸¹⁸ a case in which a woman who had stabbed her de facto husband to protect herself against a violent assault pleaded guilty to manslaughter. The woman had experienced terrible violence by the accused, had sought help from various refuges and was frightened of injury when she killed the man. Justice Hampel accepted that she was also responsible for some violence towards the deceased 'though to what extent this was by way of retaliation or straight out aggression' was not possible to determine.⁸¹⁹ The offender and her deceased partner were alcoholics. Justice Hampel said that in this case her interests, and the interests of the community, required rehabilitation to take precedence over punishment. He imposed a four year suspended sentence and made an order that she receive treatment for her alcoholism.

7.27 The Commission has identified a number of cases in the past 15 years in which women who had been victims of sustained violence received short suspended sentences for manslaughter.⁸²⁰ Such cases are typically examples of situations where the killing is:

816 *R v Denney* [2000] (Unreported, Supreme Court of Victoria, Coldrey J, 4 August 2000) para 33.

817 *R v Denney* [2000] (Unreported, Supreme Court of Victoria, Coldrey J, 4 August 2000) para 38.

818 *R v Rogers* [1995] (Unreported, Supreme Court of Victoria, Hampel J, 11 December 1995).

819 *R v Rogers* [1995] (Unreported, Supreme Court of Victoria, Hampel J, 11 December 1995) 17.

820 See *R v Bradley* [1994] (Unreported, Supreme Court of Victoria, Coldrey J, 14 December 1994). Ms Bradley was subjected to 'brutal, degrading and humiliating acts' over two decades. The husband had also committed incest. Ms Bradley divorced her husband while he was in prison and moved to Perth. The husband found her whereabouts and forced her and the children to return to him. The expert evidence was that Bradley was suffering from BWS at the time of the killing and was described by a support worker as 'just a shell of a woman with low self-esteem and no idea who to turn to for assistance'. She received a two-year suspended sentence for provocation manslaughter. See also *R v Changan* [2001] (Unreported, Supreme Court of Victoria, Coldrey J, 9 April 2001), where the offender killed his father who was a 'severe and bizarre disciplinarian' who subjected the offender to terrible violence and racial denigration throughout his childhood and adolescence. The son killed his father after the father expressed an intention to cheat the mother of her property after their divorce. He had recently been sexually assaulted at work and was suffering from severe depression. He was

characterised by extraordinary subjective circumstances so tragic and sympathetic that the objective seriousness of the loss of life of the victim ceases to be the focus of proceedings. Sentencing principles such as deterrence, retribution and denunciation are subordinated in favour of a more ‘humanitarian approach’⁸²¹ to sentencing which recognises the offenders involved as being remorseful, contrite and unlikely to reoffend.⁸²²

7.28 Victorian sentencing statistics record a total of 98 cases involving a principal proven offence of manslaughter between 1997/98 and 2001/02.⁸²³ Only four offenders did not receive sentences of immediate imprisonment.⁸²⁴ By comparison, NSW research on sentencing, covering the years 1994–2001, shows that around 11.5% of manslaughter offenders⁸²⁵ were sentenced to a punishment other than full-time imprisonment. Of the 30 offenders who received non-custodial sentences,⁸²⁶ three were women who killed their husbands in situations where there had been a history of violence.⁸²⁷ There was one case in which a male offender had been subjected to violence by his wife.

7.29 Instead of pleading guilty to manslaughter, some victims of family violence may plead not guilty to murder on the basis they were acting in self-

convicted at trial of manslaughter on the basis of provocation. He was sentenced to six years with a non-parole period of three years. For NSW examples of similar sentences imposed on women who killed violent partners see *R v Trevenna* [2003] NSWSC 463 and *R v Cheryl Ann Scott* [2003] NSWSC 627. These are Case Studies 1 and 2 in Chapter 3.

821 *R v Kennedy* [1998] (Unreported, Supreme Court of New South Wales, Greg James J, 30 June 1998) as cited in Jason Keane and Patrizia Poletti, *Sentenced Homicides in New South Wales 1994–2001* (2004), 121.

822 Ibid.

823 Department of Justice and Court Services (2003), above n 808, Table 33.1. The total number of offences was 100, so that most of these offenders had a manslaughter conviction only.

824 Ibid Table 33.2. There were two adjourned undertakings in 2001/2002. A person may be released on the basis of an undertaking to comply with conditions, for example a condition that they have psychiatric treatment, or agree to live in a particular place. There was also one suspended sentence and one person was classified as ‘other’. Fox and Freiberg (1999), above n 798, 582.

825 Keane and Poletti (2004), above n 821, 121. The study included suspended sentences in this category. The District Court was more likely to impose non-custodial sentences (24.1% of offenders), than the Supreme Court (9.9% of offenders). The majority of cases were decided in the Supreme Court; District Court cases tended to involve different types of offences.

826 Note that offenders were convicted of infanticide in two of these incidents, but the cases were included in the manslaughter statistics.

827 Eight of the cases (six women and two men) where people did not receive a gaol term involved the killing of a sexual partner. Mental conditions and/or alcohol abuse were involved in all the cases where pre-existing violence was not identified.

defence. If they are convicted of murder, despite the fact that a history of abuse was a significant contributing factor to the killing, the judge will have to take account of current sentencing practices and the higher maximum penalty for murder. However, as would be the case for a manslaughter conviction, the offender's sentence could be reduced because of the abuse⁸²⁸ and/or because of the offender's mental state when the crime was committed.⁸²⁹ A sentence similar to that imposed in Case Study 1 would be within the trial judge's discretion but would depend on the circumstances of the particular case.⁸³⁰

7.30 A non-custodial sentence for murder is very rare. Between 1997/98–2001/2 only eight of the 139 offenders whose principal proven offence was murder received a sentence other than imprisonment. Although statistics are not available, it is likely that most of these eight offenders received a hospital order or hospital security order.⁸³¹ Because murder convictions normally attract higher sentences than manslaughter convictions, some changes in approach will be necessary to ensure sentences for people who kill in response to provocation do not increase substantially as a result of abolition of the doctrine.

828 For example, see *R v Osland* [1998] 2 VR 636, 670.

829 For example, see *R v Leonboyer* [2001] VSCA 149.

830 In *R v Osland* [1998] 2 VR 636, Heather Osland's sentence for murder was 14 years 6 months, with a non-parole period of 9 years 6 months. It was argued in the Court of Appeal that this was manifestly excessive, considering the violence to which she had been subjected. The Court of Appeal rejected this argument on the basis that neither self-defence nor provocation had been established.

831 Department of Justice Court Services (2003), above n 808, Table 34.2. These are simply coded as 'other', a category which includes a wide range of sentencing outcomes, most of which are unlikely to be applied in the case of murder.

CASE STUDIES 2 AND 3—OFFENDER KILLED IN THE CONTEXT OF SEXUAL INTIMACY



CASE STUDY 2

B killed his wife by beating her over the head with a hammer. She was struck at least five times and some of the blows occurred when she was lying face down on the floor. The accused did not remember the actual killing.

B's wife had previously left him for a period and made it clear that the marriage was at an end. She wanted an amicable separation. B had asked neighbours to watch his wife.

B's defence was that he had 'snapped' and killed her because she had taunted him about an affair she was having with another man and suggested the other man was a better lover. The jury convicted B of manslaughter on the basis of provocation.



CASE STUDY 3

T was a Turkish man who killed his wife by hitting her with various household objects, including a crystal vase. She died from horrific head injuries.

Their relationship had been unhappy. He had frequently abused alcohol and had refused to stop drinking. This upset his wife because she was a devout Muslim. At one stage the wife had gone to live in a refuge because of his violence.

At the time of the killing he said his wife had used a Turkish word that upset him and had told him that she would leave him because he was drinking again. He had drunk some alcohol but did not appear to be drunk.

There was evidence that he had had a chronic depressive state for some time and the psychiatric evidence was that the killing occurred in an intense state of rage caused by welling up of emotions of anger and distress. The trial judge left provocation to the jury but the accused was convicted of murder.

COMMENTARY ON CASE STUDIES 2 AND 3

7.31 In Case Study 2⁸³² the accused was convicted of manslaughter because the jury accepted the partial defence of provocation. There was apparently no evidence of any prior violence by the accused against the deceased. The defence put forward a number of mitigating factors: the offender's remorse; the offender was being treated for depression and an anxiety disorder at the time of the offence; he was being treated with anti-depressant medication at the time of sentencing; he had no support at the time of the marriage breakdown; gaol would be particularly difficult for him because of lack of support; and he had no prior convictions.

7.32 Justice Flatman was sceptical about the offender's remorse, as he did not seek help when it became clear he had seriously injured his wife. He also had difficulty with the proposition that the offender was socially isolated and let down by others. He took account of the seriousness of the crime, the savagery of the attack, the fact the victim was not alive to defend herself from the offender's allegations about her use of abusive words, the relatively minor nature of the provocation and the irreparable distress to the wife's family.

7.33 He referred to a previous statement made by Justice Vincent recognising that 'extreme aggression, in the context of personal relationships, is almost exclusively employed by males and directed against victims usually, but not always against their wives or children who possess little capacity to defend or otherwise protect themselves'.⁸³³ Justice Flatman said courts should denounce this type of conduct. General deterrence was important particularly when 'the violence has occurred against the background of a husband who refused to accept that his wife had the right to make her own choice'. The offender was sentenced to imprisonment for eight years with a non-parole period of six years.⁸³⁴ The sentence is similar to that imposed in a number of other cases where men who have killed their partners (or their partner's lover) have been convicted of manslaughter on the basis of provocation.⁸³⁵

832 *R v Butay* [2001] (Unreported, Supreme Court of Victoria, Flatman J, 2 November 2001).

833 *R v Farfalla* [2001] (Unreported, Supreme Court of Victoria, Vincent J, 7 May 2001) para 20.

834 *R v Butay* [2001] (Unreported, Supreme Court of Victoria, Flatman J, 2 November 2001).

