

**DISCUSSION PAPER**  
**MODEL CRIMINAL CODE**  
**CHAPTER 5**  
**FATAL OFFENCES AGAINST**  
**THE PERSON**

Model Criminal Code Officers Committee of the  
Standing Committee of Attorneys-General

June 1998

This Discussion Paper was prepared by the Model Criminal Code Officers Committee. It does not necessarily represent the views of the Standing Committee of Attorneys-General

ISBN 0 642 20944 8

## PREFACE

### Background to the Model Criminal Code Project

On 28 June 1990, the Standing Committee of Attorneys General (SCAG) placed the question of the development of a national model criminal code for Australian jurisdictions on its agenda. In order to advance the concept SCAG established a Committee consisting of an officer from each Australian jurisdiction with expertise in criminal law and criminal justice matters. That Committee was originally known as the Criminal Law Officers Committee (CLOC), but, in November 1993, the name was changed to the Model Criminal Code Officers Committee (MCCOC) in order to reflect the principal remit of the Committee directly.

The first formal meeting of the Committee took place in May 1991. In July 1992, the Committee released a Discussion Paper regarding the general principles of criminal responsibility, and, after a great deal of public consultation, delivered a Final Report to SCAG which was released in December 1992. With the exception of the general principles relating to intoxicated defendants, the recommendations in the Final Report formed the basis for the Commonwealth *Criminal Code Act 1995*.

In 1994, both the Commonwealth Government and the State and Territory Premiers' Leaders Forum endorsed the Model Criminal Code project as one of national significance.

In December 1995 MCCOC released its Final Report titled Theft, Fraud, Bribery and Related Offence. MCCOC has since released discussion papers on Non Fatal Offences Against the Person in August 1996, Sexual Offences in December 1996, Contamination of Goods Offences in May 1997 (Final Report March 1998), Serious Drug Offences in June 1997, Administration of Justice Offences in July 1997 and Slavery Offences in April 1998.

This Discussion Paper deals with the area of the criminal law which criminalises fatal offences against the person.

As with its previous publications, MCCOC has attempted to produce a document which is comprehensive, concise and capable of being understood by the general public as well as those who have some legal expertise. In this Discussion Paper "Model Criminal Code" will be used to refer to the draft legislation recommended by this paper, the Bill attached to Chapter 2 as modified by the *Criminal Code Act 1995* (Cth) (Appendix 2) and Chapters 3 and 8 as drafted in the Final Reports on Theft, Fraud, Bribery and Related Offences and the Contamination of Goods Offences. The *Criminal Code Act 1995* (Cth) enacts the draft Bill attached to the Chapter 2 Final Report, with the exception of the provisions relating to the O'Connor defence of intoxication. The drafting of the Commonwealth Act differs slightly from that of the Draft Bill. These changes have been approved by the Standing Committee of Attorneys-General.

The Discussion Paper is organised with the proposed Code provision on one page and a commentary explaining the Committee's reasoning and intentions about it on the facing page.

The commentary on terminology, birth, death and euthanasia was written by Ms. Lindy Jenkins, Senior Assistant Crown Counsel of the Western Australian Crown Counsel's Office. The balance of the commentary was written by Mr. Colin Pruiti, Legal Officer in the Western Australian Crown Solicitor's Office.

The Committee not only welcomes submissions on any aspect of the proposed provisions, it actively solicits comments and criticisms. The closing date for submissions is 31 July 1998. Submissions should be sent to:

The MCCOC Secretariat  
Criminal Law Division  
Attorney-General's Department  
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## TABLE OF CONTENTS

<b>PREFACE</b>	<b>i</b>
Background to the Model Criminal Code Project	i
<b>TABLE OF CONTENTS</b>	<b>iii</b>
<b>COMMITTEE MEMBERS</b>	<b>viii</b>
<b>LEGISLATION</b>	<b>ix</b>
<b>INTRODUCTION</b>	<b>1</b>
<b>THE CORNERSTONE OF A PRINCIPLED APPROACH: A GUILTY STATE OF MIND</b>	<b>2</b>
<b>THE DISTINCTION BETWEEN MURDER AND MANSLAUGHTER</b>	<b>3</b>
HOW MANY HOMICIDE OFFENCES DO WE NEED?	3
<b>One Offence of Unlawful Homicide?</b>	<b>4</b>
<b>Three Offences: First Degree Murder, Murder and     Manslaughter?</b>	<b>5</b>
<b>Four Offences?</b>	<b>7</b>
<b>TERMINOLOGY</b>	<b>9</b>
<b>THE PHYSICAL ELEMENTS OF UNLAWFUL HOMICIDE</b>	<b>13</b>
HUMAN BEING	13
<b>Birth</b>	<b>13</b>
<b>Death</b>	<b>19</b>
PROBLEMS OF CAUSATION	25
<b>Substantial Cause Test -v- Reasonable Foreseeability Test</b>	<b>25</b>
<b>Co-incidence of Conduct and Fault</b>	<b>31</b>
<b>Year-and-a-Day Rule</b>	<b>39</b>

