

Review of the Law of Homicide

An Issues Paper



Law Reform Commission
of Western Australia

Terms of Reference

The Law Reform Commission of Western Australia (the Commission) is a government agency responsible to the Attorney General. It reviews areas of law in need of reform and makes recommendations as to how the law should be changed. On 26 April 2005 the Commission received a reference from the Attorney General to examine and report upon the law of homicide and to give consideration to:

- (i) the distinction between wilful murder and murder;
- (ii) the defences to homicide, including self-defence and provocation;
- (iii) current penalty provisions relating to the law of homicide; and
- (iv) any related matter.

The Commission was also asked to report upon the adequacy of the existing laws in Western Australia in relation to homicide and to recommend desirable changes to the existing laws, practices and procedures.

About this Issues Paper

In Western Australia the *Criminal Code* (WA) (the Code) and the *Road Traffic Act 1974* (WA) are the only statutes that contain criminal offences concerning the unlawful killing of one person by another. This is referred to in this Issues Paper as 'the law of homicide'.

This Issues Paper considers whether the current categorisation of homicide offences should be retained and whether any amendments should be made to the existing law. The Commission notes that the Code is unique in that it distinguishes between two forms of murder (namely murder and wilful murder) and provides different penalties for those offences. All other Australian jurisdictions, both those that have codified the criminal law and those that are based on the common law, have only one offence of murder. This reference requires consideration of whether or not there is any moral or legal validity in maintaining this distinction. This leads into consideration of the current sentencing processes and penalties for homicide offences and whether they too should be reformed.

The issues of abortion, euthanasia and the re-introduction of the death penalty are beyond the scope of this reference; however, there may be other issues that impact on one or more of the areas discussed in this Issues Paper. The Commission invites submissions on any of the matters referred to in this paper. The deadline for submissions is 15 June 2006.

The Law of Homicide in Western Australia

The starting point when considering the law of homicide is s 268 of the Code which provides: 'It is unlawful to kill any person unless such killing is authorized or justified or excused by law.' According to s 270 of the Code, '[a]ny person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person'. The question who can be unlawfully killed is complex and depends on statutory definitions of when human life begins and when it ends. Section 269 of the Code provides that:

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

Index

The Law of Homicide in Western Australia

Offences of homicide

- Wilful murder, murder and manslaughter
 - Causation
 - Alternative verdicts
 - The distinction between wilful murder and murder
 - Felony-murder
 - Reckless indifference
- Infanticide
 - Disturbance of the mind
 - Extension to other carers
 - Age of the victim
 - Should infanticide be abolished?
- Killing an unborn child
- Dangerous driving causing death

Defences to homicide

- Provocation
 - The 'ordinary' person test
 - Provocation and sentencing
 - Provocation and non-fatal offences
- Self-defence
 - Excessive self-defence
- Battered women's syndrome
- Insanity
- Diminished responsibility
- Accident and unwilled acts
- Duress
- Extraordinary emergency
- Aboriginal customary law
- Intoxication

Sentencing

- Wilful murder
- Murder
- Attempted murder
- Manslaughter
- Infanticide / attempted infanticide
- Dangerous driving causing death

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Offences of Homicide

In Western Australia the crime of homicide, or unlawful killing, is separated under s 277 of the Code into four categories: wilful murder, murder, manslaughter and infanticide. These categories of offence (and the penalties that attach to each offence) are intended to convey the degree of seriousness of

the act of unlawful killing and the degree of moral culpability of the offender. The intention of the accused at the time the offence was committed, the circumstances of the offence and, in cases of infanticide, the relationship between the offender and the victim, will dictate the category of homicide offence that a person is charged with.

Wilful Murder, Murder and Manslaughter

The most serious homicide offence in Western Australia is wilful murder. Under s 278 of the Code wilful murder requires that the offender intended to cause the death of the deceased or of some other person.

Murder is the second most serious category of homicide. Section 279 of the Code sets out the circumstances under which a person may be charged with murder. The most common charge of murder is under s 279(1) which provides that a person is guilty of murder "[i]f the offender intends to do the person killed or to some other person some grievous bodily harm'. Grievous bodily harm is defined in s 1(1) as 'any bodily injury of such a nature as to endanger, or be likely to endanger life, or to cause, or be likely to cause, permanent injury to health'.

Manslaughter is the third most serious homicide offence under the Code. Section 280 provides that '[a] person who unlawfully kills another under such circumstances as not to constitute wilful murder or murder is guilty of manslaughter'. There are two broad categories of manslaughter. The first category deals with those unlawful killings that do not meet the intent required for wilful murder or murder; while the second category deals with offenders who are found not guilty of wilful murder or murder on the basis that they were provoked.

Causation

Whether an accused has 'caused' the death is a question of fact for the jury. A jury is usually directed that it should apply common sense to the facts as they find them. In order to prove that the accused caused the death it is sufficient if the conduct of the accused is a substantial or significant cause of the death. Sections 272 to 275 of the Code contain provisions relating to causation.

