

# Chapter 1

## The Law of Homicide in Western Australia – An Overview

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# The Criminal Law and the Criminal Justice System

The term 'homicide' means the killing of another human being. In this Report the Commission examines homicide offences, defences to homicide and sentencing. In Western Australia the homicide offences are wilful murder, murder, manslaughter, infanticide and dangerous driving causing death.<sup>1</sup> Generally, homicide offences are regarded as the most serious offences under the law and accordingly they attract the most severe penalties. Historically, in Western Australia, this was the death penalty; now, the most serious homicide offences (wilful murder and murder) attract a penalty of mandatory life imprisonment.

In order to assess the need for reform to the law of homicide it is necessary to understand the way in which the law determines criminal responsibility. In this chapter the Commission considers some basic principles of criminal law in order to provide the background for the more detailed chapters in this Report dealing with homicide offences and defences. This chapter also outlines a number of issues which are common to most homicide offences, such as causation, and provides a brief overview of the social context in which homicide occurs.

## THE CRIMINAL LAW

The criminal law involves imposing punishment upon members of the community to enforce rules set by the state prohibiting certain conduct.<sup>2</sup> If the law provides that particular conduct is prohibited and that a penalty can be imposed for engaging in the prohibited conduct, then the relevant conduct will constitute a criminal offence. In Western Australia all criminal offences are defined in legislation. The seriousness of a criminal offence is reflected in the maximum penalty for the offence. Differing degrees of seriousness are generally determined by the level of the harm caused and/or the culpability of the person who caused the harm. For example, under the *Criminal Code* (WA) (the Code) the maximum penalty for an offence of assault is less than the maximum penalty for an offence of assault occasioning bodily harm.<sup>3</sup> In this example, greater harm results in a greater penalty. On the other hand, the maximum penalty for an offence of causing grievous bodily

harm is less than the maximum penalty for an offence of *intentionally* causing grievous bodily harm.<sup>4</sup> In the latter case, the increased culpability or blameworthiness of the accused results in a more severe penalty.

For all homicide offences, the direct harm is always the same and, therefore, questions of culpability become of paramount importance in distinguishing which homicides are the most serious. It must first be recognised that all killings are not unlawful. The law recognises that in some circumstances a killing should not attract any criminal liability. For example, killing in self-defence or being involved in an accidental death are not unlawful. The criminal law does not treat all unlawful killings in the same manner. The most serious unlawful killings in Western Australia are wilful murder and murder (attracting a mandatory penalty of life imprisonment) and the less serious forms of homicide are manslaughter, infanticide and dangerous driving causing death. Despite general consensus that the unlawful killing of another person is serious and against acceptable social standards, it is not possible to say that all people who unlawfully kill are equally blameworthy. There will always be differing moral viewpoints about the circumstances in which a person should be held criminally responsible for causing the death of another person and differing views as to how particular circumstances should be classified under the law of homicide. As explained in the introduction to this Report, the Commission has concluded that generally, intentional killing is more culpable than unintentional killing.<sup>5</sup> This view underpins the Commission's approach to homicide offences and defences.

## The source of criminal law

There are two sources of criminal law: the common law (law made by judges) and statutory law (law made by Parliament). In Western Australia, the criminal law is predominantly based upon statutory law. In 1897 Sir Samuel Griffith<sup>6</sup> drafted a criminal code which was enacted in Queensland in 1899. The Western Australian Code, which was based on the Griffith Code, was first enacted in Western Australia in 1902.<sup>7</sup> The *Criminal Code Act 1913* (WA) was enacted in 1913 after amendments were made

1. The offence of killing an unborn child under s 290 of the *Criminal Code* (WA) is not an offence of homicide because it does not involve the killing of a human being. In its Issues Paper the Commission noted that it was not aware of any specific issues in relation to this offence, LRCWA, *Review of the Law of Homicide*, Issues Paper (2006) 5. The Commission has received submissions identifying problems: see below, 'Who is Capable of Being Killed'.
2. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) [1.2].
3. Section 313 of the Code provides that the maximum penalty for assault (in circumstances of aggravation) is imprisonment for three years. The maximum penalty for assault occasioning bodily harm (in circumstances of aggravation) is imprisonment for seven years: see *Criminal Code* (WA) s 317.
4. The maximum penalty for grievous bodily harm is 10 years' imprisonment: *Criminal Code* (WA) s 297; and the maximum penalty for intentionally causing grievous bodily harm is 20 years' imprisonment: *Criminal Code* (WA) s 294.
5. See Introduction, 'Guiding Principles for Reform: Principle One'.
6. Then Chief Justice of Queensland and later the first Chief Justice of the High Court of Australia.
7. *Criminal Code Act 1902* (WA).

to the original Code.<sup>8</sup> Prior to the enactment of the Code, the criminal law in Western Australia was based entirely on the common law.<sup>9</sup> Despite codification of the criminal law in Western Australia, the common law has remained an important source of law. The Commission noted in 1999 that:

The language of the *Criminal Code* is to be interpreted according to its 'natural meaning' and the common law resorted to only in instances of ambiguity or where the words to be interpreted have acquired a technical meaning outside of the *Criminal Code*.<sup>10</sup>

As mentioned above, in Western Australia all offences (including homicide offences) are contained in legislation. Most of the more serious criminal offences are contained in the Code; however, there are many criminal offences established by other legislation, such as the *Road Traffic Act 1974* (WA) and the *Misuse of Drugs Act 1981* (WA). Apart from dangerous driving causing death (which is contained in the *Road Traffic Act*) all homicide offences are contained in the Code.

There are major differences in the criminal law (including the law of homicide) between Australian jurisdictions. The 'common law jurisdictions' in Australia are New South Wales, Victoria, South Australia and the Australian Capital Territory. These jurisdictions have not codified their criminal laws, but nevertheless have statutory provisions dealing with particular aspects of the criminal law. The 'code jurisdictions' are Western Australia, Queensland, Tasmania and the Northern Territory; each with a criminal code designed to largely replace the common law. The Commonwealth can also be described as a code jurisdiction; however, the Commonwealth Criminal Code is a substantially different model to the other codes in Australia.<sup>11</sup> It has been noted that the main difference between common law and code jurisdictions is 'one of emphasis rather than kind'.<sup>12</sup> In common law jurisdictions statutory provisions are interpreted against the background of the general principles

of common law. On the contrary, in code jurisdictions legislative provisions are interpreted accordingly to their natural meaning without any presumption that the corresponding common law principles apply. Yet, as mentioned above, the common law may be resorted to when particular terms have acquired a technical meaning.<sup>13</sup>

## The criminal justice process

The criminal justice process begins when an offence has been reported to (or observed by) the police. Generally, if an offence has been reported to the police it will be investigated. Following the investigation the police may charge a person if there is sufficient evidence against that person to suggest that he or she committed the offence. In this Report the Commission uses the term 'accused' to refer to a person who has been charged with a criminal offence.<sup>14</sup> Of course, not all criminal offences are reported to or investigated by the police and do not always result in someone being charged. For example, the police may decide, in the case of a minor offence, to issue a caution. Due to the serious nature of homicides, they are virtually always subject to a police (and/or coronial) investigation. Once an accused has been charged with an offence he or she will be required to appear in a court for the case to be heard. Depending upon the seriousness of the charge and a number of other factors, the accused will either be released into the community on bail or remanded in custody. Because of their seriousness and the consequences of a conviction, wilful murder and murder charges invariably result in the accused remaining in custody.<sup>15</sup> The accused will either plead guilty or not guilty to the offence charged. Once convicted of the offence (either by way of a plea of guilty or following a trial) the accused will be sentenced. If an accused pleads guilty he or she is accepting criminal responsibility for the offence. Because of the serious consequences of a conviction for wilful murder or murder (life imprisonment) pleas of guilty to these charges are rare.<sup>16</sup> Therefore, in many homicide

8. The schedule to the *Criminal Code Act 1913* (WA) contains the Criminal Code.

9. Law Reform Commission of Western Australia (LRCWA), *Review of the Criminal and Civil Justice System in Western Australia*, Project No. 92, Consultation Drafts Vol 2 (1999) 710.

10. *Ibid.* See also *Barlow* (1997) 93 A Crim R 113, 136 (Kirby J).

11. The *Criminal Code Act 1995* (Cth) was enacted in 1995 and commenced on 1 January 1997. It is based on the Model Criminal Code as recommended by the Model Criminal Code Officers Committee.

12. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) 7.

13. *Ibid* 9.

14. Rather than using 'appellant' or 'defendant' the Commission uses the term 'accused' for all references to a person who has been charged with an offence. The term 'offender' is used in the context of sentencing or where it is clear that the accused has been convicted of an offence.

15. Heenan J observed in *Sturgeon* [2005] WASC 256, [33] that generally for wilful murder and murder an accused will not be released on bail unless there are sufficiently exceptional circumstances to demonstrate that the accused is not likely to abscond or be a danger to the community. In *Murcott* [2004] WASC 285 [4] & [10] Miller J stated that wilful murder is the 'most serious offence known to our law' and rarely results in a grant of bail. In order for bail to be granted there must be 'extremely exceptional circumstances'.

16. The Victorian Law Reform Commission (VLRC) noted that mandatory life imprisonment does not provide any incentive for an accused to plead guilty to murder. In a study of homicide prosecutions in Victoria, it was found that very few accused plead guilty to murder. A significant number of accused do, however, plead guilty to manslaughter: see VLRC, *Defences to Homicide*, Issues Paper (2002) [9.10].

cases criminal responsibility is determined by the court following a trial.

Generally, in a criminal trial, the jury decides questions of fact and the judge makes decisions about questions of law. The essential principle underlying a jury trial is that an accused person has the right to be judged by his or her peers and, therefore, a jury is comprised of 12 people randomly selected from the community.<sup>17</sup> For offences dealt with in the District Court or the Supreme Court an accused has a right to a trial before a jury.<sup>18</sup> Wilful murder and manslaughter may be dealt with by the Supreme Court and manslaughter may be dealt with by the District Court.<sup>19</sup> In Western Australia, an accused or the prosecution may apply for a trial before a judge alone and, if granted, the judge will determine both questions of law and questions of fact.<sup>20</sup>

Therefore, for wilful murder and murder, whether the accused is criminally responsible for the offence charged (or an alternative offence) will usually be determined by a jury. However, police and prosecuting authorities also have a role to play in determining how the criminal law will attach responsibility for homicide. The police and the Office of the Director of Public Prosecutions (DPP) make decisions about what charge (if any) should be brought against an accused. In the context of homicide, these decisions may reflect opinions about the moral blameworthiness of the accused or the extent to which the police or the state prosecuting body considers that the accused should be punished.

### HOW CRIMINAL RESPONSIBILITY IS DETERMINED

Criminal responsibility means that the accused is liable to punishment for the offence.<sup>21</sup> As a general rule, in order to be held criminally responsible for an offence, it is necessary for the state to prove each element of the offence. The elements of an offence can be broadly

classified into three categories: physical or conduct elements; mental elements; and defences. The physical and mental elements of an offence are usually set out in the legislative provision creating the offence. On the other hand, most defences are set out in separate provisions and apply generally to all offences.

#### Physical or conduct element

Every offence will require proof of either an act or omission.<sup>22</sup> Most offences require proof of a physical act. However, where the criminal law imposes a positive duty to act, failure to comply with that duty (that is, an omission to act) may constitute an offence. Manslaughter is one example of an offence which can be proved by reference to an omission to act. For example, s 263 of the Code provides that it is the duty of the head of a family to provide the necessities of life for a child who is a member of the family. Failure to do so may incur criminal responsibility for any consequences (including death) that result because of the omission.<sup>23</sup> For ease of reference in this Report the Commission will use the term 'act' when discussing physical elements unless in the relevant context it is necessary to speak of an 'omission'.

At common law, the physical or conduct element is known as *actus reus* and it is necessary that the relevant act was done voluntarily.<sup>24</sup> In contrast, under the Code the requirement of voluntariness is not attached to the act, but is reflected in the defence found in s 23 of the Code which states that a person is not criminally responsible for an act that occurs independently of his or her will.<sup>25</sup>

#### Mental element

At common law the term '*mens rea*' or 'guilty mind' refers to the mental fault elements of an offence and there is a presumption that every offence requires proof of a guilty mind.<sup>26</sup> However, in code jurisdictions many offences do not require proof of a mental element. The terms 'mental

17. However, s 5 and the Second Schedule of the *Juries Act 1957* (WA) provide that particular classes of people are not eligible to sit on a jury; for example, judicial officers, legal practitioners or police officers. Also, other categories may be excused from jury duty such as medical practitioners, emergency personnel and people who have the full-time care of young children.

18. *Criminal Procedure Act 2004* (WA) s 92.