835 For other recent sentences where men have killed their partners or their partner's lover and been convicted of manslaughter on the basis of provocation, see *R v Teeken* [2000] (Unreported, Supreme Court of Victoria, Vincent J, 16 June 2000)—man shot his wife's lover when she said she wanted a divorce. The man was aged 78 and had serious medical problems. He had expressed remorse; the sentence was imprisonment for five years with a three year non-parole period. See also *R v Abebe*

7.34 In Case Study 3⁸³⁶ the accused was convicted of murder rather than manslaughter, the jury having rejected the partial defence of provocation. The trial judge imposed a sentence of 18 years with a non-parole period of 14 years. The offender appealed on the basis that the jury had been misdirected on provocation. The Victorian Court of Appeal held that provocation should not have been left to the jury, because no ordinary person could have lost control and killed their wife in the circumstances of the case.⁸³⁷ The Court of Appeal also found there was nothing to suggest the sentence was excessive. Although the crime was not premeditated it was ‘an appallingly brutal attack on a defenceless woman’. The victim had not contributed to her death in any way and the accused had previously assaulted her. There was little evidence of any genuine remorse on the part of the offender.

7.35 Comparison between these two case studies illustrates the difference between a murder and manslaughter sentence which is imposed in situations when an offender kills in the context of sexual intimacy. Although judges frequently denounce the behaviour of men who kill their partners in the context of infidelity or threatened separation, men who are convicted of manslaughter on the grounds of provocation receive significantly lighter sentences than men convicted of murder. The abolition of provocation as a partial defence will require courts to consider how to sentence men who kill in these circumstances.

7.36 Where the offender pleads guilty to murder and/or there is evidence the killing was unpremeditated, they will often receive a sentence at the lower end of the range for murder, though this will depend on a range of factors. Evidence of a psychiatric illness falling short of mental impairment may also be regarded as reducing culpability. However, if the killing involved particularly brutal or

[2000] (Unreported, Supreme Court of Victoria, Vincent J, 13 December 2000). The offender was an Ethiopian man who had been a refugee for 14 years and suffered many difficulties. He stabbed his wife’s lover three times when his wife said she intended to live with him. The lover allegedly behaved provocatively. Abebe was sentenced to imprisonment for eight years with a non-parole period of six years. See also *R v Hunter* [2002] (Unreported, Supreme Court of Victoria, Teague J, 14 May 2002). The offender killed his wife, who had allegedly mistreated the offender and the children. His case was that she had come at him with a knife and he had hit her on the head with a stick. The offender told the children their mother had left with a man. He burnt her body and buried the remains. He subsequently remarried and had more children, all of whom were fond of him. One of his sons was later killed and one was intellectually disabled. The accused was a hard worker and had no prior convictions. He was sentenced to seven years imprisonment with a non-parole period of four years.

836 *R v Tuncay* [1998] 2 VR 19.

837 *R v Tuncay* [1998] 2 VR 19, 20 Ormiston J, 29, Hedigan AJA.

sustained violence,⁸³⁸ or the offender has a history of violence against the accused (as in Case Study 3) this may result in a sentence at the higher end of the range.

7.37 In some cases it would be useful for the prosecution to lead at sentencing both case-specific and general social context evidence⁸³⁹ on the dynamics of violence. This would assist the judge to understand the reasons why, for example, the deceased had reacted violently or abusively to the offender before the killing. Absence of such evidence could lead the court to conclude that the offender's culpability is to some extent reduced by the alleged behaviour of the deceased, even though the deceased's behaviour was a response to the offender's prior violence.⁸⁴⁰

838 See for example *DPP v Richardson* [1998] 2 VR 188, where the accused was convicted of murder after he stabbed his fiancee 22 times during a quarrel. There was evidence of prior violence by the accused and the deceased had said she was frightened of him when he had been drinking. The Court of Appeal considered that the sentence of 15 years with a non-parole period of 10 years was manifestly inadequate and increased the sentence to 17 years with a non-parole period of 12 years. See also *R v Kumar* (2002) 5 VR 193, where the accused killed his former de facto wife by stabbing her many times and chopping her with a meat cleaver after he had broken into her flat. He argued provocation because she was said to have sworn at and abused him and his parents and had refused to let him into her flat. He had previously assaulted her and she was frightened of him though there were also incidents of contact between them. The Court of Appeal (Batt and O'Bryan JJA, Eames AJA dissenting) held that the trial judge was right to withdraw provocation from the jury and upheld a sentence of 20 years with a non-parole period of 16 years. It said this sentence was appropriate as the youth of the applicant was the only important mitigating factor.

839 For discussion of these types of evidence see paras 4.106–4.110.

840 If the facts are in dispute the sentencing judge cannot use them in a way adverse to the interests of the offender unless they are established beyond reasonable doubt. If disputed facts are to be used to mitigate the sentence they only need to be proved on the balance of probabilities: *R v Storey* [1998] 1 VR 359, 371.

CASE STUDY 4—OFFENDER KILLED WHILE SUFFERING FROM A MENTAL CONDITION



CASE STUDY 4

G killed his wife after they separated. She had come to the matrimonial home to pick up some jewellery. After an argument about property G stabbed her and went to another room to get another knife to stab himself. When he returned she struggled with him, using the broken blade of the knife with which he had originally stabbed her. G cut his wife's throat with a large kitchen knife, inflicting horrific wounds to her neck.

G's defence was that he was mentally impaired. He had a prior history of depression. Mental impairment was left to the jury but G was convicted of murder. The trial judge accepted that he was affected emotionally by the breakdown of the marriage and that he was suffering from depression.

COMMENTARY ON CASE STUDY 4

7.38 In *R v Tsiaras*⁸⁴¹ the Court of Appeal said that a psychiatric illness falling short of mental impairment could be relevant to sentencing in at least five ways. It could:

- reduce culpability;
- have a bearing on the kind of sentence and the conditions which should be imposed;
- make the principle of general deterrence inapplicable;
- make the goal of deterring the offender inapplicable; and
- make the sentence weigh more heavily on the offender than on a person who did not have such an illness.

7.39 In Case Study 4⁸⁴² Justice Osborn considered how these factors should apply. He said it was not sufficient to simply identify G as suffering from a psychiatric disorder such as depression. 'There must be coherent and persuasive evidence of the link between this condition and his responsibility for his

841 [1996] 1 VR 398.

842 *R v Gemmill* [2004] VSC 30.

actions.⁸⁴³ In this case, G clearly intended to kill his wife and had gone back to complete the killing. Although the fact that an offender was suffering from a mental condition could sometimes reduce the emphasis which should be placed on general deterrence, this was a particularly sensitive issue in the case of domestic killings.

Domestic killings are a cause of enormous and recurrent suffering in our community. It is common experience that marriage breakdowns result in emotional stress. Neither the community nor the court through which it speaks can tolerate the resort to violence in such circumstances, let alone the resort to extreme violence of the nature in which [the accused] engaged.⁸⁴⁴

7.40 Osborn J took account of G's lack of premeditation, the state of emotional despair which prompted him to try to kill himself as well as his wife, and the fact that two of the expert witnesses thought he was mentally impaired. G had no previous convictions and continued to suffer from distress, remorse and depression.

7.41 On the other hand, there were several factors which aggravated G's culpability, including the fact he had invited his wife to the house, the lack of provocation for the killing, the terrible struggle preceding the killing and the extreme fear and distress suffered by his wife. The horrific nature of the crime was exacerbated by the wounds which G inflicted on his wife and the fact he went back to complete the murder after becoming aware she was still alive. G was sentenced to 18 years imprisonment with a non-parole period of 14 years.

CASE STUDY 5—OFFENDER ATTEMPTED TO KILL CHILD WHILE SUFFERING FROM A MENTAL CONDITION



CASE STUDY 5

K stabbed his eight-year-old son several times with a kitchen knife. The son was seriously injured but did not die. The stabbing occurred following the defendant's domestic dispute with his wife. K pleaded guilty to attempted murder.

843 *R v Gemmill* [2004] VSC 30 para 48.

844 *R v Gemmill* [2004] VSC 30 paras 41-42.



CASE STUDY 5

K was very close to his son, who had learning difficulties. He had attended therapy sessions with him. He had serious marital, financial and drinking problems at the time of the offence. Immediately prior to the offence his wife had told him he had two weeks to move out of the house and he had abused and assaulted his wife who had told him to leave. The stabbing occurred when she came back with the police. K said he believed that if his son was left to the care of his wife the son would be better off dead.

The psychological evidence was that K 'snapped' and that he had a complete psychological breakdown at the time of the stabbing, although he had not been mentally ill.

COMMENTARY ON CASE STUDY 5

7.42 The trial judge treated the horrific nature of the offence, the father's responsibility for the child and the fact the offence took place in the child's home, as factors which increased his culpability. In mitigation he took account of K's remorse for injuring his son and his mental condition at the time of the stabbing. He commented that K's mental state was not such that he should not be considered 'a vehicle for general deterrence'. He sentenced K to 10 years imprisonment with a non-parole period of six years.

7.43 K appealed to the Court of Appeal which held that the sentence was excessive having regard to the emotional state of the offender and the stresses he was experiencing at the time of the crime, his remorse and the fact that he would have to spend the whole period of imprisonment in protective custody.⁸⁴⁵ Interestingly, the Court of Appeal took account of unanalysed sentencing statistics for attempted murder which were supplied in a schedule provided by the Department of Justice, and asked counsel to make submissions on them.⁸⁴⁶ So far as we are aware, this happens rarely. K was sentenced to 8 years imprisonment with a non-parole period of 5 years. The sentence reflects the fact this was a case of attempted murder, rather than murder.

⁸⁴⁵ He was in danger from other prisoners because he had injured an eight-year-old child.

⁸⁴⁶ These revealed that no other sentence for attempted murder or exceeding 10 years imprisonment had been imposed in the past 10 years.

ISSUES

7.44 In the five years between 1997/8 and 2001/2 there were 98 sentences imposed in which the principal proven offence was manslaughter and 139 sentences where the principal proven offence was murder.⁸⁴⁷ Without undertaking a detailed analysis of these cases it is difficult to make predictions about the types of sentence or the length of custodial sentences in the cases which concern us. However, the Case Studies show that the principles set out in the Sentencing Act are flexible enough to take account of a wide range of factors affecting culpability.

