Chapter 7

Sentencing

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Sentencing for Murder

INTRODUCTION

The offence of murder attracts the most severe penalty under the law: life imprisonment.[1] Murder is treated in this manner because the law upholds the sanctity of human life and views the intentional killing of another human being as the gravest crime. In Western Australia the penalty of life imprisonment is mandatory – an adult convicted of wilful murder or murder must be sentenced to life imprisonment.[2] However, this does not necessarily mean that the offender will spend the remainder of his or her life in prison. The sentencing court decides (within a set range) the minimum amount of time that the offender must spend in prison before any possibility of release.[3] The decision if, and when, to release an offender is not made by the courts – it is made by the Governor on advice from the Attorney General and the Prisoners Review Board.[4]

Mandatory penalties have been widely condemned.[5] In the homicide context the most pertinent criticism of mandatory penalties is that they do not allow sentencing courts to take into account the individual circumstances of the offence and the offender. Mandatory penalties are inconsistent with general sentencing principles. These principles require that the penalty must be proportionate to the seriousness of an offence and that a sentencing court must take into account any mitigating or aggravating factors.[6]

Although it is claimed that mandatory penalties promote consistency in sentencing,[7] fixed penalties may give rise to injustice by treating different cases alike. To achieve consistency in sentencing it is necessary to treat similar cases in a similar way but it is also necessary to treat different cases differently.[8] Underlying the concept of mandatory or fixed penalties is the assumption that all offences within a particular category are equally serious and, as a consequence, all offences within that category should attract the same penalty. However, this assumption is flawed because the elements of an offence do not cater for every possible factor affecting culpability. Even within the category of murder there are 'differing degrees of moral seriousness'.[9] Although all murders involve the same degree of harm, the range of culpability extends from mercy killings at one end of the scale to brutal, sadistic serial killings at the other.

Despite the mandatory penalty of life imprisonment, the sentencing regime in Western Australia does not treat all murderers in precisely the same manner. Differences in culpability are taken into account when deciding if an offender should be sentenced to strict security life imprisonment or life imprisonment and when setting the minimum term. The circumstances and seriousness of the offence are also considered by the Prisoners Review Board when determining if the offender should be recommended for release on parole.[10] However, the ability of sentencing courts to take into account the differences between the circumstances of the offence and the offender is limited. The most lenient penalty that can be imposed for wilful murder in Western Australia is life imprisonment with a minimum term of 15 years. For murder the most lenient penalty is life imprisonment with a minimum term of seven years. The minimum term is the minimum amount of time that must be served in

1. *Criminal Code* (WA) (the Code) s 282.
2. Section 282(c) of the Code provides that a child who is convicted of wilful murder is liable to a sentence of strict security life imprisonment, life imprisonment or indefinite detention at the Governor's pleasure. For murder, a child is liable to life imprisonment or indefinite detention. Because life imprisonment is not mandatory a sentencing judge has discretion, in the case of a child offender, to impose a finite term of imprisonment: see *F (A Child)* [2001] WASCA 247, [2]. Three other Australian jurisdictions have mandatory life terms for adults: Queensland, Northern Territory and South Australia. In Queensland and the Northern Territory life imprisonment is not mandatory for children: *Youth Justice Act 2007* (NT) s 82(3); *Juvenile Justice Act 1992* (Qld) ss 155, 176. However, in South Australia the penalty for murder for a child offender is also mandatory life imprisonment: *Young Offenders Act 1993* (SA) s 29(4); see also *J* (1998) 102 A Crim R 157. Because the sentencing law in Western Australia provides discretion for a court to take into account differences in culpability when dealing with children convicted of wilful murder or murder, the Commission does not further discuss the sentencing of children.
3. See below, 'Sentencing for Wilful Murder and Murder in Western Australia'.
4. The decision of the Governor is made with the consent of the Executive Council: *Interpretation Act 1984* (WA) s 60.
5. See eg Australian Law Reform Commission (ALRC), *Same Crime, Same Time: Sentencing of federal offenders*, Report No. 103 (2006) [21.63]–[21.65]; Hughes G, *The Mandatory Sentencing Debate* (Melbourne: Law Council of Australia, 2001) 3; Morgan N, 'Mandatory Sentencing Legislation: Judicial discretion and just deserts' (1999) 5 *University of New South Wales Law Journal* 5; Flynn M, 'International Law, Australian Criminal Law and Mandatory Sentencing: The claims, the reality and the possibilities' (2000) 24 *Criminal Law Journal* 184; Roche D, 'Mandatory Sentencing' (1999) *Australian Institute of Criminology: Trend and Issues in Crime and Criminal Justice*, No. 138. Even Bagaric, who has expressed support for mandatory or fixed penalties, acknowledged that if the fixed penalty is imprisonment then the penalty should only be presumptive in order to guard against potential injustice: see Bagaric M, 'Consistency and Fairness in Sentencing – The Splendour of Fixed Penalties' (2000) 2 *California Criminal Law Review* 1, [68] & [70].
6. *Sentencing Act 1995* (WA) s 6.
7. Bagaric M, 'Consistency and Fairness in Sentencing – The Splendour of Fixed Penalties' (2000) 2 *California Criminal Law Review* 1, [5].
8. The ALRC has stated that mandatory penalties 'undermine consistency': see ALRC, *Sentencing*, Report No. 44 (1988) [58].
9. Wood D, 'The Abolition of Mandatory Life Imprisonment for Murder: Some jurisprudential issues' in Strang H & Gerull SA (eds), *Homicide: Patterns, prevention and control,* Conference Proceedings No. 17 (Canberra: Australian Institute of Criminology, 1993) 237, 249.
10. *Sentence Administration Act 2003* (WA) ss 5A & 12A(3).

prison before the offender can be *considered* for release. There is no guarantee that the offender will ever be released from prison. The central issue considered in this chapter is whether the sentencing regime in Western Australia provides sufficient flexibility to take into account the wide range of circumstances that potentially affect culpability for murder.[11]

The history of sentencing for wilful murder and murder

From the commencement of the *Criminal Code* (WA) (the Code) until the passage of the *Criminal Code Amendment Act 1961* (WA) both wilful murder and murder carried a mandatory death sentence. From 1961 the death penalty only applied to the offence of wilful murder and the penalty for murder was changed to mandatory life imprisonment.[12] Although the courts had no choice but to impose the death penalty for wilful murder, in practice many cases were subsequently commuted by the Governor to a sentence of life imprisonment. In such cases the minimum period required to be served before any possibility of release by the Governor was 15 years. This was the same minimum term that applied to life imprisonment imposed by the court for murder.[13] Within a few years the legislature set different minimum terms for wilful murder and murder. From 1965 a minimum term of 10 years applied to cases where the death penalty was commuted to life imprisonment upon conviction for wilful murder and a minimum term of five years applied to murder.[14]

In 1980 the penalty for wilful murder was divided into two categories: strict security life imprisonment and life imprisonment. At that stage the decision to impose strict security life imprisonment or life imprisonment was made by the Governor. If the death penalty was commuted to strict security life imprisonment the minimum term was 20 years. In contrast, if the death penalty was commuted to life imprisonment the minimum term was 10 years. The statutory minimum term when life imprisonment was imposed for murder remained at five years.[15]

The last execution in Western Australia was in 1964; however, capital punishment was not abolished until 1984.[16] Western Australia was the last Australian jurisdiction to abolish the death penalty for homicide.[17] The death penalty was replaced by mandatory life imprisonment and the decision to impose either strict security life imprisonment or life imprisonment shifted from the Governor to the judiciary. This was the first time that the judiciary had a discretionary role in sentencing for wilful murder and murder. However, the minimum terms were still set by legislation until 1995 when the judiciary was given the responsibility for setting the minimum term within a specified range.[18] These prescribed ranges remain the same today.

The penalty for murder throughout Australia has, over time, become less severe. The death penalty has been replaced by mandatory life imprisonment and in some jurisdictions the mandatory penalty of life imprisonment has been replaced with a maximum of life imprisonment.[19] New South Wales was the first Australian jurisdiction to abolish mandatory life imprisonment in 1982[20] followed by Victoria in 1986[21] and Tasmania in 1995.[22] When capital punishment was abolished in the Australian Capital Territory in 1973 it was not replaced by a mandatory life sentence.[23]

11. This chapter only considers the sentencing regime for murder and manslaughter. The penalties for dangerous driving causing death and killing an unborn child are discussed in Chapter 3.
12. Section 3 of the *Criminal Code Amendment Act* 1961 (WA) abolished the death penalty for the offence of murder but retained the death penalty for the offence of wilful murder.
13. Morgan I, 'Sentences for Wilful Murder and Murder' (1996) 26 *University of Western Australia Law Review* 207, 208–209.
14. Ibid 209.
15. The distinction between strict security life imprisonment and life imprisonment was introduced in 1980 by the *Acts Amendment (Strict Security Life Imprisonment) Act 1980* (WA): see, ibid 209–10.
16. Capital punishment was abolished in Western Australia by the *Acts Amendment (Abolition of Capital Punishment) Act 1984* (WA).
17. New South Wales abolished the death penalty for murder in 1955 but retained the death penalty until 1985 for treason and piracy. The death penalty was abolished in Victoria in 1975; Queensland in 1922; South Australia in 1976; Tasmania in 1968; Northern Territory in 1973; Australian Capital Territory in 1973; and the Commonwealth in 1973. See Potas I & Walker J, 'Capital Punishment' (1987) 3 *Australian Institute of Criminology: Trends and Issues* 1–2.
18. Morgan I, 'Sentences for Wilful Murder and Murder' (1996) 26 *University of Western Australia Law Review* 207, 211–12.
19. Wood suggested that this gradual progression might eventually end with the abolition of the penalty of life imprisonment: see Wood D, 'The Abolition of Mandatory Life Imprisonment for Murder: Some jurisprudential issues' in Strang H & Gerull SA (eds), *Homicide: Patterns, prevention and control,* Conference Proceedings No. 17 (Canberra: Australian Institute of Criminology, 1993) 237, 252.
20. New South Wales Law Reform Commission (NSWLRC), *Partial Defences to Murder: Diminished responsibility*, Report No. 82 (1997) [212]. Mandatory life imprisonment in New South Wales was abolished following public pleas for leniency in cases of domestic violence: see Coss G, 'Legislation Comment: *Crimes (Life Sentences) Amendment Act 1989* (NSW)' (1990) 14 *Criminal Law Journal* 348, 348–89.
21. Law Reform Commission of Victoria, *Homicide*, Report No. 40 (1991) [279].
22. *Criminal Code (Life Prisoners and Dangerous Criminals) Act* 1994 (Tas) s 4. Mandatory life imprisonment remains the penalty for murder in England: *Murder (Abolition of the Death Penalty) Act 1965* (UK) s 1; and Canada: *Criminal Code* (Canada) s 235(1). In New Zealand the penalty for murder is a presumptive sentence of life imprisonment: *Crimes Act 1961* (NZ) s 172; *Sentencing Act 2002* (NZ) s 102.
23. See *Wheeldon* (1978) 18 ALR 619, as cited in Potas I, 'Life Imprisonment in Australia' (1989) 19 *Australian Institute of Criminology: Trends and Issues* 4.

In these four jurisdictions life imprisonment is the *maximum* penalty for murder.[24] Mandatory life imprisonment remains the penalty for murder in Queensland,[25] South Australia,[26] and the Northern Territory.[27]

From the above it can be observed that since the death penalty was abolished the practical consequences of being convicted of murder in this state have 'become progressively more draconian'.[28] The earliest possible release date for those convicted of wilful murder or murder is now significantly greater than it was when the death penalty was commuted to life imprisonment.

SENTENCING FOR WILFUL MURDER AND MURDER IN WESTERN AUSTRALIA

For the offence of wilful murder the sentencing court must impose either strict security life imprisonment or life imprisonment.[29] For murder the penalty is life imprisonment. The main distinction between strict security life imprisonment and life imprisonment is the difference between the minimum periods that the offender is required to spend in custody before being considered for release on parole.[30] If an offender is sentenced to strict security life imprisonment for wilful murder the sentencing court must set a minimum term of at least 20 and not more than 30 years.[31] If an offender is sentenced to life imprisonment for wilful murder the sentencing court must set a minimum term of at least 15 years but not more than 19 years.[32] For murder an offender is sentenced to life imprisonment and the court must set a minimum term of at least seven years and not more than 14 years.[33]

An offender convicted of wilful murder or murder can only be released on parole after he or she has served the minimum term set by the court and the order to release the offender must be made by the Governor of Western Australia[34] on advice from the Prisoners Review Board.[35] If an offender who is serving strict security life imprisonment or life imprisonment is released on parole, the parole period must be at least six months but not more than five years.[36] At the end of the parole period the sentence of life imprisonment is satisfied; however, if the parole order is cancelled the offender is again liable to serve the sentence of life imprisonment unless subsequently re-released on parole.