Expert evidence (for example, from forensic pathologists) is often called to establish the 'medical' or scientific cause of a death and the way or ways in which this could have been brought about. There can be cases in which there are different versions of the facts surrounding a death which may or may not be wholly consistent with the forensic or other scientific evidence relating to how or when or where the death occurred.

Criminal responsibility for a death depends upon proof that the accused caused the death. The scientific evidence and the circumstances may also be relevant in considering other issues, such as the intention of the accused or, depending upon the allegations made in a particular case, the extent to which the accused should have foreseen that certain acts might lead to death. Where criminal conduct initiates the events during which a death occurs, perhaps by an unusual

mechanism, difficult issues may arise where the accused is charged with a homicide offence.

Invitation to Submit 1

The Commission invites submissions on any specific issues with regard to causation and the application of ss 272–275 of the *Criminal Code* (WA).

Alternative verdicts

For some offences under the Code alternative verdicts are specified in the section creating the offence. This means that if an accused is not convicted of the offence for which he or she was charged, the jury can instead convict of any of the alternative offences (provided that there is sufficient evidence to convict the accused of the relevant alternative offence). If there are no alternative verdicts to a particular offence set out in the Code, then the prosecution must expressly charge the accused with any relevant alternative offences.

Originally the Code provided for alternative verdicts of murder or manslaughter on any indictment for wilful murder. However, since June 2005 the Code has not provided an alternative verdict to wilful murder. Therefore the prosecution must specify an alternative offence (such as murder) in any indictment alleging wilful murder as the principal count. There does not seem to be any rationale for this anomaly given the provision of alternative verdicts for murder and manslaughter. This is an issue that may need to be addressed by legislative amendment.

In the case of murder, alternative verdicts are manslaughter, infanticide, attempted murder and dangerous driving causing death. There is no alternative verdict to manslaughter apart from dangerous driving causing death, and only in circumstances where the elements of that offence are met.

The distinction between wilful murder and murder

Western Australia is currently the only Australian jurisdiction that distinguishes between wilful murder and murder. In other jurisdictions the offence of murder covers both an intention to kill and an intention to cause grievous bodily harm. In Western Australia both wilful murder and murder have a mandatory sentence of life imprisonment, but the minimum period that an offender will serve in custody varies greatly between the two offences. Wilful murder is therefore considered more serious an offence than murder. However, depending on the factual circumstances the moral culpability of a person convicted of wilful murder may not be as great as a person convicted of murder. For example, a person who intentionally kills their terminally ill spouse at the spouse's request

would generally be guilty of wilful murder, while a person who sets fire to another with the intention to permanently maim them and death results, would generally be guilty of murder. The question therefore arises whether the distinction is appropriate to reflect the varying culpabilities associated with the different intents.

Question 1

Is the distinction between wilful murder and murder artificial? Should the offence of wilful murder be abolished in favour of a single offence of murder? If so, should the offence of murder be retained for killing with intent to kill, and other homicides (except dangerous driving causing death) be subsumed under the offence of manslaughter? Or should murder include both intent to kill and intent to do grievous bodily harm?

Another difficulty with the distinction between wilful murder and murder is distinguishing between whether the accused had an intention to kill (wilful murder) or an intention to cause an injury that was likely to endanger life (murder). Intention is determined either by direct evidence (for example, the accused's admission) or inferred from the circumstances of the offence. This is a question of fact usually reserved for juries; however, there may be some circumstances where the distinction between an intention to kill and an intention to cause life-threatening harm is extremely difficult to discern. If the distinction between wilful murder and murder was abolished, the sentencing judge would determine the intent of the accused at the time he or she committed the offence.

Question 2

Are judges or juries better placed to determine the existence of an intent to kill?

Felony-murder

Apart from the intention to cause grievous bodily harm the Code lists other circumstances under which a person may be charged with murder. These circumstances, known as 'felony-murder', are found in ss 279(2)–(5) of the Code which provide that a person is guilty of murder:

- (2) If death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;
- (3) If the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime;
- (4) If death is caused by administering any stupefying or overpowering thing for either of the purposes last aforesaid;
- (5) If death is caused by wilfully stopping the breath of any person for either of such purposes.

Under these provisions the accused must have allegedly been involved in the commission of an unlawful act at the time of the killing. These provisions have been used infrequently in

Western Australia and there have been calls for their abolition or reform.

Unlike the common offence of murder in s 279(1) of the Code, there is no requirement for the prosecution to prove an intention to cause grievous bodily harm under ss 279(2), (4) and (5). In relation to ss 279(4) and (5), it has been noted that almost all of the cases covered by these subsections would also be covered by s 279(2). For example, the act of wilfully stopping the breath of a person in s 279(5) would clearly be an act likely to endanger human life within s 279(2). Similarly, the act of administering a stupefying or overpowering thing in s 279(4) would in many cases be an act likely to endanger human life. The purposes associated with ss 279(4) and (5) of facilitating the commission of a crime or facilitating the flight of an offender would clearly come within the phrase 'unlawful purpose' in s 279(2). It has also been argued that s 279(3) is unnecessary because any conduct that is alleged to fall within its provisions would be covered by s 279(1). Although s 279(2) of the Code extends the definition of murder to apply to cases where the accused does not intend to kill or do grievous bodily harm, it is arguable that it should be retained on the basis of the seriousness of the conduct. Alternatively it has been suggested that felony-murder be abolished in its entirety.