<b>MURDER</b>	<b>43</b>
THE CENTRAL CASE OF MURDER: INTENTION TO KILL	43
INTENDING SERIOUS HARM	49
RECKLESSNESS AS TO DEATH	53
<b>Meaning Of ‘Recklessness’</b>	<b>53</b>
<b>Foreseeing Death</b>	<b>59</b>
<b>Foreseeing Serious Harm</b>	<b>59</b>
CONSTRUCTIVE MURDER	59
PENALTY	65
<b>OTHER UNLAWFUL HOMICIDES</b>	<b>67</b>
MANSLAUGHTER	67
<b>Penalty</b>	<b>69</b>
PARTIAL EXCUSES AND MANSLAUGHTER	69
<b>Provocation</b>	<b>69</b>
<i>Historical Foundations</i>	<i>73</i>
<i>Competing Rationales</i>	<i>73</i>
<b>Abolition</b>	<b>87</b>
<i>Arguments for the Abolition of the Provocation Defence</i>	<i>87</i>
<i>Arguments Against the Abolition of the Provocation Defence</i>	<i>99</i>
<b>Excessive Self-Defence</b>	<b>107</b>
<b>Diminished Responsibility</b>	<b>113</b>
<i>Elements</i>	<i>115</i>
<i>Onus and Standard of Proof</i>	<i>121</i>
<i>Practical Problems</i>	<i>123</i>
<b>Infanticide</b>	<b>131</b>
<i>Elements</i>	<i>133</i>
<i>Problems with Infanticide</i>	<i>133</i>
<b>Aboriginal Customary Killings</b>	<b>139</b>

UNINTENTIONAL MANSLAUGHTER - THE PROPOSED DANGEROUS ACT CAUSING DEATH OFFENCE - SECTION 5.1.11	145
<b>Manslaughter by dangerous and unlawful act</b>	<b>145</b>
<b>Manslaughter by gross negligence</b>	<b>149</b>
<b>Dangerous conduct causing death - why have a separate     offence from manslaughter?</b>	<b>155</b>
<i>Dangerous conduct causing death and intoxication</i>	<i>157</i>
<i>Omissions</i>	<i>157</i>
THE PROPOSED 'MANSLAUGHTER' OFFENCE - SECTION 5.1.10	161
VEHICULAR HOMICIDE	161
<i>A special negligence standard for motorists who kill</i>	<i>165</i>
<i>Strict Liability</i>	<i>167</i>
<b>Intoxication and dangerous driving</b>	<b>173</b>
ATTEMPTS AND UNLAWFUL HOMICIDE	173
MERCIFUL VERDICT OF MANSLAUGHTER	175
<b>OFFENCES RELATED TO SUICIDE</b>	<b>181</b>
SUICIDE AND ATTEMPTED SUICIDE	181
ASSISTING AND ENCOURAGING SUICIDE	181
<b>Penalty</b>	<b>181</b>
SUICIDE PACTS	183
<b>Where the Defendant Unsuccessfully Attempts to Kill     Himself or Herself</b>	<b>183</b>
<b>Where the Defendant Kills Another Member of the Pact</b>	<b>183</b>
EUTHANASIA	185
CHILD DESTRUCTION	189
<b>Viable Foetus</b>	<b>191</b>
<b>Exception: Preserving the Mother's Life</b>	<b>193</b>
<b>Fault Element</b>	<b>193</b>
CHILD CONCEALMENT	195

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<b>DEFENCES</b>	<b>199</b>
<b>EVIDENTIAL BURDEN OF PROOF</b>	<b>201</b>
<b>APPENDIX 1 - COMPARISON BETWEEN JURISDICTIONS</b>	<b>203</b>
<b>APPENDIX 2 - CHAPTER 2 - GENERAL PRINCIPLES</b>	<b>205</b>
<b>APPENDIX 3 - CHAPTER 5 - FATAL OFFENCES</b>	<b>229</b>