Strict security life imprisonment versus life imprisonment

When sentencing an offender convicted of wilful murder the first step is to choose between strict security life imprisonment and life imprisonment. There is 'no statutory guidance regarding the principles to be applied in making the choice between these options'.[37] In *Williams*,[38] Owen J held that there are three factors to be considered when determining if strict security life imprisonment or life imprisonment should be imposed:

24. *Crimes Act 1900* (NSW) s 19A; *Crimes Act 1958* (Vic) s 3; *Criminal Code* (Tas) s 158; *Crimes Act 1900* (ACT) s 12(2); *Crimes (Sentencing) Act 2005* (ACT) s 32(1).
25. The penalty for murder is mandatory life imprisonment or an indefinite sentence: see *Criminal Code* (Qld) s 305(1). The effect of an indefinite sentence under Part 10 of the *Penalties and Sentences Act 1992* (Qld) is that after the offender has served the minimum term for life imprisonment (either 15 or 20 years) the offender is subject to continuing incarceration and regular reviews.
26. *Criminal Law Consolidation Act 1935* (SA) s 11.
27. *Criminal Code* (NT) s 157. Prior to the *Sentencing (Crime of Murder) and Parole Reform Act 2003* (NT) there was no provision to set a non-parole period. The release of a prisoner convicted of murder could only occur by executive clemency: see *Leach* [2007] HCA 3, [5] (Gleeson CJ), [25]–[26] (Gummow, Hayne, Heydon and Crennan JJ). Now the legislation provides for standard minimum terms. For a comparison of jurisdictions, see table below: 'Sentencing for Homicide'.
28. Morgan N, 'Criminal Law Reform 1983–1995: An era of unprecedented legislative activism' (1995) *University of Western Australia Law Review* 283, 295. See also Morgan I, 'Sentences for Wilful Murder and Murder' (1996) 26 *University of Western Australia Law Review* 207, 212.
29. *Criminal Code* (WA) s 282.
30. The only other differences are that a prisoner serving strict security life imprisonment cannot serve any part of the sentence in a lock up; there are specific requirements about who can authorise a transfer to another prison; and, if such a prisoner is transferred for medical treatment, the superintendent must notify the Chief Executive Officer: see *Prisons Act 1981* (WA) ss 16(6), 26(2) & 27(6).
31. *Sentencing Act 1995* (WA) s 91.
32. *Sentencing Act 1995* (WA) s 90.
33. *Sentencing Act 1995* (WA) s 90.
34. *Sentencing Act 1995* (WA) s 96.
35. The Prisoners Review Board is required to give the Minister a report at the end of the minimum period set by the court and thereafter every three years: see *Sentence Administration Act 2003* (WA) s 12A.
36. *Sentence Administration Act 2003* (WA) ss 25(3) & 26(3). If the offender successfully complies with the conditions of the parole order then at the completion of the parole period the sentence of life imprisonment is finished. Decisions are now sometimes publicly released on the Prisoners Review Board website: <www.prisonersreviewboard.wa.gov.au>. On 29 May 2007 it was recommended by the Prisoners Review Board that an offender who had been sentenced to life imprisonment for murder with a minimum term of 10 years be released on parole for a period of two years. The offender served almost 11 years before being recommended for parole: see *Seiffert*, Prisoners Review Board Decision, 29 May 2007. Another offender sentenced to life imprisonment for murder (with a minimum term of seven years) was recommended for release. This offender has served 15 years in custody prior to the recommendation to be released on parole for a term of three years: see *Abdulla*, Prisoners Review Board Decision, 27 March 2007.
37. *Griffin* [2001] WASCA 11, 44 (Malcolm CJ).
38. (1996) 90 A Crim R 200.

1. the circumstances and seriousness of the offence 'so as to place it somewhere in the scale of other crimes of wilful murder';[39]
2. the antecedents of the offender, including character, previous convictions, background and personal circumstances; and
3. the risk to the community of the offender committing serious offences of violence in the future.[40]

It was also stated that all of these factors must be considered and no one factor has priority.[41] In *Griffin*,[42] however, Malcolm CJ held that the gravity of the crime is more important than the other factors.[43] The uncertainty caused by these conflicting decisions was resolved in *Roberts*.[44] It was confirmed by the majority of the Court of Criminal Appeal that the decision to impose strict security life imprisonment or life imprisonment requires consideration of all of the relevant factors and no single factor should be assumed to carry more weight. Nonetheless, after considering all relevant factors, the court may decide that a sentence of strict security life imprisonment is justified because of the 'horrific nature of the crime' *or* because the offender's antecedents demonstrate that the offender poses a significant risk to the community.[45]

Whole-of-life term

The option of imposing a whole-of-life term for wilful murder was first introduced in Western Australia in 1988.[46] Section 40D(2a) of the *Offenders Community Corrections Act 1963* (WA) provided that:

> Where a court imposes a sentence of strict security life imprisonment on a person the court may, if it considers that the making of an order under this subsection is appropriate, order that the person is not to be eligible for parole.

The first, and only, case where an offender has received a whole-of-life term in Western Australia is *Mitchell*.[47] The 24-year-old offender pleaded guilty to four counts of wilful murder and other serious offences after killing a woman and her three children in an extremely brutal manner. Prior to committing these offences the offender had consumed alcohol, marijuana, prescription medication and amphetamines. The sentencing judge received expert evidence that the offender would not be a danger to the community in the future if he ceased using drugs and that the offender had a 'constructive attitude to the future'.[48] Although doubting the offender's ability to refrain from drug use, the sentencing judge observed that given the material before him it was not possible to say that the offender would always constitute a danger to the community. The sentencing judge imposed strict security life imprisonment but declined to order a whole-of-life term.[49]

The prosecution appealed against the decision not to impose a whole-of-life term. The majority of the Court of Criminal Appeal allowed the appeal, ordering that the offender not be eligible for parole. The High Court held that the sentencing judge did not make an error in refusing to order a whole-of-life term. It stated that the decision required an 'assessment of the balance to be struck between the circumstances of the offence and the factors militating in favour of the possibility of parole'.[50] This entitled the sentencing judge to take into account the evidence demonstrating that there was some chance for the offender's future rehabilitation. The High Court also held that the terms of s 40D(2a) of the *Offenders Community Corrections Act 1963* did not indicate any particular overriding factor.[51]

The option for a whole-of-life term is now set out in s 91(3) of the *Sentencing Act 1995* (WA) which provides that a sentencing court 'must order that the offender be imprisoned for the whole of the offender's life if it is necessary to do so in order to meet the community's interest in punishment and deterrence'. When deciding if a 'whole-of-life term' is required the court can only take into account the circumstances of the commission of the offence and any aggravating factors. An offender sentenced to a whole-of-life term can never be released

39. Ibid 208 (Owen J; Kennedy and Pidgeon JJ conurring).
40. Ibid. See also *Griffin* [2001] WASCA 11, [44] (Malcolm CJ); *Stapleton* [2002] WASCA 328, [42].
41. Ibid.
42. [2001] WASCA 11.
43. Ibid [44] (Owen and Parker JJ concurring).
44. [2003] WASCA 237.
45. Ibid [47] (Steytler J; Parker J concurring). The decision of Steyler J in *Roberts* was approved in *Gamble* [2007] WASCA 120, [31] (Miller AJA; Steytler P and McLure JA concurring).
46. Morgan I, 'Sentences for Wilful Murder and Murder' (1996) 26 *University of Western Australia Law Review* 207, 211.
47. (1995) 184 CLR 333.
48. Ibid 342.
49. At the time of sentencing the minimum term of 20 years was set by legislation.
50. (1995) 184 CLR 333, 346.
51. Ibid 347.

on parole.[52] As far as the Commission is aware no one in Western Australia has been sentenced to a whole-of-life term under the *Sentencing Act*.[53]

Although whole-of-life terms are available in most Australian jurisdictions[54] and have been imposed on a number of occasions,[55] they have been criticised. It has been suggested that whole-of-life terms are 'arguably repugnant and approaching the realms of a cruel and unusual punishment'.[56] Wood stated that the 'idea that a person should be literally incarcerated for life and that he should never be released is properly regarded as totally inhumane'.[57] Further, it has been asserted that whole-of-life terms cause prison management problems because there is no incentive for good behaviour and no further punishment can be imposed even for a subsequent killing in prison.[58]

The majority of submissions received by the Commission supported retention of whole-of-life terms.[59] The Law Society emphasised that whole-of-life terms should only be imposed in exceptional circumstances.[60] The Commission considers that to literally be imprisoned for life is an extreme form of punishment; however, there are some murders that are so horrific that no other punishment is appropriate. Bearing in mind that the Royal Prerogative of Mercy is not affected by the provision to impose a whole-of-life term,[61] there is always the possibility of the Executive showing leniency in truly exceptional cases. Therefore, the Commission has concluded that the provision for whole-of-life terms under the *Sentencing Act* should remain.

Setting the minimum term

For both wilful murder and murder the sentencing court is required to set the term within a prescribed range (assuming that a whole-of-life term is not being considered). Again there are no statutory criteria for determining the appropriate period. It has been held that when setting the minimum term the relevant considerations are the circumstances of the offence, the offender's personal circumstances, the protection of the community and the offender's prospects of rehabilitation.[62]

The highest possible minimum term available is not necessarily reserved for the worst possible case of each offence falling within the relevant statutory category.[63] In *Wood*,[64] Murray J explained that setting the minimum term is not the same as determining a finite sentence of imprisonment. He further stated that:

> It may very well be the case that a person who commits a murder in circumstances which are very grave but whose antecedents and personal circumstances are such as to indicate that his or her prospects of rehabilitation are high will have a shorter minimum period set than one who commits the offence in circumstances where his or her moral culpability is somewhat reduced but whose prospects of rehabilitation are judged to be low.[65]

For murder the *only* decision to be made by the sentencing court is the appropriate minimum term (between 7 and 14 years). Leaving to one side the question of a whole-of-life term, in comparison the sentencing process for wilful murder has two stages: the choice between strict security

52. *Sentencing Act 1995* (WA) s 96(3).
53. During the Inquiry Into the Management of Offenders in Custody in 2005 it was observed that an order under s 91(3) of the *Sentencing Act 1995* (WA) has never been made: see Quinlan P, *Closing Submissions of Counsel Assisting in Relation to Issues Arising from Public Hearings of the Inquiry* (2005) [212].
54. See *Crimes Act 1900* (ACT) s 12(2); *Crimes (Sentence Administration) Act 2005* (ACT) s 295; *Crimes Act 1900* (NSW) s 19A; *Sentencing Act 2003* (NT) s 53A(5); *Criminal Law (Sentencing) Act 1988* (SA) s 32(5); *Sentencing Act 1995* (Tas) s 18; *Sentencing Act 1991* (Vic) s 11. A whole-of-life term is also available in the United Kingdom: see *Criminal Justice Act 2003* (UK) sch 21.
55. See eg *Leach* [2007] HCA 3; *Knight* [2006] NSWCCA 292; *Camilleri* [2001] VSCA 14. In New South Wales, as at 21 September 2006, there had been 33 offenders sentenced to whole-of-life terms for murder: New South Wales Sentencing Council, *Sentencing Trends and Issues* (2005–2006) 33. Research conducted in Victoria showed that in the period from 1998–1999 to 2003–2004 there were three cases where the court did not fix a minimum term: Victorian Sentencing Advisory Council, 'Sentencing Trends for Murder in Victoria' (2005) *Sentencing Snapshots*, No. 5. See also *Inge* [1999] HCA 55, [34] where Kirby J noted that, at that time, in South Australia there had only been one case where a court had declined to set a minimum term.
56. Anderson J, 'From Marble to Mud: The punishment of life imprisonment' (Paper presented at the History of Crime, Policing and Punishment Conference, Australian Institute of Criminology, Canberra, 9–10 December 1999) 10.
57. Wood D, 'The Abolition of Mandatory Life Imprisonment for Murder: Some jurisprudential issues' in Strang H & Gerull SA (eds), *Homicide: Patterns, prevention and control*, Conference Proceedings No. 17 (Canberra: Australian Institute of Criminology, 1993) 237, 252–53.
58. Anderson J, 'From Marble to Mud: The punishment of life imprisonment' (Paper presented at the History of Crime, Policing and Punishment Conference, Australian Institute of Criminology, Canberra, 9–10 December 1999) 10.
59. See Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 7; Festival of Light Australia, Submission No. 16 (12 June 2006) 8; Law Society of Western Australia, Submission No. 37 (4 July 2006) 14; Aboriginal Legal Service (WA), Submission No. 45 (21 July 2006) 3; Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 21. Justice Miller submitted that the current sentencing regime for wilful murder and murder is appropriate but also stated that, despite dealing with very serious wilful murder offences, he has not yet imposed a whole-of-life term: see Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 7. Only one submission suggested that whole-of-life terms should be abolished: see Women's Justices' Association of Western Australia, Submission No. 14 (7 June 2006) 5.
60. Law Society of Western Australia, Submission No. 37 (4 July 2006) 14.
61. *Sentencing Act 1995* (WA) s 137.
62. *Sherratt* [2000] WASCA 112, [42] (Murray J; Pidgeon J concurring).
63. *Wood* [2002] WASCA 175, [9] Murray J; *Sherratt,* ibid [44] (Murray J; Pidgeon J concurring).
64. Ibid.
65. Ibid [9].

life imprisonment and life imprisonment, and the setting of the appropriate minimum term. In *Stapleton*,[66] the Court of Criminal Appeal observed that this process means that the court 'is confronted with the requirement to exercise its discretion anew in fixing the minimum period within the range provided'.[67] Therefore, some factors may be considered twice. In *Cooley*,[68] for example, the offender was suffering from a psychiatric disorder at the time of committing the offence of wilful murder. After finding that the offender's culpability was reduced because of his mental condition, the sentencing judge imposed life imprisonment rather than strict security life imprisonment.[69] The offender's psychiatric disorder was also considered to be relevant when determining the minimum term. The sentencing judge set a minimum term of 17 years. The majority of the Court of Appeal reduced the minimum term to 15 years because appropriate treatment for his psychiatric condition was likely to significantly reduce the offender's future risk to the community.[70]

A number of submissions received by the Commission supported retaining the division between strict security life imprisonment and life imprisonment for wilful murder.[71] Further, some submissions stated that the current sentencing regime for wilful murder is not complicated.[72] In contrast, Justice McKechnie explained that the current complicated system is a side-effect of a series of historical changes to the sentencing regime for homicide and he submitted that the different graduations of wilful murder should be abolished.[73] The Women's Justices' Association of Western Australia also submitted that the sentencing process for wilful murder and murder was complicated.[74]

The existence of two categories of life imprisonment is unique to Western Australia. In other jurisdictions, if a sentencing judge imposes life imprisonment there is only one decision to be made – the appropriate minimum term.[75] The Commission notes that when the distinction between strict security life imprisonment and life imprisonment was first introduced the court did not have the power to set a minimum term. Therefore, at this time it was the only decision that had to be made by the sentencing judge.

It has been observed that the various stages in sentencing for wilful murder involve a 'duplication of reasoning'.[76] The Commission considers that this repetitive process—choosing between strict security life imprisonment and life imprisonment, setting a minimum term and considering the possibly of ordering a whole-of-life term—is unnecessarily complicated. In Chapter 2 the Commission has recommended that the offence of wilful murder be repealed. It follows from this recommendation that the category of strict security life imprisonment for wilful murder should also be abolished. The Commission does not consider that there is any justification for maintaining two categories of life imprisonment for its recommended offence of murder.