Question 3

Is it fair to convict a person of murder in circumstances where they do not intend to kill or to cause grievous bodily harm to the person? Should felony murder be abolished completely or should s 279 (2) of the *Criminal Code* (WA) be retained?

Reckless indifference

Another issue that arises in this context is whether a mental element of reckless indifference should suffice to establish the offence of murder under the Code. In common law jurisdictions, in addition to an intention to kill or cause grievous bodily harm, reckless indifference as to death or grievous bodily harm may be sufficient to establish the mental element for murder. This means that a person might be found guilty of murder if he or she foresees the probable risk of death or grievous bodily harm attached to certain conduct but decides to engage in that conduct despite the risk.

The position in Western Australia with respect to reckless indifference is unclear. Some cases support the view that intention should be interpreted to include reckless indifference, while others state that reckless indifference is not enough and that actual intention to cause death or grievous bodily harm is required.

Question 4

Should the mental element of murder be extended to include reckless indifference? If so, should murder be limited to reckless indifference to death, or should it also include reckless indifference to grievous bodily harm? Should there be an offence of dangerous conduct causing death and, if so, with what mental element?

Offences of Homicide

Infanticide

Infanticide is the killing of a child under the age of 12 months by its mother. It has historically been considered a separate category of homicide which is not dependent on the intention of the mother. Section 281A(1) of the Code provides:

When a woman or girl who unlawfully kills her child under circumstances which, but for this section, would constitute wilful murder or murder, does the act which causes death when the balance of her mind is disturbed because she is not fully recovered from the effect of giving birth to the child or because of the effect of lactation consequent upon the birth of the child, she is guilty of Infanticide only.

There are several elements to this offence. Firstly, the mother must commit the offence when the balance of her mind is disturbed 'from the effect of giving birth to the child or because of the effect of lactation'. Secondly, it only applies to natural mothers and does not extend to other carers, for example, fathers or step-mothers. Thirdly, the offence only applies in respect of the death of a child under 12 months old.

Disturbance of the mind

The medical foundation for the requirement that an accused must show that she was suffering from a disturbance of the mind resulting from childbirth or due to lactation has been widely criticised. Commentators have noted that medical research has established that women are more likely to kill their children as a result of mental imbalance caused by social and economic factors, rather than the effect of childbirth or lactation.

Question 5

Should the offence of infanticide with the requirement of mental imbalance resulting from the effects of childbirth or lactation be retained? Should social, psychological and economic factors causing a mental imbalance also be taken into account? Or should the offence be repealed entirely?

Extension to other carers

As noted above, infanticide is limited in its application to the natural mother of the child. If infanticide is extended to include mental imbalance caused by factors other than the effects of childbirth and lactation, the limitation to a child's natural mother could be seen to be discriminatory.

Question 6

If infanticide is extended to include mental imbalance caused by factors other than the effects of childbirth and lactation should the offence be applicable to other carers of the child, such as the child's father?

Age of the victim

With respect to the age of the child, the Victorian Law Reform Commission has heard evidence that most infanticide cases occur within two years of birth and the age requirement has been subsequently extended to two years in Victoria.

Question 7

In regard to the offence of infanticide, should the age requirement of the victim be increased?

The Victorian Law Reform Commission also recommended that the offence of infanticide, while remaining applicable to the natural mother alone, should include the killing of older children at the same time as the killing of a child under two years. This would prevent the situation where a mother was charged with infanticide for the killing of one child (under two years) and murder for the killing of another child (above two years) where the deaths occurred as a result of a mental disorder consequent on childbirth. To date this recommendation has not been legislatively implemented in Victoria.

Question 8

Should the offence of infanticide apply in respect of the death of older children killed at the same time as a younger child to which the offence currently applies? If so, should there be any limitations to whom the offence could apply to (eg. natural mothers only) or the nature of the mental imbalance (eg. disorders consequent upon childbirth only)?

Should infanticide be abolished?

Because of the limitations to infanticide and the various criticisms of its requirements, it has been suggested that infanticide should be abolished.

Question 9

Should the offence of infanticide be abolished in Western Australia? If the mandatory sentence of life imprisonment for wilful murder and murder was abolished could the circumstances in which infanticide occurs adequately be taken into account during the sentencing process? Alternatively, would it be unfair for a person who kills a child under the relevant circumstances to be labelled as a murderer?



Killing an Unborn Child

It is important to note that infanticide is the killing of a child that has been born alive. There is a separate offence under s 290 of the Code of killing an unborn child which states:

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

The offence is limited in its terms to the circumstances when a woman is about to be delivered of a child. The original rationale for the offence was to ensure that those who terminated the life of a foetus could not avoid criminal

responsibility by arguing that their act did not amount either to procuring a miscarriage or to killing a human being.

The offence is obviously closely related to the law relating to abortion, and as such, is not part of the Commission's Terms of Reference. The Commission is not aware of any specific and current issues concerning the offence in s 290 of the Code; however, submissions about any problems or concerns with this offence are invited.