19. Section 42 of the *District Court of Western Australia Act 1969* (WA) provides that the District Court does not have jurisdiction to determine any criminal case where the maximum penalty is life imprisonment or strict security life imprisonment. Therefore, the District Court cannot hear cases of wilful murder, murder, attempted murder or killing an unborn child. In the case of dangerous driving causing death, depending upon the circumstances, the case may be heard in either the Magistrates Court or the District Court: see Chapter 3, 'Dangerous Driving Causing Death'.

20. *Criminal Procedure Act 2004* (WA) s 118. If the prosecution applies for a trial by judge alone it can only be granted with the consent of the accused.

21. *Criminal Code* (WA) s 1.

22. *Criminal Code* (WA) s 2.

23. For further discussion of the duties relating to the preservation of human life in ss 262–67, see Chapter 3, 'Manslaughter'.

24. Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 8 & 11.

25. See Chapter 4, 'Unwilled Conduct and Accident: Unwilled conduct'.

26. Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 21.

element', 'mental fault element' and 'fault element' are all used to describe the same thing: the state of mind of the accused that is necessary before criminal responsibility can attach. In this Report, when discussing the law in Western Australia, the Commission uses the term 'mental element'. The most common examples of a fault element or mental element are intention, knowledge, recklessness and negligence.<sup>27</sup> The concepts of intention, recklessness and negligence are discussed in detail in Chapter 2.

In Western Australia, wilful murder, murder and manslaughter are mainly distinguished on the basis of the intention of the accused or the absence of any relevant intention. Intention is not defined in the Code. If a person intends to kill, in general terms this will mean that the objective or purpose of the accused person's conduct was to kill the deceased. Intention is a subjective question, namely what was in the mind of the accused at the relevant time. In some cases, intention may be proved by direct evidence from the accused (for example, from evidence given in court or from a previous confession). In other cases, intention can be inferred from all the circumstances of the case because those circumstances may be such that the only reasonable inference is that the accused intended a particular consequence.<sup>28</sup>

Intention is not the same as motive. Section 23 of the Code provides that unless 'otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility'. A person's motive is the reason that he or she does a particular act. For example, a person may administer a fatal dose of medication to an elderly relative with the *intention* that the relative will die. However, the *motive* may be to ease the suffering of the relative who is terminally ill. In contrast, a person may intend to kill an elderly relative in the same way, but with the motive being financial gain because he or she is a beneficiary of that relative's will. In both cases, the intention is the same. While the motive of the accused cannot generally

be considered when determining criminal responsibility, it may be relevant for sentencing.

## Defences: Justification and excuse

Division V of the Code deals with criminal responsibility. Included in this division are a number of separate defences. Those of particular relevance to homicide are the defences of accident, unwilling conduct, duress, emergency and insanity, mistake and intoxication.<sup>29</sup> The defences in Division V apply to all offences in Western Australia, even those offences found in legislation other than the Code.<sup>30</sup> Part V of the Code (which deals with offences against the person) also contains a number of defences that are relevant to homicide, such as provocation, self-defence, and defence against home invasion.

Section 268 of the Code provides that a killing is unlawful, unless it is authorised, justified or excused by law. The terms 'authorised', 'justified' and 'excused' refer to the various defences available under the Code. For example, s 31(1) of the Code provides that a person is not criminally responsible for an act done in execution of the law. Thus, a person who was required to inflict the death penalty on a prisoner would have been authorised by law and accordingly would not have been criminally responsible for causing the death. Following the abolition of the death penalty, a killing can no longer be authorised under the criminal law.<sup>31</sup>

A justification has been described as 'socially approved conduct', whereas an excuse is conduct which is not socially approved but 'forgivable'.<sup>32</sup> An example of a justification is self-defence. The defence of provocation, however, is today generally considered to be an excuse. Similarly, the defence of accident has been categorised as an excuse.<sup>33</sup> Whether a defence is a justification or an excuse does not have any practical consequences under the criminal law.<sup>34</sup> Nevertheless, the Victorian Law Reform Commission (VLRC) made reference to the distinction when it observed that in some cases of homicide it has been argued that:

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27. Negligence is perhaps more correctly described as a fault element rather than a mental element because it does not involve the accused's state of mind but rather the failure to comply with an objective standard: see Yeo S, *Fault in Homicide: Murder and involuntary manslaughter in England, Australia and India* (Sydney: Federation Press, 1997) 3.
28. In *Parker* (1963) 111 CLR 610, 649 Windeyer J stated that if 'the immediate consequence of an act is obvious and inevitable, the intentional doing of the act imports the intention to produce the consequence. Thus, to suppose that a sane man who wilfully cuts another man's throat does not intend to do him harm would be absurd', as cited in *Turner* [2004] WASCA 127 [22] (Wheeler J; Murray & Templeman JJ concurring).
29. The Commission does not examine intoxication or mistake in this Report; however, these defences are mentioned where necessary.
30. *Criminal Code* (WA) s 36.
31. *Stott & Van Embden* [2001] QCA 313 [14] (McPherson JA).
32. Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 1–2.
33. *Ugle* [2002] HCA 25, [44] (Kirby J) & [23] (Gummow & Hayne JJ).
34. Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 1–2. It is noted that the distinction between a justification and an excuse may be useful when considering moral questions associated with particular defences or partial defences.

[T]he circumstances were such that the killing was justified—that it was not wrong to kill in the particular situation. In others, it is argued that while it may have been wrong to kill, the circumstances were such that the accused should not be held fully responsible and the behaviour should be excused.<sup>35</sup>

In this Report the Commission uses the term 'defence' to refer to both a justification and an excuse. However, where relevant, the distinction between the two concepts will be discussed in the process of analysing some of the defences and partial defences to homicide.

### Model Criminal Code

In 1991 the Standing Committee of Attorneys General established the Model Criminal Code Officers Committee (MCCOC) to develop a uniform model criminal code for all Australian jurisdictions.<sup>36</sup> In December 1992 the MCCOC published Chapters One and Two of the Model Criminal Code which deal with criminal responsibility. In general terms, Chapter Two of the Model Criminal Code provides that the elements of an offence consist of both physical elements and fault elements. However, a statutory provision may stipulate that no fault element is required.<sup>37</sup> The criminal responsibility provisions of the Model Criminal Code have been adopted by the Commonwealth, and partly adopted by the Australian Capital Territory and the Northern Territory. In the Model Criminal Code, physical elements are defined as an act, an omission, a state of affairs, a circumstance or a result of an act, omission or state of affairs. The Model Criminal Code also provides that an act, an omission or a state of affairs can only constitute the physical element of the offence if it is voluntary (willed). Fault elements are defined as intention, knowledge, recklessness or negligence.<sup>38</sup> Therefore, in relation to criminal responsibility, the Model Criminal Code largely reflects the common law.

It has been observed that the approach to fault elements under the Model Criminal Code is an improvement on the position under the Griffith codes.<sup>39</sup> The Commission has not examined this claim because to do so would require a

review of the entire criminal law in this state – a task clearly outside the terms of reference for this project. Nonetheless, this Report does examine the current framework for determining criminal responsibility under the Code in relation to the law of homicide.

### Burden and standard of proof

A person charged with an offence is presumed innocent until proven guilty. This raises the following questions: who is required to prove that the accused is guilty (burden of proof) and how much proof is necessary (standard of proof)? The general rules in relation to the burden and standard of proof in criminal trials are not set out in the Code; therefore, the common law rules apply.<sup>40</sup> Generally, the state (or prosecution) is required to prove that the accused is guilty beyond a reasonable doubt.<sup>41</sup> Thus, the burden of proof (also referred to as the persuasive burden) rests on the prosecution and the standard of proof required is proof 'beyond reasonable doubt'. In civil matters the standard of proof is on the 'balance of probabilities'. The standard of proof in criminal trials is higher than the standard of proof in civil matters because of the 'severe sanctions which can follow a conviction'.<sup>42</sup>

In some instances, the burden will shift and the accused is required to prove something. Whenever the burden of proof rests with the accused the standard of proof is on the balance of probabilities. The defence of insanity is an example of where the onus is reversed and the accused is required to prove on the balance of probabilities that he or she was insane when the offence was committed.<sup>43</sup>

In addition to the persuasive burden, the prosecution generally also bears the evidential (or evidentiary) burden. What this means is that the prosecution must lead some evidence of each element of the offence. Failure to do so will mean that the judge will withdraw the case from the jury. The term 'defence' may be assumed to imply that the onus of proof has been reversed and the accused must prove that any defence applies. This is not generally

35. VLRC, *Defences to Homicide*, Issues Paper (2002) [1.8].

36. Model Criminal Code Officers Committee (MCCOC), *General Principles of Criminal Responsibility* (1992) i–iii. The Commission notes that in July 2006 the Standing Committee of Attorneys General (SCAG) changed the name of the Model Criminal Code Officers Committee to the Model Criminal Law Officers Committee (MCLOC) in order to 'reflect the Committee's broader role on advising on criminal law issues referred to it by SCAG': see <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Model\\_criminal\\_code](http://www.ag.gov.au/www/agd/agd.nsf/Page/Model_criminal_code)>.

37. MCCOC, *ibid* 6.

38. *Ibid* 6–21.

39. Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 12.

40. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials*, (Sydney: LexisNexis Butterworths, 2005) 9. See also *Hutchinson* [2003] WASC 323, [33] (McKechnie J).

41. *Woolmington v DPP* [1935] AC 462, 481–82 (Viscount Sankey LC).

42. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials*, (Sydney: LexisNexis Butterworths, 2005) 13.

43. *Criminal Code* (WA) s 27 and see further discussion about the reversal of the onus of proof in Chapter 3, 'Dangerous Driving Causing Death: Reversal of the onus of proof'.

the case. The accused does, however, carry the evidential burden in relation to any defences. If an accused wishes to rely on a defence then, he or she will be required to produce some evidence to support the defence unless there is already relevant evidence before the court from the evidence led by the prosecution which raises the issue. Once there is evidence 'that warrants the attention of the jury' the prosecution is required to negate the defence beyond a reasonable doubt.<sup>44</sup> In other words, the prosecution retains the persuasive burden of proof.

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44. For a general discussion about the burden and standard of proof, see Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) 12–16.

# The Social Context of Homicide

The purpose of this section is to provide a brief overview of the context in which homicide takes place and the characteristics of homicide offenders and victims. Many law reform bodies, academics, judges and other commentators have criticised aspects of the law of homicide because it does not adequately reflect the social context in which killings take place. In particular, it has been said that because the law 'developed in recognition of the circumstances of male-on-male violence'<sup>1</sup> some defences to homicide are 'gender-biased.' As an example, it has frequently been argued that provocation and self-defence do not adequately reflect the circumstances in which women kill.<sup>2</sup> In order to properly examine the current law of homicide in Western Australia and determine whether there is any need for reform, it is necessary to understand the general circumstances in which homicide takes place and the gender (as well as other characteristics) of homicide victims and offenders.

The National Homicide Monitoring Program (NHMP), which is run through the Australian Institute of Criminology, has been collecting data on homicide in Australia since 1989.<sup>3</sup> Many of the statistics discussed in this section are from the various reports prepared by the NHMP. Throughout this Report, further statistics and analysis of the social context in which homicide takes place in both Australia and Western Australia will be considered where necessary and relevant. In particular, in Chapter 6 the Commission examines in detail the link between domestic violence and homicide.