7.45 Nevertheless, our recommended changes to homicide defences raise some important policy issues. These include:

- how to ensure that family violence is adequately taken into account when courts sentence an offender who has killed a violent partner or an offender who has previously been violent to the deceased;
- how to meet the concern that the abolition of provocation may result in women who kill violent partners receiving longer custodial sentences; and
- how to encourage appropriate consistency in judicial approaches to sentencing in cases involving domestic violence, excessive self-defence or a mental condition not amounting to mental impairment.

SENTENCING IN THE CONTEXT OF PRIOR FAMILY VIOLENCE

7.46 Women who kill violent husbands and plead guilty to manslaughter will often receive relatively short sentences. However, the sentence imposed in such a case will also reflect the individual background and circumstances of the accused (and how sympathetically these are viewed by the court). Some commentators have argued that legal responses to family violence, including approaches to sentencing, are gender biased because of insufficient recognition of the social realities which may lead women (and sometimes other family members) to kill those who have abused them. Stubbs and Tolmie suggest:

myths and stereotypes about domestic violence may significantly shape sentencing outcomes... The sentencing process may reproduce such stereotypes in a setting where

847 Department of Justice, Court Services (2003), above n 808.

there is little prospect for challenge, and unless there is a legal error or a manifestly excessive sentence, there will be little room for appeal.⁸⁴⁸

7.47 The authors identify a number of ways in which a lack of understanding of the dynamics of family violence may prevent it from being adequately taken into account in sentencing.

- The court may not give sufficient weight to a history of violence in a relationship because it does not recognise the connection between the killing and prior violence.⁸⁴⁹
- If a woman uses physical force in self-defence the court may characterise the situation as one of mutual violence or 'family dysfunction' rather than as a response to a continuing pattern of violence.⁸⁵⁰
- Women who fight back or 'are not passive and helpless or who do not otherwise conform to accepted stereotypes' may be judged more harshly than women who are depicted as helpless victims.⁸⁵¹
- The social factors which lead people in particular communities to react violently may be insufficiently recognised.⁸⁵²
- Women who abuse alcohol or drugs, or abuse or neglect their children, may be less favourably treated than women who 'cope' better, even though the woman's negative behaviour may be caused or related to the fact she has been in a violent relationship.

848 Julie Stubbs and Julia Tolmie, 'Defending Battered Women on Charges of Homicide: The Structural and Systemic Versus the Personal and Particular' in Wendy Chan, Dorothy Chunn and Robert Menzies (eds) *Women, Mental Disorder and the Law* (Forthcoming in 2004), 12.

849 See for example *R v MacKenzie* [2000] (Unreported, Queensland Court of Appeal, 11 August 2000). In this case the woman pleaded guilty to negligent manslaughter after she had tripped while carrying a loaded gun and shot her husband. Despite the 'grim history of domestic violence', McMurdo P at para 24 said that a substantial sentence should be imposed to deter people from handling guns in a negligent manner, especially in the context of domestic arguments'. By contrast McPherson J at para 56 recognised that she might have been carrying the gun because of her fear of the accused, although he remarked on the difficulty of finding a logical rationale for taking the violence into account because she was pleading guilty on the basis of criminal negligence.

850 See for example *R v Churchill* (Unreported, Supreme Court of Western Australia Court of Appeal, 28 August 2000) discussed in Stubbs and Tolmie (2004), above n 848, 13.

851 Ibid 5. The comment is made particularly in relation to BWS, but could also be applied to sentencing.

852 See for example *R v Burke* [2000] (Unreported, NSW Court of Appeal, 3 November 2000) discussed in Stubbs and Tolmie, ibid 14.

7.48 Lack of information about usual patterns of family violence may also lead courts to impose inappropriately low sentences on offenders who have been violent to their partners throughout their relationship, but who argue in mitigation that the killing was a one-off emotional response to a particular situation, such as the partner's decision to leave.⁸⁵³

7.49 Professional education would give judges and lawyers a better understanding of the realities of family violence. It would encourage defence lawyers to refer to relevant information about the dynamics of family violence when making pleas in mitigation for women who kill violent partners, and would assist judges in sentencing offenders. In Chapter 4 we make recommendations for judicial education and professional education programs for lawyers about the realities of family violence.

7.50 Chapter 4 also recommends changes to the law of evidence to make it clear that expert evidence on the social and economic factors that affect victims of abuse is admissible. This may include evidence about:

- the impact of social isolation on people in abusive relationships;
- the lack of knowledge by many victims of existing services and other barriers to accessing help;
- common beliefs that reporting the violence to police or others will not end the violence or will result in an escalation of the violence;
- lack of alternative options to leave the relationship (for instance, a lack of independent income or poor employment prospects);
- barriers that may be experienced by victims from Indigenous or culturally and linguistically diverse backgrounds in disclosing abuse and accessing services.

7.51 We have argued above that this evidence would assist juries when they decide whether self-defence applies. However, if a self-defence argument fails at trial or the offender pleads guilty to murder or manslaughter, evidence of this kind may also be relevant to sentencing. The Commission believes that defence counsel should consider calling expert evidence on these matters if they mitigate the offender's culpability. The New South Wales Legal Aid Commission sometimes has expert reports prepared which examine the behaviour of the offender in the context of what is known about women's typical responses to ongoing violence.

853 See para 7.37.

7.52 Similarly, the prosecution's sentencing submission could refer to evidence about previous patterns of violence which exacerbate the culpability of an offender.

THE COMMISSION'S VIEW AND RECOMMENDATIONS

PREVENTING UNFAIR INCREASES IN SENTENCING

7.53 The Commission considers it important to address the concern that a conviction for murder will necessarily attract a higher sentence than would have been the case for a manslaughter conviction, if provocation were retained. There is no minimum sentence for either murder or manslaughter. Sentencing judges should be prepared to use the full range of options available when the offender has been subjected to violence by the victim. Where an offender is convicted of murder, the court should consider whether the violence experienced by the offender, combined with other factors, justifies imposing a very short custodial sentence or even suspending it altogether. In other words, the full range of sentencing options should be considered, even where the offender is convicted of murder. This is recommended below.

7.54 During our consultations, some people were concerned that judges sentencing offenders who had been convicted of murder would feel under public pressure to impose longer sentences, even where this was inappropriate because of the circumstances of the killing. At present, the shorter sentences imposed on offenders who kill in response to violence or other types of provocation can be attributed to the fact that they were convicted of manslaughter, rather than murder. The Commission considers that the best way of meeting this concern is to provide the public with more information about the sentencing process. In paragraph [7.60] we refer to the recent establishment in Victoria of a Sentencing Advisory Council, which will have responsibility for providing public education on sentencing.

PROVIDING MORE GUIDANCE FOR TRIAL JUDGES

7.55 As discussed above, the Court of Appeal has provided some guidance on sentencing offenders who are suffering from mental conditions at the time of the trial. The Court of Appeal could provide similar guidance on the principles which should apply in sentencing an offender convicted of murder or manslaughter who

responded to, or was affected by, a previous history of abuse by the deceased. This could be done when an appropriate case arises.⁸⁵⁴

7.56 It would also be helpful for the Court of Appeal to articulate the principles which should apply when the killing is an escalation of prior violence by the offender. Courts appear to be placing increasing emphasis on the seriousness of domestic killings and the need to deter men from resorting to violence. The Commission welcomes this trend.

7.57 The breadth of the sentencing discretion means there may be considerable variations in the sentences imposed for murder or manslaughter. We believe this lack of consistency has the potential to cause injustice to individual offenders and affect public confidence in sentencing. The unavailability of comprehensive and reliable statistical information available in Victoria hinders consistency in sentencing. As Professor Freiberg commented in his sentencing review:

Victoria's criminal justice statistical information base is amongst the least developed of any in Australia. The information provided to sentencers, researchers and the general public is episodic and less than comprehensive. This is partly the product of not having an independent bureau of crime statistics and research such as exists in New South Wales, South Australia, Western Australia and to a lesser extent Queensland ... The need for such information is urgent and ongoing. Public policy should not be developed in ignorance of information which should be readily available and public.⁸⁵⁵

7.58 The poor quality of sentencing information will also make it difficult to assess the effect of our recommended changes on sentencing. If the changes are implemented, the Commission believes their effect on sentencing should be evaluated to ensure the abolition of provocation does not lead to an inappropriate increase in sentences for murder. In NSW the Judicial Commission has

854 Another way in which this could be done would be through the Court of Appeal publishing a guideline judgment. Since 1998 the New South Wales Court of Criminal Appeal has been delivering guideline judgments for some categories of cases. Freiberg considered whether this should be done in Victoria, as was recommended by the 1988 Sentencing Committee chaired by Sir John Starke: Victorian Attorney-General's Department, *Sentencing: Report of the Victorian Sentencing Committee* (1988). Freiberg concluded that despite the strong arguments in favour of this approach guideline judgments should not be introduced until there was broad judicial and professional support for them: Freiberg (2002), above n 794, 214. For a useful discussion of the merits and limits of this approach see Lovegrove (2002), above n 804, 182.

855 Freiberg (2002), above n 794, 194.

undertaken two large studies on sentences imposed in homicide cases.⁸⁵⁶ The second study, covering the period from 1 January 1994 to 31 December 2001, provides both statistical and qualitative information about sentences for homicide. Some categories of homicide are given special attention, including killings of sexual partners⁸⁵⁷ and cases involving Indigenous offenders.⁸⁵⁸ Such information is necessary to enable sentencing trends to be accurately monitored. If the evaluation indicates a trend towards imposing higher sentences on people who kill in response to violence, changes to sentencing principles may be desirable.

