

Introduction

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Introduction

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Introduction

TERMS OF REFERENCE

On 26 April 2005 the Commission received a reference from the Attorney General, the Hon. Jim McGinty MLA, to examine and report upon the law of homicide¹ in Western Australia. In particular, the Commission was asked to give consideration to:

- (i) the distinction between wilful murder and murder;
- (ii) the defences or partial excuses 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 further asked to report on the adequacy of the existing law, practices and procedures in relation to homicide offences and defences and the desirability of changes to those laws.

MATTERS BEYOND THE SCOPE OF THE REFERENCE

Although the issues of abortion, euthanasia and the reintroduction of the death penalty could conceivably be considered in a homicide inquiry, the Commission determined that these issues were beyond the scope of the reference.² The reasons for this determination varied in each case and are set out below.

Death penalty

Since 1985 the death penalty has been abolished in all Australian jurisdictions.³ Western Australia was one of the

last jurisdictions to abolish the death penalty in 1984.⁴ In its inquiry into sentencing in 1998, the Australian Law Reform Commission (ALRC) commented that once 'repealed, the death penalty should never be re-instated'.⁵ It found that the death penalty is 'retributive justice at its rawest'⁶ and highlighted the irreversible nature of this sentence. The ALRC also commented that the death penalty is contrary to international human rights standards.⁷ In recent years, there have been a number of high profile cases in Western Australia where the accused has subsequently been found to have been wrongfully convicted of wilful murder or murder. In some cases the accused had spent a significant number of years in prison before the original conviction was overturned.⁸ These cases emphasise the injustice that could occur if convicted murderers were to be subject to the death penalty.⁹ Any consideration of the re-introduction of the death penalty would necessarily become a highly politicised topic and the Commission is of the view that it is inappropriate and unnecessary to consider the issue within this reference.

Abortion

The law relating to abortion was considered in detail in Western Australia in 1998. Since May 1998,¹⁰ the *Criminal Code* (WA) (the Code) and the *Health Act 1911* (WA) have provided that an abortion, carried out under specified circumstances, is not a criminal offence.¹¹ These amendments occurred after extensive public and political debate.¹² Medical practitioners and others in the health profession were also extensively consulted about the proposed amendments.¹³ In 2002 the effectiveness and operation of these laws were reviewed and it was

1. In this Report the Commission uses the term homicide to refer to incidents involving the unlawful killing of another person. This is consistent with the approach under the *Criminal Code* (WA). Section 277 (which is titled 'Unlawful Homicide') sets out the various offences that constitute unlawful killing; namely wilful murder, murder, manslaughter and infanticide. Attempted murder is discussed where necessary for the sake of comparison.
2. Law Reform Commission of Western Australia (LRCWA), *Review of the Law of Homicide*, Issues Paper (2006) 1.
3. Western Australia has often been cited as the last Australian jurisdiction to abolish the death penalty; however, the death penalty remained available as a punishment for certain offences relating to piracy and treason in New South Wales until 1985. See Potas I & Walker J, 'Capital Punishment' (1987) 3 *Australian Institute of Criminology: Trends and Issues* 1–2. The death penalty was abolished under federal law in 1973 by the *Death Penalty Abolition Act 1973* (Cth).
4. *Acts Amendment (Abolition of Capital Punishment) Act 1984* (WA) s 20.
5. Australian Law Reform Commission (ALRC), *Sentencing*, Report No. 44 (1988) [31].
6. *Ibid.* See also Potas I & Walker J, 'Capital Punishment' (1987) 3 *Australian Institute of Criminology: Trends and Issues* 5.
7. ALRC, *ibid.*
8. See in particular, *Beamish* [2005] WASCA 62, [424] where the conviction was overturned by the Supreme Court of Criminal Appeal after more than 40 years. Beamish was originally convicted of wilful murder and sentenced to death. The death penalty was later commuted to life imprisonment and Beamish served his full sentence before being released on parole. In the highly publicised case *Mallard* [2005] HCA 68, the accused was originally convicted of murder and sentenced to life imprisonment. The High Court overturned the conviction in 2005.
9. In 1987 Potas and Walker emphasised that because it is well known that mistakes can occur in the criminal justice system the 'modern history of the death penalty is replete with examples where sentences of death have been commuted to less severe forms of punishment, indicating a reluctance to impose the ultimate sanctions even when available': see Potas I & Walker J, 'Capital Punishment' (1987) 3 *Australian Institute of Criminology: Trends and Issues* 2.
10. See *Acts Amendment (Abortion) Act 1998* (WA).
11. *Criminal Code* (WA) s 199; *Health Act 1911* (WA) s 334.
12. The Criminal Code Amendment (Abortion) Bill 1998 originated as a private member's bill in the Legislative Council of the Western Australian Parliament by Cheryl Davenport MLC: see Western Australia, *Parliamentary Debates*, Legislative Council, 10 March 1998, 11 (Cheryl Davenport).
13. The Acts Amendment (Abortion) Act 1998 Review Steering Committee, *Report to the Minister for Health on the Review of Provisions of the Health Act 1911 and the Criminal Code Relating to Abortion as Introduced by the Acts Amendment (Abortion) Act 1998* (June 2002) 7.