## THE INCIDENCE OF HOMICIDE

Despite public perceptions to the contrary, the rate of homicide in Australia over the last 100 years has remained relatively stable.<sup>4</sup> Potas and Walker noted in 1987 that although the media often depicts an escalating homicide rate in Australia, statistics demonstrate otherwise.<sup>5</sup> More recently, in a detailed study of homicide over a 10-year period in Australia from 1989 to 1999, it was found that the rate of homicide had remained fairly stable.<sup>6</sup> In 2005–2006 there were 283 homicide incidents in Australia.<sup>7</sup> The NHMP reported that the majority of homicides in this period were categorised as murder (90%). Nine per cent were manslaughter and the remaining one per cent of homicides were classified as infanticide. The research conducted by the NHMP is based upon the categories as recorded by police and, therefore, the classification of a particular homicide incident may change after the matter has been dealt with by a court.<sup>8</sup> For example, an accused may be charged with murder, but later convicted of manslaughter. Research conducted by the Crime Research Centre indicates that in Western Australia in 2004 there were 34 reported cases of murder (including wilful murder) and 11 cases of manslaughter.<sup>9</sup> In 2004 the rate of homicide in Western Australia (3.8 per 100,000) was slightly higher than the national rate (3.0 per 100,000).<sup>10</sup> In 2005 the rate of homicide in Western Australia (3.2 per 100,000) was less than the national average (3.8 per 100,000); there were 20 reported cases of murder (including wilful murder) and five cases of manslaughter.<sup>11</sup>

1. Victorian Law Reform Commission (VLRC), *Defences to Homicide*, Issues Paper (2002) [1.18].
2. See Chapter 4, 'Self-Defence' and 'Provocation'.
3. The Australian Institute of Criminology, produced various statistics in relation to homicide and defined homicide as murder, manslaughter and infanticide (but not dangerous driving causing death and attempted murder): see Mouzos J, *Homicidal Encounters: A study of homicide in Australia 1989–1999* (Canberra: Australian Institute of Criminology, 2000) 8.
4. It has been observed that the rate of homicide in the period from 1915 to 1925 was similar to the rate in 1997: see James M, 'Homicide in Australia' (Paper presented at the Australian Institute of Criminology's Second National Outlook Symposium: Violent Crime, Property Crime and Public Policy, Canberra, 3 & 4 March 1997) 5. The Commission notes that there have been some fluctuations in the rate of homicide. For example, from 1930 to 1950 the homicide rate decreased and then significantly increased in 1988.
5. On a per capita basis the rate of homicide is generally stable: see Potas I & Walker J, 'Capital Punishment' (1987) 3 *Australian Institute of Criminology: Trends and Issues*, 3.
6. Mouzos J, *Homicidal Encounters: A study of homicide in Australia 1989–1999* (Canberra: Australian Institute of Criminology, 2000) xix & 1. For the period 2003–2004 the National Homicide Monitoring Program (NHMP) reported that for the first time since it began collecting data in relation to homicide, there had been a marginal decrease in the number of homicides.
7. Davies M & Mouzos J, *Homicide in Australia 2005–2006: National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2007) 8.
8. *Ibid.*
9. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2004* (Perth: Crime Research Centre, 2005) 8 & 67. There were also 30 reported cases of attempted murder. These Crime Research Centre statistics are based on crimes reported and recorded by the police and do not therefore represent the number of convictions. It is noted that the lowest conviction rates in 2004 were for offences against the person. In homicide cases 63 per cent of accused were convicted. Over the period 1996–2004 the homicide conviction rate varied from 49.3 per cent to 64.9 per cent.
10. *Ibid.* 8. The rate of homicide in this instance is based upon the reported cases of murder, manslaughter and attempted murder but does not include dangerous driving causing death (or similarly defined offences in other Australian jurisdictions).
11. Loh N, Maller M, Fernandez J, Ferrante A & Walsh M, *Crime and Justice Statistics for Western Australia: 2005* (Perth: Crime Research Centre, 2007) 10. In 2005 there were 23 reported cases of attempted murder.

## OFFENDERS

The vast majority of homicide offenders in Australia are male. Research conducted by the NHMP from 1989–1999 found that 87.2 per cent of homicide offenders were male and 12.8 per cent were female.<sup>12</sup> Similar patterns were observed in the period 2005–2006.<sup>13</sup> In Western Australia the majority of homicide offenders are also male. While the data varies annually, it appears that the proportion of male and female offenders in Western Australia is usually similar to the national level. For example, in 2002–2003 females accounted for 11 per cent of homicide offenders.<sup>14</sup>

At the national level Indigenous people are over-represented as homicide offenders. Although constituting only about two per cent of the population, Indigenous people make up approximately 15 per cent of homicide offenders.<sup>15</sup> Consistent with Western Australia's general level of over-representation of Indigenous people in the criminal justice system, from 1989–1999 Indigenous people comprised more than 28 per cent of all homicide offenders in this state.<sup>16</sup>

## VICTIMS

The majority of victims of homicide in Australia are men. The NHMP statistics from 1989–1999 show that approximately 63 per cent of homicide victims were male and 37 per cent were female.<sup>17</sup> Similar findings were made for the period from 2005–2006.<sup>18</sup> Although homicides predominantly involve male offenders and male victims,

the proportion of female victims is far greater than the proportion of female offenders. The NHMP found that in Western Australia from 2003–2004 the proportion of female victims was almost half and this is significantly greater than the national figure.<sup>19</sup> This finding is consistent with research undertaken by the Western Australia Police. While only examining statistics for murder (defined as intentional homicide) this research showed that in 1994 the proportion of male and female victims was about the same. Although there was an increase in the proportion of male victims over the following two years, by 1998 the proportion was again relatively equal.<sup>20</sup> In the period 2005–2006 the proportion of female victims in Western Australia was again greater than the national average.<sup>21</sup> The Commission is of the view that the prevalence of female victims of homicide in Western Australia is important in terms of law reform.

Indigenous people are also over-represented as victims of homicide. Indigenous people are about eight times more likely to be victims of homicide than non-Indigenous people.<sup>22</sup> During the period 1989–2000 Indigenous people constituted about 15 per cent of homicide victims in Australia.<sup>23</sup> Again in Western Australia, the rate of over-representation is greater. For example, 27.6 per cent of murder victims in 1998 were Indigenous.<sup>24</sup>

A significant number of homicide victims are children. During the period from 1989–1999 children accounted for nine per cent of homicide victims. It has been observed that biological parents (generally the mother) were predominantly responsible for the killing of children.<sup>25</sup> The Victorian Law Reform Commission (VLRC) has also noted

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12. Mouzos J, *Homicidal Encounters: A study of homicide in Australia 1989–1999* (Canberra: Australian Institute of Criminology, 2000) xix.
13. Davies M & Mouzos J, *Homicide in Australia 2005–2006: National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2007) 20.
14. Mouzos J & Segrave M, *Homicide in Australia 2002–2003: National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2004) 51. However, in the period from 1999–2000 females constituted 32 per cent of homicide offenders in Western Australia: see Mouzos J, 'Homicide in Australia 1999–2000' (2001) 187 *Australian Institute of Criminology: Trends and Issues* 4. From 2003–2004 females accounted for 18 per cent of homicide offenders in Western Australia: see Mouzos J, *Homicide in Australia 2003–2004: National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2005) 44.
15. Mouzos J, 'Indigenous and Non-Indigenous Homicides in Australia: A Comparative Analysis' (2001) 210 *Australian Institute of Criminology: Trends and Issues* 2.
16. Mouzos J, *Homicidal Encounters: A study of homicide in Australia 1989–1999* (Canberra: Australian Institute of Criminology, 2000) 55.
17. *Ibid* xx.
18. Davies M & Mouzos J, *Homicide in Australia 2005–2006: National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2007) 12.
19. Mouzos J, *Homicide in Australia 2003–2004: National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2005) 8.
20. Heathcote B & Bell D, 'Murder Victims in Western Australia' [1998] *Crime Analysis* 2.
21. Fifty-eight per cent of homicide victims were male and 42 per cent were female: Davies M & Mouzos J, *Homicide in Australia 2005–2006: National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2007) 45.
22. Mouzos J, *Homicidal Encounters: A study of homicide in Australia 1989–1999* (Canberra: Australian Institute of Criminology, 2000) xx.
23. Mouzos J, 'Indigenous and Non-Indigenous Homicides in Australia: A Comparative Analysis' (2001) 210 *Australian Institute of Criminology: Trends and Issues* 2.
24. Heathcote B & Bell D, 'Murder Victims in Western Australia' [1998] *Crime Analysis* 2.
25. Mouzos J, *Homicidal Encounters: A study of homicide in Australia 1989–1999* (Canberra: Australian Institute of Criminology, 2000) xxiii.

that the greatest risk of homicide for children is when they are under the age of one.<sup>26</sup> In 2005–2006 there were 35 homicide cases in Australia where the victim was a child.<sup>27</sup> Of these, about 30 per cent of the victims were infants under the age of one year.<sup>28</sup> Over 90 per cent of child homicides were committed by a family member and about 37 per cent of child homicides involved the mother killing her child.<sup>29</sup> Only two children (out of 35) were killed by a stranger.<sup>30</sup> In relation to similar figures in 2003–2004, the NHMP observed that the number of children killed by a stranger 'is relatively small despite public fears that children are most in danger of being abducted and murdered'.<sup>31</sup>

### RELATIONSHIP BETWEEN THE OFFENDER AND THE VICTIM

Most homicides in Australia take place between people who are known to each other.<sup>32</sup> For example, 80 per cent of homicides during the period from 1989–1999 involved an offender and a victim who were known to each other. Within this category, females were more likely to be killed by an 'intimate partner' and males were more likely to be killed by a friend or an acquaintance.<sup>33</sup> Approximately 21 per cent of all homicides in that period involved intimate partners and this figure remained relatively constant over the 10-year period. Of these intimate partner homicides, 75 per cent were committed by a male offender against a female victim.<sup>34</sup> When women kill intimate partners it was found that often there was a 'long history of violent conduct'.<sup>35</sup>

### CONTEXT IN WHICH HOMICIDE OFFENCES USUALLY TAKE PLACE

#### Location of offence

Research conducted by the Crime Research Centre of Western Australia indicates that in 2004 the majority of homicide offences occurred in residential places.<sup>36</sup> This is consistent with national figures but it was noted by the NHMP in 2005 that there has been an 'increasing trend in the proportion of homicides occurring on the street or in an open area'.<sup>37</sup> In the period 2005–2006 residential homicides accounted for 43 per cent of all homicides in Western Australia and 37 per cent occurred in a street or open area.<sup>38</sup>

#### Motive or reason for the offence

Approximately 13 per cent of homicides took place during the course of committing another crime, the most common being the offence of robbery.<sup>39</sup> The NHMP has noted that this category includes homicides that occur as secondary crimes (for example, to avoid detection for the original offence or because of an unexpected confrontation with the victim) as well as homicides that are the primary or intended crime with the other crime (such as robbery) taking place subsequent to the killing.<sup>40</sup> The incidence of homicides which occur during the course of committing another crime is relevant to a consideration of the appropriateness or otherwise of the offence of felony-murder.

26. VLRC, *Defences to Homicide*, Issues Paper (2002) [2.41].

27. The NHMP include children aged up to 15 years.

28. Davies M & Mouzos J, *Homicide in Australia 2005–2006: National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2007) 26.

29. *Ibid.*

30. *Ibid.*

31. Mouzos J, *Homicide in Australia 2003–2004: National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2005) 17.

32. Davies M & Mouzos J, *Homicide in Australia 2005–2006: National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2007) 27.

33. Mouzos J, *Homicidal Encounters: A study of homicide in Australia 1989–1999* (Canberra: Australian Institute of Criminology, 2000) xxi.

34. *Ibid.* xxii.

35. *Ibid.* xxiii.

36. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2004* (Perth: Crime Research Centre, 2005) 36. Approximately 68 per cent of all murders and 52 per cent of all murder and manslaughters occurred in a dwelling. Similarly, 56 per cent of all attempted murders occurred in a dwelling.

37. Nevertheless, the majority of homicides still take place in a residential setting: see Mouzos J, *Homicide in Australia 2003–2004: National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2005) 1.

38. Davies M & Mouzos J, *Homicide in Australia 2005–2006: National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2007) 10.

39. Mouzos J, *Homicidal Encounters: A study of homicide in Australia 1989–1999* (Canberra: Australian Institute of Criminology, 2000) xxi & 71–73. Ten per cent of homicides in Australia took place during a robbery in the period from 1989–1999. For those homicides that occurred during the course of another crime, 66 per cent occurred during a robbery offence.

40. Mouzos J, *Homicide in Australia 2003–2004: National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2005) 7.

The NHMP found that, in 2003–2004, female victims were most likely to have been killed ‘as a result of a domestic argument and/or the breakdown of a relationship’.<sup>41</sup> Male victims were more likely to have been killed for reasons associated with ‘revenge, money/drugs’ and ‘alcohol related arguments’.<sup>42</sup> The VLRC found in its study of homicide cases over a four-year period that both men and women were more likely to kill in the ‘context of sexual intimacy’.<sup>43</sup> It was observed that, in the cases of sexual intimacy, men were more likely to kill because of jealousy or a need to control their partners whereas women tended to kill as a response to abuse or violence by their partners. These observations have significant implications for the law relating to provocation (which favours anger and loss of control) and self-defence which traditionally has not adequately served women who respond to violence and abuse.<sup>44</sup>

### Cause of death

In the period from 2003–2004 stab wounds were the major cause of death in homicide cases in Australia. Women were more likely to die as a result of strangulation, suffocation or beating. Men, on the other hand, were more likely to die as a result of stabbings.<sup>45</sup> The Commission notes, however, that in 2005–2006 women were more likely to be killed with a knife or other sharp instrument.<sup>46</sup> Nevertheless, in that same period not one female offender killed her intimate partner without a weapon of some kind. In relation to the statistics in 2003–2004, it was observed that:

Given the differences between men and women in terms of physical strength, it is not surprising to find that only five per cent of the male intimate partners were beaten to death compared with 35 per cent of females. In contrast, male

victims were more likely to be killed with a knife or sharp instrument (63%) by their female partners.<sup>47</sup>

This factor needs to be considered when examining the law of self-defence. Historically, self-defence was modelled on the typical male-to-male confrontation involving two people of similar strength. Is it reasonable for the law to require women who respond in self-defence to violence to do so in a manner that assumes they are equally as strong as the perpetrators of the violence?<sup>48</sup>

### Indigenous homicides

As noted above, Indigenous people are over-represented as both offenders and victims of homicide. Indigenous women feature more predominantly in homicide statistics than non-Indigenous women. In a study of Indigenous homicides during the period from 1989–2000, approximately 20 per cent of Indigenous homicides involved female offenders compared to 10 per cent of non-Indigenous homicides. Almost 75 per cent of Indigenous female homicide offenders killed an intimate partner.<sup>49</sup> Similarly, a greater proportion of Indigenous homicides took place between family members (that is, intimate partners or other family) compared to non-Indigenous homicides.<sup>50</sup> The frequency of Indigenous homicides which occur between partners and family members has implications when considering the need to reform the law with respect to defences available for women who kill after suffering prolonged domestic or family violence. In Chapter 6 it is noted that the concept of ‘battered women’s syndrome’ does not adequately deal with cultural diversity.<sup>51</sup> It is vital that if the law is to be reformed to remove gender-bias it is done in a way that will not prejudice particular groups of women.