7.59 Statistical and qualitative information on sentences for homicide would also assist judges when they are sentencing offenders. We are aware of at least one case in which the Court of Appeal has taken sentencing statistics supplied by the Department of Justice into account.⁸⁵⁹ In NSW judges have online access to statistical databases kept by both the Judicial Commission and the Public Defenders' Office.⁸⁶⁰ We believe similar information should be available to judges in Victoria.⁸⁶¹

7.60 The Sentencing Advisory Council recommended by the Freiberg Report has now been established. It has responsibility for undertaking research into sentencing policy and practice, collecting and analysing sentencing statistics and providing information to the judiciary, the government and the public about the operation of the sentencing system.⁸⁶² We recommend the new Council should have responsibility for the evaluation of sentencing in homicides, as well as for establishing a database which provides both statistical and qualitative information

856 Judicial Commission of New South Wales, *Sentenced Homicides in New South Wales 1990–1993, A Legal and Sociological Study* (1995), Keane and Poletti (2004), above n 821.

857 Keane and Poletti (2004), above n 821, 125–126.

858 Ibid ch 7.

859 *R v Kasulaitis* [1998] 4 VR 224.

860 The New South Wales Public Defenders Office compiles short case summaries at <www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_shortnotes> at 2 September 2004. These are publicly available. The Judicial Commission provides sentencing statistics as part of its judicial information research system. It also provides full text sentencing decisions from a range of courts. This is a subscription service. See <www.judcom.nsw.gov.au/sentencing/jirs.php> at 2 September 2004.

861 Note, however, the limitations of statistical information systems. Lovegrove argues that these need to be used in the context of broader sentencing policies: Austin Lovegrove, 'Statistical Information Systems as a Means to Consistency and Rationality in Sentencing' (1999) 7 (1) *International Journal of Law and Information Technology* 31.

862 Freiberg (2002), above n 794, 196.

on sentencing in homicide. The database should provide information on, and allow monitoring of, sentencing trends in cases where:

- the offender killed a person who subjected her/him to family violence;
- the offender had previously subjected the deceased to violence;
- the offender acted under provocation from the deceased; and
- the offender was suffering from a mental condition at the time of the killing.



RECOMMENDATION(S)

50. In sentencing an offender for murder in circumstances where the accused might previously have been convicted of manslaughter on the grounds of provocation, judges should consider the full range of sentencing options.
51. When an appropriate case arises, the Court of Appeal should consider indicating the principles which should apply in sentencing an offender who has been subjected to abuse by the deceased and how these should be taken into account in sentencing the offender.
52. The Sentencing Advisory Council should establish a statistical database to monitor sentencing trends in homicide cases. This database should be developed in consultation with members of the judiciary.
53. Construction of the database should allow monitoring of sentencing trends in cases where:
 - the offender killed a person who subjected her/him to family violence;
 - the offender had previously subjected the deceased to violence;
 - the offender acted under provocation from the deceased; and
 - the offender was suffering from a mental condition at the time of the killing.
54. In consultation with the judiciary, the Sentencing Advisory Council should establish processes for making up-to-date sentencing information about homicide cases available to judges.

!

RECOMMENDATION(S)

55. The Judicial College of Victoria should offer judicial education on sentencing in homicide cases, in collaboration with the Sentencing Advisory Council.
56. The Sentencing Advisory Council should provide public education on sentencing in homicide cases.

Appendix 1

PARTICIPANTS AT CONSULTATIONS

ROUNDTABLE: MENTAL CONDITION DEFENCES 25 NOVEMBER 2003

FACILITATOR

Professor Marcia Neave Chairperson, VLRC

PARTICIPANTS

Bruce Paterson	Department of Human Services
Dr Alan Jager	Forensic Psychiatrist
Detective Senior Sergeant Lucio Rovis	Homicide Squad, Victoria Police
Joanne Mazzeo	Mental Health Review Tribunal
Professor Felicity Hampel SC	Part-time Commissioner, VLRC
Carmen Randazzo	Victoria Legal Aid
Tom Dalton	Forensicare
Dr Lester Walton	Forensic Psychiatrist
Vivienne Topp	Mental Health Legal Centre
Gerard Mullaly	Criminal Bar Association

OBSERVERS

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Victoria Moore	Policy and Research Officer, VLRC

APOLOGIES

The Hon Justice Philip Cummins	Supreme Court of Victoria
Dr Amgad Tanaghaw	Chief Psychiatrist
Dr Ruth Vine	Deputy Chief Psychiatrist
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Supreme Court of Victoria

The Hon Justice Bernard Teague

Supreme Court of Victoria

Wendy Tabor

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ROUNDTABLE: MENTAL CONDITION DEFENCES 26 FEBRUARY 2004

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Inspector Greg Boland

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Ania Wilczynski (by phone)

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The Hon Justice Philip Cummins	Supreme Court of Victoria
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Professor Jenny Morgan	Deputy Dean, Melbourne University Law School
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Joanna Fletcher	Women's Legal Service
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The Hon Justice David Harper

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Barrister

Assistant Commissioner Leigh Gassner
APM

Victoria Police

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Trust

Bill Morgan-Payler QC

Chief Crown Prosecutor, OPP

Detective Insp Andrew Allen

Homicide Squad, Victoria Police

Georgina Connelly

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Supreme Court of Victoria

The Hon Justice Tim Smith

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NO WAY OUT? UNDERSTANDING THE USE OF FATAL FORCE BY VICTIMS AND PERPETRATORS OF FAMILY VIOLENCE—CALD WORKSHOP

29 MARCH 2004

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Maria Selga	Court Services
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Della Robb	Melbourne City Mission
Kate Seear	Women's Legal Service
Jackie Kerr	Diversity Unit—Department of Justice
Melis Cevik	Court Services Victoria
Mark Brandi	Director, Diversity Unit—Department of Justice

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Victoria Moore Policy and Research Officer, VLRC

**NO WAY OUT? UNDERSTANDING THE USE OF FATAL FORCE BY VICTIMS
AND PERPETRATORS OF FAMILY VIOLENCE—INDIGENOUS WORKSHOP
6 MAY 2004**

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Professor Marcia Neave Chairperson, VLRC

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Karen Bryant	Elizabeth Hoffman House
Rose Solomon	Elizabeth Hoffman House
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Joanne Holmes	Loddon Mallee Region
Yvonne Luke	
Vernus Mobourne	
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DEFENCES TO HOMICIDE IN THE CONTEXT OF VIOLENCE AGAINST WOMEN

FORUM 5 DECEMBER 2003

MC / CHAIR

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Aboriginal Family Violence Prevention and Legal Service

David Neal

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Sue Finucane	DVIRC
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Joanna Fletcher	Women's Legal Service
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Jemma Goulton	Wanjana Lidj
Natalie Greenham	Albury Wodonga Legal Service
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Renee Lemmon	VCCAV
Patricia LoCascio	Forensic Psychologist
Penny Maroulis	Department of Justice
Dot May	Koorie Women Mean Business
Robyn McGrath	DHS—Victims of Crime

Noel McNamara	Crime Victims Support Association
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Leanne Miller	Koorie Women Mean Business
Terri-lee Mobourne	Wilka Klue Aboriginal Family Preservation
Sarah Mokbel	Mary Anderson Lodge
Christa Momot	Reichstein Foundation
Claud Monzo	Department of Justice & Community Safety, ACT
Janelle Morgan	Victims Services Taskforce
Julie Mouy	Eastern Community Legal Centre
Jenny Mouzos	Australian Institute of Criminology
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Cheryl Munzel	EASE
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Peter Schubert	Aboriginal Torres Strait Islander Services
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Rose Soloman	Elizabeth Hoffman House
Bernice Soloman	Goulburn Valley Community Health Service
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Amy Sweeney	Brimbank Community Legal Centre

Valerie Thomas	National Council of Women Victoria
Alan Thompson	
Danielle Tyson	University of Brighton, England
Tess Walsh	Victoria Police, Homicide Squad
Lesley Walsh	Women's Health West
Suzanne Whiting	Victims Services Taskforce
Khai Wong	Flow Counselling & Consulting Service
Brodie Woodland	Department of Justice, Legal Policy
Natalie Zirngast	RMIT, Women's Information & Research Officer