Recommendation 43

Strict security life imprisonment

That the sentence of strict security life imprisonment be abolished.[77]

66. [2002] WASCA 328.
67. Ibid [43].
68. [2005] WASCA 160.
69. Ibid [101] (Roberts-Smith JA).
70. Ibid [115]–[116] (Roberts-Smith JA; Wheeler JA concurring).
71. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 7; Festival of Light Australia, Submission No. 16 (12 June 2006) 8; Michael Bowden, Submission No. 39 (11 July 2006) 4; Aboriginal Legal Service (WA), Submission No. 45 (21 July 2006) 3; Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 21.
72. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 7; Festival of Light Australia, Submission No. 16 (12 June 2006) 8; Michael Bowden, Submission No. 39 (11 July 2006) 4; Aboriginal Legal Service (WA), Submission No. 45 (21 July 2006) 3.
73. Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 7–8.
74. Women's Justices' Association of Western Australia, Submission No. 14 (7 June 2006) 5.
75. Some Australian jurisdictions have complete discretion to set any minimum term for a sentence of life imprisonment: see *Criminal Law (Sentencing) Act 1988* (SA) ss 32; *Sentencing Act 1995* (Tas) s 18; *Sentencing Act 1991* (Vic) s 11. In the Northern Territory the standard minimum term for murder is 20 years, but if the murder is committed in particular aggravating circumstances the standard minimum term is 25 years. There is limited discretion to move above or below the relevant standard minimum term: *Sentencing Act 2003* (NT) s 53A. In New South Wales and the Australian Capital Territory, if a sentence of life imprisonment is imposed the offender is imprisoned for his or her natural life: *Crimes Act 1900* (NSW) s 19A. However, s 295 of the *Crimes (Sentence Administration) Act 2005* (ACT) provides for Executive release on licence after serving at least 10 years in prison. In Queensland, if the offender is being sentenced for more than one conviction of murder or the offender has a previous conviction for murder, the court must order a minimum non-parole period of at least 20 years: *Criminal Code* (Qld) s 305(2). In all other cases the minimum non-parole period is 15 years as set by s 181 of the *Corrective Services Act 2006* (Qld). The Commission notes that there is currently a bill before the South Australian Parliament proposing that the non-parole period for murder must be at least 20 years unless there are exceptional circumstances: Criminal Law (Sentencing)(Dangerous Offenders) Amendment Bill 2007, cl 8.
76. Morgan I, 'Sentences for Wilful Murder and Murder' (1996) 26 *University of Western Australia Law Review* 207, 208–21.
77. For the Commission's full recommendation for the sentencing of murder, see below, Recommendation 44. The Commission notes that the abolition of strict security life imprisonment will necessitate consequential amendments to other legislation including the *Sentence Administration Act 2003* (WA) and the *Prisons Act 1981* (WA).

MANDATORY LIFE IMPRISONMENT

Is life imprisonment an appropriate penalty?

It is rare for an offender sentenced to life imprisonment to die in prison. In Western Australia from 1965–2005 only 14 prisoners died in prison while serving a life sentence.[78] Although many prisoners sentenced to life imprisonment will eventually be released, the unique characteristic of life imprisonment (and other indeterminate sentences) is that 'the prisoner has no guarantee of ever being released from custody'.[79] The Murray Review noted the argument that the penalty of life imprisonment is unfair because the offender does not know if, and when, he or she will be released.[80] The penalty of life imprisonment has also been criticised because it offends the concept of 'truth in sentencing'.[81]

The crime of murder ordinarily demands severe punishment. If life imprisonment was not available, the alternative for murder would be very long finite terms of imprisonment. However, the risk associated with finite terms is that once the sentence has been served the prisoner must be released irrespective of the risk posed to the public.[82] Further, long finite sentences of imprisonment are inflexible. If, for example, an offender was sentenced to 50 years' imprisonment but was fully rehabilitated after 20 years, he or she would nonetheless be required to finish the sentence before release. The Murray Review concluded that:

> [T]he retention of life imprisonment is justified in cases of serious offences as a penalty in itself of a substantial nature, and with a substantial punitive element, as well as incorporating a greater degree of flexibility than a finite term.[83]

Life sentences enable the potential dangerousness of the prisoner to be reconsidered at regular intervals – a goal that cannot be achieved by finite terms. For this reason the Commission does not consider that there is any reason for removing life imprisonment as a penalty for murder. The question is, should the penalty of life imprisonment be imposed in every case?

Support for mandatory life imprisonment

Murder is 'uniquely' serious

The principal argument advanced by those who support mandatory life sentences for murder is that 'murder is a uniquely heinous crime and that a mandatory life sentence is necessary to reflect the gravity of the crime and society's abhorrence of murder'.[84] In his submission Justice McKechnie stated that the offences of wilful murder and murder are 'so grave that nothing else is appropriate'.[85] The Commission agrees that murder is an extremely serious offence, but the claim that murder is uniquely serious does not always stand up to scrutiny. It might be argued that murder is uniquely serious because the offender has caused the death of another person. Yet, manslaughter and dangerous driving causing death also involve killing a person. It also might be suggested that the presence of an intention to kill distinguishes murder from all other crimes. However, the offence of attempted murder also requires proof of an intention to kill and the attempt may have 'failed' due to circumstances outside the control of the offender. Of course, it is indisputable that intentional killings are more serious than unintentional killings. Nevertheless, there may be examples of murder that are regarded as less serious than some instances of manslaughter and attempted murder. For example, a sadistic serial killer who unsuccessfully attempted to kill the victim (instead causing serious permanent brain damage) would be considered more culpable than a person who killed as part of a failed suicide pact.

Public confidence in the criminal justice system

It has also been argued that the mandatory life penalty for murder is necessary to maintain public confidence in

78. Western Australia, *Parliamentary Debates*, Legislative Assembly, 7 March 2006, 81 (Mr Jim McGinty, Attorney General). During the same period 190 prisoners serving life sentences were released from prison.
79. Potas I, 'Life Imprisonment in Australia' (1989) 19 *Australian Institute of Criminology: Trends and Issues* 2.
80. Murray MJ, *The Criminal Code: A general review* (1983) 178.
81. Wood D, 'The Abolition of Mandatory Life Imprisonment for Murder: Some jurisprudential issues' in Strang H & Gerull SA (eds), *Homicide: Patterns, prevention and control*, Conference Proceedings No. 17 (Canberra: Australian Institute of Criminology, 1993) 237, 252–53. Legislation enacted in Western Australia in August 2003 increased, for finite terms of imprisonment, the period of time that must be spent in custody before release on parole. The purpose was to provide greater 'truth in sentencing' by reducing the disparity between the sentence imposed by the court and the amount of time actually spent in custody: see *Sentencing Act 1995* (WA) s 93; Western Australia, *Parliamentary Debates*, Legislative Assembly, 15 August 2002, 177 (Mr Jim McGinty, Attorney General).
82. Criminal Law Revision Committee, *Penalty for Murder*, Twelfth Report (1973) [17].
83. Murray MJ, *The Criminal Code: A general review* (1983) 178–79. It was noted that the penalty of life imprisonment enables the delayed release of potentially dangerous offenders until such time as the 'protection of the community no longer requires his incarceration'.
84. New Zealand Law Commission (NZLC), *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No. 73 (2001) [146]. See also Grant I, 'Rethinking the Sentencing Regime for Murder' (2001) 39 *Osgoode Hall Law Journal* 655, 694.
85. Justice John McKechnie, Supreme Court of Western Australia, Submission No. 1 (12 September 2006) 2.

the justice system because disparate sentences for murder would lead to public controversy.[86] Public controversy about sentencing practices is nothing new: sentencing decisions are frequently criticised by the public and the media. But it is by no means clear that judicial discretion in sentencing for murder would lead to any greater controversy than is currently the case for manslaughter and other serious crimes.[87]

Further, it should not be assumed that abolishing mandatory life imprisonment will result in significantly less severe penalties for murder. Lengthy terms of imprisonment, including life terms, are invariably imposed in jurisdictions with flexible sentencing regimes. A study published by the Judicial Commission of New South Wales considered the sentencing outcomes for all homicide convictions during an eight-year period from 1994 to 2001.[88] The study found that all offenders convicted of murder (a total of 216) were sentenced to immediate imprisonment. For those offenders sentenced to a finite term the median term was 18 years and the median non-parole period was 13½ years.[89] The lowest sentence imposed for murder was nine years' imprisonment and 17 offenders received a whole-of-life term.[90] Similarly, research conducted by the Victorian Sentencing Advisory Council shows that in the period from 1998/1999–2003/2004 all offenders sentenced for murder were given a custodial sentence.[91] The most lenient penalty imposed was imprisonment for 10 years and the most severe was life imprisonment with no eligibility for parole.[92]

Closely linked to the 'public confidence' argument is the contention that issues affecting culpability should be taken into account by partial defences under the substantive criminal law rather than during the sentencing process. It is asserted that partial defences 'enhance the public's confidence in the criminal justice system and increase community acceptance of sentences imposed' because the decision about culpability is made by the jury.[93] The New South Wales Law Reform Commission (NSWLRC) was of the view that a conviction of manslaughter by a jury (rather than the imposition of a lesser sentence for murder) 'enables the public to understand why a seemingly lenient sentence' has been given.[94] A recent case in Queensland demonstrates why this is not necessarily the case. In *Sebo*,[95] the accused was charged with murder and subsequently convicted by a jury of manslaughter on the basis of provocation. He was sentenced to 10 years' imprisonment. The sentencing judge stated that when the offender killed the victim he was 'responding to the taunts' of his alcohol-affected 16-year-old girlfriend and was in a 'jealous rage'.[96] Media reports of the incident stated that the victim was killed by being 'bludgeoned to death with a car steering lock' and that the offender was 'provoked' by the victim taunting the offender about her 'sexual exploits with other men'.[97] As a result of public controversy following this case the Queensland Attorney General announced on 18 July 2007 that the defence of provocation in Queensland would be reviewed.[98] The Commission further discusses its approach to partial defences below but at this stage emphasises that there are other ways of improving public confidence in the criminal justice system.[99]

Grading murders is difficult

The NSWLRC also mentioned that requiring judges to make assessments of culpability for murder would be an 'inappropriate burden'.[100] Western Australian judges have observed that assessing the gravity of wilful murder is

86. It was recently stated during Parliamentary debates in England that the government's justification for mandatory life imprisonment is to give 'the public confidence in the criminal justice system': see England, *Parliamentary Debates*, House of Lords, 1 March 2007, 1721 (Baroness Scotland of Asthal, Minister of State, Home Office).
87. Advisory Council on the Penal System, *Sentences of Imprisonment: A review of maximum penalties* (London: Home Office, 1978) [241].
88. Keane J & Poletti P, *Sentenced Homicides in New South Wales 1994–2001* (Sydney: Judicial Commission of New South Wales, 2004). During the study period all homicides were sentenced under the current s 19A of the *Crimes Act 1900* (NSW) where the maximum penalty for murder is a whole-of-life term.
89. Ibid 22.
90. Ibid. The Commission notes that in New South Wales during the period of the study the partial defences of provocation, diminished responsibility and infanticide were available to reduce murder to manslaughter. The report observed that the existence of these partial defences 'generally operate to ensure that it is only the more serious homicide incidents that result in convictions for murder': at 141.
91. This included finite terms of imprisonment, life imprisonment and custodial hospital orders for mentally impaired offenders: see Victorian Sentencing Advisory Council, 'Sentencing Trends for Murder in Victoria' (2005) *Sentencing Snapshots,* No. 4.
92. Ibid.
93. NZLC, *Battered Defendants: Victims of domestic Violence who offend*, Preliminary Paper No. 41 (2000) [143].
94. NSWLRC, *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper No. 31 (1993) [3.133].
95. (Unreported, Supreme Court of Queensland, No. 977 of 2006, Byrne J, 30 June 2006).
96. Ibid 2.
97. Flatley C, 'Murder Accused "Didn't Mean to Kill"', *The Australian*, 26 June 2007.
98. The Hon Kerry Shine, Attorney General, Minister for Justice and Minister Assisting the Premier in Western Queensland, *Media Statement*, 18 July 2007.
99. See further discussion below, 'Public confidence in sentencing'.
100. NSWLRC, *Partial Defences to Murder: Diminished Responsibility*, Report No. 82 (1997) [3.12].

particularly difficult.[101] But judges are currently required to assess the relative seriousness of wilful murder in order to choose between strict security life imprisonment and life imprisonment. Further, issues of culpability are taken into account when determining the appropriate minimum term for both wilful murder and murder. The Commission is not persuaded by the argument that it is too difficult for judges to grade murders – judges routinely distinguish between levels of culpability for other serious offences such as attempted murder, armed robbery, aggravated sexual penetration without consent and manslaughter.

Perhaps a more pertinent point is that grading cases of wilful murder or murder may cause distress for the families of victims.[102] Interestingly, an inquiry in England found that victims' families considered it vital that when a victim is intentionally killed it is called murder and not manslaughter. The sentencing outcome was given less priority by those questioned.[103] If a penalty other than life imprisonment is imposed for murder it is essential that the family of the victim and the broader community understand why and that it is not because one human life is regarded as less worthy than another.

Protection of the public

Finally, it has been claimed that mandatory life imprisonment is necessary for the protection of the community because the assessment of dangerousness is undertaken by an executive body in the future, rather than by the judge at the time of sentencing.[104] However, all murderers do not necessarily pose any future danger.[105] Most people would agree that an elderly man who killed his terminally ill wife for compassionate reasons would be unlikely to kill or harm anyone again. Equally, a victim of serious prolonged domestic violence who kills her abuser would not generally be considered dangerous to the wider community. While life imprisonment may well provide the most flexible and appropriate penalty for determining future dangerousness, it does not follow that it must be imposed in every case.