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41. Australian Institute of Criminology, *Motives for Homicide*, Crime Facts Info No. 110 (November 2005). The Commission notes that the Australian Institute of Criminology refers to homicide as murder, manslaughter and infanticide.
42. Ibid. The NHMP has observed that it ‘is difficult to ascribe a single reason or motive to a homicide when in actual fact the reasons or lack thereof may be varied and complicated’: see Mouzos J, *Homicide in Australia 2003–2004: National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2005) 11.
43. VLRC, *Defences to Homicide*, Final Report (2004) [1.40].
44. See Chapter 4, ‘Self-Defence’ and ‘The Partial Defence of Provocation’.
45. Australian Institute of Criminology, *Homicides in Australia 2003–2004: Cause of death*, Crime Facts Info No. 108 (October 2005).
46. Davies M & Mouzos J, *Homicide in Australia 2005–2006: National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2007) 18.
47. Mouzos J, *Homicide in Australia 2003–2004: National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2005) 17.
48. See Chapter 4, ‘Self-Defence’.
49. Mouzos J, ‘Indigenous and Non-Indigenous Homicides in Australia: A comparative analysis’ (2001) 210 *Australian Institute of Criminology: Trends and Issues* 4.
50. Ibid 5. Sixty-one per cent of Indigenous homicides occurred between family members, compared to 33 per cent in the case of non-Indigenous homicides.
51. See Chapter 6, ‘Should There be a Separate Defence to Homicide for Victims of Domestic Violence: Problems with Battered Women’s Syndrome’.

# The Law of Homicide in Western Australia

## HISTORICAL CONTEXT

Historically, at common law, the offence of murder involved

a [person] of sound memory, and of age of discretion, unlawfully [killing] ... any reasonable creature in rerum natura under the King's peace, with malice forethought, either expressed by the party, or implied by law, so as the party wounded, or hurt, etc die of the wound, or hurt, etc within a year and a day after the same.<sup>1</sup>

Murder at common law is unlawful homicide with 'malice aforethought'. Malice aforethought (the *mens rea* of murder) was described in 1877 in *Stephen's Digest of Criminal Law* as including an intention to cause death or grievous bodily harm to any person or knowledge that death or grievous bodily harm will probably result.<sup>2</sup>

At the time of drafting the Griffith Code there was no distinction at common law between wilful murder and murder. Sir Samuel Griffith observed at the time that in many countries there was a distinction between different levels of murder, such as 'first degree murder' and 'second degree murder'.<sup>3</sup> Accordingly, Sir Griffith recommended the Code should provide a distinction between wilful murder and murder.<sup>4</sup> Thus, the *Criminal Code* (WA) (the Code) represents a significant departure from the common law categories of homicide.

## THE WESTERN AUSTRALIAN CRIMINAL CODE

Section 277 of the Code provides that an unlawful killing is a crime and depending upon the circumstances may be wilful murder, murder, manslaughter or infanticide. The physical or conduct element of wilful murder, murder and manslaughter is the same: the accused must have killed the deceased. For wilful murder, the mental element is that the accused intended to kill the deceased or some other person.<sup>5</sup> For murder, it must be proved that the accused intended to cause grievous bodily harm to the deceased or to some other person.<sup>6</sup> An unlawful killing

that does not constitute wilful murder or murder will be either manslaughter or infanticide.<sup>7</sup> In Western Australia manslaughter covers unlawful killings where there is no intention to kill or cause grievous bodily harm or where the partial defence of provocation applies.

As mentioned above, there are a number of defences under the Code that are relevant to homicide. These are discussed in detail in Chapters 4 and 5. There are also a number of partial defences in Australia and in other common law jurisdictions. The effect of successfully raising a partial defence is that a charge of wilful murder or murder will be reduced to manslaughter. In Western Australia the only partial defence is provocation. The offence of infanticide operates in a similar way to a partial defence because it provides a lesser penalty and a different offence category where there is either an intention to kill or an intention to cause grievous bodily harm. Infanticide is where a mother kills her child (under the age of one year) while the balance of her mind is disturbed because of the effects of childbirth or lactation.<sup>8</sup> In other Australian jurisdictions there are partial defences of diminished responsibility, excessive self-defence and suicide pacts.

Chapters 2 and 3 of this Report examine each homicide offence in detail. For all homicide offences under the Code there are common definitions and provisions affecting the physical element of homicide: that the accused caused the death of another person. These matters are considered below.

### Who is capable of being killed

Under the Code, in order to constitute wilful murder, murder, manslaughter or infanticide, it is necessary for the prosecution to prove that *a person* has been killed.<sup>9</sup> Section 269 of the Code provides that:

A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not, and whether the navel-string is severed or not.

1. Coke E, *The Institutes of the Laws of England* (1628) vol. III, 47, as quoted in Whitney K, Flynn M & Moyle P, *The Criminal Codes: Commentary and materials* (Sydney: Law Book Company, 5th ed., 2000) 48. Whitney et al noted that the term *rerum natura* means 'in existence'.  
2. As cited in *Crabbe* (1985) 156 CLR 464, 467–68 (Gibbs CJ, Wilson, Brennan, Deane & Dawson JJ).  
3. Queensland Law Reform Commission, *The Proposed Abolition of the Distinction Between Wilful Murder and Murder*, Working Paper No. 3 (1969) 1–2.  
4. *Ibid.*  
5. *Criminal Code* (WA) s 278.  
6. *Criminal Code* (WA) s 279 (1). There are other circumstances in s 279 that will constitute murder and these are discussed in detail in Chapter 2, 'Felony-murder'.  
7. *Criminal Code* (WA) s 277. See Chapter 3, 'Manslaughter' and 'Infanticide'.  
8. *Criminal Code* (WA) s 281A.  
9. This is also the case for dangerous driving causing death: see Chapter 3, 'Dangerous Driving Causing Death'.

'Living state' is not defined under the Code. Similarly, at common law, murder or manslaughter can only be committed against a person who has been born in a living state. In *Hutty*,<sup>10</sup> it was stated that a baby is born alive when it has a 'separate and independent existence in the sense that it does not derive its power of living from its mother' and is 'living by virtue of the functioning of its own organs'.<sup>11</sup>

The Murray Review of the Code in 1983 noted that the common law interpretation of 'living state' is applicable to the Code, subject to the qualification that it is not necessary to show that the child has breathed or has an independent circulation.<sup>12</sup> The Murray Review did not recommend any substantial amendments to s 269 of the Code.<sup>13</sup> The Model Criminal Code Officers Committee (MCCOC) concluded that the definition under the Western Australian Code was preferable to the common law description because it stipulates that a child is capable of being killed even if it has not breathed or does not have independent circulation.<sup>14</sup> It was noted that many children are born alive but do not breathe for some time after their birth.<sup>15</sup>

The MCCOC also commented that with modern medical technology the question whether a baby has been born alive may be complicated. The effect of the common law rule may mean that a child who is kept alive on a life support machine is not capable of being murdered. A child may be on life support because he or she has multiple organ failure. On the other hand, a child may be on life support in circumstances where he or she is likely to recover with medical treatment.<sup>16</sup> The MCCOC recommended that a person's birth should be defined as the time when the person is 'fully removed from the mother's body and has an independent existence from the mother'.<sup>17</sup> It was also recommended that the following matters should be 'relevant, but not determinative' to the question whether a person has been born:

- whether the 'person is breathing';
- whether the 'person's organs are functioning of their own accord'; and

- whether the 'person has an independent circulation of blood'.<sup>18</sup>

The only significant difference between the MCCOC recommendation and s 269 of the Code is that the MCCOC recommendation provides that whether the person's organs are functioning of their own accord is not determinative. The Commission is not aware of any problems in practice with the operation of s 269 of the Code. However, in the absence of consultation with the medical profession, the Commission is not in a position to conclude that there is no need for reform. As will be seen in the discussion below about the definition of death, advances in medical technology may mean that the current provisions should be reconsidered.

A similar issue exists with the question of when a child is capable of being born alive for the purposes of the 'killing an unborn child' offence under s 290 of the Code. That section currently provides:

Any person who, when a woman is about to be delivered of a child, prevents the child from being born alive by any act or omission of such nature that, if the child had been born alive and had then died, he would be deemed to have unlawfully killed the child, is guilty of a crime, and is liable to imprisonment for life.

The Commission notes that the current wording of s 290 requires clarification. For example, the phrase 'when a woman is about to be delivered of a child' would appear to create a timing issue in the application of the section because it raises questions as to whether the section applies only when a woman is carrying a child to full-term, or whether it also includes the situation where a child's birth is medically induced at some time earlier than would be 'natural'.<sup>19</sup>

In his 2003 review of similar sections in all Australian jurisdictions, Mervyn Finlay stated that this timing issue had caused the dismissal of at least one of the two charges under s 290 in Western Australia.<sup>20</sup> He considered that the provision was a product of its time in that when it was

10. [1953] VLR 338.

11. *Ibid* 339 (Barry J). It was also held that whether the baby is still attached to its mother by the umbilical cord is not relevant. Thus, both the common law and the Code provide that it does not matter if the umbilical cord is severed or not when determining whether a child has been born alive.

12. Murray MJ, *The Criminal Code: A general review* (1983) 168.

13. It was recommended that the term 'navel-string' should be replaced with 'umbilical cord': see *ibid*.

14. As well as the definitions in Queensland, Tasmania and the Northern Territory.

15. Model Criminal Code Officers Committee (MCCOC), *Fatal Offences Against the Person*, Discussion Paper (1998)13.

16. *Ibid* 13 & 17.

17. *Ibid* 17.

18. *Ibid* 16. The Model Criminal Code provision has recently been adopted in the Northern Territory: see *Criminal Reform Amendment Act (No.2) 2006* (NT) s 5.

19. While this is unclear, the wording at least appears to limit the provision to a time proximate to the time of delivery of the child.

20. Finlay MD, *Review of the Law of Manslaughter* (2003) 78. Finlay observed that in 1992, in the case of *Booth* (an unreported Court of Petty Sessions decision), the charge under s 290 was dismissed by a magistrate because the woman was not about to be 'delivered of a child'.

drafted more than 100 years ago, medical science was such that only children carried to full-term had a realistic chance of survival.<sup>21</sup> Of course, medical science has now significantly advanced and a child is capable of being born alive and surviving after being carried for much less than full-term. It was recommended by the Murray Review that s 290 should be amended to apply when a 'woman is pregnant with a child capable of being born alive'.<sup>22</sup> The Commission agrees that this amendment would be appropriate and that s 290 should be reviewed in consultation with the medical profession to clarify the application of the section and to establish a statutory period of gestation beyond which a child is presumed to be capable of being born alive.<sup>23</sup>

## Definition of death

There is no statutory definition of 'death' in the Code. In the majority of homicide cases there will be no issue as to whether the victim is dead or when the victim died. At common law the long-established definition of death was the 'irreversible cessation of all vital functions, including those of the heart and lungs'.<sup>24</sup> However, advances in medical technology now mean that a person can be kept alive artificially even though the person has suffered irreversible brain damage. This situation arose in *Kinash*.<sup>25</sup> The accused had assaulted the victim causing head injuries. In hospital the victim was placed on a ventilator and after a period of time it was determined by medical practitioners that the victim had 'suffered permanent functional death of the brain stem'.<sup>26</sup> After the ventilator was turned off, the victim suffered cardiac arrest and died. Connolly J held that the actions of the applicant were the only cause of the death because brain death had already occurred prior to switching off the ventilator.<sup>27</sup>

In 1977 the Australian Law Reform Commission (ALRC) noted that there was 'widespread international acceptance

of the concept that a person who has suffered irreversible cessation of brain function is dead'.<sup>28</sup> The ALRC concluded that there should be a statutory definition of death with reference to 'irreversible cessation of brain function' and recommended, for all purposes under the law, that death should be defined as follows:

A person has died when there has occurred:

- (a) irreversible cessation of all functions of the brain of the person; or
- (b) irreversible cessation of circulation of blood in the body of a person.<sup>29</sup>

Except for Western Australia and Queensland, this definition has been adopted by all Australian jurisdictions and in each case the definition expressly applies for all purposes under the law in the relevant jurisdiction.<sup>30</sup> Section 45 of the *Transplantation and Anatomy Act 1979* (Qld) uses the same definition of death but the definition only applies for the purpose of that particular Act. Although Western Australia does not explicitly define death, the concept of irreversible cessation of brain function is recognised in s 24(2) of the *Human Tissue and Transplant Act 1982* (WA). This section provides that, if respiration and circulation are being maintained artificially, bodily organs can only be removed if two medical practitioners (who have both examined the patient and have the required level of medical experience) have declared that 'irreversible cessation of all functions of the brain of the person has occurred'.