concluded that the legislation was working as intended.¹⁴ Because the current law relating to abortion has been comprehensively and recently considered, and because there is no apparent need for reform, the Commission does not believe that it is appropriate to include abortion within the scope of this reference.

Euthanasia

Although the Commission made clear in its Issues Paper that it considered euthanasia to be beyond the scope of the reference, a number of submissions on the subject were received.¹⁵ Voluntary euthanasia generally refers to the killing of another person with his or her consent for the purpose of relieving pain or suffering resulting from a terminal illness.¹⁶ These types of cases are sometimes referred to as 'mercy killings'. The Coalition for the Defence of Human Life submitted that euthanasia should be considered within this reference.¹⁷ Similarly, the West Australian Voluntary Euthanasia Society submitted that the law in Western Australia should recognise the reduced culpability of a person who kills a close relative for compassionate reasons and that the issue of euthanasia is 'too important to ignore'.¹⁸ The Criminal Lawyers' Association and Dr Thomas Crofts suggested that there could be a separate offence for euthanasia with a lesser maximum penalty than is currently the case for the offences of wilful murder and murder.¹⁹

The Commission agrees that euthanasia is an important legal, medical and moral issue. In this Report the Commission has noted that 'mercy killings' would usually constitute wilful murder.²⁰ Intentional killing of another person for compassionate reasons and with that person's consent would generally be considered significantly less morally culpable than the behaviour of many other people who

kill. However, s 261 of the Code provides that the consent of the deceased (to his or her own death) is irrelevant for the purpose of determining criminal responsibility for homicide.

The Commission has purposefully excluded consideration of euthanasia from this reference. It is the Commission's opinion that the issues surrounding euthanasia are far too complicated²¹ and controversial to be properly examined in a reference which addresses the general law in relation to homicide.²² Other law reform bodies have determined that considering euthanasia within a reference on the general law of homicide is inappropriate. The Model Criminal Code Officers Committee (MCCOC) stated that if legal exceptions are to be made in this area those exceptions should be contained in specific legislation.²³ The Victorian Law Reform Commission stated that 'the law concerning euthanasia would be more appropriately dealt with in a specific reference on that area'.²⁴ The Commission agrees and recommends that an inquiry be established to review the law in this area.

Recommendation 1

Inquiry on euthanasia and related matters

1. That the Attorney General of Western Australia establish an inquiry into how the law in Western Australia should respond to euthanasia, mercy killings, suicide pacts and any other related matter.
2. That the Attorney General of Western Australia direct that this inquiry be undertaken in consultation with medical experts and other relevant organisations and individuals.

14. Ibid 12–13.

15. West Australian Voluntary Euthanasia Society, Submission No. 19 (12 June 2006) 1; Coalition for the Defence of Human Life, Submission No. 32 (16 June 2006) 1; Dr Thomas Crofts, Submission No. 33 (16 June 2006) 2; Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 12.