Invitation to Submit 2

The Commission invites submissions on matters relating to the offence of killing an unborn child in s 290 of the *Criminal Code* (WA).

Dangerous Driving Causing Death

Section 59 of the *Road Traffic Act 1974* (WA) creates the offence of dangerous driving causing death and provides:

(1) If a motor vehicle driven by a person ('the driver') is involved in an incident occasioning the death of, or grievous bodily harm to, another person and the driver was, at the time of the incident, driving the motor vehicle

- (a) while under the influence of alcohol, drugs, or alcohol and drugs to such an extent as to be incapable of having proper control of the vehicle; or
- (b) in a manner (which expression includes speed) that is, having regard to all the circumstances of the case, dangerous to the public or to any person,

the driver commits a crime and is liable to the penalty in subsection (3).

Alternative verdicts available when a charge under this section is dealt with summarily (that is, in the Magistrates Court) are dangerous driving causing bodily harm (s 59A), dangerous driving (s 61) or careless driving (s 62).

Section 59 of the *Road Traffic Act* was amended in 2004 by the *Road Traffic Amendment (Dangerous Driving) Act 2004*, otherwise known as Jess' law, which inserted subsection (1)(a) into the provision. The motivation for the amendments was the killing of a young girl by a drunk driver. The law now provides that drivers who kill a person whilst under the influence of alcohol or drugs to such an extent as to be incapable of having proper control of the vehicle, commit the offence of

dangerous driving causing death. There is no need for the prosecution to establish that the driver's intoxication caused the collision which resulted in the death.

The Second Reading Speech on the amendment states that:

When death is caused by an accident involving a motor vehicle driven by a drunk or intoxicated person, the fact of intoxication will be evidence of dangerous driving and it will be up to the person charged to satisfy the court that the death was not in any way attributable to the fact that he or she was drunk or intoxicated.

Section 59B(6) of the *Road Traffic Act* provides that it is a defence for a person charged with dangerous driving causing death to prove that the death was 'not in any way attributable to' the manner of driving or the fact that the driver was under the influence of alcohol or drugs. Jess' law reverses the onus of proof, requiring an accused person to prove his or her innocence in these circumstances.

Question 10

Should dangerous driving causing death be retained as a distinct offence under the *Road Traffic Act 1974* (WA)? Does the reversal of the onus of proof in s 59B(6) of the *Road Traffic Act* operate unfairly against drivers and, if so, should it be amended?

The Law Reform Commission of Western Australia invites submissions on any matters referred to in this Issues Paper. The deadline for submissions is 15 June 2006. Submissions should be sent to:

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Defences to Homicide

A person charged with wilful murder or murder may rely on a complete defence (such as self-defence) or a partial defence (such as provocation and, in other jurisdictions, diminished responsibility). If a complete defence is successfully raised the accused will be acquitted. If a partial defence is successfully raised the accused will be convicted of manslaughter instead of wilful murder or murder. Partial defences recognise particular circumstances where the accused is less morally culpable. It has been suggested that instead of relying on a partial defence,

circumstances indicating less moral culpability could adequately be taken into account during sentencing. This approach is problematic in Western Australia because the sentence for wilful murder and murder is a mandatory sentence of life imprisonment. If the sentences for wilful murder and murder were amended to provide for a maximum, rather than mandatory, sentence of life imprisonment, then issues that reduce the moral culpability of the accused could be taken into account during sentencing.

Provocation

The Code provides in s 281 that an offender is not guilty of wilful murder or murder, but guilty of manslaughter if he or she was provoked into doing the act which causes a death. Provocation is therefore a partial defence rather than a complete defence because it means that an accused is found guilty of a less serious offence, rather than being acquitted.

cannot easily be analysed in these terms. For example, the requirements that the accused acted suddenly and in the heat of passion reflect male rather than female patterns of aggression making it more difficult for women to rely on the defence.

Section 281 of the Code sets out the partial defence of provocation in the context of homicide:

When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute wilful murder or murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only.

Question 11

Should provocation be abolished as a partial defence to wilful murder and murder?

The defence of provocation will apply in circumstances where the provocation caused the accused to lose control; the accused killed the deceased whilst still out of control; and, having assessed the gravity of the provocation to the accused by reference to his or her personal characteristics, it is considered that the provocation could cause an ordinary person to lose self-control and commit homicide.

The 'ordinary person' test

The objective test of provocation—that is, how an ordinary person would have reacted to provocation of that degree of seriousness—has been criticised for its complexity and potentially unfairness to minorities. For example, it might be argued that the 'ordinary person' is male, Anglo Saxon, of a Judeo-Christian background and of heterosexual orientation. The Commission has recently considered these arguments in its Discussion Paper on Aboriginal Customary Laws where it invited submissions on whether an ordinary person should be defined as a person of the same cultural background as the accused for the purposes of assessing the gravity of the provocation and determining whether an ordinary person would have lost self-control.

The defence therefore has both objective and subjective components. The personal characteristics of an accused are considered when assessing the nature and seriousness of the provocation. Once the gravity of the provocation has been established, it is then necessary to assess how an ordinary person would have reacted to provocation of that degree of seriousness.