In the 1983 Murray Review it was noted that the lack of a definition of death in the Code had led to concerns about the position of medical practitioners who were required to make decisions about when a person had died in order to undertake organ transplants. It was observed that there should be a precise definition in order that medical practitioners can act quickly when required in the

21. Ibid 104.

22. Murray MJ, *The Criminal Code: A general review* (1983) 185.

23. Submissions to the current reference have also suggested several other matters to be considered in any review of s 290 of the *Criminal Code* (WA). These included that the offence be extended to include grievous bodily harm as well as fatal harm and that the offence of dangerous driving causing death also include the death or grievous bodily harm that might be caused to an unborn child in a motor vehicle accident: Festival of Light Australia, Submission No. 16 (12 June 2006) 4; Alexis Fraser, Submission No. 30 (15 June 2006) 10; Coalition for the Defence of Human Life, Submission No. 32 (16 June 2006) 3.

24. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) 28.

25. (1981) 5 A Crim R 240 (Qld CCA).

26. Ibid 241 (Connolly J; Douglas and Kelly JJ concurring).

27. Ibid 242.

28. Australian Law Reform Commission (ALRC), *Human Tissue Transplants*, Report No. 7 (1977) [119]. This was recognised by Lord Goff of Chieveley in the House of Lords in *Airedale NHS Trust v Bland* [1993] AC 789, 863.

29. ALRC, *ibid* [136].

30. *Transplantation and Anatomy Act 1978* (ACT) s 45; *Human Tissue Act 1983* (NSW) s 33; *Human Tissue Transplant Act 1979* (NT) s 23; *Death Definition Act 1983* (SA) s 2; *Human Tissue Act 1985* (Tas) s 27A; *Human Tissue Act 1982* (Vic) s 41. The Commission notes that s 4(2) of the *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005* (NT) incorporates the same definition of death.

knowledge that they will not be held accountable for the death of a person.<sup>31</sup>

In 1991 the Commission also referred to the lack of a general definition of death in Western Australia in its report *Medical Treatment for the Dying*.<sup>32</sup> The Commission found, after observing that there was widespread support for a statutory definition, that death should be defined in the following manner:

For the purposes of the law in Western Australia, a person has died when there has occurred irreversible cessation of all function of the brain of the person, including the brain stem.<sup>33</sup>

The Commission noted that one view is that death should be defined by reference only to the irreversible cessation of brain function because irreversible cessation of circulation of blood is just one method of determining if death had occurred. The Commission excluded 'irreversible cessation of the circulation of blood' from the definition of death and noted that it would remain the responsibility of the medical profession to decide the criteria, test and procedures for determining when irreversible cessation of brain function has occurred.<sup>34</sup>

The MCCOC considered whether there was any need to amend the definition of death as recommended by the ALRC. It was observed that in some cases although a patient's brain stem cell remained alive, in all other respects the patient was effectively dead. For example, in *Airedale NHS Trust v Bland*,<sup>35</sup> the MCCOC noted that the patient had been in a 'vegetative state' for three years. Although he was able to breathe unaided and digest food, there were no other signs of life: the 'space which the brain should have occupied was full of watery liquid'.<sup>36</sup> In these types of complex cases, medical practitioners and/or families of the patient have sought an order from a court granting permission to turn off the life support machine.<sup>37</sup> The

MCCOC recommended that a definition of death along similar lines to the definition as recommended by the ALRC.<sup>38</sup>

The Western Australian *Standing Committee on Uniform Legislation and Intergovernmental Agreements* recommended in 2000 that Western Australia should adopt the uniform definition of death as recommended by the ALRC because the absence of a definition means the legal position is unclear.<sup>39</sup> In 1982 when the Human Tissue and Transplant Bill was introduced into the Western Australian Parliament, the then Minister for Health stated that the definition of death had not been included in the Bill because further public debate about the issue was considered necessary.<sup>40</sup>

As mentioned at the outset, questions about when a person has died are rarely complicated. However, in cases where a person is being artificially kept alive difficult questions could potentially arise. Bearing in mind the various reports that have recommended the inclusion of a definition of death, it would appear appropriate for Western Australia to adopt the definition used in other Australian jurisdictions. On the other hand, it is now almost 30 years since the ALRC made its recommendation with respect to the appropriate definition of death. At that time the ALRC noted that one argument against a statutory definition of death is that medical knowledge is continually progressing.<sup>41</sup> The Commission considers that there should be a statutory definition of death that applies for all purposes (civil and criminal) under the law in Western Australia. However, the Commission is of the view that there should be up-to-date consultation with the medical profession and the general public about this issue. At the same time, any need to reform the definition of when a child becomes a person capable of being killed and when a child is presumed to be capable of being born alive should also be examined.

31. Murray MJ, *The Criminal Code: A general review* (1983) 169 & 152. It was recommended that the definition of death should be inserted as s 270(2) of the Code as follows: 'A person dies when there is irreversible cessation of all function of his brain or of circulation of blood in his body'. In *Martin (No. 2)* (1996) 86 A Crim R 133, 136 Murray J noted that s 270 of the Code 'may be regarded as inadequate in its terms in that it does not deal, and the Code nowhere else deals, with what constitutes death and when that may be said to occur'.

32. Law Reform Commission of Western Australia (LRCWA), *Medical Treatment for the Dying*, Final Report, Project No.84 (1991) 30–33.

33. *Ibid* 33.

34. *Ibid* 32–33.

35. [1993] AC 789.

36. MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 21.

37. *Ibid* 21. Similarly, in 1991 it was suggested to the Commission that the definition of death should include 'total and irreversible loss of consciousness', but the Commission noted that this option would be unlikely to receive significant public support: see LRCWA, *Medical Treatment for the Dying*, Final Report, Project No. 84 (1991) 33.

38. MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 23.

39. Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Organ Donation and Transplantation*, Report No. 25 (2000) 21.

40. *Ibid* 21.

41. ALRC, *Human Tissue Transplants*, Report No.7 (1977) [130].

## Recommendation 3

### Review of statutory definitions in consultation with the medical profession

That the Department of the Attorney General consult with the medical profession and relevant organisations and individuals to determine:

- (a) an appropriate statutory definition of death which is applicable to the laws of Western Australia and which may be inserted into relevant legislation;
- (b) if the definition of when a child becomes a person capable of being killed under s 269 of the *Criminal Code* (WA) requires amendment with regard to the current level of medical knowledge and technology; and
- (c) if s 290 of the *Criminal Code* (WA) requires amendment to, among other things, reflect a statutory period of gestation beyond which a child is presumed to be capable of being born alive.

## Causation

In Western Australia the physical element which must be proved by the prosecution for the offences of wilful murder, murder, manslaughter and infanticide is that the accused killed the deceased.<sup>42</sup> Killing is defined in s 270 of the Code as:

Any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person.<sup>43</sup>

Although this section provides a definition of killing, it is in fact a provision dealing with causation.<sup>44</sup> A person cannot

be held criminally responsible for the killing of another person unless he or she *caused* that person's death. Historically, at common law a person could not be held to have caused the death of another person if death occurred more than a year and a day after the relevant event. In 1991 the Law Reform Commission of Victoria observed that the year-and-a-day rule is inappropriate given medical advances and changing circumstances. For example, someone may intentionally inflict another person with HIV but that person may not die for many years.<sup>45</sup> Section 276 of the Code (which previously contained the year-and-a-day rule) was repealed on 12 December 1991.<sup>46</sup> However, for any death that occurred before 12 December 1991 the year-and-a-day rule still applies.<sup>47</sup>

In most cases, the law in relation to causation is easy to apply in practice.<sup>48</sup> For example, if the accused shoots a person in the chest and death results from the gunshot wound there would be no question that the accused caused the death. However, difficult cases arise when there is more than one potential cause of death. For an accused to be held to have caused the death of another it is not necessary that the act of the accused is the 'sole, direct or immediate cause of the death'.<sup>49</sup> Nevertheless, in some cases it is argued that an intervening act of the victim or a third person (known at common law as *novus actus interveniens*) caused the death and, therefore, this act broke the chain of causation and the accused should not be held criminally responsible for the death. There are rules under the Code and at common law to cover a number of common factual scenarios where it is argued that an intervening act broke the chain of causation.

It is important to emphasise that the medical or factual cause of death is not necessarily the same as the legal cause of death. For example, if an accused assaults a person and leaves that person unconscious in the middle of a

42. The position with respect to dangerous driving causing death is separately considered in Chapter 3 because it is no longer necessary for the prosecution to prove that the person who was driving dangerously caused the death of the victim: see Chapter 3, 'Dangerous Driving Causing Death'.
43. Queensland has the same definition in s 293 of the *Criminal Code* (Qld). In New South Wales, Victoria, South Australia and the Australian Capital Territory there is no statutory definition for causation. Section 149C of the *Criminal Code* (NT) provides that a 'person's conduct causes death or harm if it substantially contributes to the death or harm'. This definition of causation in the Northern Territory is based upon the Model Criminal Code. The same definition is contained in s 115.9 of the *Criminal Code* (Cth). In Tasmania, causation is defined in s 153 of the *Criminal Code* (Tas) in the following manner: 'Killing is causing the death of a person by an act or omission but for which he would not have died when he did, and which is directly and immediately connected with his death'.
44. *Martin* (No. 2) (1996) 86 A Crim R 133, 136 (Murray J; Ipp and Wallwork JJ concurring).
45. Law Reform Commission of Victoria, *Homicide*, Report No. 40 (1991) 119.
46. *Criminal Law Amendment Act 1991* (WA) s 6. Section 276 was repealed following the recommendation of the Murray Review: Murray MJ, *The Criminal Code: A general review* (1983) 168. The year-and-a-day rule has been abolished in the United Kingdom and in all Australian jurisdictions: see MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 41.
47. Section 6 (3) of the *Criminal Law Amendment Act 1991* (WA) provides that s 276 continues to apply to any death that occurred before 12 December 1991 and to any death that occurs after 12 December 1991 if the relevant act or omission contributing to the death took place less than a year and a day before 12 December 1991.
48. In *Royall* (1991) 172 CLR 378, 398 Brennan J observed that the 'question of whether the required causal relationship exists is usually a simple question of fact'. Similarly, McHugh J stated that in 'most criminal cases, the issue of causation is not controversial': at 441.
49. *Ibid.* Toohey and Gaudron JJ also noted that there may be more than one cause of death: at 423. Similarly, Deane and Dawson JJ acknowledged that there may be no single cause of death: at 411. McHugh J stated that it is 'not necessary that an act or omission be the sole or main cause': at 441.

busy freeway and the victim subsequently dies as a result of the injuries sustained from being run over by a vehicle, the medical or factual cause would be the injuries sustained from the impact with the vehicle rather than the injuries caused by the assault. However, the accused would nonetheless be held to have legally caused the death of the victim.<sup>50</sup> Therefore, medical or scientific evidence about the cause of death is clearly not determinative at law. Whether the accused caused the death is a question of fact to be determined by the jury (or a judge alone).<sup>51</sup> Burt CJ observed in *Campbell*,<sup>52</sup> in relation to the appropriate direction to be given to juries, that:

It would seem to me to be enough if juries were told that the question of cause for them to decide is not a philosophical or a scientific question, but a question to be determined by them applying their common sense to the facts as they find them they appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter.<sup>53</sup>

It has been held that general common law principles of causation apply to the rule under the Code that a person kills another if he or she directly or indirectly causes that person's death by any means whatever.<sup>54</sup>

## Causation at common law

### The 'but for' test

One definition or test of legal causation is that death would not have occurred but for the act or acts of the accused.<sup>55</sup> This is commonly known as the 'but for' test. The High Court of Australia has held that the 'but for' test is only the first step in determining legal causation. In *Arulthilakan*,<sup>56</sup> it was stated by five of the six presiding judges of the High Court that '[o]ne of the dangers of a "but for" test of causation is that, in some cases, it is capable of indicating that a negligible causal relationship will suffice'.<sup>57</sup> Kirby J also stated that:

The reference to the 'but for' test of causation is, however, a legal misdirection ... At most, the 'but for' test can only constitute a 'threshold test for determining whether a particular act or omission qualifies as a cause'. It is insufficient to 'make that act or omission a legal cause of the damage'. The problem of the 'but for' test is that, on its own, it casts the net of causation too widely. It includes acts of a remote and peripheral or purely temporal connection which have no part to play in the determination of the 'legal cause'.<sup>58</sup>

In Western Australia it has been stated that the 'but for' test will often suffice for determining causation; however, this is not always the case.<sup>59</sup> The difficulty in relying solely on the 'but for' test can be illustrated by a practical example.