Problems with mandatory life imprisonment

Differences in culpability

The most compelling argument against mandatory life imprisonment is that differences in culpability cannot adequately be taken into account and therefore injustice may result.[106] This is the most common reason given by law reform bodies when recommending the abolition of mandatory life terms.[107] In response to this view it could be argued that in exceptional cases the police or prosecution would exercise their discretion and not charge the accused with murder. Also, where the accused was charged with murder and the circumstances called for leniency the jury might give a 'mercy' verdict convicting the accused of manslaughter. While these factors may be true in some instances it is unrealistic to assume that prosecutorial leniency or mercy from the jury would always lead to the correct result. Further, as the Commission discusses below, shifting discretion from the judiciary to the prosecution is not ideal.

Discourages pleas of guilty

Section 8(2) of the *Sentencing Act 1995* (WA) provides that a plea of guilty is a mitigating factor. Mandatory penalties in general discourage pleas of guilty because there is no incentive to admit guilt. As a result, mandatory penalties increase the cost of administering justice and cause delays in the criminal justice system.[108] It is certainly uncommon for an accused to plead guilty to wilful murder or murder in Western Australia.[109] The possibility of obtaining an acquittal or a conviction for manslaughter would be likely to outweigh any benefits that might accrue from pleading guilty within the current framework.

The New Zealand Law Commission acknowledged that the abolition of mandatory life imprisonment may increase the costs associated with sentencing but overall the costs would be reduced.[110] The Law Reform Commission of

101. See eg *Griffin* [2001] WASCA 11, [44] (Malcolm CJ); *Williams* (1996) 90 A Crim R 200, 209 (Owen J; Kennedy and Pidgeon JJ conurring).
102. Western Australia, *Parliamentary Debates*, Legislative Council, 9 December 2003, 14625 (Mr N Griffiths, Minister for Housing and Works).
103. England, *Parliamentary Debates*, House of Lords, 1 March 2007, 1704 (Baroness Darcy de Knayth).
104. NZLC, *Battered Defendants: Victims of domestic violence who offend*, Preliminary Paper No. 41 (2000) [140].
105. NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No. 73 (2001) [145].
106. See NZLC, *Battered Defendants: Victims of domestic violence who offend*, Preliminary Paper No. 41 (2000) [139]; Grant I, 'Rethinking the Sentencing Regime for Murder' (2001) 39 *Osgoode Hall Law Journal* 655, 656.
107. See eg Queensland Criminal Code Review Committee, *Final Report to the Attorney General* (1992) 55, 194; NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No. 73 (2001) [147]; Law Reform Commission of Ireland, *Report on Sentencing*, Report No. 53 (1996) [5.12].
108. NZLC, *Battered Defendants: Victims of domestic violence who offend*, Preliminary Paper No. 41 (2000) [139]; Potas I, 'Life Imprisonment in Australia' (1989) 19 *Australian Institute of Criminology: Trends and Issues* 4.
109. The Commission has examined a sample of 28 appeal cases between 1998 and 2007; of these, only three involved an offender who had pleaded guilty.
110. NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No. 73 (2001) [145].

Victoria observed in 1988 that following the abolition of mandatory life in Victoria 'early figures' showed a decrease in appeals against conviction for murder and an increase in guilty pleas.[111] In addition to reducing the costs of and delays in the criminal justice system, abolition of mandatory life sentences may also spare some victims' families the trauma of long trials.[112]

Shifts discretion from the judiciary to prosecuting authorities

Proponents of mandatory sentencing do not support judicial discretion in sentencing. However, it has been observed that mandatory penalties 'do not remove discretion from the criminal system but, in effect, make pre-trial decisions the key to the outcome of the case'.[113] Thus, discretion is shifted from the judiciary to police and prosecuting authorities. Judicial discretion is exercised in open court; it is subject to the rule of law and to the appeal process. On the other hand, discretionary decisions made by police and prosecutors are not open or accountable.

The presence of a mandatory life sentence provides a powerful bargaining tool for police and prosecutors. It may encourage police and prosecutors to over-charge.[114] If charged with wilful murder or murder, an accused may feel compelled to plead guilty to manslaughter (despite the possibility of raising a defence) in order to avoid the possibility of mandatory life imprisonment.[115] In particular, it has been observed that mandatory life imprisonment may prejudice victims of domestic violence who kill their abusive partners. The threat of life imprisonment may be so daunting that the only choice is to plead guilty to manslaughter even though the circumstances strongly support self-defence.[116] In other words, it is just too risky for some accused to plead not guilty to murder and run self-defence at trial. The Commission has recommended the introduction of excessive self-defence in Western Australia.[117] This recommendation will go some way to alleviating this problem. However, even with the availability of excessive self-defence, mandatory life imprisonment may still discourage victims of domestic violence from running self-defence at trial. Flexibility in sentencing would mean that victims of domestic violence who kill their abusive partners can properly argue self-defence (or excessive self-defence) but if these defences are unsuccessful their individual circumstances can still be taken into account during sentencing.

Partial defences

Historically, the harshness of mandatory sentencing for murder led to the development of partial defences. The effect of successfully relying on a partial defence is that murder is reduced to manslaughter and therefore the offender is not subject to a mandatory penalty. As the Law Reform Commission (England and Wales) stated, the development of partial defences is the 'the way that the law has created space for discretion in sentencing in murder cases'.[118]

The partial defences of provocation, diminished responsibility and excessive self-defence, and the offence of infanticide supposedly reflect mitigating circumstances. Each partial defence and infanticide has been separately considered by the Commission. It has been recommended that the partial defence of provocation and the offence of infanticide should be repealed.[119] The Commission has also concluded that diminished responsibility should not be introduced in this state.[120] Two of the Commission's guiding principles—that intentional killings should be distinguished from unintentional killings and that differences in culpability should be taken into account during sentencing—are fundamental to these conclusions.[121]

Partial defences have been criticised because they are an arbitrary and inflexible tool for taking into account differences in culpability. The New Zealand Law Commission (NZLC) observed that '[p]artial defences inevitably create a fairly arbitrary patchwork which then has to be stretched

111. Law Reform Commission of Victoria, *Homicide*, Discussion Paper No. 13 (1988) [179]. The Judicial Commission of New South Wales considered cases in the first three years following the provision for full sentencing discretion for murder in 1990. This research indicated that 30 per cent of offenders pleaded guilty to murder under the new regime. However, only three per cent of offenders who were dealt with under the old legislative provision (limited discretion) pleaded guilty: see Spears D & MacKinnell I, 'Sentencing Homicide: The effect of legislative changes on the penalty for murder' (1994) 7 *Sentencing Trends Judicial Commission of New South Wales* 3.
112. See Law Society of Western Australia, Submission No. 37 (4 July 2006) 13.
113. Morgan N, 'Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories' (1999) 22 *University of New South Wales Law Journal* 267, 278.
114. Grant I, 'Rethinking the Sentencing Regime for Murder' (2001) 39 *Osgoode Hall Law Journal* 655, 667.
115. Ibid.
116. Sheehy E, 'Battered Women and Mandatory Minimum Sentences' (2001) 39 *Osgoode Hall Law Journal* 529, 553.
117. See Chapter 4, 'Excessive Self-Defence'.
118. Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [2.150].
119. See Chapter 3, 'Infanticide'; Chapter 4, 'The Partial Defence of Provocation'.
120. See Chapter 5, 'Diminished Responsibility'.
121. The Commission's approach is discussed in detail in the Introduction to this Report.

out of shape to catch "deserving" cases'.[122] Bearing in mind the wide range of issues affecting culpability for murder, partial defences are incapable of catering for every factor that may conceivably call for leniency.[123] Therefore, it is arguable that even if all partial defences are available it would still be necessary to provide a degree of flexibility in sentencing to deal with those cases that fall outside the scope of partial defences.[124]

In the absence of mandatory life imprisonment the need for partial defences is significantly reduced.[125] The Commission believes that with discretionary sentencing, partial defences are not justified unless the underlying rationale of the defence *always* reflects less culpability. For most partial defences this is not the case.[126] Each partial defence has strict elements designed to capture those cases demonstrating less moral culpability. However, the elements of each partial defence do not always achieve this goal.[127] Some 'deserving' cases may fall outside the boundaries of the defence and hence the offender is convicted of murder. Conversely, partial defences may be successfully relied on in circumstances where, arguably, culpability is not significantly reduced.[128]

Unlike the substantive criminal law, sentencing is a flexible process – it can accommodate the wide variety of circumstances that arise in homicide cases.[129] Dealing with issues affecting culpability during sentencing allows those issues to be considered *at the same time* as other relevant sentencing factors.[130] As Mason CJ, Brennan, Dawson and Toohey JJ stated in *Veen (No. 2)*:[131]

> The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.[132]

For example, if mental impairment (insufficient to establish insanity) leads to the conclusion that the offender's moral culpability is reduced, this factor can be balanced with the requirement to take into account the protection of the community.[133] Likewise, mitigation arising from provocative conduct in the context of a domestic relationship can be balanced against the need to deter domestic violence. Bearing in mind the Commission's conclusion in relation to partial defences, it is essential that there is sufficient flexibility in sentencing to ensure that issues affecting culpability can be taken into account.

The Commission's view

While there is little evidence of unqualified support for mandatory life imprisonment,[134] opposition to mandatory life imprisonment by law reform bodies, academics and other

122. NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No. 73 (2001) [145]. See also VLRC, *Defences to Homicide*, Final Report (2004) [1.26].
123. The NZLC observed that partial defences are 'incapable of reflecting the full range of mitigating circumstances': see NZLC, ibid (2001) [148].
124. The Commission notes that in New South Wales, which has discretionary sentencing, there are three partial defences (provocation, diminished responsibility and excessive self-defence) as well as the offence of infanticide.
125. NZLC, *Battered Defendants: Victims of domestic violence who offend*, Preliminary Paper No. 41 (2000) [142]; Grant I, 'Rethinking the Sentencing Regime for Murder' (2001) 39 *Osgoode Hall Law Journal* 655, 656. One benefit of reducing the number of partial defences is that murder trials would be significantly less complicated. Provocation, diminished responsibility and excessive self-defence are all available in New South Wales. Due to the overlap between these defences it would be possible for an accused facing a murder conviction in New South Wales to rely upon provocation, diminished responsibility and excessive self-defence at the same time.
126. Excessive self-defence is the exception. The Commission recommended partial defence of excessive self-defence requires that the accused reasonably believed that it was necessary to use force in defence and that the accused believed that the act was necessary for defence. Although the response of the accused (the killing) would be considered unreasonable (otherwise the accused would be acquitted on the basis of self-defence) it is clear that the accused must have originally been lawfully acting in self-defence. Therefore, in every case where excessive self-defence applies the killing is less culpable than other intentional killings: see Chapter 4, 'Excessive Self-Defence'. It is important to note that partial defences relating to suicide pacts and mercy killings would also possibly constitute an exception but the Commission has not considered the possibility of these partial defence in this Report: see 'Introduction: Matters beyond the scope of this Reference'.
127. See Chapter 4, 'The Partial Defence of Provocation: Provoked killings do not always demonstrate reduced moral culpability'.
128. See the discussion of *Veen (No. 1)* (1979) 143 CLR 458; *Veen (No. 2)* (1988) 164 CLR 465*; Brown* (Unreported, Supreme Court of Queensland Court of Appeal, Fitzgerald P, Ambrose and White JJ, 13 September 1993) in Chapter 5, 'Diminished Responsibility'.
129. Wood D, 'The Abolition of Mandatory Life Imprisonment for Murder: Some jurisprudential issues' in Strang H & Gerull SA (eds), *Homicide: Patterns, prevention and control*, Conference Proceedings No. 17 (Canberra: Australian Institute of Criminology, 1993) 237, 249.
130. VLRC, *Defences to Homicide*, Final Report (2004) [1.27].
131. (1988) 164 CLR 465.
132. Ibid, 476–77.
133. If an offender successfully relied upon the partial defence of diminished responsibility he or she would be convicted of manslaughter and liable to a maximum of 20 years' imprisonment. However, if mental impairment (short of insanity) is considered during sentencing for murder, the sentencing judge is able to weigh all relevant factors. If the offender is considered to be a significant danger to the public then any mitigation may be outweighed and the offender sentenced to life imprisonment. As the Commission discusses below, one attraction of the penalty of life imprisonment is that it enables dangerousness to be assessed closer to the possible release date.
134. The Criminal Law Revision Committee supported mandatory life imprisonment but at the same time recommended that provision should be made for special or tragic cases such as killing for compassionate reasons: see Criminal Law Revision Committee, *Penalty for Murder*, Twelfth Report (1973) [22]. The Murray Review recommended that the mandatory penalty of life imprisonment for murder should remain but this recommendation was made at the time that wilful murder carried the death penalty: see Murray MJ, *The Criminal Code: A general review* (1983) 179.

commentators is overwhelming.[135] Although there were a number of submissions received by the Commission supporting mandatory life imprisonment,[136] the majority were against maintaining mandatory life terms for wilful murder or murder.[137]

As explained at the beginning of this chapter, although the penalty of life imprisonment is mandatory in Western Australia, there is still a degree of flexibility within the sentencing regime to take into account differences in culpability. But the most lenient penalty currently available for wilful murder is life imprisonment with a minimum term of 15 years and for murder it is life imprisonment with a minimum term of seven years. The Commission is of the view that there is insufficient scope within the current sentencing regime to take into account differences in culpability. Bearing in mind the Commission's recommendation to repeal the partial defence of provocation and the offence of infanticide, the need for greater flexibility is essential. For example, in the absence of discretion, an intentional killing committed in a state of extreme anger following the discovery that the deceased had sexually abused a close relative or an intentional killing of an infant by its mother would attract life imprisonment with a minimum term of at least 15 years.

One possible way of providing greater flexibility in the sentencing process would be to reduce the minimum terms available but at the same time retain mandatory life. For instance, a court could set a minimum term of one or two years in certain cases.[138] During Parliamentary debates in England a member of the House of Lords provided an example: for a mercy killing life imprisonment with a minimum term of three months might be imposed. Such a sentence was described as a 'contradiction' and 'meaningless'.[139] The NZLC recommended against reforming the law so that judges could impose less than the current minimum term of 10 years because this option would be inconsistent with 'truth in sentencing'.[140] Generally, a non-parole period should be proportionate to the length of the sentence.[141] Although the application of this principle to the penalty of life imprisonment is not as straightforward as it is when imposing a finite term, the Commission is of the view that it would be inappropriate to impose the penalty of life imprisonment but at the same time show leniency by imposing a nominal minimum term. If the circumstances of a case demanded a nominal minimum term this would strongly suggest that life imprisonment was not the appropriate penalty.