Question 12

If the objective 'ordinary person' test for provocation is to be retained, what characteristics should be taken into account in assessing an ordinary person's response to provocation? Should the person's age, sex, religion or ethnic background be taken into account? Should the defence be reformulated and a purely subjective test be introduced?

By providing a partial defence of provocation, the law considers that an offender is less than fully responsible for the homicide because they were not in control of their emotions at the time of the killing. There has been criticism of provocation as a partial defence. One of the main arguments in favour of abolishing the defence is that an 'ordinary person' should not be considered one who could be driven to lose his or her self-control to such an extent as to kill. Additionally, it is frequently pointed out that persons who rely on provocation actually intend to kill or cause grievous bodily harm. In these circumstances why should the result rest upon the defendant allegedly being out of control?

Provocation and sentencing

The defence of provocation was introduced when murder offences were punishable by a mandatory penalty of death. The punishment is now a mandatory sentence of life imprisonment. Those who argue in favour of retaining the defence suggest that if provocation is abolished, but intent

to kill or cause grievous bodily harm is proved, juries will be required to convict of murder or wilful murder regardless of circumstances of provocation. If the mandatory life sentence for murder offences was reduced to a maximum sentence of life imprisonment, then circumstances of provocation could be taken into account during sentencing.

Question 13

If the mandatory life sentence for murder offences was abolished, should the partial defence of provocation be retained?

Provocation and non-fatal offences

Provocation is not a defence to attempted murder; however, ss 245–246 of the Code provide that it is a complete defence to non-fatal offences that include assault as an element. Because there is discretion in sentencing in relation to non-fatal offences circumstances of provocation can be taken into account.

Question 14

If the partial defence to provocation for fatal offences is abolished is there any justification for retaining the complete defence of provocation for non-fatal offences that include assault as an element?

Self-defence

Self-defence is a complete defence to the offences of wilful murder, murder, manslaughter and attempted murder. There are two different types of self-defence under the Code. Section 248 of the Code provides for self-defence against an unprovoked assault.

When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for him to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, provided that the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.

If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that he cannot otherwise preserve the person defended from death or grievous bodily harm, it is lawful for him to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.

Section 249 of the Code provides for self-defence against a provoked assault.

When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults him with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce him to believe, on reasonable grounds, that it is necessary for his preservation from death or grievous bodily harm to use force in self-defence, he is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.

This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first began the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or to do grievous bodily harm to some person before the necessity of so preserving himself arose; nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable.

The distinction between provoked and unprovoked self-defence in the Code may be unnecessarily complex and difficult for juries to understand. Other jurisdictions incorporate a test that the force used in self-defence was reasonable and proportionate in the circumstances.

Question 15

Should self-defence be simplified and the distinction between provoked and unprovoked assaults be removed?

Self-defence contains an assessment of what the accused believed at the time of the killing (a subjective element) as well as consideration of whether that belief was based on reasonable grounds (an objective element). Some have argued for an entirely subjective defence, where a jury is simply required to determine whether the accused honestly believed his or her actions were necessary. The alternative position is an entirely objective test, where a jury must ask whether the accused's actions were necessary in all the circumstances.

Question 16

By incorporating both subjective and objective elements, is the test of self-defence too complicated and difficult for juries to understand? Should either an entirely subjective test, or alternatively an entirely objective test, be introduced?

Excessive self-defence

In some situations a person may honestly believe that their conduct, which resulted in the death of another, was necessary in self-defence. However, when judged objectively the conduct may be determined to be excessive in the circumstances. This may have particular relevance to battered women (see below) who may use force that is disproportionate or excessive. The Victorian Law Reform Commission recently recommended the introduction of a partial defence of 'excessive self-defence' which would operate to reduce murder to manslaughter. The

Defences to Homicide

rationale for such a defence is that the person who kills in these circumstances has reduced moral culpability.

It has also been suggested that a partial defence of excessive self-defence would add unnecessary uncertainty to the law and should not be introduced. There is currently no partial defence of excessive self-defence in Western Australia.

Battered Women's Syndrome

Battered women's syndrome is the term given to the situation where women kill in response to prolonged domestic violence or abuse. It has been used to explain why some women do not respond immediately to abuse and why they remain in an abusive relationship. Battered women's syndrome is not a defence in its own right; however, in some cases it may support defences such as self-defence and provocation. In cases where evidence of battered women's syndrome is presented, courts have sought to relax the requirements of the defences of provocation and self-defence.

The requirement that a response to provocation must be sudden and in the heat of passion does not necessarily accommodate the experiences of battered women. Likewise, the requirements under self-defence that the threat of harm must be imminent and that the killing must be an immediate

Insanity

Section 27 of the Code deals with offenders who are legally insane at the time that they commit a homicide or other offence.

A person is not criminally responsible for an act or omission on account of unsoundness of mind if at the time of doing the act or making the omission he is in such a state of mental impairment as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission.

A person whose mind, at the time of his doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was induced by the delusions to believe to exist.