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## LEGISLATION

Australian Capital Territory	<i>Crimes Act 1900</i>
Commonwealth	<i>Crimes Act 1914</i> <i>Criminal Code Act 1995</i>
New South Wales	<i>Crimes Act 1900</i>
Northern Territory	<i>Criminal Code Act 1983</i>
Queensland	<i>Criminal Code 1899</i>
South Australia	<i>Criminal Law Consolidation Act 1935</i>
Tasmania	<i>Criminal Code 1924</i>
Victoria	<i>Crimes Act 1958</i>
Western Australia	<i>Criminal Code 1913</i>



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## INTRODUCTION

This Discussion Paper considers fatal offences against the person and any specific defences that apply to these offences. General defences that also apply to fatal offences, such as self-defence and duress, were addressed by the Committee in Chapter 2 of the Model Criminal Code, reproduced in Appendix 2 at the back of this Discussion Paper.

All Australian jurisdictions distinguish between various forms of fatal offences. The primary distinction is between murder and manslaughter. While murder is reserved for what are, morally, the most serious cases of homicide, manslaughter has always been a residual category, and as a consequence remains a notoriously ill-defined offence. Cases of manslaughter run the gamut from causing death by negligence, to cases of intentional killing involving mitigating circumstances such as provocation or diminished responsibility.

Consideration of the extreme diversity of cases that fall within the existing categories of murder and manslaughter has persuaded the Committee to recommend a more discriminating scheme that maintains the dichotomy between murder and lesser homicides. In adopting this approach, the Committee has opted to eliminate all partial defences to murder that would otherwise reduce that offence to manslaughter.

Murder and manslaughter are supplemented, in most Australian jurisdictions, by other offences such as infanticide and dangerous driving causing death. These variant forms of homicide are the subject of recommendations made later in this Discussion Paper. To anticipate that discussion, the Committee recommends abolition of distinct offences of infanticide and vehicular homicide. The reformulated offences of murder, manslaughter and dangerous conduct causing death, proposed by the Committee, will cover cases of infanticide and vehicular homicide.

The Committee has suggested penalty provisions in the draft Code. These penalties are merely a guide to the structure of the various offences contained in this Discussion Paper. They are only intended to be indicative of the relative gravity of each offence, and do not constitute recommendations of the Committee. For ease of reference, Appendix 1 to this Discussion Paper summarises the various fatal offences that exist in each jurisdiction, showing the penalty attaching to each and the Committee's suggested penalty.

The Committee was confronted with the need to make several difficult and controversial decisions in the course of considering its recommendations contained in this Discussion Paper. In making these decisions, the Committee found it necessary to be absolutely clear on the underlying rationale that, in its view, ought to fashion its recommendations. This rationale is considered in the next section and prefaces discussion of the substantive issues that arise for discussion in this Chapter of the Model Criminal Code.

## THE CORNERSTONE OF A PRINCIPLED APPROACH: A GUILTY STATE OF MIND

Unlike non-fatal offences, it is not possible to structure fatal offences using the extent of the harm inflicted by the defendant as a basis. This is obviously because in the case of fatal offences, the harm is always the same, namely, death. Rather, it is the defendant's state of mind at the time he or she causes the death that determines the culpability of the defendant. A guilty state of mind is the fundamental criterion of fault that the community understands and accepts as requiring the intervention of the criminal justice system. In short a requirement for a guilty mind avoids 'the public scandal of convicting on a serious charge persons who are in no way blameworthy'.<sup>1</sup>

Logically, the need for a guilty mind escalates with the gravity of the crime.<sup>2</sup> Fatal offences are amongst the most serious of crimes. The Committee places a strong emphasis upon subjective intent and notes this to be consistent with liberal democratic values such as free-will. Accordingly, subjective intention is used as the cornerstone by which a principled approach to the law of homicide is achieved.<sup>3</sup> The recommendations that follow make proof of fault on the part of the offender central to the definition of all homicide offences. The first principle, therefore, is that merely causing the death of another human being without more will not amount to culpable homicide; serious blameworthiness as denoted by the defendant's guilty state of mind is further required.

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1 *Sweet v. Parsley* [1970] AC 132 at 150 per Reid LJ.

2 See *He Kaw Teh v. R* (1985) 157 CLR 523; *Parker v. R* (1964) 111 CLR 665; *Morgan v. DPP* [1976] AC 182.

3 In England the Law Commission has consistently adopted the same approach which it refers to as "subjectivist theory" as opposed to, for example, "utilitarian theory": see for instance Law Commission, *Legislating the Criminal Code: Unintentional manslaughter*, Law Com No 237, 1995-96 at paras. 4.4-4.6, esp. footnote 4 page 28.