While declining to comment on mandatory life imprisonment, the Western Australia Police acknowledged in its submission that 'there are a range of factors unique to every killing and that it is appropriate that these factors be considered thoroughly by a sentencing judge'.[142] The Commission considers that the arguments against mandatory life imprisonment are compelling. It is essential to introduce greater flexibility into sentencing for murder in this state.

135. See eg New Zealand Criminal Law Reform Committee, *Report on Culpbable Homicide* (1976) [6]; Law Reform Commissioner of Tasmania, *Insanity, Intoxication and Automatism*, Report No. 61 (1988) 3; House of Lords Select Committee, *Report on Murder and Life Imprisonment*, HL Paper 78-1 (1989) 31; Law Reform Commission of Victoria, *Homicide*, Report No. 40 (1991) [294]; Queensland Criminal Code Review Committee, *Final Report to the Attorney General* (1992) 55, 194; Chief Justice of the Supreme Court of Western Australia's Taskforce, *Report on Gender-Bias* (30 June 1994) 218; Law Reform Commission of Ireland, *Report on Sentencing*, Report No. 53 (1996) [5.12]; Model Criminal Code Officers Committee (MCCOC), *Fatal Offences Against the Person*, Discussion Paper (1998) 65; NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No. 73 (2001) [147]; Potas I, 'Life Imprisonment in Australia' (1989) 19 *Australian Institute of Criminology: Trends and Issues* 7; Sheehy E, 'Battered Women and Mandatory Minimum Sentences' (2001) 39 *Osgoode Hall Law Journal* 529; Coss G, 'Provocative Reforms: A comparative critique' (2006) 30 *Criminal Law Journal* 138, 144; McAnally S, 'The Penalty for Murder' (1998) *New Zealand Law Journal* 420; Cato C, 'Criminal Defences and Battered Defendants' (2002) *New Zealand Journal* 35, 36; Grant I, 'Rethinking the Sentencing Regime for Murder' (2001) 39 *Osgoode Hall Law Journal* 655, 700–701; Morgan I, 'Sentences for Wilful Murder and Murder' (1996) 26 *University of Western Australia Law Review* 207, 221; Wood D, 'The Abolition of Mandatory Life Imprisonment for Murder: Some jurisprudential issues' in Strang H & Gerull SA (eds), *Homicide: Patterns, prevention and control*, Conference Proceedings No. 17 (Canberra: Australian Institute of Criminology, 1993) 237, 252. During recent parliamentary debates in England significant support for abolishing the mandatory penalty of life imprisonment for murder was expressed by members of the House of Lords: see England, *Parliamentary Debates*, House of Lords, 1 March 2007, 1692–725.

136. Justice John McKechnie, Supreme Court of Western Australia, Submission No. 1 (12 September 2006) 2; Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 7; Festival of Light Australia, Submission No. 16 (12 June 2006) 8; Aboriginal Legal Service (WA), Submission No. 45 (21 July 2006) 3; Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 21.

137. Paul Ritter, Submission No. 4 (29 May 2006) 3; Women's Justices' Association of Western Australia, Submission No. 14 (7 June 2006) 5; Brian Tennant, Submission No. 15 (12 June 2006) 2; Alexis Fraser, Submission No. 30 (15 June 2006) 15; Law Society of Western Australia, Submission No. 37 (4 July 2006) 13; Michael Bowden, Submission No. 39 (11 July 2006) 4; Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 11; Department for Community Development, Submission No. 42 (7 July 2006) 11; Women's Law Centre of Western Australia, Submission No. 49 (7 August 2006) 5.

138. In South Australia, Victoria and Tasmania there is no mandatory minimum term: see *Criminal Law (Sentencing) Act 1988* (SA) ss 32; *Sentencing Act 1991* (Vic) s 11; *Sentencing Act 1995* (Tas) s 18. The Criminal Law (Sentencing) (Dangerous Offenders) Amendment Bill 2007, cl 8 proposes a mandatory minimum term of 20 years unless there are exceptional circumstances.

139. England, *Parliamentary Debates*, House of Lords, 1 March 2007, 1693 (Lord Lloyd of Berwick).

140. NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No. 73 (2001) [169].

141. See *Inge* [1999] HCA 55, [59] Kirby J.

142. Office of the Commissioner of Police, Submission No. 48 (31 July 2006) 14.

INTRODUCING FLEXIBILITY INTO SENTENCING FOR MURDER

Broadly, there are two ways of introducing flexibility in sentencing for murder: full sentencing discretion with a maximum penalty of life imprisonment; or limited discretion with a presumptive sentence of life imprisonment. In all Australian jurisdictions that have abolished mandatory life imprisonment, the penalty for murder is a maximum of life imprisonment.[143] The option of a presumptive sentence of life imprisonment previously existed in New South Wales and is currently available in New Zealand.

Full sentencing discretion: maximum life imprisonment

Providing full sentencing discretion for murder is consistent with general sentencing principles and practice. However, setting life imprisonment as the maximum penalty for murder would mean that life imprisonment would only be imposed for those cases described as falling within the worst category of murder. In *Veen (No. 2)*,[144] Mason CJ, Brennan, Dawson and Toohey JJ held that:

> [T]he maximum penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that penalty is prescribed ... That does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case: ingenuity can always conjure up a case of greater heinousness. A sentence which imposes the maximum penalty offends this principle only if the case is recognizably outside the worst category.[145]

Discretionary sentencing for murder exists in a number of Australian jurisdictions, including New South Wales and Victoria. The position in New South Wales is unique because a life term always means that the offender will be imprisoned for the term of his or her natural life.[146] Even so, 17 offenders (7% of the total number of offenders sentenced for murder) were sentenced to life imprisonment during the eight-year period from 1994 to 2001.[147] In Victoria, if an offender is sentenced to life imprisonment a minimum term must be set unless it is inappropriate to do so. Therefore, a life term in Victoria may be a whole-of-life term or life imprisonment with the possibility of release in the future.[148] During the period from 1998/1999 to 2003/2004, 16 offenders (9%) sentenced for murder received life imprisonment. Of those 16 offenders only three received whole-of-life terms. For the remaining 13 offenders the minimum terms ranged from 14½ years to 35 years.[149] The vast majority of offenders in these jurisdictions receive finite terms of imprisonment. In New South Wales the longest non-life sentence imposed during the period referred to above was 45 years imprisonment.[150]

Thus the effect of setting life imprisonment as the maximum penalty is that for most murders long finite sentences are imposed. As explained above, the attraction of life imprisonment as a penalty is that it reflects the gravity of the offence of murder but, at the same time, provides flexibility to reconsider the potential dangerousness of the offender in the future. Accordingly, the Commission believes that for most cases of murder the penalty of life imprisonment is appropriate.

In reaching this conclusion the Commission has also taken into account that life imprisonment is the maximum penalty for other offences under the Code, in particular, attempted murder.[151] If the penalty for murder was changed to a maximum of life imprisonment the penalties for murder and attempted murder would be the same.[152] Although there may be examples of murder demonstrating less culpability than examples of attempted murder, clearly

143. The Commission notes that in New South Wales the sentencing regime was amended in February 2003. The *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* introduced a 'new system' of standard non-parole periods for certain serious offences. For murder where the victim is a public officer and the offence arose in circumstances connected with the victim's occupation or work the standard non-parole period is 25 years. In any other case the standard non-parole period is 20 years: *Crimes (Sentencing Procedure) Act 1999* (NSW) Div 1A. The standard non-parole period represents the appropriate period for an offence falling within the middle of the range of objective seriousness for that offence. The standard non-parole period can be departed from if the court considers that it is appropriate to do so: Johnson P, *Reforms to the NSW Sentencing Law – The Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (Paper presented for a Judicial Commission of New South Wales seminar, 12 March 2003). This regime appears to provide guidance for (rather than limitation to) the exercise of judicial discretion.
144. (1988) 164 CLR 465.
145. Ibid 478.
146. *Crimes Act 1900* (NSW) s 19A.
147. Keane J & Poletti P, *Sentenced Homicides in New South Wales 1994–2001* (Sydney: Judicial Commission of New South Wales, 2004) 112.
148. *Crimes Act 1958* (Vic) s 3.
149. Victorian Sentencing Advisory Council, 'Sentencing Trends for Murder in Victoria' (2005) *Sentencing Snapshots,* No. 4.
150. Keane J & Poletti P, *Sentenced Homicides in New South Wales 1994–2001* (Sydney: Judicial Commission of New South Wales, 2004) 22. This sentence was given to a juvenile offender. It was observed that the offender may have received a whole-of-life term if the offender had been an adult.
151. *Criminal Code* (WA) s 283. In all but one of the jurisdictions with a maximum penalty of life for murder, the maximum penalty for attempted murder is less than life imprisonment: see *Crimes Act 1900* (NSW) ss 27–30 (maximum of 25 years); *Crimes Act 1958* (Vic) s 321P (25 years); *Criminal Code* (Tas) s 389 (21 years). In the Australian Capital Territory the maximum penalty for attempted murder is also life imprisonment: see *Criminal Code 2002* (ACT) s 44(9).
152. The penalty for murder would also be the same as the penalty for killing an unborn child (s 290 of the Code), and armed robbery (s 392 of the Code).

murder will usually be regarded more seriously. It has been suggested that having the same penalty for murder and attempted murder risks 'trivializing some murders and treating them on par with attempted murder'.[153] The Commission believes that it is necessary to reflect the loss of human life by providing different penalties. The Commission does not consider that it would be appropriate to reduce the maximum penalty of life imprisonment for attempted murder because the offence is extremely serious and offenders convicted of attempted murder may be just as dangerous as many murderers.

Limited sentencing discretion: presumptive life imprisonment

In 1982 mandatory life imprisonment in New South Wales was replaced with a 'prima facie' penalty of life imprisonment.[154] Section 19 of the *Crimes Act 1900* (NSW) provided that the penalty for murder was life imprisonment unless the 'person's culpability for the crime is significantly diminished by mitigating circumstances'. The meaning of the phrase 'culpability for the crime' was subject to differing interpretations. The broader view was that all matters ordinarily relevant to sentencing, including the offender's personal circumstances, could be taken into account. The narrower and more accepted view was that the phrase 'culpability for the crime' was limited to the concept of blameworthiness and, therefore, only factors that were relevant to the commission of the crime could be considered.[155] Decisions departing from the 'prima facie' sentence of life imprisonment do not appear to have been made often. Research conducted by the New South Wales Judicial Commission indicates that in 87 per cent of cases dealt with under s 19 of the *Crimes Act* from January 1990 to December 1993 a sentence of life imprisonment was imposed.[156]

In its 2001 report, *Some Criminal Defences with Particular Reference to Battered Defendants*, the NZLC recommended introducing limited discretion for sentencing of murder. It was recommended that murder should attract life imprisonment unless there were 'strong mitigating factors', relating either to the offence or the offender, that would 'render a life sentence clearly unjust'.[157] The report noted that the New Zealand government had recently announced a similar reform.[158] The Sentencing and Parole Reform Bill 2001 (NZ) was introduced into Parliament on 14 August 2001. The legislative history shows that it was intended that there would be a 'strong presumption in favour of life imprisonment for murder'.[159] In Parliament the only examples referred to, that might displace the presumption of life imprisonment, were mercy killings and cases 'where there is evidence of prolonged and severe abuse'.[160]

Section 102 of the *Sentencing Act 2002* (NZ) came into force on 30 June 2002[161] and it provides that:

> (1) An offender who is convicted of murder must be sentenced to imprisonment for life, unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust.

153. Grant I, 'Rethinking the Sentencing Regime for Murder' (2001) 39 *Osgoode Hall Law Journal* 655, 697.
154. Coss G, 'Legislation Comment: *Crimes (Life Sentences) Amendment Act 1989* (NSW)' (1990) 14 *Criminal Law Journal* 348, 349. Section 19 of the *Crimes Act 1900* (NSW) was repealed in 1990 and replaced by s 19A which provided for a maximum of life imprisonment. The second reading speech indicates that this change was motivated by the goal of 'truth in sentencing'. It was stated that the provision of a natural life term would provide 'truth in sentencing' for murder. For offenders who are sentenced to finite terms of imprisonment, it was said that the offender would serve the actual sentence received. During the second reading speech it was also stated that these amendments would overcome the 'grave and understandable community concern in relation to the release of offender ... the community, victims and everyone concerned ... will know the time at which they need to be concerned about that person's release': New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 November 1989, 14052–53. The Commission notes that under the sentencing regime in Western Australia the time when an offender will become eligible for release from a life term is known at the date of sentencing. Further, the flexibility of life terms for murder enables the Executive to assess the dangerousness of the prisoner at the time of potential release. The imposition of finite terms of imprisonment as the usual penalty for murder may provide more certainty but it would not necessarily ensure the safety of the public.
155. In *Burke* [1983] NSWLR 93, 101 (Nagel CJ), 105 (Miles J), the majority of the Court of Appeal held that the phrase 'culpability for the crime' requires an assessment of blameworthiness. Street J held that all relevant objective and subjective factors must be considered in order to decide if it is appropriate to depart from the 'prima facie' sentence of life imprisonment: at 97. In *Bell* (1985) NSWLR 466, 479, Samuels JA held that 'culpability' means blameworthiness and factors unconnected with the commission of the offence cannot be taken into account. For example, evidence of remorse, a plea of guilty and cooperation with authorities would not be relevant to the offender's culpability. Lee J agreed that the factors to be considered under the provision 'must have a connection with the crime committed': at 483. Street CJ dissented and reiterated his earlier view that all matters ordinarily relevant to the sentencing process should be considered: at 468.
156. Spears D & MacKinnell, 'Sentencing Homicide: The effect of legislative changes on the penalty for murder' (1994) 7 *Sentencing Trends Judicial Commission of New South Wales* 2. Only five cases out of a total of 35 received a sentence other than life imprisonment. The 87 cases dealt with during this period were sentenced under the old provision because the offence occurred prior to its repeal.
157. NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No. 73 (2001) [154] (emphasis added).
158. Ibid [154].
159. New Zealand, Parliamentary Debates, 594, 14 August 2001, 10910 (P Goff, Minister of Justice). The Bill also proposed that when life imprisonment is imposed for aggravated murders there should be a presumptive minimum term of 17 years.
160. Ibid.
161. Chhana R, Spier P, Roberts S & Hurd C, *The Sentencing Act 2002: Monitoring the First Year* (Ministry of Justice New Zealand, 2004).