The defence requires not only that the accused suffered at the relevant time from a mental condition but that this deprived the accused of one of three capacities: being able to understand the act done; being able to control his or her actions; or knowing that the act was wrong. Proving that an offender comes within the scope of s 27 of the Code requires psychiatric evidence. Sometimes both the prosecution and the defence call their own experts, who may disagree as to whether the accused comes within this provision. Unlike other defences discussed above (which, once raised by the accused, the prosecution must disprove beyond reasonable doubt), the

Question 17

Should a partial defence of excessive self-defence be introduced in Western Australia? If so, how should the defence be formulated? Alternatively, is excessive self-defence an issue which can be dealt with adequately during the sentencing process if mandatory life imprisonment is abolished?

response to the violence, are aspects which limit the application of the defence in circumstances where women kill their partners after years of domestic abuse. If a woman kills her spouse before or some time after an incident of abuse it is difficult to establish that she feared imminent death or could not otherwise remove herself from the situation.

Question 18

Should the defences of provocation and self-defence be amended to enable battered women to rely upon them in relation to homicide of a partner? Alternatively, should a separate defence be established for women who kill in response to serious and prolonged domestic violence or abuse? If so, should such a defence extend to others in abusive relationships?

accused must prove that he or she was insane at the time of the offence on the balance of probabilities.

Whether an accused person meets the test for insanity in s 27 of the Code is usually determined by a jury. However, an application can be made for a trial by judge alone, in which case the judge determines whether the accused meets the test for insanity.

Under the Code, if an offender meets the legal test for insanity they have a complete defence; that is, they are not responsible for their offending and are effectively not guilty of homicide. The *Criminal Law (Mentally Impaired Accused) Act 1996* dictates how the court must deal with an offender who has been found not guilty for reason of insanity. In the case of a successful defence of insanity in relation to a homicide offence, the offender must be made the subject of a custody order in a mental health facility or prison. Under such an order there is no right to parole and no fixed term: the offender can only be released by order of the Governor. Where offenders are convicted of less serious offences by reason of insanity they can be released on community-based orders (which can include treatment conditions).

Question 19

Should the issue of insanity remain principally one for the jury? Should this be determined before or after the guilt of the accused on the facts alleged? Do the requirements in s 27 of the *Criminal Code* (WA) require change?

Diminished Responsibility

In some jurisdictions diminished responsibility can be raised by the accused as a partial defence to murder (reducing the offence to manslaughter). It applies where the accused was suffering from an abnormality of mind which arose from a specified cause, and where that abnormality substantially impaired the accused's mental responsibility for the act. Like insanity, the onus is on the accused to prove, on the balance of probabilities, that he or she was suffering from an abnormality of the mind at the time of the offence.

Those who may be able to raise the defence of diminished responsibility include persons with intellectual disabilities or psychosis; people who are suffering from post traumatic stress disorder; and women who commit infanticide. The rationale underlying the defence is that offenders with significant mental impairment are less morally culpable than offenders who do not have such impairment. It is also argued that offenders who kill whilst suffering some sort of mental impairment should not be labelled as murderers.

Diminished responsibility is not currently a defence available under the Code.

Question 20

Should a partial defence of diminished responsibility be introduced into the Code? If so, what should be its scope? What areas should be encompassed within the term 'abnormality of mind'? Should it, for example, include issues such as depression? Who should determine questions of insanity and diminished responsibility? Would the abolition of a mandatory life sentence for murder and wilful murder avoid the need for the introduction of a diminished responsibility defence?

Question 21

Should infanticide be incorporated within a defence of diminished responsibility? Or should infanticide be considered during the sentencing process rather than as a partial defence in the trial process?

Accident and Unwilled Acts

Section 23 of the Code provides that a person is not responsible for a homicide if the act or omission that causes the death occurs independently of the person's will or if the death occurs by accident.

Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

The first paragraph of s 23 of the Code contains two distinct limbs. The first involves an act or omission committed independently of the exercise of the accused's will. This includes the defence known at common law as 'automatism', as well as unwilled reflex actions. The second involves an unforeseeable consequence of an act or omission, properly described as 'accident'.

Automatism is generally described as a temporary state where a person's body continues to function, but his capacity to act voluntarily has been overcome. Automatism can therefore result from a blow to the head, a psychological condition, certain medical conditions such as epilepsy and sleepwalking. Medical evidence is required to establish the accused's thought processes and mental state at the time of the alleged offence.

Accident involves a person whose mental faculties are intact but who is alleged to be responsible for an event that was not intended, not foreseen and not reasonably foreseeable. For example, a person who hit a golf ball and struck another person who died as a result. In this case the accused would argue that they did not intend to kill the person, did not foresee that they would kill the person and that the death of another was not reasonably foreseeable.

Question 22

Should the two limbs of s 23 of the *Criminal Code* (WA) be separated to provide for separate and distinct offences of 'unwilled act' and 'accident'? Are there any other issues with respect to s 23 of the Code which the Commission should be aware of?