Appendix 2

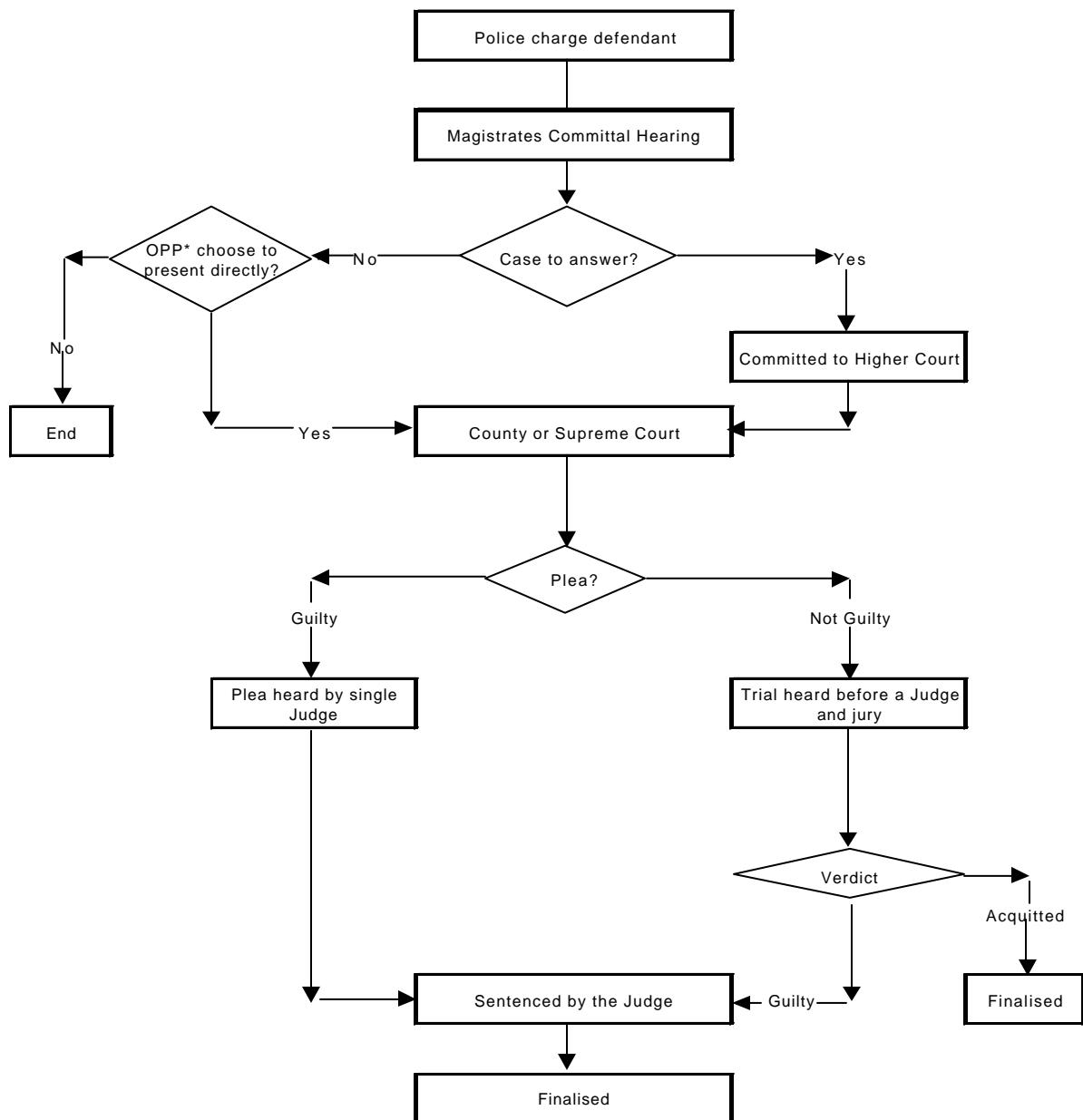
LIST OF SUBMISSIONS RECEIVED

No	Date received	Name	Affiliation
1	14 Nov 2003	Stephen Matthews	School of Humanities and Social Sciences, Centre of Applied Philosophy and Public Ethics, Charles Sturt University
2	10 Nov 2003	Jeremy Horder	Faculty of Law, Oxford University, England
3	19 Nov 2003	Lesley Childs & Gerry Michailidis	
4	21 Nov 2003	Cheryl & David Smit	
5	20 Nov 2003	Julian Knight	
6	27 Nov 2003	Fiona McCord	
7	21 Nov 2003	Glenn J Childs	
8	25 Nov 2003	Kerry Lancaster	
9	28 Nov 2003	Confidential	
10	28 Nov 2003	Mary Crooks & Sarah Capper	Victorian Women's Trust & the Heather Osland Support and Action Group
11	4 Dec 2003	Confidential	
12	15 Dec 2003	Bernadette McSherry	Faculty of Law, Monash University
13	15 Dec 2003	Meredith MacDonald	NSW Intellectual Disability Rights Service Inc.
14	16 Dec 2003	Joanna Fletcher	Women's Legal Service Victoria Inc
15	15 Dec 2003	Justice TH Smith	Supreme Court of Victoria
16	17 Dec 2003	Debbie Kirkwood	Federation of Community Legal Centres Inc.
17	13 Dec 2003	Rebecca Bradfield	

No	Date received	Name	Affiliation
18	17 Dec 2003	Libby Eltringham	Domestic Violence & Incest Resource Centre
19	17 Dec 2003	Confidential	
20	28 Jan 2004	Frank E Guivarra	Victorian Aboriginal Legal Service Co-operative Ltd.
21	19 Dec 2003	Michael Burt	Forensicare (Victorian Institute of Forensic Mental Health)
22	27 Nov 2003	Kristie Neville	
23	12 Jan 2004	Janelle Morgan	Victims Referral and Assistance Service
24	11 Jan 2004	Monica A Walters	Villamanta Legal Service Inc.
25	28 Jan 2004	Kate Lawrence	Mental Health Legal Centre
26	21 Jan 2004	Ruth Vine	Mental Health, DHS
27	29 Apr 2004	Tony Parsons	Criminal Bar Association of Victoria & Victoria Legal Aid
28	4 Apr 2004	Noel McNamara	Crimes Victims Support Association Inc.
29	24 Nov 2003	Patricia Easteal	School of Law, University of Canberra
30	25 Mar 2004	Nha Neuyen	Vietnamese Community in Australia – Vic Chapter
31	22 June 2004	Danielle Tyson	Criminology, University of Brighton, UK
32	8 Dec 2003	Confidential	

Appendix 3

HOW HOMICIDE CASES ARE PROCESSED



*OPP = Office of Public Prosecutions

Appendix 4

DRAFT BILL AND EXPLANATORY MEMORANDUM

Draft Proposals for a Crimes (Defences to Homicide) Bill

TABLE OF PROPOSALS

Proposal

PART 1—PRELIMINARY

1. Purposes
2. Commencement

PART 2—AMENDMENT OF THE CRIMES ACT 1958

3. New section 4 inserted
4. Provocation no longer a partial defence to murder
4. Section 6 substituted
6. Infanticide
5. New Part 1C inserted

**PART 1C—SELF-DEFENCE, DURESS, SUDDEN OR
EXTRAORDINARY EMERGENCY**

- 322G. Application
- 322H. Onus of Proof
- 322I. Self-defence
- 322J. Excessive force that causes or contributes to death
- 322K. Response to lawful conduct
- 322L. Duress
- 322M. Sudden or extraordinary emergency
- 322N. Intoxication—interpretation
- 322O. Intoxication(relevance to defences)
- 322P. Evidentiary
6. New section 600 inserted
600. Transitional provisions—**Crimes (Defences to
Homicide) Act 2004**

**PART 3—AMENDMENT OF THE CRIMES (MENTAL
IMPAIRMENT AND UNFITNESS TO BE TRIED) ACT 1997**

7. Definition of “mental impairment” inserted
8. When mental impairment is not in dispute

=====

Draft Proposals for a Crimes (Defences to Homicide) Bill

PART 1—PRELIMINARY

1. Purposes

The purposes of this Act are—

- (a) to amend the **Crimes Act 1958**—
 - (i) to revise the offence of infanticide; and
 - (ii) to remove provocation as a partial defence to murder; and

- (iii) to provide expressly for the defences of self-defence, excessive self-defence, duress and sudden or extraordinary emergency in relation to murder and manslaughter; and
- (b) to amend the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997** to provide further for the defence of mental impairment.

2. Commencement

- (1) Subject to sub-section (2), this Act comes into operation on a day or days to be proclaimed.
- (2) If a provision referred to in sub-section (1) does not come into operation before 1 July 2005, it comes into operation on that day.

PART 2—AMENDMENT OF THE CRIMES ACT 1958

3. New section 4 inserted

After section 3A of the **Crimes Act 1958** insert—

"4. Provocation no longer a partial defence to murder

- (1) The rule of law that provocation reduces the crime of murder to manslaughter is abolished.
- (2) This section does not apply to offences alleged to have been committed—
 - (a) before the commencement of section 3 of the **Crimes (Defences to Homicide) Act 2004**; or
 - (b) between two dates, one before and one after that commencement.".

See:
 Act No.
 6231.
 Reprint No. 17
 as at
 17 June 2003
 and amending
 Act Nos
 63/2003,
 80/2003,
 104/2003,
 105/2003,
 16/2004,
 20/2004,
 41/2004 and
 56/2004.
 LawToday:
www.dms.dpc.vic.gov.au

4. Section 6 substituted

For section 6 of the **Crimes Act 1958** substitute—

"6. Infanticide

- (1) If a woman by any wilful act or omission causes the death of her child in circumstances that would constitute murder and, at the time of the act or omission, the balance of her mind was disturbed by reason of—

- (a) the woman not having fully recovered from the effect of giving birth to that child or any other child within the preceding 2 years; or
 - (b) any disorder consequent on giving birth to that child or any other child within the preceding 2 years—
she is guilty of infanticide, and not of murder, and liable to level 6 imprisonment (5 years maximum).
- (2) On an indictment or presentment for murder—
- (a) a woman found not guilty of murder may be found guilty of infanticide; and
 - (b) once the issue of infanticide is raised, the prosecution retains the legal burden of proving the offence of murder.
- Note: See sections 10(3) and 421 for other alternative verdicts.
- (3) Nothing in this Act affects the power of the jury on a charge of murder of a child to return a verdict of not guilty because of mental impairment.".

5.New Part IC inserted

After Part IB of the **Crimes Act 1958** insert—

'PART IC—SELF-DEFENCE, DURESS, SUDDEN OR EXTRAORDINARY EMERGENCY

322G. Application

Without derogating from the law relating to any other offences, this Part applies only to the offences of murder and manslaughter.

322H. Onus of proof

- (1) In any criminal proceeding in which self-defence is raised, the prosecution has the onus of proving beyond reasonable doubt that the person did not carry out the conduct in self-defence.

- (2) In any criminal proceeding in which duress is raised, the prosecution has the onus of proving beyond reasonable doubt that the person did not carry out the conduct under duress.
- (3) In any criminal proceeding in which sudden or extraordinary emergency is raised, the prosecution has the onus of proving beyond reasonable doubt that the person did not carry out the conduct in response to circumstances of sudden or extraordinary emergency.

322I. Self-defence

- (1) A person is not criminally responsible for an offence of murder or manslaughter if the person carries out the conduct constituting the offence in self-defence.
- (2) A person carries out conduct in self-defence if and only if—
 - (a) the person believes the conduct is necessary—
 - (i) to defend himself or herself or another person; or
 - (ii) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person; and
 - (b) the conduct is a reasonable response in the circumstances as the person perceives them.
- (3) Without limiting sub-section (2)—
 - (a) a person may believe that the conduct is necessary; and
 - (b) the person's response may be reasonable—when the person believes that the harm to which he or she responds is inevitable, whether or not it is immediate.
- (4) The use of force by a person may be a reasonable response in the circumstances as the person perceives them even though the force used by the person exceeds the force used against the person.