16. See Legislative Council, Western Australia, *Report of the Constitutional Affairs Committee in Relation to Petitions Regarding Voluntary Euthanasia*, Report No. 23 (1998) 3–4, where it was stated that euthanasia is generally defined as 'actions that have as their intention or likely consequence the shortening of another person's life to prevent further pain and suffering of that person' and voluntary euthanasia was described in terms of intervention with the consent of the person to end his or her life.

17. The Commission notes that the Coalition for the Defence of Human Life also submitted that abortion should be considered in this reference: see Coalition for the Defence of Human Life, Submission No. 32 (16 June 2006) 1.

18. West Australian Voluntary Euthanasia Society, Submission No. 19 (12 June 2006) 1.

19. Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 12; Dr Thomas Crofts, Submission No. 33 (16 June 2006) 2. Dr Crofts alternatively suggested that there could be a partial defence where a person kills another at his or her request in circumstances where the deceased was terminally ill.

20. See Chapter 2, 'The Distinction Between Wilful Murder and Murder'.

21. In the Commission's opinion this would require consideration of medical and mental health issues as well as legal issues. Public forums or a survey of general public opinion would also be important evidence in determining this matter.

22. The Commission notes that the offence of aiding a suicide is linked to the issue of euthanasia and accordingly has not considered it in this Report. Section 288 of the Code provides that it is an offence to procure, counsel or aid 'another in killing himself'. The punishment is a maximum penalty of life imprisonment and, therefore, unlike wilful murder and murder there is discretion for the sentencing judge to take into account any mitigating circumstances that may be present, such as the fact that the accused assisted a close relative to end his or her life with the relative's consent. The Commission notes that the offence of aiding a suicide may take place in circumstances other than for compassionate reasons but it is not aware of any general need for reform.

23. Model Criminal Code Officers Committee, *Fatal Offences Against the Person*, Discussion Paper (1998) 189.

24. Victorian Law Reform Commission (VLRC), *Defences to Homicide*, Issues Paper (2002) [1.24]. For similar reasons the VLRC did not consider the law relating to 'suicide pacts'.

ABOUT THIS REPORT

Presentation

Following a discussion of the Commission's approach to reform in this section, the remainder of this Report is presented in seven chapters. Chapter 1 includes an overview of general criminal law principles and the main legal concepts surrounding the law of homicide. Chapter 2 considers the offences of wilful murder and murder and in particular, the appropriate mental element required for wilful murder and/or murder. Importantly, this chapter also examines the appropriateness of the distinction between wilful murder and murder. Chapter 3 deals with other homicide offences: manslaughter, infanticide and dangerous driving causing death.²⁵ A number of defences (including the partial defence of provocation) are considered in Chapter 4.²⁶ Chapter 5 deals specifically with defences relating to mental impairment. Chapter 6 looks at homicide in the context of domestic violence. Finally, the sentencing regime for murder and manslaughter is considered in Chapter 7.

Recommendations

The Commission has made a total of 45 recommendations amending the law of homicide in Western Australia. The recommendations in this Report represent the Commission's view about how the law of homicide should operate in its entirety; that is, in relation to offences, defences and sentencing. Therefore, many of the recommendations are interrelated. For instance, the Commission has recommended that the rarely charged offence of infanticide should be repealed and has also recommended that the partial defence of provocation be abolished. But at the same time, the Commission has recommended the abolition of mandatory life imprisonment

to provide greater flexibility in sentencing for murder. This will ensure that cases falling within the provisions of infanticide and provocation can be appropriately dealt with by the justice system. Further, the Commission has recommended that the partial defence of diminished responsibility not be introduced in Western Australia. This conclusion must be viewed in the context of the Commission's recommendations to provide greater flexibility for courts when dealing with offenders convicted of murder and when dealing with mentally impaired accused. In addition, the Commission has recommended significant reforms to self-defence and the introduction of a partial defence of excessive self-defence. Because of the way the recommendations necessarily interact and interrelate, the Commission strongly encourages the Western Australian government to treat the recommendations in this Report as a *cohesive package of reform*.