The Law Reform Commission of Western Australia invites submissions on any matters referred to in this Issues Paper. The deadline for submissions is 15 June 2006. Submissions should be sent to:

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Defences to Homicide

Duress

Section 31 of the Code provides:

A person is not criminally responsible for an act or omission if he does or omits to do the act under any of the following circumstances, that is to say:

- (1) In execution of the law;
- (2) In obedience to the order of a competent authority which he is bound by law to obey, unless the order is manifestly unlawful;
- (3) When the act is reasonably necessary in order to resist actual and unlawful violence threatened to him, or to another person in his presence;
- (4) When he does or omits to do the act in order to save himself from immediate death or grievous bodily harm threatened to be inflicted upon him by some person actually present and in a position to execute the threats, and believing himself to be unable otherwise to escape the carrying of the threats into execution.

But this protection does not extend to an act or omission which would constitute an offence punishable with strict security life imprisonment, or an offence of which grievous bodily harm to the person of another, or an intention to cause such harm, is an element, nor to a person who has, by entering into an unlawful association or conspiracy, rendered himself liable to have such threats made to him.

Subsection 31(4) of the Code contains the defence referred to as duress. However, unlike at common law, in Western Australia the defence only applies where a person is themselves threatened with imminent harm – the threat of harm to others would not invoke the defence. Duress is excluded in the Code as a defence to wilful murder or murder but could apply to attempted murder or manslaughter. The rationale for the defence is to excuse criminal liability where a person has been faced with a choice between two evils: a choice of either committing the offence or suffering the harm that has been threatened.

Extraordinary Emergency

It is noteworthy that another form of compulsion, namely extraordinary emergency, is available to all offences (including homicide offences). The Code recognises a defence of extraordinary emergency in s 25 which provides:

Subject to the express provisions of this Code relating to acts done upon compulsion or provocation or in self-defence, a person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise.

Question 23

Is it reasonable to expect a person to sacrifice their own life rather than kill an innocent person? Should a person who kills another under duress be convicted of murder?

Duress is a defence to murder and attempted murder under the Commonwealth and ACT Criminal Codes. These jurisdictions provide that a person is acting under duress if the person reasonably believes that a threat has been made that will be carried out unless an offence is committed; that there is no reasonable way that the threat can be rendered ineffective; and that the conduct is a reasonable response to the threat.

The Commission has recently considered duress in its Aboriginal Customary Laws Discussion Paper and has proposed that s 31(4) of the Code be amended to remove the requirement that there must be a threat of immediate death or grievous bodily harm; that s 31(4) be amended to provide that the threat may be directed towards the accused or to some other person; and that the defence include an objective test.

Question 24

Should the reformulated defence of duress as proposed by the Commission also apply to murder and wilful murder?

Invitation to Submit 3

It should be noted that the defences contained in ss 31(2)–(4) of the *Criminal Code* (WA) also do not apply to murder or wilful murder. The Commission is not aware of any issues or problems in relation to these subsections; however it invites submissions on any concerns about their operation.

Unlike the current defence of duress under the Code, the defence of extraordinary emergency incorporates an objective element.

Question 25

Bearing in mind the Commission's proposal in its Aboriginal Customary Laws Discussion Paper to include an objective test for the defence of duress is there any rationale for excluding murder and wilful murder from the defence of duress when they are included within the defence of extraordinary emergency?

Aboriginal Customary Law

In Project 94 the Commission considered whether there should be a partial defence of Aboriginal customary law which, if proved, would result in a conviction for manslaughter instead of murder or wilful murder. Such a defence could apply in circumstances where the conduct that caused the death of the person was required or permissible under Aboriginal customary law. Such a defence may be justified because the accused is less morally blameworthy and because there is little scope for customary law issues to be taken into account during sentencing.

Intoxication

In order to rely on the defence of intoxication it is necessary for the accused to fall within the provisions relating to the defence of insanity (s 27 of the Code). This means that the accused must have been involuntarily intoxicated to the extent that they did not have the capacity to understand what they were doing, to control their actions or to know that they ought not do the act or make the omission. Section 28 of the Code sets out the defence:

The provisions of the last preceding section apply to the case of a person whose mind is disordered by intoxication or stupefaction caused without intention on his part by drugs or intoxicating liquor, or by any other means.

They do not apply to the case of a person who has intentionally caused himself to become intoxicated or stupefied, whether in order to afford excuse for the commission of an offence or not.

Question 26

Should there be a partial defence of Aboriginal customary law and if proved, should that result in a person charged with wilful murder or murder instead being convicted of manslaughter? If the mandatory sentence of life imprisonment for wilful murder and murder is abolished then can an Aboriginal customary law justification for the offence be adequately taken into account during sentencing?

When an intention to cause a specific result is an element of an offence, intoxication whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention in fact existed.

If a person is voluntarily intoxicated then that state cannot be raised as a defence, but it may be taken into account by the court in determining whether the accused had the relevant intention attached to the offence. This has particular relevance to the offences of wilful murder and murder because they require proof of an intent to kill or cause grievous bodily harm.

Invitation to Submit 4

The Commission is not aware of any issues or problems in relation to intoxication; however it invites submissions on this matter.

Sentencing

When an accused person has either pleaded guilty to a homicide offence, or is found guilty after a trial of a homicide offence, a sentencing hearing before a judge takes place.