322J. Excessive force that causes or contributes to death

- (1) If—
- (a) a person uses force that causes or contributes significantly to the death of another; and
 - (b) the conduct is not a reasonable response in the circumstances as the person perceives them—but the person believes the conduct is necessary—
 - (c) to defend himself or herself or another person; or
 - (d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person—the person is not criminally responsible for murder.
- (2) On a trial for murder, a person who is not criminally responsible for murder in the circumstances referred to in sub-section (1) is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.

322K. Response to lawful conduct

- (1) Sections 322I and 322J do not apply if—
- (a) the person is responding to lawful conduct; and
 - (b) at the time of response, the person knows that the conduct is lawful.
- (2) Conduct is not lawful merely because the person carrying it out is not criminally responsible for it.

322L. Duress

- (1) A person is not criminally responsible for an offence of murder or manslaughter if the person carries out the conduct constituting the offence under duress.
- (2) A person carries out conduct under duress if and only if the person reasonably believes that—
- (a) a threat has been made that will be carried out unless an offence is committed; and

- (b) the conduct is a reasonable response to the threat; and
 - (c) there is no other reasonable way that the threat can be rendered ineffective.
- (3) This section does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.

322M. Sudden or extraordinary emergency

- (1) A person is not criminally responsible for an offence of murder or manslaughter if the person carries out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency.
- (2) This section applies if and only if the person carrying out the conduct reasonably believes that—
 - (a) circumstances of sudden or extraordinary emergency exist; and
 - (b) committing the offence is the only reasonable way to deal with the emergency; and
 - (c) the conduct is a reasonable response to the emergency.

322N. Intoxication—interpretation

- (1) In this Part—

"intoxication" means intoxication because of the influence of alcohol, a drug or any other substance.
- (2) For the purposes of this Part, intoxication is self-induced unless it came about—
 - (a) involuntarily; or
 - (b) because of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force; or
 - (c) from the use of a drug for which a prescription is required and that was used in accordance with the directions of the person who prescribed it; or

- (d) from the use of a drug for which no prescription is required and that was used for a purpose, and in accordance with the dosage level, recommended by the manufacturer.
- (3) Despite sub-section (2), intoxication is self-induced in the circumstances referred to in sub-section (2)(c) or (d) if the person using the drug knew, or had reason to believe, when the person took the drug that the drug would significantly impair the person's judgment or control.

322O. Intoxication (relevance to defences)

- (1) If any part of a defence is based on actual knowledge or belief, evidence of intoxication may be considered in determining whether that knowledge or belief existed.
- (2) If any part of a defence is based on reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.
- (3) If any part of a defence is based on reasonable response, evidence of intoxication is irrelevant in determining whether the response was reasonable.
- (4) If a person's intoxication is not self-induced, in determining whether any part of a defence based on reasonable belief exists, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.

322P. Evidentiary

- (1) Without limiting the evidence that may be adduced, the following evidence may be relevant in determining whether a person has carried out conduct in self-defence or under duress in circumstances where family violence is alleged—
 - (a) the history of the relationship between the person and a family member, including violence by the family member towards the person or in relation to any other person;

- (b) the cumulative effect, including psychological effect, on the person of that violence;
 - (c) social, cultural and economic factors that impact on the person;
 - (d) the general nature and dynamics of abusive relationships, including the possible consequences of separation from the abuser;
 - (e) the psychological effect of abuse on people who are or have been in an abusive relationship;
 - (f) social and economic factors that impact on people who are or have been in an abusive relationship.
- (2) In this section—
- "child"** means a person who is under the age of 17 years;
- "family member"**, in relation to a person, includes—
- (a) a person who is or has been the spouse of the person; or
 - (b) a person who has or has had an intimate personal relationship with the person; or
 - (c) a person who is or has been the father, mother, step-father or step-mother of the person; or
 - (d) a child who normally or regularly resides with the person; or
 - (e) a guardian of the person; or
 - (f) another person who is or has been ordinarily a member of the household of the person;
- "family violence"**, in relation to a person, means violence against that person by a family member;
- "spouse"** of a person means a person to whom the person is married;
- "violence"** means—
- (a) physical abuse;
 - (b) sexual abuse;

- (c) psychological abuse (which need not involve actual or threatened physical or sexual abuse), including but not limited to—
 - (i) intimidation;
 - (ii) harassment;
 - (iii) damage to property;
 - (iv) threats of physical abuse, sexual abuse or psychological abuse;
 - (v) in relation to a child—
 - (A) causing or allowing the child to see or hear the physical, sexual or psychological abuse of a person by a family member; or
 - (B) putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring.
- (3) Without limiting the definition of "violence" in subsection (2)—
- (a) a single act may amount to abuse for the purposes of that definition;
 - (b) a number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.'

6. New section 600 inserted

After section 599 of the **Crimes Act 1958** insert—

"600. Transitional provisions—Crimes (Defences to Homicide) Act 2004

- (1) The amendment of this Act made by section 5 of the **Crimes (Defences to Homicide) Act 2004** applies only to offences alleged to have been committed on or after the commencement of section 5 of that Act.

- (2) For the purposes of sub-section (1), if an offence is alleged to have been committed between two dates, one before and one after the commencement of section 5 of the **Crimes (Defences to Homicide) Act 2004**, the offence is alleged to have been committed before that commencement.".

PART 3—AMENDMENT OF THE CRIMES (MENTAL IMPAIRMENT AND UNFITNESS TO BE TRIED) ACT 1997

7. Definition of "mental impairment" inserted

In section 3(1) of the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997** insert the following definition—

' "mental impairment" includes, but is not limited to, a disease of the mind;'.

See:
Act No.
65/1997.
Reprint No. 2
as at
1 July 2002
and
amending
Act No.
44/2004.
LawToday:
www.dms.dpc.vic.gov.au

8. When mental impairment is not in dispute

- (1) In section 21(2)(b) of the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**, after "(b)" insert "subject to sub-section (4),".
- (2) After section 21(3) of the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997** insert—
- "(4) If, before the empanelment of a jury, the prosecution and the defence agree that the proposed evidence establishes the defence of mental impairment, the trial judge may hear the evidence and—
- (a) if the trial judge is satisfied that the evidence establishes the defence of mental impairment, may direct that a verdict of not guilty because of mental impairment be recorded; or
- (b) if the trial judge is not so satisfied, must direct that the charge for the offence be tried by a jury.

EXPLANATORY MEMORANDUM

Prepared by the Victorian Law Reform Commission

General

The purpose of this draft Bill is to:

- amend the *Crimes Act 1958*—
 - to revise the offence of infanticide;
 - to remove provocation as a partial defence to murder; and
 - to provide expressly for the defences of self-defence, excessive self-defence, duress, and sudden or extraordinary emergency in relation to murder and manslaughter; and
- amend the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*—
 - to clarify ‘mental impairment’ includes, but is not limited to, a disease of the mind; and
 - to allow a plea of not guilty by reason of mental impairment to be accepted by a judge after a hearing of expert evidence has been held.

Notes

Clause 3 of the Bill inserts a new section 4 in the *Crimes Act 1958* abolishing provocation as a partial defence to murder in Victoria.

Clause 4 of the Bill proposes that a new section 6 be substituted for the existing section.

Section 6—Crimes Act 1958 [substituted]

Section 6(1)(a) removes reference to lactation as a potential cause of mental disturbance. The section also extends the application of the offence from 12 months to 2 years and makes it clear that where a woman kills a child older than 2 years as a result of a mental disturbance related to childbirth the offence still applies to her.

The existing provision prevents a woman from raising infanticide in relation to an older child even where she has

killed that child as a result of a disturbance caused as a result of the birth of a younger child. The Commission has proposed this amendment to resolve this anomalous situation.

Section 6(1)(b) makes it clear that the disturbance of mind suffered by a woman to commits infanticide does not need to result from childbirth itself, but may instead result from a range of circumstances following on from birth.

Section 6(2) makes it explicit that infanticide is available as a statutory alternative to murder.

The law is ambiguous as to the burden of proof in relation to the current provisions on infanticide. The proposed provisions are intended to make it clear that the burden of proof in relation to the elements of infanticide remains with the prosecution.

Section 6(3) makes it clear that the provisions in relation to infanticide do not prevent a jury from finding the accused not guilty by reason of mental impairment.

Clause 5 of the Bill proposes the insertion of a new Part IC in the *Crimes Act 1958*.

Part 1C—Crimes Act 1958 [inserted]

Section 322G makes it clear that the new Part applies only to murder and manslaughter.

It is outside the scope of the Commission's reference to recommend the application of these provisions to criminal offences more generally. The Commission recognises that by confining the operation of the Part to the offences of murder and manslaughter, it might give rise to anomalies. The Commission therefore recommends that should these provisions be introduced in Victoria, serious consideration be given to their application to offences more generally.

Section 322H provides that in any criminal proceeding in which self-defence, duress or sudden or extraordinary emergency is raised as a defence, the prosecution has the onus of proving beyond reasonable doubt that the person did not carry out the conduct in self-defence, under duress or due to circumstances of sudden or extraordinary emergency.

Section 322I codifies the law of self-defence in Victoria and is modelled on the Model Criminal Code provision for self-defence, now adopted by the Commonwealth⁸⁶³ and in the Australian Capital Territory⁸⁶⁴ and New South Wales.⁸⁶⁵ The provision is also largely consistent with Section 46 of the *Criminal Code Act 1924* (Tas)⁸⁶⁶ and Section 15(1) of the *Criminal Law Consolidation Act 1935* (SA).⁸⁶⁷

Subsection (1) provides that a person is not criminally responsible for an offence of murder or manslaughter if the person carries out the conduct constituting the offence in self-defence. [Note—Should it be determined that the provision should apply to offences more generally, the words ‘of murder or manslaughter’ should be omitted].

Subsection (2) sets out the test for self-defence. Under this test, a person carries out conduct in self-defence if the person believes the conduct is necessary: to defend himself or herself or another person; or to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person; and the conduct is a reasonable response in the circumstances as the person perceives them.