(2) If a court does not impose a sentence of imprisonment for life on an offender convicted of murder, it must give written reasons for not doing so.[162]

The phrase 'manifestly unjust' is not defined in s 102 but the judicial interpretation of the phrase is that the injustice must be clear.[163] In *Rapira,*[164] the Court of Appeal also held that the presumption under s 102 would only be displaced in exceptional cases.[165] This interpretation appears to have been influenced by the legislative intention expressed in Parliament.[166] When interpreting the identical phrase in s 104 of the *Sentencing Act 2002* (NZ) courts have reached a slightly different view because of the different legislative intention expressed in Parliament. Section 104 provides, where life imprisonment is imposed, there is a presumptive minimum term of 17 years for murders committed in certain aggravating circumstances.[167] The minimum term of 17 years must be imposed unless it would be 'manifestly unjust'. While the word 'manifestly' in s 104 has also been interpreted to mean clearly or obviously,[168] in *Williams*[169] it was held the phrase 'manifestly unjust' in s 104 does not necessarily mean that such injustice would only arise in exceptional cases.

> There is … nothing in the legislative history which indicates that it was part of the legislative purpose that the test would be satisfied only in rare cases with 'exceptional circumstances'.[170]

Because the New Zealand government made it clear that exceptions to life imprisonment were only expected to occur in the case of mercy killings and victims of domestic violence, the courts have strictly applied the test under s 102. The Commission is only aware of three cases where life imprisonment has not been imposed. Two of these decisions were subsequently overturned on appeal.[171] In the remaining case, *Law,*[172] a sentence of 18 months' imprisonment was imposed for murder. In this case a 77-year-old man killed his 73-year-old wife who was suffering from Alzheimer's disease. The offender and the victim had promised to kill each other if either of them developed Alzheimer's. Immediately after killing his wife the offender tried to kill himself.[173]

Commentators have expressed support for a presumptive sentence of life imprisonment for murder. Rathus argued that although murder should *ordinarily* attract life imprisonment there are circumstances, such as when a women kills an abusive partner, that call for the imposition

162. If life imprisonment is imposed the court must set a minimum term of at least 10 years: *Sentencing Act 2002* (NZ) s 103(1). However, there is also a presumptive minimum term of 17 years for certain aggravated murders. A minimum term of less than 17 years cannot be imposed unless a minimum term of 17 years would be manifestly unjust: *Sentencing Act 2002* (NZ) s 104.
163. *Rapira* [2003] 3 NZLR 794, [121]. See also *O'Brien* (Unreported, High Court, New Plymouth, T06/02, 21 February 2003), as referred to in Chhana R, Spier P, Roberts S & Hurd C, *The Sentencing Act 2002: Monitoring the first year* (Ministry of Justice New Zealand, 2004) 14.
164. [2003] 3 NZLR 794.
165. Ibid.
166. Ibid [121].
167. Examples of aggravating circumstances include that the murder involved 'lengthy planning'; that the murder was committed in the course of another serious offence; that the murder involved a 'high level of brutality, cruelty, depravity or callousness'; and that the victim was a police or prison officer acting in the course of his or her duty.
168. Chhana R, Spier P, Roberts S & Hurd C, *The Sentencing Act 2002: Monitoring the first year* (Ministry of Justice, New Zealand, 2004) 18.
169. (Unreported, Court of Appeal, CA 117/04, 20 December 2004).
170. Ibid [63], as cited in *Green and Morice* (Unreported, Court of Appeal, CA 461/04 & CA 462/04, 2 June 2005) [31]. In *Paul* (Unreported, High Court, Palmerston North, Gendall J, 28 November 2005) [12] it was confirmed that departure from the presumptive minimum term of 17 years was not restricted to 'exceptional cases'.
171. See *Mayes* 2004] NZLR 71, [11]–[16] & [34]. In this case the male offender stabbed his female partner after an alcohol-fuelled argument. Prior to the killing the offender and the victim had been arguing and it was claimed that the victim was aggressive. The offender stated that he stabbed the victim after she had threatened to have him killed. The sentencing judge concluded that the culpability of the offender was reduced because of a mental disability caused by a previous head injury. Further, the judge expressed the view that the offender did not pose a significant future risk. He was sentenced to 12 years' imprisonment with a minimum term of eight years. On appeal a sentence of life imprisonment was substituted. The Court of Appeal did not agree with the sentencing judge's assessment of the degree of future risk and described the murder as callous. It was stated that the cases where the presumption is displaced will be 'rare'. In *Smail* [2006] NZCA 253, [24]–[25] & [41] the offender killed the victim who was a paraplegic. The victim and the offender were friends and the offender cared for the victim at various times. At the time of the killing the victim was living with the offender. The offender stabbed the victim numerous times after he had been drinking. There was evidence that the offender was suffering from mild depression and stress and that he believed killing the victim was in the victim's best interests. The sentencing judge concluded that a life term would be manifestly unjust and sentenced the offender to 12 years' imprisonment with a minimum term of seven years. On appeal the Court of Appeal stated that the circumstances did not amount to a 'mercy killing' and accordingly the presumptive sentence of life could not been displaced. A sentence of life imprisonment with a minimum term of 13 years was imposed.
172. (Unreported, High Court, Hamilton, T021094, 29 August 2003), as referred to in Chhana R, Spier P, Roberts S & Hurd C, *The Sentencing Act 2002: Monitoring the first year* (Ministry of Justice, New Zealand, 2004) 15.
173. Mild intellectual disability coupled with youth has been held insufficient to displace the presumption of life imprisonment: see *O'Brien* (Unreported, Court of Appeal, CA 107/03, 16 October 2003) [36]. The New Zealand Court of Appeal stated that there may be cases where 'mental or intellectual impairment of the offender may be so mitigating of moral culpability that, absent issues of future risk to public safety, it would be manifestly unjust to impose a sentence of life imprisonment'.

of a lesser sentence.[174] After examining the sentencing regime for murder in Canada, Grant concluded that the 'majority of murders deserve a life sentence'.[175] Because there will be some cases where life imprisonment is unfair she recommended that life imprisonment should be the 'starting point' but there should be a statutory exception where life imprisonment would 'constitute a miscarriage of justice'.[176] Grant stated that this option would 'recognize the unique seriousness of murder on the one hand, and yet allow for flexibility on the other'.[177] The Law Commission (England and Wales) noted that as an alternative to partial defences, discretion in sentencing for murder could be achieved by proof of 'exceptional mitigating circumstances'.[178]

The Commission's recommendations

Presumptive life imprisonment

The Commission has concluded that it is appropriate to recommend a presumptive sentence of life imprisonment for murder in Western Australia. The interpretation of the New Zealand provision is straightforward: manifestly unjust means clearly unjust. Consistent with its view that the law should be as simple as possible, the Commission has decided to use the phrase 'clearly unjust'.

However, the adoption of similar wording does not mean that the provision should be interpreted and applied in the same way that it has been in New Zealand. The New Zealand provision has been interpreted and applied by reference to the legislative policy expressed at the time. Also the provision has necessarily been interpreted in the context of the substantive law of homicide in New Zealand. The partial defences of provocation and suicide pacts operate to reduce what would otherwise be murder to manslaughter.[179] Also, the offence of infanticide exists.[180] Therefore, these types of intentional killings are not considered under s 102 of the *Sentencing Act 2002* (NZ). This would most likely have influenced the types of examples given in the New Zealand Parliament when the legislation was introduced.

Similarly, the types of examples that would displace the presumptive sentence in Western Australia will depend upon the substantive criminal law in this state. The Commission has recommended a number of reforms to the law relating to murder. Two categories of homicide that currently do not constitute murder—provoked intentional killings and infanticide—are included within the scope of murder under the Commission's recommendations. Also, a killing committed with an intention to cause a permanent but non life-threatening injury will no longer amount to murder. Likewise, an intentional killing that is considered excessive self-defence will be classified as manslaughter. Thus, the definition of murder will be wider in some respects but narrower in others.

When interpreting the provision in Western Australia, courts may have regard to extrinsic material, including statements made during debate in Parliament.[181] The Commission warns against listing as exhaustive categories the circumstances that might justify departing from the presumptive sentence of life imprisonment. The threshold will be high; however, it is not appropriate to restrict the categories or assume that instances will be rare. It is impossible to know in advance how often a sentence of life imprisonment will be clearly unjust. Nevertheless, the Commission acknowledges it may be necessary to provide possible examples in order that the purpose of the legislative provision can be fully understood.

Therefore, for the purpose of illustration, the Commission suggests that life imprisonment *might*, depending on the individual circumstances, be considered clearly unjust in cases involving mercy killings or failed suicide pacts; cases that would previously have constituted infanticide; killings mitigated by significant provocation; killings mitigated (but not excused) by mental impairment; and cases where victims of serious and prolonged domestic violence have

174. Rathus Z, 'There Was Something Different About Him That Day: The criminal justice system's response to women who kill their partners' (Brisbane: Women's Legal Service, 2002) 26.
175. Grant I, 'Rethinking the Sentencing Regime for Murder' (2001) 39 *Osgoode Hall Law Journal* 655, 697.
176. Ibid. Grant stated that full sentencing discretion may be appropriate for murder but at the same time she recognised that any move toward full sentencing discretion for murder would have to occur gradually to maintain confidence in the justice system.
177. Ibid.
178. Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [1.1] & [2.150]. The Law Commission (England and Wales) was effectively precluded from considering such an option because its terms of reference required it to 'take into account the continuing existence of the mandatory sentence for murder'.
179. *Crimes Act 1961* (NZ) ss 169 & 180(1).
180. *Crimes Act 1961* (NZ) s 178.
181. See *Interpretation Act 1984* (WA) s 19. Extrinsic material (such as the second reading speech, explanatory memorandum and Law Reform Commission reports) can be considered to confirm the ordinary meaning of a statutory provision by taking into account the object underlying the law.

killed their abusers but where self-defence and excessive self-defence are not applicable.[182]

Relevant factors for determining if life imprisonment is clearly unjust

The interpretation of the earlier New South Wales provision restricted the relevant factors to circumstances connected with the commission of the offence. In contrast the New Zealand provision refers to the circumstances of the offence *and* the offender. It is not entirely clear whether this means that the circumstances of the offence *and* the circumstances of the offender must demonstrate the injustice or whether it means that the court is required to consider both factors.

The Commission does not consider that it is appropriate to limit the criteria to only those factors connected with the offence. Usually factors connected with the commission of the offence will be the most significant because those factors will impact upon the assessment of the offender's culpability. However, personal circumstances of the offender, such as age, ill health or a past history of abuse may demonstrate, especially in cases where culpability is also reduced, that life imprisonment would be unjust. A court should not be precluded from considering all relevant factors.

The New South Wales case of *Wetherall*[183] provides a useful example.[184] The offender was charged with murder but pleaded guilty to manslaughter on the basis of diminished responsibility. In Western Australia this offender would probably have been convicted of murder.[185] The offender stabbed her de facto partner after discovering that he had sexually abused her daughter for a second time. The offender herself had been repeatedly sexually abused as a child by various family members. At the age of 14 she was sexually assaulted by an uncle who resided with her family and she became pregnant; the child was subsequently adopted. A relationship commenced between the offender and the victim when she was 16 years old. During this relationship the offender suffered several miscarriages and after believing that she would not be able to have any more children she agreed to take over the care of her sister's newborn baby. It was this child that the offender believed had been sexually assaulted by the victim. After considering the offender's mental state at the time of committing the offence the sentencing judge stated that the offender

> is entitled to a very considerable degree of leniency principally to be derived from her plea of guilty; her previous good character; her admirable employment record; the circumstance that, because of the impairment of her metal processes at the time of the offence, the element of general deterrence has diminished significance; the fact that, due to sexual abuse, she was deprived of a normal childhood; and her deep remorse; my conclusion that she is unlikely to reoffend; and the desirability that her children should have their mother returned to them.[186]

The offender was sentenced to three years' imprisonment with a non-parole period of 18 months.[187] The combination of the circumstances of the offence and the personal circumstances of the offender indicate that a sentence of life imprisonment would have been clearly unjust.

The Commission has concluded that the legislative provision in Western Australia should provide that the relevant factors are either the circumstances of the offence or the circumstances of the offender. In other words, both may be considered but the injustice may be evident by reference to either factor.[188]

Minimum non-parole terms for life imprisonment

It is anticipated that under the Commission's recommendation, life imprisonment will continue to be imposed for the majority of murders. The recommended repeal of the offence of wilful murder and the abolition of strict security life imprisonment make it necessary to reconsider the minimum terms that should be set when life imprisonment is imposed.