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## THE DISTINCTION BETWEEN MURDER AND MANSLAUGHTER

The fault element also impacts upon the structure of the law of unlawful homicide. Murder and manslaughter are merely two forms of the one offence of unlawful homicide. The murder/manslaughter distinction reflects the degree of seriousness of the offence, as connoted by the fault element. Historically, 'murder' became the label associated with the more serious homicides involving malice aforethought (intentional killings). Other homicides lacking that mental quality were designated 'manslaughter'.<sup>4</sup> All Australian legislatures have adopted the murder/manslaughter distinction.

Under present law, liability to conviction for murder is not limited to cases of intentional killing. The scope of the crime extends to include cases in which death resulted from acts committed recklessly, with knowledge that death or serious injury might result. The precise location of the borderline between the offences of murder and manslaughter varies among Australian jurisdictions. In marginal cases the distinction is often the subject of appeals against conviction. The difference between murder and manslaughter may be exceedingly fine. Individuals who take conscious risks with the lives of others are liable to conviction for murder, unless the risk was justifiable. However, the degree of risk is crucial. Death resulting from the defendant's dangerous conduct is only murder if it was done in realisation that death was a probable consequence. Conduct undertaken in the knowledge that death was merely a possible consequence makes the offender guilty of manslaughter, but not murder, in most, if not all, Australian jurisdictions.

### HOW MANY HOMICIDE OFFENCES DO WE NEED?

A growing debate has emerged which has simultaneously pulled the two-fold murder/manslaughter classification in opposing directions. Some argue that the distinction ought to be abolished and replaced by the one generic offence of 'unlawful homicide'. Others suggest a third category of unlawful homicide, first degree murder, should be introduced to separately recognise the most heinous homicides. This latter approach has been adopted in some states of the United States of America.

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4 See Sir Owen Dixon "The Development of the Law of Homicide" (1953) 9 *Australian Law Journal Supplement* 64 at 65-66; and R Perkins "A Re-Examination of Malice Aforethought" (1934) *Yale Law Journal* 537 at 541-542.

## One Offence of Unlawful Homicide?

Uncertainty on the question where to draw the line between murder and manslaughter has prompted proposals to abolish the distinction so as to merge murder and manslaughter into a single offence of unlawful homicide.<sup>5</sup> The most common reason advanced in favour of the suggestion is the promise of clarity and avoidance of unworkable distinctions in homicide law. Despite the promise of increased clarity, the proposal has won few adherents. Law reform bodies, in Australia and in other jurisdictions with criminal laws resembling our own, have rejected proposals for a single, inclusive offence of unlawful homicide.<sup>6</sup>

In 1991, the Victorian Law Reform Commission concluded that the offences of murder and manslaughter should retain their separate identities.<sup>7</sup> In doing so the Commission emphasised the value of public understanding and acceptance of laws that reflect the fundamental distinctions of common morality. As the Commission saw the matter, abolition of a separate and distinct offence of murder 'would have removed from the statute books an ancient and powerful word [namely, murder], widely understood by the public, carrying the strongest possible overtones of moral condemnation'.<sup>8</sup>

The abolition of the distinction carries fundamental implications for the operation of the criminal justice system. A single offence of unlawful homicide necessarily involves a shift in emphasis away from the jury towards the judge. This may simplify and shorten the length of trials and consequently save costs, but it also undermines the proper role of the jury in determining issues of guilt.<sup>9</sup> Such a result is inconsistent with the approach recommended by the Committee in formulating criminal offences elsewhere in the Model Criminal Code. In general, the Committee has sought to ensure that issues that will make a significant difference to the punishment that can be imposed will be determined by juries.<sup>10</sup>

5 Judicial support for this position can be found in Lord Kilbrandon's decision in *Hyam* [1975] AC 55 at 98. See further New Zealand Criminal Law Reform Committee *Report on Culpable Homicide* (1976); K Milte, A Bartholomew & F Galbally "Abolition of the Crime of Murder and of Mental Conditional Defences" (1975) 49 *Australian Law Journal* 160.

6 Victorian Law Reform Commission, *Homicide*, Report 40, 1991 at 52-53; Victorian Law Reform Commissioner, *The Law of Murder* (1974) at 5-7; United Kingdom, *Report of the Royal Commission on Capital Punishment, 1949-1953*, Cmnd 8932; United Kingdom, *Report of the Select Committee on Murder and Life Imprisonment* (House of Lords), 1989 at 12-13.