The test as to the need to use force is subjective, while the reasonableness of the response, including the level of force used, is objective. In assessing the objective reasonableness of the response, the jury must consider its reasonableness in the circumstances as the accused subjectively perceived them. While the objective test of reasonableness is therefore retained,

863 *Criminal Code Act 1995* (Cth) s 10.4.

864 *Criminal Code 2002* (ACT) s 42.

865 *Crimes Act 1900* (NSW) s 418.

866 Section 46 of the *Criminal Code Act 1924* (Tas) provides: ‘A person is justified in using, in the defence of himself or another person, such force as, in the circumstances as he believes them to be, it is reasonable to use.’

867 Section 15(1) of the *Criminal Law Consolidation Act 1935* (SA) provides: ‘It is a defence to a charge of an offence if—

(a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; and

(b) the conduct was, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.’

the jury must consider the reasonableness of the accused's actions from the accused's perspective.

The major difference between the test proposed and the common law test for self-defence is that under the Model Criminal Code it is the reasonableness of the accused's *conduct*, rather than the reasonableness of the accused's *belief*, that is at issue. Therefore a person who believed that they were in danger, even if mistaken about that perception, would be able to rely on self-defence, unless his or her conduct was not a reasonable response in the circumstances as he or she perceived them. The reasonableness of the belief is only relevant to whether the belief was in fact honestly held.

Subsection (3) provides that a person may believe that the conduct is necessary; and the person's response may be reasonable when the person believes that the harm to which he or she responds is inevitable, whether or not it is immediate. This makes clear that harm which does not consist of an assault upon the person, or threat of immediate harm, may form the basis for conduct carried out in self-defence.

Subsection (4) provides that the use of force by a person may be a reasonable response in the circumstances as the person perceives them even though the force used by the person exceeds the force used against the person. For instance, there may be a disparity in size or strength between the parties which may make the use of force over and above the force used against the person reasonable in self-defence. In considering the level of force used by the accused, the history of the relationship and the cumulative effects of violence may be relevant (see below Section 322P(1)).

Section 322J

provides that self-defence does not apply if :

- the person is responding to lawful conduct; and
- at the time of the response, the person knew that the conduct was lawful.

Under subsection (2) conduct is not lawful merely because the person carrying it out is not criminally responsible for his or her actions. This will allow a person who honestly believed that his or her actions were necessary to defend himself or

herself against a child, or someone who is mentally impaired, to raise the defence.

This is largely consistent with the position at common law, and is based on the Model Criminal Code provision now operating in the Commonwealth, ACT and NT.⁸⁶⁸

Section 322K

reinstates a partial defence of excessive self-defence in Victoria. The defence is to apply in circumstances in which a person believes that his or her conduct is necessary to protect himself, herself or another person, or to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, but the conduct is not a reasonable response in the circumstances as he or she perceives them.

Conduct may be unreasonable in the circumstances, for example, because the level of force used is found to be grossly excessive, or because, although the accused honestly believed that it was necessary to take action in self-defence, his or her belief was grossly unreasonable.

Excessive self-defence was abolished as a defence under the common law by a majority of the High Court in *Zecevic v Director of Public Prosecutions (Vic)*.⁸⁶⁹ The defence was reintroduced as a partial defence to murder in South Australia in 1991⁸⁷⁰ and New South Wales in 2002.⁸⁷¹

Section 322L

provides that the defence of duress provides a complete defence to murder or manslaughter in Victoria. Under the current law, duress is not a defence to murder. It is unclear whether duress applies to attempted murder. While this part is restricted to the offences of murder and manslaughter, the Commission recommends if the section is to apply more generally, duress be recognised as a defence also to attempted murder.

868 *Criminal Code 2002 (ACT) s 42(4); Criminal Code Act 1983 (NT) ss 29(5) and 29(6) ; Criminal Code Act 1995 (Cth) s 10.4(4).*

869 *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645 (Wilson, Dawson and Toohey JJ).

870 *Criminal Law Consolidation Act 1935 (SA) s 15(2) inserted by the Criminal Law Consolidation (Self-Defence) Amendment Act 1991 (SA) s 2 and substituted by the Criminal Law Consolidation (Self Defence) Amendment Act 1997 s 2.*

871 *Crimes Act 1900 (NSW) s 421. Crimes Legislation Amendment Act 2002 sch 4 [6].*

Subsection (2) defines conduct carried out under duress. Under the provision, a person carries out conduct under duress if and only if the person reasonably believes that—

- (a) a threat has been made that will be carried out unless an offence is committed; and
- (b) the conduct is a reasonable response to the threat; and
- (c) there is no other reasonable way that the threat can be rendered ineffective.

Subsection 3 precludes reliance on the defence of duress if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.

Section 322M

provides for a complete defence to murder or manslaughter where a person's actions are carried out in circumstances of sudden or extraordinary emergency. It is unclear under the current law whether a defence of sudden or extraordinary emergency already applies as a complete defence to murder.

Subsection (2) sets out the test for sudden or extraordinary emergency. Under the provision, the person carrying out the conduct must reasonably believe that—

- (a) circumstances of sudden or extraordinary emergency exist; and
- (b) committing the offence is the only reasonable way to deal with the emergency; and
- (c) the conduct is a reasonable response to the emergency.

Section 322N

is modelled on s 30 of the *Criminal Code 2002* (ACT).

Subsection (1) defines intoxication as intoxication due to the influence of alcohol, a drug or any other substance.

Subsection (2) provides that intoxication is not self-induced if it came about:

- involuntarily; or
- because of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force; or

- from the use of a drug for which a prescription is required and that was used in accordance with the directions of the person who prescribed it; or
- from the use of a drug for which no prescription is required and that was used for a purpose, and in accordance with the dosage level, recommended by the manufacturer.

Subsection (3) makes clear that intoxication may also be self-induced if the person using the prescription or non-prescription drug knew, or had reason to believe, when the person took it that it would significantly impair his or her judgment or control.

Section 322O

clarifies how self-induced intoxication is to be taken into account in considering whether the defences have been made out. The provision is based on Clause 8.4 of the Model Criminal Code now adopted by the Commonwealth⁸⁷² and in the ACT.⁸⁷³

Subsection (1) provides that if any part of a defence is based on actual knowledge or belief, evidence of intoxication may be considered in determining whether that knowledge or belief existed. For example, under s 322H(2)(a), a person's self-induced intoxication could be taken into account in considering if he or she honestly believed that his or her conduct was necessary in self-defence.

Under subsection (2), if any part of a defence is based on reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated. Similarly, under subsection (3), if any part of a defence is based on reasonable response, evidence of intoxication is irrelevant in determining whether the response was reasonable.

Subsection (4) allows intoxication that is not self-induced to be taken into account in considering any element of a defence requiring a reasonable belief on the part of the accused. In

872 *Criminal Code Act 1995* (Cth) s 8.4.

873 *Criminal Code 2002* (ACT) ss 30, 33 and 34.

these circumstances, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.

Section 322P provides for a range of evidence that may be relevant in determining whether a person has carried out conduct in self-defence or under duress in circumstances where family violence is alleged.

Subsection (1) recognises evidence which may be relevant includes:

- the history of the relationship between the person and the family member, including violence by the family member towards the person or in relation to any other person;
- the cumulative effect, including psychological effect, on the person of that violence;
- the social, cultural and economic factors that impact on the person;
- the general nature and dynamics of abusive relationships, including the possible consequences of separation from the abuser;
- the psychological effect of abuse on people who are or have been in an abusive relationship;
- social and economic factors that impact on people who are or have been in an abusive relationship.

The purpose of this section is to highlight the sort of evidence that may be relevant where the accused is a victim of prior abuse perpetrated by the deceased.

This provision thereby provides for evidence to be given by:

- the accused;
- others who have witnessed the violence or the physical effects of it, or under exceptions to the hearsay rule proposed by the Commission to the *Evidence Act 1958*, who have been told about it;
- expert witnesses, including social workers, family violence workers and researchers, and psychiatrists or psychologists, giving evidence about:

- (a) the social, cultural and economic factors that might have impacted on the accused person;
- (b) the cumulative effect, including psychological effect, on the accused person of that violence;
- (c) the general nature, dynamics and effects of family violence and the social and economic factors that impact on people who have been, or are in an abusive relationship;
- (d) the psychological effects of abuse on people who are or have been in an abusive relationship; or
- (e) a combination of (a), (b), (c) and/or (d).

Subsection (2) defines ‘family violence’ and other words and expressions used in the definition of ‘family violence’. ‘Family violence is defined to mean violence against that person by a family member.

The definition of ‘family member’ is based on the definition in Section 3 of the *Crimes (Family Violence) Act 1987* (Vic). A family member includes:

- a spouse;
- a person who has or has had an intimate personal relationship with the person;
- a person who is or has been the father, mother, step-father or step-mother of the person;
- a child who normally or regularly resides with the person;
- a guardian of the person; or
- another person who is or has been ordinarily a member of the household of the person.

The term ‘domestic partner’ has been excluded from the section on the basis that the relationships section 322P is intended to apply to would ordinarily come within the ambit of ‘a person who has had an intimate personal relationship with the person’. For instance, a person in a same-sex relationship, regardless of whether he or she is ordinarily a member of the household of that person, would qualify as a person who has or has had an intimate personal relationship with the person.

The section also refers to ‘a person who is or has been the father, mother, step-father or step-mother of the person’, rather than, as under the *Crimes (Family Violence) Act 1987* (Vic), to a relative of that person. The Commission believes the majority of circumstances to which self-defence will arise, and the evidentiary provision will be sought to be relied upon, will be captured by this provision. However, ‘family member’ is defined as including the relationships set out in the section, and therefore may be extended to other relationships not covered in the definition provided.

As under section 3 of the *Crimes (Family Violence) Act 1987*, a ‘child’ is defined as a person who is under the age of 17 years. The Commission notes that should the Children and Young Persons (Age Jurisdiction) Bill 2004 be passed, the definition of ‘child’ will need to be amended to define a child as a person under the age of 18 years.