The Commission acknowledges that the implementation of the recommendations in this Report will substantially change the law of homicide in Western Australia. As a result, the Commission is of the view that after the recommendations have been implemented for five years there should be a review of how the new laws of homicide are operating in practice. This review should focus on examining cases to determine if the changes to the law are operating as intended.

Recommendation 2

Review of reforms to the law of homicide

That the Western Australian government review the practical operation of the laws of homicide after any of the recommendations in this Report have been implemented for a period of five years.

25. The Commission has not separately dealt with the offence of killing an unborn child in this Report. It is discussed briefly in Chapter 1.

26. The Commission has not examined every defence that is potentially available to an offence of homicide. Instead the Commission has focused on the more common or problematic defences. In its Issues Paper it was stated that the Commission was unaware of any problems with the defence of intoxication under s 28 of the Code. The Commission did not receive any submissions identifying problems with the defence of intoxication. Accordingly, intoxication is not examined in this Report.

The Commission's Approach to Reform

In early 2006 the Commission published an Issues Paper seeking submissions on offences of homicide, defences and sentencing.¹ The Commission received over 50 submissions from members of the judiciary, organisations and individuals² and consulted with various experts involved in the criminal justice system.³ The Commission emphasises that each recommendation in this Report should not be viewed in isolation.⁴ The Commission has approached the task of reforming the law of homicide with the aim of ensuring that the laws of homicide in this state are principled, clear, consistent and modern. Thus, in order to provide a framework for coherent and principled reform to the law of homicide in Western Australia, the Commission determined seven guiding principles for reform.

GUIDING PRINCIPLES FOR REFORM

Principle One: Intentional killings

In general terms, intentional killing should be distinguished from unintentional killing. In most jurisdictions murder requires proof of an intention to kill or an intention to cause serious injury. In contrast, manslaughter does not require proof of any specific intention. Thus, murder and manslaughter are generally distinguished by the presence or absence of intention. The Commission has recommended that the mental element for murder should be an intention to kill or an intention to cause an injury likely to endanger life.⁵ It is the Commission's view that the difference between an intentional killing and an unintentional killing is significant. While it is not possible to say that every intentional killing is more serious than every unintentional killing, the culpability of a person who intends to kill (or cause a life-threatening injury) is invariably much higher than the culpability of a person who did not intend to kill (or cause a life-threatening injury). The Commission considers that it is appropriate to continue to differentiate intentional killings from unintentional killings by the retention of separate offences of murder and manslaughter.

The present law in Western Australia does not treat all intentional killings as murder. An intentional but provoked killing is classified as manslaughter on the basis of the partial

defence of provocation. Further, the intentional killing of a child under the age of 12 months by its biological mother may be categorised as infanticide. Although not currently available in Western Australia, other partial defences (such as diminished responsibility and excessive self-defence) also reduce an intentional killing to the status of an unintentional killing. Historically, the principal justification for partial defences was to avoid the mandatory death penalty (and subsequently the mandatory penalty of life imprisonment) for murder.

In this Report the Commission has examined three partial defences (provocation, diminished responsibility and excessive self-defence), as well as the offence of infanticide. The Commission's first guiding principle is not absolute: it is acknowledged that there may be circumstances where an intentional killing is morally equivalent to an unintentional killing. In order to constitute an acceptable departure from this principle, it is the Commission's view that partial defences are only appropriate if the circumstances giving rise to the defence *always* demonstrate reduced culpability. If so, it is appropriate that the killing is categorised as a different offence with different consequences. The Commission has concluded that the only partial defence to satisfy this test is excessive self-defence.

The offence of murder in Western Australia also includes felony-murder. Under s 279(2) of the Code, murder is defined to include an unlawful killing where death is caused by an act of such a nature as to be likely to endanger life and where that act is done in the prosecution of an unlawful purpose. Because of this provision, murder also includes some unintentional killings. After careful examination of felony-murder, including examples of cases in Western Australia, the Commission has concluded that the felony-murder provision is appropriate. As stated above, there may be circumstances where an intentional killing is morally equivalent to an unintentional killing – the reverse is also true. The culpability involved in felony-murder is sufficiently serious to elevate the unintended killing to the status of murder. It is the combination of dangerous conduct and the presence of an unlawful purpose that increases culpability.