### Example

A and B are married. Following an argument B locks A out of the house. A walks to his friend's house and on the way he trips over a broken bottle. The bottle was left on the footpath by an intoxicated person who had fallen asleep near the path. A seriously cuts his leg on the broken bottle and a passer-by calls an ambulance. While the ambulance is driving A to hospital a vehicle driving at excessive speed fails to stop at a red light and crashes into the ambulance. As a result of injuries sustained during the crash A dies.

Applying the 'but for' test A would not have been killed but for B locking him out of the house. A would also not have been killed but for the intoxicated man leaving the broken bottle on the ground or but for the conduct of the driver of the vehicle. Thus, there are three possible causes of death using the 'but for' test. However, the commonsense approach would suggest that only the driver should be held criminally responsible for A's death. The

50. The Commission is of the view that in this hypothetical case the accused would be held to have legally caused the death because the conduct of the accused substantially contributed to the death of the victim. The same result would be arrived at by applying the commonsense approach as formulated by Burt CJ in *Campbell* [1981] WAR 286, 290. The substantial contribution test is discussed below.

51. *Arulthilakan v* [2003] HCA 74, [55] (Kirby J); *Evans and Gardiner (No. 2)* [1976] VR 523, 527.

52. [1981] WAR 286.

53. *Ibid* 290 (Burt CJ; Jones and Smith JJ concurring). This statement by Burt CJ was approved by the High Court in *Royall* (1991) 172 CLR 378, 387 (Mason CJ), 411–12 (Dean and Dawson JJ); 423 (Toohey and Gaudron JJ).

54. *Martin (No. 2)* (1996) 86 A Crim R 133, 137 (Murray J; Ipp and Wallwork JJ concurring); *Jemiellita* (1995) 81 A Crim R 409, 427 (Walsh J) & 432 (Murray J); *Krakouer* [2006] WASCA 81 [74] (McLure JA).

55. Tasmania is the only jurisdiction with a statutory definition of causation which refers to the 'but for' test. Section 153(2) of the *Criminal Code* (Tas) provides that 'Killing is causing the death of a person by an act or omission *but for* which he would not have died when he did, and which is directly and immediately connected with his death' (emphasis added). Section 153(3) provides that the 'question whether an act is directly and immediately connected with a person's death is a question of fact depending upon the circumstances of each particular case'. Section 154 of the *Criminal Code* (Tas) also provides specific deeming rules for circumstances where the accused person's conduct is not the sole or immediate cause of the victim's death. These specific provisions cover similar problems as the deeming provisions under ss 271–275 of the Code. The apparent breadth of the 'but for' test in s 153(2) is restricted by the requirement that the accused person's act must be directly or immediately connected with the death of the victim.

56. (2003) 203 ALR 259.

57. *Ibid* 268 (Gleeson CJ, Gummow, Hayne, Callinan & Heydon JJ).

58. *Ibid* 273 (Kirby J) (footnotes omitted).

59. *Krakouer* [2006] WASCA 81, [22] (Steytler P).

same conclusion would be arrived at by using the substantial contribution (or significant cause) test at common law.

### ***The substantial contribution or significant cause test***

Once it is established—in cases where there is more than one possible cause of death—that the death would not have occurred but for the conduct of the accused, it is necessary to consider whether the conduct of the accused was a significant cause or substantially contributed to the death.<sup>60</sup> It was recently confirmed that this test applies under the Code in Western Australia. In *Krakouer*,<sup>61</sup> Steyler P stated that:

In the end, it seems to me that, on the present state of authority, it is enough to satisfy the requirement of causation for the purpose of attributing criminal responsibility if the act of the accused makes a significant contribution to the death of the victim, whether by accelerating the victim's death or otherwise, and that it is for the jury to decide whether or not the connection is sufficiently substantial.<sup>62</sup>

The limits of the 'but for' test in determining causation and the need to consider whether the conduct of the accused substantially contributed to the death is demonstrated by the facts in *Hallett*.<sup>63</sup> For present purposes it is sufficient to note that the accused had seriously assaulted the deceased and left him at the water's edge on the beach. The deceased died from drowning in shallow water. The trial judge directed the jury that the actions of the accused must be the substantial cause of death. The facts in *Hallett* were compared to a hypothetical situation where a person is left in a safe location on the beach but is then drowned because of an extraordinary event such as a tidal wave. In such a case the accused would not be held to have caused the death. However, in this case the South Australian Supreme Court held that the conduct of the accused in leaving the deceased at water's edge did cause the death because in 'exposure cases the ordinary operation of natural causes' does not break the chain of causation.<sup>64</sup> The Commission notes that the commonsense approach and the substantial contribution test would both operate to attribute causation

to the accused in this case because he left an injured man in a dangerous location on the beach.

### ***Foreseeability and accident***

At common law it has also been suggested that the concept of foreseeability may be relevant in determining causation. In *Royall*,<sup>65</sup> one issue was whether the accused had caused the death of the victim who fell from a bathroom window in the flat in which she and the accused lived. One possible explanation for the death considered by the High Court was that the victim jumped from the window in order to escape from the violent attack by the appellant. Five of the seven High Court judges acknowledged that foreseeability may be relevant to causation but expressed the clear preference that juries should be directed in terms other than foreseeability. In cases where the immediate cause of death is an act done by the victim in self-preservation (in response to the accused's attack), Deane and Dawson JJ stated that juries should be directed in terms of whether the actions of the victim were reasonable in all the circumstances and the 'natural consequence' of the accused person's conduct.<sup>66</sup> Toohey and Gaudron JJ held that the jury should be asked to consider whether the reaction of the victim was disproportionate or unreasonable.<sup>67</sup> Mason CJ noted that to direct the jury in terms of foreseeability would in most cases confuse the issue of causation.<sup>68</sup>

On the other hand, McHugh J said that the 'balance of authority favours the reasonable foresight test over the "natural consequence" test' for determining causation in cases where there has been some intervening act.<sup>69</sup> Similarly, Brennan J stated that in cases where the direct and immediate cause of death is an act of the victim in an attempt at self-preservation, whether the chain of causation will be broken will depend upon whether the victim's attempt at self-preservation is reasonable and whether it was reasonably foreseeable that the victim may act in the manner that he or she did in response to the conduct of the accused.<sup>70</sup>

60. *Royall* (1991) 172 CLR 378, 398 (Brennan J), 411 (Deane & Dawson JJ), 423 (Toohey & Gaudron JJ), 441 (McHugh J).

61. [2006] WASCA 81.

62. *Ibid* [39] (Wheeler JA; McClure JA concurring). On 26 October 2006 an application for leave to appeal against the decision of the Western Australia Court of Criminal Appeal was refused by the High Court: see *Krakouer* [2006] HCATrans 581 (26 October 2006).

63. [1969] SASR 141.

64. *Ibid* 149.

65. (1991) 172 CLR 378.

66. *Ibid* 412–13.

67. *Ibid* 425.

68. *Ibid* 390.

69. *Ibid* 449.

70. *Ibid* 398–400. Brennan J acknowledged that causation does not involve consideration of the mental element of an offence. Thus, in some cases facts relating to the issue of foreseeability may be relevant to both the question of causation as well as the specific mental element of the offence.

It has been observed that at common law the substantial contribution test appears to have greater judicial support than the reasonable foreseeability test.<sup>71</sup> Whatever the position at common law, it appears that under the Code questions about foreseeability will only arise when considering whether an event was accidental under s 23. An event (such as death) will be accidental if it was not intended, not foreseen and not reasonably foreseeable in the circumstances.<sup>72</sup> In *Royall*, Brennan J noted that the reasonable foreseeability test at common law is essentially the same as the test that would apply under the Code for accident.<sup>73</sup> In *Jemielita*,<sup>74</sup> Murray J concluded that under the Code questions of foreseeability arise in consideration of whether the event (death) was accidental, but the particular circumstances of a case may mean that causation and accident are closely related.<sup>75</sup> Similarly, Colvin has observed that the reasonable foreseeability test of causation is usually addressed under the Code by s 23. However, the scope of accident is wider and may be relevant to cases where there is no issue in relation to causation.<sup>76</sup> Thus, in Western Australia questions of foreseeability should not arise in deciding the issue of causation. Instead, if death was not reasonably foreseeable, the accused may be excused on the basis of the defence of accident under s 23. This separation of issues of foreseeability and causation has been adopted by the MCCOC, which emphasised that causation is a physical element and questions concerning reasonable foreseeability are appropriately dealt with as part of the mental (or fault) element of an offence.<sup>77</sup>

### Specific deeming provisions under the Western Australian Criminal Code

Under the Code there are specific provisions (ss 271–275) which complement the general principles of causation. These provisions deal with a number of common factual problems which arise when there is more than one possible

cause of death. In relation to these provisions it has been stated that:

These are all self-evidently particular examples of situations more commonly encountered which might give rise to some uncertainty or difficulty in respect of the issue of causation generally provided for by the rule stated in s 270. It may not be suggested that s 270 should be interpreted so as to exclude matters which might expressly fall within any of ss 271–275 inclusive.<sup>78</sup>

In its Issues Paper the Commission invited submissions about any concerns in the application of these provisions.<sup>79</sup> The Commission received only one submission addressing ss 271–275 of the Code. Festival of Light Australia submitted that these provisions should be retained because they explain how particular acts will be relevant for determining causation.<sup>80</sup>

### *Death by acts done at childbirth*

Section 271 of the Criminal Code provides that:

When a child dies in consequence of an act done or omitted to be done by any person before or during its birth, the person who did or omitted to do such act is deemed to have killed the child.

As stated above, a child does not become a person capable of being killed until ‘it has completely proceeded in a living state from the body of its mother’.<sup>81</sup> In *Martin (No 2)*,<sup>82</sup> Murray J held that the heading of s 271 (Death by acts done at childbirth) does not limit the application of this section to only acts or omissions done at or shortly before the child’s birth.<sup>83</sup> Therefore, if a child dies sometime after birth as a result of injuries received anytime before birth or during birth, the person who inflicted the injuries will be deemed to have caused the death of the child. According to the intent of the person at the time he or she may be guilty of wilful murder, murder or manslaughter.

71. Colvin E, ‘Causation in Criminal Law’ (1989) 1 *Bond Law Review* 253, 263.

72. See Chapter 4, ‘Unwilled Conduct and Accident’.

73. (1991) 172 CLR 378, 399.

74. (1995) 81 A Crim R 409.

75. *Ibid* 433.

76. Colvin E, ‘Causation in Criminal Law’ (1989) 1 *Bond Law Review* 253, 261. For this reason the Commission has considered accident separately in Chapter 4.

77. MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 27.

78. *Martin (No. 2)* (1996) 86 A Crim R 133, 139 (Murray J; Ipp and Wallwork JJ concurring).

79. LRCWA, *Review of the Law of Homicide*, Issues Paper (2006) 2.

80. Festival of Light Australia, Submission No. 16 (12 June 2006) 1. Festival of Light Australia describes itself on its website as ‘a Christian ministry to our nation promoting true family values in the light of the wisdom of God. We work in partnership with Christians and churches of many denominations to bring the gospel and its lifestyle to the world God loves. Festival of Light is particularly concerned with issues involving Christian values and the family, permanence of marriage, primacy of parenthood, sanctity of life and limited government.’

81. *Criminal Code (WA)* s 269.

82. (1996) 86 A Crim R 133.

83. *Ibid* 138 (Murray J; Ipp and Wallwork JJ concurring).