Wilful murder

The sentence for wilful murder is mandatory life imprisonment (s 282(2)(a) of the Code). When a person is convicted of wilful murder, they may be sentenced to either life imprisonment or strict security life imprisonment. A judge generally takes three factors into account in making the choice between life imprisonment and strict security life imprisonment, namely:

- (1) the circumstances of the offence and the gravity of the crime, so as to place it somewhere in the scale of seriousness of other crimes of wilful murder;
- (2) the antecedents of the offender – character, personal circumstances, previous criminal history, upbringing; and
- (3) the need to protect the public – the likelihood of the offender committing serious offences in the future.

The second step is for the sentencing judge to determine the length of the term to be served by the offender before he or she may apply for release on parole. There are no statutory criteria setting out what factors the sentencing judge must look at in deciding the length of the minimum term. Where a wilful murderer is sentenced to life imprisonment, the minimum term before becoming eligible for parole is between 15 and 19 years (s 90(2) of the *Sentencing Act 1995*). Where a wilful murderer is sentenced to strict security life imprisonment, the minimum term before coming eligible for parole is between 20 and 30 years (s 91(1) of the *Sentencing Act*). These terms are minimum terms, it does not necessarily follow that release on parole will be granted. The decision whether or not to release a life sentence prisoner on parole is made by the Governor upon recommendation by the parole board and the Attorney General.

A judge can also order that a person be imprisoned for the whole of his or her life. A judge must make such an order if it is necessary to do so to meet the community's interest in

Sentencing

punishment and deterrence (s 91(3) of the *Sentencing Act*). In determining whether such an order is necessary, the only matters relating to the offence that are to be taken into account are the circumstances of the commission of the offence and any aggravating factors (s 91(4) of the *Sentencing Act*).

The Commission is unaware of any cases where a sentencing judge has sentenced an offender to a whole of life term under s 91(3) of the *Sentencing Act*. However, the provisions of the precursor to s 91(3), the now repealed s 40D(2a) of the *Offenders Community Corrections Act 1963* (WA), was considered by the High Court which stated that when exercising this power the proper approach is for a court to make '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'. The power to sentence a person to a whole of life term is arguably only to be exercised in extreme circumstances, as it precludes any chance that the offender will ever be released, even if fully rehabilitated.

Question 27

Is the sentencing process for wilful murder unnecessarily complicated? Should the factors to be considered be set out in the Code? Is it necessary to have two categories of seriousness for wilful murder? Should there continue to be the option of a whole of life term of imprisonment?

Murder

The penalty for persons convicted of murder is also a mandatory sentence of life imprisonment (s 282(2)(a) of the Code). Section 90(1) of the *Sentencing Act* states that an offender who has been convicted of the offence of murder must be sentenced to a minimum term of imprisonment of 7–14 years before becoming eligible for parole.

Question 28

Should the mandatory penalty of life imprisonment for wilful murder or murder be retained? If not should the penalty be a maximum of life imprisonment or should there be a minimum term or range of terms which applies? If the partial defence of provocation is abolished, how can the range of circumstances in such cases be adequately reflected in the sentencing process? Should a sentencing judge have a full range of sentencing options (including non-custodial sentences) in certain circumstances? If so, in what circumstances?

Question 29

If wilful murder and murder are not retained as separate offences, how should the changes be reflected in the penalty provisions?

Attempted murder

Section 283(1) of the Code provides that the maximum penalty for attempted murder is life imprisonment. There is therefore greater flexibility in the sentencing process for this offence.

Manslaughter

Section 287 of the Code provides a maximum penalty of 20 years' imprisonment for the offence of manslaughter. Given the broad range of circumstances that could result in a manslaughter conviction, the offence attracts wide variations in sentence.

Question 30

If the offences of wilful murder and murder were not retained separately and those homicides which currently constitute murder were included in manslaughter, should the maximum sentence for manslaughter be increased to life imprisonment?

Infanticide / attempted infanticide

Section 287A of the Code provides a maximum of seven years' imprisonment for infanticide. This penalty is mirrored for the offence of attempted infanticide.

Dangerous driving causing death

Uniquely for a homicide offence, dangerous driving causing death can be dealt with summarily by the Magistrates Court. The penalties in the Magistrates Court are a maximum fine of \$8,000 or 18 months' imprisonment and disqualification of the offender's drivers licence for a minimum of two years.

If the charge is dealt with in the District Court the maximum penalties vary according to the circumstances of the offence. If the offence includes the offender 'driving under the influence' or, if under s 59B(3) of the *Road Traffic Act* an offence is aggravated (by the offender being involved in a police chase, driving at more than 45kmh over the speed limit, or driving a stolen car) the maximum penalties are 20 years' imprisonment or an unlimited fine and disqualification of the offender's drivers licence for a minimum of two years.

If the offence does not involve any of these factors, the maximum penalties are a fine of \$20,000 or four years' imprisonment and disqualification of the offender's drivers licence for a minimum of two years.

Question 31

Are these penalties appropriate? Are they broad enough in their range to enable all the varying circumstances to be reflected in the sentences?

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