1. Law Reform Commission of Western Australia (LRCWA), *Review of the Law of Homicide*, Issues Paper (2006).

2. See Appendix B.

3. See Appendix B.

4. For an overview of the Commission's reforms to the law of homicide, see 'Overview of the Commission's Reforms to the Law of Homicide' at the end of this section.

5. The Commission closely examines the mental element for murder and concludes that an intention to cause an injury of such a nature as to be likely to endanger life is closely comparable to an intention to kill: see Chapter 2, 'The Mental Element of Murder: Intention to do grievous bodily harm'. The Commission also recommends in Chapter 2 that the distinction between wilful murder and murder should be abolished.

Principle Two: Lawful purpose

The only lawful purpose for intentional killing is self-preservation or the protection of others. The Commission has determined that the only lawful purpose for an intentional killing is self-preservation or the protection of others. No other purpose should excuse or justify an intentional killing.⁶ This principle underpins the Commission's recommendations in relation to the defences of self-defence, duress and emergency; in each case the defence only applies if the purpose for killing was self-preservation or the protection of another. Of course, the existence of this lawful purpose is not of itself sufficient to establish each defence. Additional requirements for each defence ensure that they are kept within appropriate limits.

As stated above, the Commission has recommended that the partial defence of excessive self-defence be introduced in Western Australia. The elements of the recommended partial defence require that the accused reasonably believed that it was necessary to use defensive force and further, that the accused believed that the death-causing act was necessary in the circumstances. The difference between self-defence and excessive self-defence is that for self-defence the killing is a reasonable response to the threat, but for excessive self-defence the killing is unreasonable. In all other respects the requirements for each defence are the same. In other words, the purpose for killing is identical, but in the case of excessive self-defence the accused has mistakenly used too much force. In terms of moral culpability, an intentional killing in excessive self-defence is more akin to negligent manslaughter than murder. The Commission believes that the elements of its recommended partial defence of excessive self-defence ensure that only those cases that demonstrate reduced culpability will qualify for the defence.

Principle Three: Mental incapacity

The only other excuses for intentional killing are mental impairment and immature age. The Commission has concluded that mental impairment is an appropriate excuse for an intentional killing.⁷ The

defence of insanity excuses an accused from criminal responsibility if the accused—as a result of mental impairment—did not have the capacity to understand what he or she was doing, to control his or her actions, or to know that he or she ought not to do the act or make the omission. The underlying basis for this defence is that an accused should not be held criminally responsible and punished if he or she lacked the mental capacity to make rational choices about conduct. On a similar basis, s 29 of the Code recognises that children below a certain age do not have sufficient mental capacity to be held criminally responsible. A child under the age of 10 years cannot be held criminally responsible for any offence; while a child between the ages of 10 and 14 years is not criminally responsible if he or she did not have the capacity to know that he or she ought not to do the act or make the omission.⁸

Principle Four: Culpability and sentencing

There should be sufficient flexibility in sentencing to reflect the different circumstances of offences and the relative culpability of offenders. Although intentional killing is generally more serious than unintentional killing, there are a wide range of circumstances in which intentional killings can be committed. Thus not all intentional killings are equally culpable and differences in degrees of culpability should be taken into account.

Other law reform bodies have approached this issue by deciding whether differences in culpability should be determined during sentencing or by a jury. A conclusion that differences in culpability should be determined by a jury inevitably supports partial defences. The New South Wales Law Reform Commission supported partial defences principally because they enabled community input into decisions about culpability and thereby enhanced the community's acceptance of sentences imposed for manslaughter.⁹ On the other hand, the Victorian Law Reform Commission concluded that differences in degrees of culpability for intentional killing should be taken into account during sentencing, rather than through partial defences.¹⁰ The New Zealand Law Commission observed


6. The Commission notes that killing for the purpose of compassion arguably reduces culpability to such an extent that the offender should be partially excused. However, as explained above, the Commission has determined that euthanasia, mercy killings and suicide pacts are beyond the scope of this reference: see above, 'Matters Beyond the Scope of the Reference'.