## Causing death by threats

At common law, acts done by the victim in order to escape unlawful violence or threats of violence by the accused will not necessarily break the chain of causation.<sup>84</sup> As discussed above, it will largely depend upon whether the conduct of the victim was reasonable.<sup>85</sup> This principle is recognised in s 272 of the Code which provides that:

A person who, by threats or intimidation of any kind, or by deceit, causes another person to do an act or make an omission which results in the death of that other person, is deemed to have killed him.

Therefore, in Western Australia conduct of the victim will not constitute an intervening act and break the chain of causation if that conduct is caused by threats, intimidation or deceit by the accused.<sup>86</sup>

## Acceleration of death

If a person's conduct has led to the death of another, that person will still be held to have caused the death even if the victim was already dying at the time of the relevant conduct. It has been observed that '[n]o-one has the right to shorten by an hour the life of a human being'.<sup>87</sup> This principle is recognised in s 273 of the Code which provides that:

A person who does any act or makes any omission which hastens the death of another person who, when the act is done or the omission is made, is labouring under some disorder or disease arising from another cause, is deemed to have killed that other person.

For example, if the conduct of an accused led to the death of a person who was suffering from a terminal illness, the accused could not argue that his or her conduct did not

cause the death because the victim was already dying. However, the precise scope of s 273 is unclear because 'disease' and 'disorder' are not defined in the Code and there is no clear case authority on the meaning of these terms.<sup>88</sup>

One particular area of uncertainty is where the victim was suffering from a constitutional weakness or abnormality such as an 'eggshell skull'. It is well established at common law that an accused must take his or her victim as he or she finds them.<sup>89</sup> In other words, where injury or death results from the infliction of violence it will be irrelevant that the harm caused may not have occurred but for a particular weakness or abnormality in the victim. Therefore, at common law the accused will be held to have legally caused the death irrespective of any particular weakness of the victim. However, it is not entirely clear whether s 273 of the Code would cover a case where the victim has some form of inherent weakness or defect, which on its own is not fatal, but in combination with an injury caused by the accused contributes to death.<sup>90</sup> It has been suggested that s 273 of the Code reflects the common law position; however, there is no clear case authority confirming that 'disease' or 'disorder' includes a constitutional weakness.<sup>91</sup>

Whether an accused should be held criminally responsible for the death of a victim in circumstances where a weakness or abnormality in the victim contributed to death is further complicated by the operation of the defence of accident under s 23 of the Code.<sup>92</sup> There are conflicting views as to whether s 23 of the Code may operate to excuse a person from criminal responsibility where death or grievous bodily harm would not have occurred but for the particular constitutional weakness of the victim. The Commission discusses this issue further in Chapter 4.<sup>93</sup>

84. See above, 'Foreseeability and Accident'.

85. In *Royall* (1991) 172 CLR 378, 389 Mason CJ held that 'where the conduct of the accused induces in the victim a well-founded apprehension of physical harm such as to make it a natural consequence (or reasonable) that the victim would seek to escape and the victim is injured in the course of escaping, the injury is caused by the accused's conduct'.

86. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) 34.

87. *Burdee* (1916) 12 Cr App Rep 153, 154 (Darling J), as quoted in *Krakouer* [2006] WASCA 81, [35] (Steytler P).

88. *Carter* [2003] QCA 515, [23] (McPherson JA; Williams JA and White J concurring); *Krakouer* [2006] WASCA 81, [37] (Steytler P). The Commission has recommended that the Attorney General of Western Australia establish an inquiry about euthanasia and any other related matter: see Introduction, Recommendation 1. This provision may be relevant to that inquiry.

89. This rule is otherwise known as the 'eggshell skull' rule. See *Moffatt* (2000) 112 A Crim R 201, 212 (Wood CJ; Forster AJA & Adams J concurring). See also *Smithers* [1978] 1 S.C.R. 506, 521.

90. Morgan N, 'Hubert: Case and comment' (1994) 18 *Criminal Law Journal* 359, 361–62.

91. As discussed below, Philp J held in *Martyr* [1962] Qd R 398, 415 that a 'disease' or 'disorder' would include a constitutional weakness. However, it has been observed that a similar provision under the Tasmanian Criminal Code (s 154) does not have any relevance in 'eggshell skull' cases: see Blackwood J, 'Humpty Dumpty Was Pushed Off the Wall Humpty Dumpty Died from the Fall: An accidental death or manslaughter in Tasmania?' (1996) 15 *University of Tasmania Law Review* 306, 311 (s 154(d) of the *Criminal Code* (Tas) which provides that a person is deemed to have killed another ... where his act or omission is not the immediate, or not the sole, cause of death' and 'where by any act or omission he hastens the death of another who is suffering under any disease or injury which would itself have caused death'). In *Dablestein* [1966] Qd R 411, 416 Hanger J stated that the equivalent Queensland provision does not limit the operation of s 23 of the Queensland Code.

92. Generally, this issue will only arise in manslaughter cases because if the accused intended to cause death or grievous bodily harm he or she would not be able to rely upon the defence of accident under s 23 of the Code.

93. See Chapter 4, 'Unwilled Conduct and Accident: The "egg-shell" skull rule'.

### **When injury or death might be prevented by proper precaution**

The common law provides that a victim is 'under no duty to save his or her own life'.<sup>94</sup> In *Blaue*,<sup>95</sup> the accused stabbed an 18-year-old girl. While at hospital following the stabbing the victim refused a blood transfusion because she was a Jehovah's Witness. The accused argued that the actions of the victim had broken the chain of causation and accordingly it could not be said that he caused her death. It was held that the stab wound was the 'operative cause of death' and that the victim's decision not to do anything to stop death occurring did not break the chain of causation.<sup>96</sup> This principle is reflected in s 274 of the Code which provides that:

When a person causes a bodily injury to another from which death results, it is immaterial that the injury might have been avoided by proper precaution on the part of the person injured, or that his death from that injury might have been prevented by proper care or treatment.

The Commission is not aware of any problems in practice with the operation of this provision.

### **Injuries causing death in consequence of subsequent treatment**

Section 275 of the Code provides that:

When a person does grievous bodily harm to another and such other person has recourse to surgical or medical treatment, and death results either from the injury or the treatment, he is deemed to have killed that other person, although the immediate cause of death was the surgical or medical treatment; provided that the treatment was reasonably proper under the circumstances, and was applied in good faith.

The meaning of medical treatment was considered in *Royston Cook*.<sup>97</sup> In this case the accused had stabbed the deceased with a knife. The victim was taken to hospital and it was found that the knife had partially severed his spinal cord. The treating doctor had to decide whether to administer an anti-coagulant drug to prevent clotting. The doctor decided that the risk that the drug could result

in haemorrhaging was too high and did not administer the drug. The victim died 11 days later as a result of pulmonary embolism caused by a large clot. The trial judge had held that s 298 of the *Criminal Code* (Qld) (which is equivalent to s 275 of the Code) was not relevant to the facts of this case because the non-administration of drugs did not constitute medical treatment under s 298. However, the Queensland Court of Criminal Appeal held that s 298 did apply. Lucas J concluded that the word 'treatment' refers to the 'whole management of the patient, to everything that was done in accordance with that management, and also to things which are not done as a result of a decision which is deliberately taken with regard to the management of the patient'.<sup>98</sup>

On the basis of the wording of s 275 it is arguable that any degree of negligence or improper medical treatment may break the chain of causation. It has been held that medical treatment is not improper just because it is unsuccessful.<sup>99</sup> Colvin et al state that while the words of s 275 might suggest that any degree of negligence would be sufficient to break the chain of causation, only gross medical negligence (that is, negligence sufficient to attract criminal responsibility) should break the chain of causation.<sup>100</sup> The Commission notes that under the Code a medical practitioner would only be held criminally responsible for death arising as a result of medical treatment if that treatment was grossly negligent.<sup>101</sup> The Commission is not aware of any Western Australian case where subsequent medical treatment has been held to break the chain of causation. The Commission believes that current provisions of the Code (and the general common law rules in relation to causation) are adequate to cover a situation where medical treatment was so grossly negligent that the person administering the treatment should be considered culpable for the death of the victim. Bearing in mind the general principles, in any particular case it will depend upon whether the actions of the accused were a substantial cause or whether the conduct of the medical practitioner was so grossly negligent that the jury would conclude that the accused should not be held responsible for the death.

94. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) 35.

95. (1975) *Weekly Law Reports* 1412.

96. Ibid 1415–16 (Lawton LJ). See also *Bingapore* [1975] 11 SASR 469 where it was held that the actions of the victim (who had been injured by the appellant) in leaving hospital against medical advice did not break the chain of causation. The violence by the accused was still the operating cause of death.

97. [1979] 2 A Crim R 151.

98. Ibid 154 (Kelly and Sheehan JJ concurring).

99. *Levy* (1949) WALR 29.

100. Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and materials* (Sydney: LexisNexis Butterworths, 2005) 35.

101. While the words 'reasonable skill' and 'reasonable care' may appear on their face to mirror the concept of negligence under the civil law, it has been held that there must be 'criminal negligence' or 'gross negligence': see Colvin, Linden & McKechnie, *ibid* 59. See also s 265 of the Code and the relevant discussion in Chapter 3, 'Manslaughter'. The Commission notes that at common law negligent medical treatment does not necessarily break the chain of causation: see *Smith* [1959] 2 QB 35, 42–43; *Evans and Gardiner* (No 2) [1976] VR 523, 534.

## Issues raised by submissions

In its Issues Paper the Commission invited submissions about any concerns in relation to the general law of causation.<sup>102</sup> The Commission received a number of identical submissions which suggested that the law in relation to causation produces results that are not in accordance with contemporary views on morality.<sup>103</sup> In these submissions it was argued that the law should not require that a 'precise cause of death' be determined and that causation should 'relate to the act that led to the death and not the actual cause'.<sup>104</sup> In support of this argument an example was provided:

If I hit a golf ball and it causes someone to die then surely the cause of their death was being hit by that golf ball. The fact that they may have had some medical condition or that there were some other mitigating circumstances is irrelevant. Being hit by the golf ball led to death.<sup>105</sup>

As the Commission has explained above, the law does not require that a precise cause of death must be determined before an accused can be held to have caused the death of the victim. The conduct of the accused does not have to be the only cause of death and does not have to be the direct or immediate cause of death. In response to the example above, the Commission is of the view that if a person hits a golf ball and the golf ball strikes another killing him or her, that person would be held to have caused the death. Whether that person would be held to be criminally responsible for the death will depend upon whether the killing was unlawful. Of particular relevance in

this scenario is the defence of accident.<sup>106</sup> In any particular case it will depend upon the precise factual circumstances. For example, if a person tees off in the direction of a person standing only a metre away, the prosecution may well be able to prove that the death was reasonably foreseeable. However, in another situation where the person tees off and there is no one nearby, it may not have been reasonably foreseeable that someone might die.

The Commission also received a submission from Mr Steve Robinson in relation to the death of his son Leon Robinson.<sup>107</sup> Four accused were charged with manslaughter following the death of Leon Robinson on 25 December 2002. The acquittal of the four accused led to public controversy and media attention.<sup>108</sup> Causation was one issue raised at the trial; however, there were further issues including the defence of accident and whether each accused was responsible for a joint assault upon the deceased. Despite the number of different issues, it is useful to discuss this case in the context of causation.

It is clear that the deceased was assaulted by a number of people. At trial there was evidence to suggest that the deceased may have died as a result of injuries sustained during CPR administered by a bystander following the assault.<sup>109</sup> The trial judge informed the jury, during summing up, that the forensic pathologist had given evidence that the deceased could have died as a result of one of three possible scenarios. First, cardiac injury caused by injury to the chest wall. Second, cardiac injury caused by damage

102. LRCWA, *Review of the Law of Homicide*, Issues Paper (2006) 2. The Commission notes that the Coalition for the Defence of Human Life submitted in response to this invitation that the Issues Paper concentrated on acts rather than omissions: see Coalition for the Defence of Human Life, Submission No. 32 (16 June 2006) 1. The Commission has noted earlier that for ease of reference it will generally refer in this report to acts rather than 'acts and omissions'; However, in Chapter 3 the Commission discusses the specific duty provisions of the Code that impose criminal liability for omissions in certain cases: see Chapter 3, 'Manslaughter'.

103. Ron Campain, Submission No. 21 (12 June 2006) 1; Steve Robinson & Katharina Barlage, Submission No. 24 (14 June 2006) 1; Colette Doherty, Submission No. 25 (14 June 2006) 1; Jan Garabedian, Submission No. 26 (14 June 2006) 1; Pauline Harris, Arena Joondalup, Submission No 29 (15 June 2006) 1.

104. *Ibid.*

105. *Ibid.*

106. The same submissions also raised the question of accident and submitted that where someone is hit and falls to a hard pavement and dies from the head injury, death should not be classified as an accident. The Commission separately considers these types of factual scenarios under Chapter 4, 'Unwilled Conduct and Accident'.