In 2003 when the Western Australian government proposed to repeal the offence of wilful murder it also

182. The Commission received two submissions suggesting that cases involving 'battered women's syndrome' may call for a non-custodial sentence: see Brian Tennant, Submission No. 15 (12 June 2006) 2; Department for Community Development, Submission No. 42 (7 July 2006) 6–7. The Criminal Lawyers' Association submitted that, in the absence of a separate offence of euthanasia, it may be appropriate to impose finite sentences of imprisonment or even non-custodial penalties for mercy killings: see Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 12.
183. [2006] NSWSC 486.
184. This case was mentioned in the Law Society's submission: see Law Society of Western Australia, Submission No. 37 (4 July 2006) 13–14.
185. There was some suggestion that provocation might also have been argued if the trial had gone ahead: see further discussion in Chapter 4, 'The Partial Defence of Provocation: Provocation does not always catch deserving cases'.
186. [2006] NSWSC 486 [65].
187. Ibid [67].
188. The Commission notes that the NZLC used the phrase 'circumstances of the offence or the offender' in its recommendation to introduce flexibility in sentencing.

proposed that the penalty for murder would be life imprisonment with a minimum term of at least 10 years but no more than 30 years.[189] This proposal would have increased the lower limit from seven years to 10 years. The Commission is not aware of the reason for this suggested increase.[190]

As discussed above, there is no justification for reducing the lower limit of seven years. A sentence of life imprisonment with a nominal or short minimum term disregards the concept of truth in sentencing and undervalues the significance of life imprisonment.[191] In his submission to this reference, Justice McKechnie recommended that the penalty for murder should be life imprisonment with a minimum non-parole period of 10 years and with full discretion to impose a greater non-parole period up to life.[192]

The Commission notes that the minimum term currently applicable to life imprisonment when it is imposed for offences other than murder is also seven years.[193] Reflecting the seriousness of murder, the lowest minimum term should be greater than when life imprisonment is imposed for other offences. Currently, a minimum term of seven years can only be imposed for murder. The mental element of murder is currently an intention to cause grievous bodily harm – an intention to cause an injury of such a nature as to be likely to either endanger life or cause permanent injury to health. The Commission has recommended that an intention to cause a permanent injury should not be sufficient to establish the offence of murder. Therefore, the lowest level of culpability has been excluded from the definition of murder. Further, by abolishing mandatory life imprisonment, some cases that would have previously received the lowest minimum term may now be dealt with by a finite sentence or other penalty. Therefore, the Commission has concluded that it would be appropriate to increase the lower limit for the minimum term to 10 years. On the other hand, the Commission has decided against increasing the upper limit beyond 30 years. The option of a whole-of-life term remains available for extreme cases. Where this is not appropriate, the Commission considers that a minimum term of 30 years is long enough to reflect the seriousness of the offence, but at the same time provide for a realistic possibility of release.

The Commission does not consider that there is any need to specify in legislation relevant factors for setting the minimum term. In some jurisdictions the setting of a minimum term is guided by lists of specified factors. For the most part these factors are obvious. For example, under the New Zealand legislation a presumptive minimum term of 17 years must be given if the murder involved a 'high level of brutality, cruelty, depravity or callousness'.[194] In England the abduction and murder of a child for sexual or sadistic motives gives rise to a 'starting point' for a whole-of-life term.[195] Judges are clearly capable of recognising these and other aggravating circumstances without recourse to a legislative list.

Further, in some cases listed factors are problematic because they may be aggravating, but not necessarily so. Under s 104 of the *Sentencing Act 2002* (NZ) the presumptive minimum term of 17 years applies if the victim was particularly vulnerable because of age or health. But a victim may be vulnerable in cases otherwise calling for leniency such as infanticide or a mercy killing. Similarly, under schedule 21 of the *Criminal Justice Act 2003* (UK) a murder committed with a 'substantial degree of premeditation or planning' attracts a starting point of a whole-of-life term. But a victim of long-standing domestic violence may have planned to kill the perpetrator believing that there was no other way of defending herself from future harm. Also under the United Kingdom legislation the starting point for a murder involving the use of a firearm is a minimum term of 30 years. The Law Commission (England and Wales) noted that this starting point would apply to a farmer who shoots and kills his terminally ill wife as an act of mercy simply because the offence involved the use of a firearm.[196] Although it is acknowledged that presumptive minimum terms or 'starting points' can be departed from, the Commission has concluded that they are unnecessary. This is consistent with the majority of submissions which opposed the idea of listing relevant sentencing factors.[197]

189. Criminal Code Amendment Bill 2003 (WA) cl 20.
190. It was observed during parliamentary debates that the government had not provided any justification for increasing the minimum term for murder: see Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 September 2003, 10946–60 (Ms Sue Walker).
191. Potas I, 'Life Imprisonment in Australia' (1989) 19 *Australian Institute of Criminology: Trends and Issues* 4.
192. Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 7.
193. *Sentence Administration Act 2003* (WA) ss 12A & 25.
194. *Sentencing Act 2002* (NZ) s 104.
195. *Criminal Justice Act 2003* (UK) sch 21.
196. Law Commission (England and Wales), *A New Homicide Act for England and Wales*, Consultation Paper No. 177 (2005) [1.113].
197. Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 7; Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 11; Aboriginal Legal Service (WA), Submission No. 45 (21 July 2006) 3. Only the Women's Justices' Association supported listing factors in legislation: see Women's Justices' Association of Western Australia, Submission No. 14 (7 June 2006) 5.

Recommendation 44

Penalty for murder

1. That s 282 of the *Criminal Code* (WA) be repealed and replaced with the following:

   282. Penalty for murder

   (1) A person, other than a child, who commits the crime of murder must be sentenced to imprisonment for life, unless, given the circumstances of the offence or the offender, a sentence of imprisonment for life would be clearly unjust.

   (2) If a court does not impose a sentence of imprisonment for life on an offender convicted of the crime of murder, it must give written reasons for not doing so.

   (3) If a court does not impose a sentence of imprisonment for life on an offender convicted of the crime of murder, the maximum penalty is imprisonment for 20 years.

   (4) A child who commits the crime of murder is liable to imprisonment for life or an order that the child be detained in strict custody until the Governor's pleasure is known and, thereafter, in safe custody in such place or places as the Governor may, from time to time, direct.

2. That s 91 of the *Sentencing Act 1995* (WA) be repealed.

3. That s 90 of the *Sentencing Act 1995* (WA) be repealed and replaced with the following:

   90. Imposing life imprisonment

   (1) A court that sentences an offender to life imprisonment must, unless it makes an order under subsection (3), set a minimum period of at least 10 years and not more than 30 years that the offender must serve before being eligible for release on parole.

   (2) The minimum period begins to run when the term of life imprisonment begins.

   (3) A court that sentences an offender to life imprisonment must order that the offender be imprisoned for the whole of the offender's life if it is necessary to do so in order to meet the community's interest in punishment and deterrence.

   (4) In determining whether an offence is one for which an order under subsection (3) is necessary, the only matters relating to the offence that are to be taken into account are —

   (a) the circumstances of the commission of the offence; and

   (b) any aggravating factors

4. That consequential amendments be made to any other relevant legislation as a result of the above recommendations.

Public confidence in sentencing

As mentioned above, mandatory life terms for murder are considered necessary in order to maintain public confidence in the criminal justice system. Increasing judicial discretion in sentencing for murder will be met with opposition from some members of the community. Some people will fear that the abolition of mandatory life terms will lead to excessively lenient sentences. However, in jurisdictions with full sentencing discretion life terms are still imposed and long finite sentences are routinely given. Importantly, under the Commission's recommendation life terms will generally be imposed for murder and it will only be in those cases where it would be clearly unjust that another penalty will be given. Further, in those cases where it is decided that life imprisonment would be clearly unjust a significant term of imprisonment may still be given.

The Commission does not underestimate the importance of ensuring public confidence in the criminal justice system. However, mandatory penalties do not necessarily achieve this goal. Even with mandatory life terms, criticism of lenient sentencing for murder is evident. Media reports often highlight the minimum term imposed; rarely is it emphasised that the offender has been sentenced to life imprisonment and that he or she may never be released from prison. Further, inaccurate public statements may damage the public's confidence in the justice system. In April 2007 the Shadow Justice Minister, Rob Johnson, reportedly claimed that some offenders sentenced to life imprisonment had been released earlier than the minimum non-parole period.[198] This was subsequently corrected by the Prisoners Review Board. It was explained that those offenders who appeared to have been released earlier than the minimum non-parole period were in fact released

198. O'Connell R & Knowles G, 'Outrage as Murderers, Rapists Get Early Parole', *The West Australian*, 14 April 2007, 10.

under the previous statutory scheme, which had lesser minimum terms for wilful murder and murder.[199] The Chairman of the Prisoners Review Board confirmed that 'no prisoner has been recommended for or released to parole by the Board before the minimum period set by the sentencing court has been completed'.[200]

The key to improving public confidence in the criminal justice system is ensuring that the public understands the sentencing process for murder and is provided with accurate information about sentencing practices. Research has shown that members of the public are often less punitive after receiving more detailed information about the circumstances of a case. Once fully informed, it has been found that members of the public are not necessarily more punitive than judges.[201] Therefore, any perceived lack of public confidence in the justice system may be based upon the lack of information or the provision of inaccurate information.

In 2006 the Department of the Attorney General published on its website information about the sentence lengths imposed for wilful murder and murder over the previous 10 years. This research indicates that the mean minimum term imposed for wilful murder and murder has increased. In 1996 the mean minimum term for wilful murder was 15.8 years and in 2006 it was 21 years. For murder the mean minimum term in 1996 was 10.5 years but by 2006 it had increased to 12.6 years.[202] But more detailed information about the range of minimum terms imposed and the actual time served in custody for offenders convicted of wilful murder or murder in Western Australia is difficult to access.[203] Recent information tabled in Parliament set out the amount of time actually served in custody for those offenders who were released from prison during the period from February 2001 to January 2007.[204] However, this information did not allow a comparison to be made between the actual time served and the minimum term set by the court. For example, two offenders served approximately 20 years in custody for murder; a period far greater than any possible minimum term.[205]

It is difficult to make general observations or conclusions based on the current available information. There is a strong need for easily accessible and accurate information about sentencing practices and outcomes for homicide in Western Australia. Publicly available information should include the sentencing remarks and reasons for decision; sentences imposed; up-to-date statistical information about the range of sentences imposed over time; the range of minimum terms set when life imprisonment is given; and the periods actually served by prisoners in custody.

In other jurisdictions the role of providing accurate information about sentencing practices is undertaken by a sentencing council.[206] In its report on homicide, the VLRC recommended that the Sentencing Advisory Council of Victoria should establish a sentencing database for homicide for the purpose of monitoring sentencing trends. It was proposed that this database be developed to facilitate information about particular categories of homicide, such as domestic violence killings or killings where the offender suffered from a mental impairment. It was also recommended that the Sentencing Advisory Council should provide 'up-to-date sentencing information' about homicide cases to the judiciary and to the public.[207]

199. Prisoners Review Board, *Board Responds*, Media Release (17 April 2007).
200. Ibid.
201. Gelb K, *Myths and Misconceptions: Public opinion versus public judgment about sentencing* (Melbourne: Victorian Sentencing Advisory Council, 2006) 17. A study in England found that 80 per cent of those surveyed believed that sentences imposed by judges were too lenient. Once provided with the details of a case the majority of survey participants would have given a less severe penalty than that actually imposed: see Hough M & Roberts J, *Attitudes to Punishment: Findings from the British crime survey*, Home Office Research Study No. 179 (1998) viii–ix. See also Tasmanian Law Reform Institute, *Sentencing*, Issues Paper No. 2 (2002) 57–58.
202. Department of the Attorney General, 'Sentence Length v Time Served in Prison: Western Australian higher courts offenders 1996–2006', *Contemporary Issues Bulletin* (July 2006) 6.
203. The Crime Research Centre of Western Australia publishes annual statistical reports. The Commission examined these reports over the last five years. Each annual report indicates the number of offenders convicted of wilful murder and murder; the lowest and highest minimum term imposed; and the average minimum term imposed. From 2001–2005 the average minimum term imposed for both offences ranged from 15.58 years to 17.8 years. However, certain aspects of the data appear unreliable. In 2005 it is stated that the lowest minimum term imposed for wilful murder and murder was six years. Under the law the lowest minimum term must be at least seven years. There is no explanation for this figure: see Loh NSN, Maller MG, Fernandez JA, Ferrante A & Walsh MRJ, *Crime and Justice Statistics for Western Australia: 2005* (Crime Research Centre, March 2007) 75. See also *Crime and Justice Statistics for Western Australia* reports for 2004, 2003, 2002 and 2001.
204. Department of Corrective Services, *Release into the Community of Prisoners Jailed for Life or Given Indefinite Sentences* (tabled in Parliament 27 February 2007).
205. It also appeared that some of the information may have been incorrect or required further explanation. Four offenders sentenced for wilful murder appear to have served very low periods in custody; including one offender serving just over one year in prison. One possibility is that these four offenders were juveniles and were sentenced to indefinite detention rather than life imprisonment.
206. The Commission notes that in jurisdictions outside Australia the role of sentencing councils may be wider, including the drafting or setting of sentencing guidelines: see eg NZLC, *Sentencing Guidelines and Parole Reform*, Report No. 94 (2006) 13.
207. VLRC, *Defences to Homicide*, Final Report (2004) [7.60]. The Sentencing Advisory Council's website lists homicide as a current project and states that the Council, the Australian Institute of Criminology and the Victoria Police Homicide Squad are working towards establishing a comprehensive database about homicide cases: see <www.sentencingcouncil.vic.gov.au>.

The Sentencing Advisory Council of Victoria is an independent statutory body established in 2004 and its roles include conducting research; collecting and analysing statistics; and providing advice to the government, the public and the judiciary. In its submission the Western Australia Police supported greater community education about sentencing practices, specifically referring to the Sentencing Advisory Council of Victoria.[208]

A similar body was established in New South Wales in 2003. The statutory functions of the New South Wales Sentencing Council include advising the Attorney General, monitoring and reporting on sentencing trends and practices, and preparing research reports on sentencing issues.[209] Although the composition of each council is different, members include representatives from law enforcement, retired judicial officers, academics, legal practitioners, victim representatives and representatives from justice agencies.

Another way of improving the community's understanding of sentencing practices is through the research and activities undertaken by a judicial commission. The Judicial Commission of New South Wales was established in 1986 by the *Judicial Officers Act 1986* (NSW). It is made up of six judicial members and four non-judicial members. The functions of the Judicial Commission include the monitoring of sentences; the dissemination of information and reports on sentences; the continuing education and training of judicial officers; and dealing with complaints against judicial officers.[210] In May 2007, the Chief Justice of Western Australia referred to a submission to government for the establishment of a judicial commission in Western Australia.[211] He stated that the 'core functions' of the Judicial Commission would be to deal with complaints against the judiciary, compile and disseminate information about sentencing *to the judiciary,* and judicial education.