‘Violence’ is not currently defined in the *Crimes (Family Violence) Act 1987*. The Commission has chosen to adopt as a model the definition under the New Zealand *Domestic Violence Act 1995*, which has received some support in consultations on the Commission’s current reference on family violence. Violence is defined as

- physical abuse;
- sexual abuse;
- psychological abuse (which need not involve actual or threatened physical or sexual abuse), including but not limited to—
 - (i) intimidation;
 - (ii) harassment;
 - (iii) damage to property;
 - (iv) threats of physical abuse, sexual abuse or psychological abuse;
 - (v) in relation to a child—
 - (A) causing or allowing the child to see or hear the physical, sexual or psychological abuse of a person by a family member; or

(B) putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring.

Subsection (3) makes it clear that a single act may amount to abuse for the purposes of the definition of ‘family violence’, and that a number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

Clause 7 inserts a new definition of mental impairment into section 3(1) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

Section 3(1)—*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*
[new definition inserted]

Section 3(1) provides that mental impairment includes, but is not limited to, a disease of the mind.

Notwithstanding that section 25(1) of the Act expressly abolishes the common law defence of insanity, in recent cases, the courts have taken a conservative approach, confining the definition of mental impairment in line with the common law notion of a disease of the mind (see, for example, *R v R*⁸⁷⁴ and *R v Sebalf*⁸⁷⁵). The new definition will allow other conditions which would not satisfy the ‘disease of the mind’ test to provide a basis for a defence of mental impairment in appropriate cases.

Clause 8 allows the trial judge to hear expert evidence about whether the accused was mentally impaired at the time of the killing, without a jury being empanelled and to direct that a verdict of not guilty because of mental impairment be recorded. This process will only apply if both the defence and the prosecution agree that the defence is established. If the judge is not satisfied that the defence of mental impairment is established, the judge must direct that the accused be tried by a jury

874 [2003] VSC 187 (Unreported, Supreme Court of Victoria, Teague J, 5 March 2003).

875 [2003] VSC 181 (Unreported, Supreme Court of Victoria, Smith J, 5 June 2003).

Glossary

automatism

A state in which the mind or will of the person does not accompany that person's actions. The 'defence' of automatism applies where the behaviour of an accused was automatic or unwilling (eg if the accused person was sleepwalking, suffering an epileptic fit, or had a concussion). A distinction is made by the courts between 'sane automatism', which generally results from some internal cause (such as epilepsy), and 'insane automatism', which results primarily from an external cause (such as a blow to the head). Sane automatism results in an acquittal, while insane automatism may result in the person receiving a supervision order under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

case-specific evidence

Any statement, record, testimony or other things relating to the particular case before the court which tends to prove the existence of a fact in issue at trial. There are many types of evidence: oral, direct, circumstantial, indirect, original, derivative, documentary, real, expert, opinion, and confessional.

codification

Codification in this Report refers to the introduction of legislation which restates the case law in a particular area and becomes a complete statement of the law on defences to homicide. It is still permissible to resort to the previous case law if there is ambiguity in the legislation.

criminal culpability

The extent to which an offender is responsible under the law for an offence (see also 'moral culpability').

diminished responsibility

A partial defence to homicide, which reduces murder to manslaughter. Diminished responsibility is not a defence in Victoria. In jurisdictions where diminished responsibility is recognised as a defence, the accused person must generally prove: he or she was suffering from an abnormality of mind at the time of the offence; the abnormality of mind arose from a specified cause; and the abnormality of mind substantially affected the accused in a specified way. There is

no clear definition of ‘abnormality of mind’ although it includes cognitive disorders, uncontrollable urges and extreme emotional states. Generally the abnormality of mind must have impaired the accused’s capacity to: understand what he or she was doing; know or judge that he or she ought not do the act; or control his or her actions.

disposition

In this Report, the way a person who is either convicted of a homicide offence, or found not guilty by reason of mental impairment, is dealt with by the courts. In the case of a person found not guilty by reason of mental impairment, the *Crimes (Mental Impairment and Fitness to be Tried) Act 1997* specifies that the court must either declare the defendant is liable to supervision under Part 5 of the Act, or order the defendant to be released unconditionally.

duress

A defence to a crime which applies where the accused was under a threat that if he or she failed to do the act, death or serious injury would be inflicted on himself, herself, or a family member or members. The threat must have been of such a nature that a person of ordinary firmness of mind and strength of will would have given in to it. Duress does not apply if the accused had a reasonable opportunity to safely prevent the execution of the threat. Duress is not a defence to murder in Victoria.

examination in chief

Questioning of a witness by the party who called the witness.

excessive self-defence

A partial defence to murder which reduces murder to manslaughter. Excessive self-defence is not a defence in Victoria. Excessive self-defence applies where a person has an honest belief he or she needed to protect himself, herself or another person, but where the prosecution can prove beyond reasonable doubt that the accused’s response was not reasonable in this circumstance. This may be because the level of force used was substantially out of proportion to the threat, or for some other reason.

expert evidence

Evidence given by a witness who is an expert in a particular field. There are two kinds of expert evidence: (1) evidence of fact given by a person who is an expert; (2) evidence of opinion of a person who is an expert. Expert opinion evidence is an exception to the general rule that witnesses may speak only about facts. The

facts upon which the expert opinion is based, however, must be proved by evidence.

facts in issue

The facts relevant to proving the commission of an offence.

infanticide

An offence by which a woman by wilful act or omission causes the death of her child who is under 12 months old, but at the time of the act or omission the balance of her mind was disturbed because she had not fully recovered from the effect of giving birth to the child, or because of the effect of lactation following the birth of the child. Infanticide is also an alternative verdict to murder. On a trial for murder, the jury may therefore return a verdict of infanticide.

jury charge/judge's charge

The judge's directions to the jury about matters of law and process.

mens rea

The state of mind necessary to establish a particular crime, or the mental element of an offence. The mental element varies depending on the nature of the crime, but may include intention (eg in the case of murder an intention to kill or cause serious bodily harm), recklessness, negligence, dishonesty or malice.

mental impairment

A defence in Victoria defined under section 20 of the *Crimes (Mental Impairment and Fitness to be Tried) Act 1997*, replacing the common law defence of insanity, that requires: the accused was suffering from a mental impairment; and that the mental impairment affected the accused so he or she either did not understand the nature and quality of his or her conduct, or did not know that it was wrong. People who establish that, on the balance of probabilities, they committed the offence while mentally impaired, are found not guilty by reason of mental impairment. The term 'mental impairment' is not defined in the legislation, but includes the common law notion of 'disease of the mind'.

mitigation

The reduction of the severity or the effect of a wrongful act. In the context of sentencing, mitigating circumstances are those factors which may lead to a less severe penalty following conviction. These factors may include the personal circumstances of the offender, the circumstances of the offence, the fact the

offender had no previous criminal record, that the offender pleaded guilty, and that the offender showed genuine remorse.

mitigating circumstances

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

moral culpability

The extent to which an offender is morally responsible for an offence. Factors affecting moral culpability may include the motive for committing the offence; the personal circumstances of the accused person (eg did the person act due to personal pressures, or kill for profit); the relationship with the deceased (was the person the accused killed a stranger, a relative, or a child); and/or whether the accused was suffering from a mental disorder or intellectual disability.

necessity

A defence to a crime under which a person argues that he or she was compelled by a threat or danger to commit the crime charged, which the person believed he or she could not otherwise avoid, and a reasonable person in the same circumstances would not have considered that he or she could have acted in another way. The defence is not a defence to murder in Victoria. Necessity is also referred to as ‘duress of circumstances’ and ‘defence of emergency’.

nominal term

A period of time specified in the *Crimes (Mental Impairment and Fitness to be Tried) Act 1997* which triggers a major review. In the case of homicide, the nominal term is 25 years. The purpose of the review is to determine whether the supervision orders the accused is subject to should continue to apply.

plea

An accused person’s answer to a charge which usually takes the form of ‘guilty’ or ‘not guilty’ (known as a plea to the general issue). The accused may also make a special plea, in addition to or instead of the general plea.

pro bono

Legal work performed free or at a reduced fee. The term also means legal work performed for the public good or in the public interest.

probative value

Probative value is the extent to which the evidence can be used by a jury to assess the probability of whether a particular fact occurred.

propensity evidence

Propensity evidence shows the accused person has a general tendency to do certain things.

proportionality

A proper balance between two things, such as in the case of self-defence, the proportionality between the threat and the accused's response, or in sentencing, the proportionality between the offender's total criminality and the sentence imposed.

provocation

A partial defence that reduces murder to manslaughter. The jury must be satisfied that: there was sufficient evidence of provocative conduct; the accused lost self-control as a result of the provocation; and the provocation was such that it was capable of causing an ordinary person to lose self-control and form an intention to inflict serious bodily harm or death.

res gestae

An exception to the hearsay rule, the rule against opinion evidence and the rule against self-corroboration which allows statements made contemporaneously with matters under investigation to be admitted. There are four general categories of *res gestae* exceptions to the hearsay rule: statements contemporaneously with, and explaining a relevant act; statements made contemporaneous with and directly concerning an event in issue; statements made by a person concerning that person's contemporaneous state of mind or emotion; and a person's statements concerning his or her contemporaneous physical sensation.

self-defence

A criminal defence which provides a complete defence to murder. In the case of murder, when evidence of self-defence is raised, the prosecution must establish beyond reasonable doubt either that the accused did not believe it was necessary to do what he or she did to protect himself, herself or another person, or that the accused's belief in the need to do what he or she did was not reasonable in the circumstances.

substantive law

Law, including the criminal law, which creates, defines and regulates people's rights, duties, powers and liabilities, including common law and statutory principles. Compare with procedural law, which is concerned with the method of enforcing rights and duties, such as the rules of procedure and evidence.

test

In this Report, the legal requirements to establish the defence. May also refer to different types of standards applied. For example, an objective test requires the accused's conduct, mental state or behaviour to be judged by reference to the standard external to the person being assessed (such as the reasonableness test in self-defence, or the ordinary person test in provocation). In comparison, a subjective test is a test based upon what the accused person actually believed or knew at the time of the conduct.

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