107. Steve Robinson, Submission No. 28 (15 June 2006). In addition Mr Robinson made comments in relation to general issues within the criminal justice system such as the lack of justice and respect for victims during the criminal justice process and problems with juries. These issues are outside the Commission's terms of reference but the Commission notes that on 28 September 2006 the Attorney General, Jim McGinty announced that the state government will set up a Victims Reference Group 'to look after the interests of victims in the justice system'. This announcement followed a meeting between a group of victims of crime, the Attorney General, the Chief Justice of the Supreme Court of Western Australia, the Chief Judge of the District Court and the Director of Public Prosecutions: see Attorney General Jim McGinty, *Victims to Get a Stronger Voice*, Media Statement (28 September 2006). The Victims Reference Group was established in February 2007.

108. In Parliament the former Premier, Dr Geoff Gallop, was asked by the Leader of the Opposition, Matt Birney, whether he agreed with the 'overwhelming public view that to allow nothing to happen over the death of Leon Robinson would be an act of gross injustice and an affront to our sense of decency and fairness?': Western Australia, *Parliamentary Debates*, Legislative Assembly, 30 June 2005, 3782. See also Penn S, 'Murder Law Loophole in for Scrutiny', *The West Australian* (Perth), 9 July 2006, 4; Titelius R, 'Sickening Confessions May Never Lead to Prison' *The West Australian* (Perth), 2 August 2005, 3.

109. From the transcript of the judge's summing up to the jury it does not appear that s 275 of the Code was raised by the prosecution. The Commission is unable to say whether the actions of a passer-by in administering CPR would be held to constitute medical treatment under s 275. If so, then assuming that the CPR was given in good faith and was reasonably proper, the effect of s 275 would be that any accused who caused grievous bodily harm to the deceased would be deemed to have caused the death even though it may have been caused by the CPR.

to the heart during attempts to resuscitate the victim. The third possibility was a combination of the first two options.<sup>110</sup> Where there are two or more possible causes of death, the central issue will be whether the conduct of the accused substantially contributed to the death. The direction given to the jury in relation to causation was that causation in a criminal trial is not

[a] philosophic or scientific question, but is one to be decided applying your commonsense to the facts as you find them to be, appreciating that the purpose of your inquiry is to attribute legal responsibility in a criminal matter. Further as to causation, a person is said to cause the death of another if his act or conduct is a substantial or significant cause of the death or substantially contributed to the death. It does not of course have to be the only cause of that event.<sup>111</sup>

The Commission considers that this direction was in accordance with the law and explained to the jury the correct test to be applied. If the jury determined that the deceased was already dying before the CPR was administered, they would have had no difficulty in finding that those responsible for the assault caused the death. However, if the jury were not satisfied beyond reasonable doubt that a fatal blow had been given prior to the CPR then the question for the jury would have been whether the conduct of one or more of the accused substantially contributed to the death. Bearing in mind the question from the jury in relation to the defence of accident (discussed below), the jury may have concluded that a fatal blow delivered by one or more of the accused caused the death of the deceased.

The prosecution case against the four accused was that they jointly assaulted the deceased by punching and kicking him and that each aided one another. On this basis it was said that it did not matter who struck the fatal blow.<sup>112</sup> The trial judge directed the jury that they had to be satisfied that each accused joined in the assault knowing that the other accused were also assaulting the deceased.<sup>113</sup> If the

jury could not be satisfied that an accused joined in a group assault they would still be required to consider whether there was evidence to prove that a particular accused acting alone had assaulted the deceased and caused the death.<sup>114</sup>

The Commission notes that where two or more people act together criminal responsibility is sometimes more difficult to establish. Chapter II of the Code (Parties to Offence) provides rules for determining which people can be held criminally responsible for an offence. Section 7 of the Code provides, among other things, that:

When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say —

- (a) Every person who actually does the act or makes the omission which constitutes the offence;
- (b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
- (c) Every person who aids another person in committing the offence.

The prosecution's case against the four accused was conducted on the basis of s 7 of the Code.<sup>115</sup> It has been held that where there is a joint assault it is not necessary under s 7 of the Code for the prosecution to prove who actually inflicted the fatal blow as long as it can be proved that each member of the group joined in the assault and assisted one another.<sup>116</sup> In *Warren and Ireland*,<sup>117</sup> the two accused were convicted of grievous bodily harm to the same victim. The victim suffered a severe head injury which could have been caused by one blow or by more than one blow. Burt CJ observed that each accused jointly assaulted the victim and because of ss 7(a) and 7(c) of the Code it did not matter who struck the fatal blow or blows.<sup>118</sup> Kennedy J agreed that the fact it was not possible to determine who did the act which caused the grievous

110. Transcript of Proceedings, DC 1329 of 2003, 9 June 2005, 1283.

111. Ibid 1295–96.

112. Transcript of Proceedings, DC 1329 of 2003, 8 June 2005, 3 & 11.

113. Transcript of Proceedings, DC 1329 of 2003, 9 June 2005, 1295.

114. Transcript of Proceedings, DC 1329 of 2003, 10 June 2005, 1331.

115. The Commission notes that it may also have been possible for the prosecution to argue that the accused were criminally responsible on the basis of s 8 of the Code. Section 8 provides that when two or more persons 'form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence'. Sections 7 and 8 are not mutually exclusive and the prosecution can present their case on the basis of either provision: see *Mouritz* [2006] WASCA 165 [10] (Roberts-Smith J); *Lowrie and Ross* [1999] 2 Qd R 529, 541 (Thomas J); *Warren and Ireland* (1987) 15 A Crim R 317, 325 (Kennedy J), 332 (Franklyn J). In the circumstances of the Robinson case the prosecution would have been required to prove that the accused formed a common intention to assault the deceased and that death was a probable consequence of an assault of the nature inflicted. The agreement to prosecute an unlawful purpose does not have to be express; it may be implied or inferred from all the circumstances. The test for whether the offence actually committed was a probable consequence of the prosecution of the unlawful purpose is objective: see Whitney K, Flynn M & Moyle P, *The Criminal Codes: Commentary and materials* (Sydney: Law Book Company, 5th ed., 2000) 572–74.

116. See *Lowrie and Ross*, ibid 535 McPherson JA; *Mohan* [1967] 2 AC 187; *Nguyen* [2001] WASCA 176, [29] (Murray J; Malcolm CJ & Owen J concurring).

117. (1987) 15 A Crim R 317 (WA CCA).

118. Ibid 322.

bodily harm did not prevent criminal responsibility from attaching to each accused because 'whichever of the two persons did the act, the other aided him'.<sup>119</sup>

The trial judge also directed the jury that they had to be satisfied beyond a reasonable doubt that the killing was unlawful. In the circumstances of this case, the judge drew particular attention to the defence of accident. In relation to accident he advised the jury that an event occurs by accident under s 23 of the Code if

the particular accused person did not intend that event to occur, the accused person did not foresee its occurrence and it was not reasonably foreseeable by an ordinary person.<sup>120</sup>

The prosecution contended in relation to accident that each accused had joined in the assault knowing that the other accused were also assaulting the deceased and 'that it was foreseeable that death might result from a multiple attack involving hitting, kicking and throwing to the ground'.<sup>121</sup> The trial judge directed the jury that if they were not satisfied that there had been a joint assault but they were satisfied that a particular accused had assaulted the deceased acting alone, they would also need to consider whether that accused could rely on the defence of accident.<sup>122</sup>

After the jury had begun deliberations, they returned to the court and asked a specific question, namely:

If someone who engages in an assault and not aware of all possible causes of death and yet that someone strikes a blow that inadvertently causes death, is that legal responsibility; that is, is someone who assaults someone else with a blow that would not normally cause death and death results, can this be considered by the law an accident?<sup>123</sup>

It is not possible to conclude from this question whether the jury were considering the defence of accident for all accused (because they had already found that there was

a joint assault) or whether they were considering accident for one particular accused. The trial judge reminded the jury of the requirements of s 23 and, in particular, he said that in the context of a joint assault the jury would have to consider whether it was reasonably foreseeable that death might result from a group assault. Thus, for a particular accused the question is not whether it was reasonably foreseeable that death would result from the blows which that accused struck, but whether it was reasonably foreseeable that death might result from an 'assault by a number of people striking blows'.<sup>124</sup>

It is impossible to know why the jury acquitted the four accused in this case. It may have been because the jury were not satisfied beyond reasonable doubt that one or more of the accused caused the death. It could also have been because the jury were not satisfied beyond a reasonable doubt that there was a joint assault. Alternatively, the jury may have acquitted the accused on the basis of the defence of accident.<sup>125</sup> The jury's question about the defence of accident may have related to all accused or to only some of them. Further, the jury's question may have only been one of many issues being considered.

What is clear is that the jury did not have any alternative charge available to them after determining that the prosecution had not proved beyond a reasonable doubt that each accused was guilty of manslaughter.<sup>126</sup> By virtue of ss 10A and 10B of the Code, an accused can only be convicted of an alternative offence if he or she is charged with an alternative offence or if the Code specifies an alternative offence in the section creating the offence which has been charged.<sup>127</sup> The only statutory alternatives for a charge of manslaughter are killing an unborn child, concealing the birth of a child or dangerous driving causing death.<sup>128</sup> For the four accused to have been able to be convicted of an alternative offence (such as assault occasioning bodily harm or grievous bodily harm) the

119. Ibid 324.

120. Transcript of Proceedings, DC 1329 of 2003, 9 June 2005, 1296–97.

121. Transcript of Proceedings, DC 1329 of 2003, 10 June 2005, 1310.

122. Ibid 1332.

123. Ibid 1336.

124. Ibid 1334–37.

125. The Commission notes that Mr Robinson suggested that because of the jury's question to the trial judge it appeared that the jury were of the view that it was not reasonably foreseeable that his son would have died as a result of the attack: see Steve Robinson, Submission No. 28 (15 June 2006) 1.

126. Mr Robinson questioned in his submission how the accused were not able to be convicted of a lesser offence in the absence of proof that they were guilty of manslaughter: see Steve Robinson, Submission No. 28 (15 June 2006) 1.

127. Sections 10A and 10B were inserted in the Code on 31 May 2005 by s 36 of the *Criminal Law Amendment (Simple Offences) Act (WA)*. The Commission notes that prior to these amendments the prosecution were still able to charge an accused with any relevant offences. For example, in *Hooper* [2000] WASCA 394 the accused was charged with manslaughter, and alternatively with grievous bodily harm or assault occasioning bodily harm.

128. See *Criminal Code (WA)* s 280. The Commission has recommended that s 294 of the Code be included as a statutory alternative offence for manslaughter: see Chapter 3, Recommendation 8.

prosecution were required to charge each accused with any possible alternatives. This was not done.<sup>129</sup> The failure of the DPP to charge the four accused with one or more alternative offences meant that the jury could not attribute criminal responsibility to any of the accused for the assault against Leon Robinson.

## Conclusion

While the Commission understands that the issue of causation may be complicated in some circumstances, it does not consider that there is any need for reform. In simple terms, the law must draw a line in attributing criminal responsibility for causing death. As mentioned earlier, the 'but for' test, while uncomplicated, is inappropriate because it may catch people who are not morally culpable for the death and accordingly should not be considered criminally responsible. The MCCOC concluded that:

Problems of causation are clarified when it is understood that the test of culpability is not whether the defendant's act is the cause of death, but rather whether it substantially

contributed to the death. Thus, in cases where there are a number of competing causes of death the task is not to weigh one against the other so as to determine the principal cause of death. Rather, one need only focus on the defendant's act and ask whether it substantially contributed to the death.<sup>130</sup>

The Commission is of the opinion that the current provisions under the Code and the interpretation of those provisions are appropriate. At the same time the Commission acknowledges that sometimes difficulty arises in cases where causation and accident are closely related. Apart from recommending that s 23 of the Code should be amended to clarify that 'eggshell' skull does not fall within the scope of the defence of accident, the Commission is satisfied that the test for accident under s 23 of the Code is appropriate. The requirement that the prosecution must prove beyond a reasonable doubt that the event was reasonably foreseeable incorporates an objective standard. Whether death was reasonably foreseeable in the circumstances will be determined by a jury (or judge alone).<sup>131</sup>

129. Following the acquittal of each accused of the charge of manslaughter; however, the DPP did charge each of the accused with assault occasioning bodily harm. These charges were subsequently dismissed by a Magistrate who concluded that charging the accused after they had already been on trial for the same set of facts was an abuse of process.

130. MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 25 & 31. The MCCOC recommended that a 'person causes death or other proscribed harm when their conduct substantially contributes to that death or harm'.

131. For a detailed discussion of the defence of accident, see Chapter 4, 'Unwilled Conduct and Accident'.