The establishment of a judicial commission in Western Australia could assist in the preparation and dissemination of information about sentencing practices and therefore improve public understanding.[212] However, it is essential that there is a dedicated body in Western Australia responsible for providing sentencing information *to the public*. Whether such a role is appropriate for a judicial commission will require further consultation. The Commission recommends that the Attorney General consult with the Chief Justice and any other relevant judicial officers, organisations or individuals to determine the best way of improving the accessibility and understanding of sentencing practices for homicide (and possibly other crimes) in this state.

The Commission also emphasises the importance of monitoring the impact of changes to the substantive law of homicide on the sentencing outcomes for the offences of murder and manslaughter. For example, it has been argued that if the partial defence of provocation is abolished it would be necessary to ensure that sentences for murder are 'closely scrutinised' to examine whether the gender-bias associated with provocation reappears in sentencing decisions for murder.[213] Following the implementation of the recommendations in this Report, sentencing practices and outcomes for murder and manslaughter should be examined to determine the impact, if any, of the repeal of the offence of wilful murder, the abolition of provocation, the repeal of infanticide, and the introduction of excessive self-defence.

Recommendation 45

Improving public understanding and awareness of sentencing practices for homicide in Western Australia

1. That the Attorney General consult with the Chief Justice, other judicial officers, and relevant organisations and individuals to determine the most appropriate body to undertake the responsibility for improving public understanding and awareness of sentencing practices for homicide in Western Australia.

2. That the Attorney General ensure that there is a designated body to monitor sentencing practices for homicide offences; collect, disseminate and analyse sentencing data in relation to homicide; publish reports; and provide easily accessible information to the public and to the judiciary.

208. Office of the Commissioner of Police, Submission No. 48 (31 July 2006) 14.
209. See *Crimes Sentencing Procedure Act 1999* (NSW) s 100J.
210. *Judicial Officers Act 1986* (NSW) ss 8–12.
211. Martin CJ, 'State of Justice: Law week address', 7 May 2007, 12. The Commission notes that in 2006 the Joint Standing Committee on the Corruption and Crime Commission recommended against the establishment of a Judicial Commission in Western Australia: see Joint Standing Committee on the Corruption and Crime Commission, *Interim Report on Amendments to the Corruption and Crime Commission Act 2003*, Report No. 10 (2006) 12.
212. The website of the Judicial Commission of New South Wales has a large number of publications dealing with sentencing trends and practices, including publications specifically in relation to homicide: see <www.judcom.nsw.gov.au>.
213. Coss G, 'Provocative Reforms: A comparative critique' (2006) 30 *Criminal Law Journal* 138, 149.

7 Sentencing for Manslaughter

The sentencing process for manslaughter is the same as for any other criminal offence: there is full sentencing discretion to take into account the circumstances of the offence and the offender. The maximum penalty for manslaughter is 20 years' imprisonment. It is frequently emphasised that manslaughter covers a wide range of conduct.[1] Accordingly, the penalties imposed for manslaughter range from non-custodial sentences to lengthy terms of imprisonment.[2]

Historically, the practical difference between murder and manslaughter was that manslaughter attracted discretionary sentencing. Until 1981 the penalty for manslaughter in Western Australia was a maximum of life imprisonment.[3] This remains the position in the three other Australian jurisdictions with mandatory life imprisonment for murder.[4] Currently in Western Australia the penalty for manslaughter differs from the penalty for murder in two respects. First, the maximum penalty is 20 years' imprisonment and not life; and second, there is full sentencing discretion. The penalty for manslaughter in Western Australia is similar to those jurisdictions with discretionary sentencing for murder. The maximum penalty for manslaughter in Victoria and the Australian Capital Territory is also 20 years' imprisonment.[5] In Tasmania[6] and New South Wales[7] the maximum penalty is 21 and 25 years' imprisonment respectively.

The Commission has recommended a presumptive sentence of life imprisonment for murder. In the remainder of this chapter the Commission considers whether there is any need to increase or change the current penalty for manslaughter in light of that and other recommendations in this Report.

DISTINGUISHING BETWEEN MURDER AND MANSLAUGHTER

It has been suggested by some that the penalty for murder and manslaughter should be the same.[8] But if it was the same there would be a good argument for abolishing the distinction between the two offences.[9] The Commission is of the view that the distinction between murder and manslaughter is appropriate – intentional killings should be distinguished from unintentional killings. Thus, it is essential that the penalty for each offence reflects that distinction.[10] The vast majority of submissions supported the continued distinction between the penalties for murder and manslaughter.[11]

INCREASING THE PENALTY FOR MANSLAUGHTER

In its Issues Paper, the Commission invited submissions about whether the penalty for manslaughter should be reconsidered if the distinction between wilful murder and murder was abolished.[12] The Commission has recommended the repeal of the offence of wilful murder and has redefined the elements of murder. An intention to cause a permanent but non life-threatening injury to health will no longer be sufficient to establish the mental element of murder.[13] Therefore, some unlawful killings that are currently classified as murder may fall within the scope of manslaughter. However, it does not follow from this recommendation that the maximum penalty for manslaughter should be increased because the recommendation was made on the basis that an unlawful killing with an intention to cause a

1. See eg *Churchill* [2000] WASCA 230, [22] (Kennedy ACJ; Wheeler and Anderson JJ concurring).
2. In *McDonald* [2000] WASCA 336 the offender was sentenced to 3½ years' imprisonment suspended for two years. In *Wicks* (1989) 44 A Crim R 147, the offender was sentenced to 13½ years' imprisonment after taking into account 18 months already spent in custody (a total effective sentence of 15 years' imprisonment).
3. *Criminal Code* (WA) s 287. The penalty was amended to 20 years' imprisonment by s 4 of the *Acts Amendment (Jurisdiction of Courts) Act 1981* (WA) as referred to in *Wicks,* ibid 160 (Malcolm CJ). The Murray Review noted that the maximum was reduced to 20 years' imprisonment as part of a package of reforms designed to increase the criminal jurisdiction of the District Court: see Murray M, *The Criminal Code: A general review* (1983) v.
4. *Criminal Code* (NT) s 161; *Criminal Code* (Qld) s 310; *Criminal Law Consolidation Act 1935* (SA) s 13(1). See also *Criminal Law (Sentencing) Act 1988* (SA) s 20.
5. *Crimes Act 1958* (Vic) s 5; *Crimes Act 1900* (ACT) s 15.
6. *Criminal Code* (Tas) s 389.
7. *Crimes Act 1900* (NSW) s 24. The Commission notes that the MCCOC recommended that the maximum penalty for manslaughter should be 25 years' imprisonment: MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 69.
8. The Queensland Criminal Code Review Committee recommended in 1992 that the penalty for murder and manslaughter should be the same – a maximum of life imprisonment: see Queensland Criminal Code Review Committee, *Final Report to the Attorney General* (1992) 194–95. The Law Commission (England and Wales) recommended that the penalty for second degree murder and the penalty for manslaughter should both be a maximum of life imprisonment: Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [A.3]–[A.5].
9. Yeo S, *Fault in Homicide: Murder and involuntary manslaughter in England, Australia and India* (Sydney: Federation Press, 1997) 4. See also Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 12.
10. The Law Reform Commission of Victoria expressed the same view: see Law Reform Commission of Victoria, *Homicide*, Report No. 40 (1991) [290].
11. Only the Department for Community Development submitted that the maximum penalty for both murder and manslaughter should be life imprisonment: see Department for Community Development, Submission No. 42 (7 July 2006) 12. It appears that this view was made on the basis that killings currently classified as murder would instead by classified as manslaughter.
12. LRCWA, *Review of the Law of Homicide,* Issues Paper (2006) 12.
13. See Chapter 2, 'The Mental Element of Murder: Intention to do grievous bodily harm'.

permanent non-life threatening injury to health was significantly less culpable than a killing with an intention to cause an injury likely to endanger life.

Further, the Commission has recommended that the partial defence of provocation be repealed. The abolition of provocation will reduce the scope of manslaughter. As a consequence intentional provoked killings will instead be classified as murder. On the other hand, the introduction of excessive self-defence will add another category to the offence of manslaughter.

Two submissions supporting mandatory life imprisonment for murder also suggested that the maximum penalty for manslaughter should be increased to life imprisonment. Although expressing the view that the current penalty structure for wilful murder, murder and manslaughter is appropriate, Justice Miller submitted that if homicides that are currently classified as murder were instead included in manslaughter, the maximum penalty for manslaughter should be life imprisonment.[14] Justice McKechnie stated that the penalty for manslaughter should be a maximum of life imprisonment.[15]

The Law Society of Western Australia submitted that the penalty for manslaughter should be increased to a maximum of 25 years' imprisonment. This submission was made on the basis that the offence of murder should only apply where the accused intended to cause death.[16] Thus manslaughter would include an intention to cause an injury of such a nature as to be likely to endanger life. However, that is not what the Commission has recommended; an intention to cause an injury of such a nature as to be likely to endanger life is included within the recommended definition of murder.

Overall, the Commission has concluded that the changes to the substantive law of homicide do not demand an increase to the maximum penalty available for manslaughter.[17] Although from one perspective the offence of manslaughter will be wider under the Commission's recommendations, the offence is also narrower by virtue of the abolition of provocation. In this regard the Commission notes that in those jurisdictions with discretionary sentencing for murder, the maximum penalty for manslaughter is similar to the penalty for manslaughter in Western Australia. Although New South Wales has a higher maximum penalty (25 years' imprisonment), manslaughter in that jurisdiction encompasses provoked killings, killings reduced to manslaughter by diminished responsibility and killings reduced to manslaughter by excessive self-defence.[18] Victoria has the partial defences of excessive self-defence and suicide pacts, and the maximum penalty is the same as in Western Australia.

In the absence of accessible and accurate information about current sentencing trends, it is difficult to predict what impact the recommendations in this Report will have on the sentencing practices for manslaughter. It is therefore vital that statistics are collected and analysed to determine the impact on the sentencing for manslaughter as a result of the abolition of provocation and the introduction of excessive self-defence.

14. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 8.
15. Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 7.
16. Law Society of Western Australia, Submission No. 37 (4 July 2006) 14–15.
17. Three submissions expressed the view that the current penalty for manslaughter was appropriate: Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 12; Aboriginal Legal Service (WA), Submission No. 45 (21 July 2006) 3; Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 21.
18. Further, in New South Wales the offence of infanticide has the same penalty as manslaughter: *Crimes Act 1900* (NSW) s 22A.

Chart: Sentencing for homicide in different jurisdictions

Jurisdiction	Penalty for murder*	Lowest possible sentence for murder	Highest possible sentence for murder (other than whole-of-life term)	Whole-of-life term available	Penalty for manslaughter	Partial defences and infanticide
Western Australia	Mandatory life imprisonment	Life imprisonment with minimum term of 7 years (murder); life imprisonment with minimum term of 15 years (wilful murder)	Life imprisonment with minimum term of 14 years (murder); life imprisonment with minimum term of 30 years (wilful murder)	Yes	Maximum 20 years' imprisonment	Provocation Infanticide
Commission's recommendations	Presumptive life imprisonment	Non-custodial (but if life imprisonment is imposed there must be a minimum term of at least 10 years)	Life imprisonment with minimum term of 30 years	Yes	Maximum 20 years' imprisonment	Excessive self-defence
Northern Territory	Mandatory life imprisonment	Life imprisonment with any minimum term (but standard minimum term is 20 years or 25 years in circumstances of aggravation)	Life imprisonment with any minimum term (but standard minimum term in aggravating circumstances is 25 years)	Yes	Maximum life imprisonment	Diminished Responsibility Provocation
Queensland	Mandatory life imprisonment or indefinite sentence	Life imprisonment with minimum term of 15 years	Life imprisonment with minimum term of 20 years or more (if more than one offence of murder or previous conviction for murder)	No	Maximum life imprisonment	Diminished Responsibility Provocation
South Australia	Mandatory life imprisonment	Life imprisonment with any minimum term**	Life imprisonment with any minimum term	Yes	Maximum life imprisonment	Provocation Excessive self-defence Suicide Pact
Victoria	Maximum life imprisonment	Non-custodial sentence	Life imprisonment with any minimum term	Yes	Maximum 20 years' imprisonment	Infanticide Defensive Homicide (excessive self-defence) Suicide Pact
New South Wales	Maximum life imprisonment	Non-custodial sentence	Any finite sentence (standard non-parole period of 20 years and if victim a public officer 25 years)	Yes	Maximum 25 years' imprisonment	Infanticide Diminished Responsibility Provocation Excessive self-defence
Tasmania	Maximum life imprisonment	Non-custodial sentence	Life imprisonment with any minimum term	Yes	Maximum 21 years' imprisonment	Infanticide
Australian Capital Territory	Maximum life imprisonment	Any finite term of imprisonment	Any finite term of imprisonment	Yes	Maximum 20 years' imprisonment	Provocation Diminished Responsibility
Canada	Mandatory life imprisonment	Life imprisonment with minimum term of 10 years (second degree murder); life imprisonment with minimum term of 25 years (first degree murder)	Life imprisonment with minimum term of 25 years (second degree murder); life imprisonment with any minimum term above 25 years (first degree murder)	No	Maximum life imprisonment	Infanticide Provocation
United Kingdom	Mandatory life imprisonment	Life imprisonment with any minimum term (but guidelines for standard minimum terms)	Life imprisonment with any minimum term (but guidelines for standard minimum terms)	Yes	Maximum life imprisonment	Infanticide Provocation Diminished Responsibility Suicide Pact
New Zealand	Presumptive life imprisonment	Non-custodial sentence	Life imprisonment with minimum term of at least 10 years (presumptive minimum term of at least 17 years in aggravating circumstances)	No	Maximum of life imprisonment	Infanticide Provocation Suicide Pact

* The penalty for murder in each jurisdiction does not include the penalty for children.

** There is currently a bill before the South Australian Parliament proposing that the non-parole period for murder must be at least 20 years unless there are exceptional circumstances: see Criminal Law (Sentencing)(Dangerous Offenders) Amendment Bill 2007, cl 8.