7. The defences of unwillful conduct and accident under s 23 of the Code are available as a defence to wilful murder or murder; however, proof of the required intention for murder would be inconsistent with the elements of these defences. In other words, although these defences can be raised in a trial for wilful murder and murder they cannot excuse an intentional killing. If successfully raised it would mean that the prosecution was unable to prove beyond reasonable doubt that the accused had formed the relevant intention: see Chapter 4, 'Unwillful Conduct and Accident'.

8. The Commission has not examined the defence of immature age in this Report.

9. New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and infanticide*, Report No. 83 (1997) [2.24].

10. VLRC, *Defences to Homicide*, Final Report (2004) [1.29].



that the jury participation argument would demand a partial defence for every conceivable circumstance that ‘renders intentional killing less culpable’.¹¹

The Commission has approached this issue differently. Instead of asking who should determine degrees of culpability, the Commission believes the correct question is: ‘in what circumstances is it appropriate to reduce an intentional killing to the same status as an unintentional killing?’ As stated above, this should occur in very limited circumstances – where the purpose for the killing is self-preservation or the protection of others. The effect of this conclusion is that, in the absence of a lawful purpose, differences in culpability will be considered during sentencing.

The Commission wishes to emphasise that this conclusion should not be viewed as a choice between juries or judges. Irrespective of whether partial defences are abolished or retained, the role of the jury is always the same: to determine criminal responsibility. Criminal responsibility is determined by reference to the elements of an offence and any relevant defences.¹² It is Parliament’s role to make laws that are appropriate for the community. In the context of criminal law this role includes determining the boundary between murder and manslaughter. The role of the jury is not altered under the Commission’s approach. Under the existing homicide laws, the following issues may be determined by a jury:¹³

- whether the accused caused the death of the victim;
- whether the accused intended to kill *or* intended to cause grievous bodily harm or did not intend either of these consequences;¹⁴
- whether the accused is excused from criminal responsibility on the basis of one of the complete defences under the Code;
- whether the accused should be acquitted on account of unsoundness of mind; and
- whether the accused is partially excused from criminal responsibility on the basis of provocation.

Under the Commission’s recommended scheme for homicide, a jury may decide the following issues:

- whether the accused caused the death of the victim;

- whether the accused *either* intended to kill or intended to cause an injury likely to endanger life or did not intend either of these consequences;
- whether the accused should be excused from criminal responsibility on the basis of a complete defence (including duress and emergency);
- whether the accused should be acquitted by reason of mental impairment; and
- whether the accused should be partially excused from criminal responsibility on the basis of excessive self-defence.

In summary, the Commission’s approach is that the partial defences are only appropriate if the relevant factors *always* reduce culpability. In other circumstances—where culpability *may* be reduced—the sentencing process is uniquely equipped to determine the degree of culpability involved. While the sentencing process is clearly capable of taking into account differences in culpability, the actual penalties available must be sufficiently flexible to enable this to occur. The penalty for wilful murder and murder in Western Australia is mandatory life imprisonment. As long as the mandatory penalty remains there will be continued support for partial defences such as provocation.

One of the central recommendations in this Report is the abolition of mandatory life imprisonment. In its place the Commission has recommended that the penalty for murder should be a presumptive sentence of life imprisonment. What this means is that in most cases of murder, life imprisonment will be imposed. However, if life imprisonment would be clearly unjust, the sentencing court will have discretion to impose a different penalty.

Principle Five: Simplifying the law

The law of homicide should be as simple and clear as possible. In undertaking this reference the Commission has noted that many legislative provisions dealing with homicide are complex. The Chief Justice of the High Court has recently drawn attention to the complexity of criminal trials, in particular the complicated nature of some jury directions.¹⁵ In its recent reference on homicide, the Law Commission (England and Wales) stated that:

[T]here is a need to ensure that the law does not become so complex that it cannot be applied by juries. There must be

11. New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No. 73 (2001) [114].

12. See Chapter 1, ‘The Criminal Law and the Criminal Justice System: How criminal responsibility is determined’.

13. Unless the accused elects to be tried by judge alone.

14. The jury may also have to consider if the accused caused death by an act likely to endanger life in the prosecution of an unlawful purpose under s 279 (2) of the Code.

15. Gleeson M, ‘The State of the Judicature’ (Paper presented at the 35th Australian Legal Convention, Sydney, 25 March 2007) 9–10.

clarity and simplicity in the distinctions drawn between offences.¹⁶

The Commission has endeavoured to ensure that its reforms provide a clear framework for the law of homicide. This is important for all those involved in the criminal justice system. Specific recommendations designed to simplify the law include reforming self-defence; separating the defences of unwilling conduct and accident; and reformulating the defence of insanity.

Principle Six: Contemporary conditions

Reforms to the law of homicide should adequately reflect contemporary circumstances.

Many of the relevant legislative provisions under the Code have not been substantially changed since the beginning of the 20th century. In examining homicide offences, defences to homicide and sentencing, the Commission has taken into account advances in medical and scientific knowledge, changes in community standards, and the current social context in which homicide takes place.

Advances in medical and scientific knowledge have impacted on a number of the Commission's recommendations. The definition of when a child becomes a person capable of being killed requires reconsideration in light of medical advances.¹⁷ Likewise, the Commission has recommended that there should be an appropriate legislative definition of death.¹⁸ Improvements to medical treatment are relevant when assessing the definition of grievous bodily harm (as part of the mental element of murder). In the past, most serious injuries would have been life threatening but this is no longer the case.¹⁹

Contemporary views about morality depart from historical views in some instances. For example, it was once considered acceptable or justified for men to defend their honour with violence. In today's society violence, especially as a result of anger, is not usually considered socially acceptable. This has implications for the defence of provocation.²⁰ Current social values are also relevant when considering the offence of infanticide; it is generally no longer considered to be socially unacceptable to have an illegitimate child, and the social and economic circumstances of single mothers have changed.²¹

In examining the law of homicide it is essential to take into account the social context in which killings take place. As a consequence of the prevalence of domestic violence homicides, the Commission has dedicated an entire chapter to this issue. Moreover, the domestic violence context has informed the Commission's recommendations for reform of self-defence and the repeal of provocation.²²

Principle Seven: Removing bias

There should be no offences or defences that apply only to specific groups of people on the basis of gender or race. The Commission is of the view that the law of homicide should be applied equally to all members of the community. What this means is that every offence and every defence must be applicable to anyone irrespective of gender or race. In its Issues Paper the Commission invited submissions as to whether there should be a partial defence of Aboriginal customary law to reduce murder to manslaughter.²³ After this, the Commission completed its final report on Aboriginal customary laws in which it expressed the view that such a partial defence would be inappropriate.²⁴ The conclusion reached by the Commission in that reference remain unchanged and this issue is not further discussed in this Report.

This principle also underpins the Commission's recommendation to repeal the offence of infanticide. Infanticide acts to reduce culpability for the intentional killing of a child, but it only applies to a biological mother. Despite data showing that at least half of all child homicides are committed by men, a man cannot rely upon infanticide even where the act is similar in nature to those where women have relied upon infanticide.

In Chapter Six the Commission considers the law of homicide in the context of domestic violence including whether there should be a specific defence for 'battered women'. The Commission is of the view that such a defence should not be introduced; the preferable way to accommodate the different circumstances of men and women is to ensure that any gender-bias attached to the current law is removed. In other words, offences and defences must be flexible enough and appropriately formulated to cater for differences between genders.

16. Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No. 304 (2006) [2.25].

17. See Chapter 1, Recommendation 3.

18. See Chapter 1, Recommendation 3.

19. See Chapter 2, 'The Mental Element of Murder: Intention to do grievous bodily harm'.

20. See Chapter 4, 'Provocation: Provocation condones violence'.

21. See Chapter 3, 'Infanticide: Infanticide today'.

22. See Chapter 4, 'The Partial Defence of Provocation' and 'Self-Defence'; and Chapter 6.

23. LRCWA, *Review of the Law of Homicide*, Issues Paper (2006) 11.

24. LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report, Project No. 94 (2006) 138.