7 Victorian Law Reform Commission, *Homicide*, Report 40, 1991 at 52-53

8 *Ibid*, quoting from G Woods, "The Sanctity of Murder: Reforming the Homicide Penalty in New South Wales" (1983) 57 ALJ 162.

9 This role has been stressed by the High Court albeit in a different context: see *Kingswell* (1985) 62 ALR 161; *Brown* (1986) 60 ALJR 257.

10 That approach is evident in Part 5.1 of the Model Criminal Code, which defines non-fatal offences against the person. These offences distinguish between serious and less serious offences according to the degree of fault accompanying the infliction of harm and impose penalties appropriate to the degree of fault. It would be flatly inconsistent with this scheme to abandon distinctions based on fault when death, rather than a lesser harm, resulted from the conduct of the defendant. Questions relating to intention, recklessness or negligence accompanying conduct that causes harm or death are particularly appropriate for jury determination.

Likewise, abolishing the murder/manslaughter distinction will leave the trial judge with no indication of the relative culpability of the defendant. The judge is left to second-guess the jury's findings, presumably by tracing its reasoning process. This is an impossible task. A judge placed in this position is likely to determine the facts consistent with the verdict through his or her own analysis of the evidence. Once this occurs, the proper function of the jury has been usurped and the appearance of justice jeopardised.

#### Recommendation

The law of homicide should continue to distinguish between murder and lesser unlawful homicides.

### **Three Offences: First Degree Murder, Murder and Manslaughter?**

If it is desirable to distinguish between less serious (manslaughter) and more serious (murder) homicides, why not create a third category reserved for the most serious homicides?

The idea of distinguishing between murder in the first and second degrees is not entirely foreign to Australian criminal jurisprudence. The Queensland Criminal Code, which was substantially adopted in Western Australia, drew a distinction between wilful murder, requiring an intention to kill, and murder, merely requiring an intention to do grievous bodily harm. Though the Queensland Parliament abandoned the distinction, it maintains a precarious existence in Western Australia.<sup>11</sup>

It is arguable that a distinction between murder in the first and second degrees would ensure a closer relationship between legal and moral condemnation for the worst kinds of homicide. The single largest obstacle against introducing a separate offence of first degree murder is formulating an underlying rationale which operates to accurately isolate the worst murder cases. The Canadian Law Reform Commission was in favour of such an approach, defining first degree murder in terms of intentional homicides involving the 'deliberate subordination of the victim's life to the offender's purpose'.<sup>12</sup> First degree murder, in the Commission's proposal, was to include:

- cases of killing for pecuniary gain;
- killings for political motives (eg. terrorism or assassination);

<sup>11</sup> Sections 278 and 279(1) of the Western Australian *Criminal Code* respectively. Refer to Murray J's *General Review of the Western Australian Criminal Code*, which recommends abandonment of the distinction between wilful murder and murder given the abolition of the death penalty in that State.

<sup>12</sup> Law Reform Commission of Canada, *Homicide*, (1984), Working Paper 33 at p83.

- killings for personal advantage (eg. escape);
- contract killings; or
- repeated intentional killings where the repetition manifests contempt for human life.<sup>13</sup>

The definition deliberately excludes other intentional killings seen to be less culpable in nature, such as mercy killings or euthanasia.<sup>14</sup>

Attractive though the proposal may appear at first sight, application of the suggested criteria involves obvious problems of interpretation. The meaning of the general criterion proposed by the Commission - 'deliberate subordination of the victim's life to the offender's purpose' - is far from certain. All cases of intentional killing might be said to subordinate the life of the victim to the murderer's purpose. The catalogue of particularly heinous killings fares no better. It is not difficult to envisage cases deserving the utmost condemnation that would fall outside the catalogue. Cases where the victim is killed for no reason at all may be just as shocking and deserving of condemnation as cases of killing for pecuniary gain. So also when the killing was done for sexual gratification.

Attempts to distinguish between murder in the first and second degree invariably encounter difficulty in defining the most heinous varieties of murder. In England, the Royal Commission on Capital Punishment, which reported in 1953, concluded that it was impossible to devise a defensible legal definition: among the most important factors are the motive for the offence and the character and circumstances of the offender, which can never be inferred from the legal quality of his criminal act. Though distinctions can be drawn between more and less heinous murders, they are more appropriately considered at the sentencing phase of the trial.

#### Recommendation

The Committee recommends that a separate offence of first degree murder should not be introduced.

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13 *Ibid* at 81.

14 *Ibid* at 82.

### Four offences?

In his recent book on the law of homicide<sup>15</sup>, Professor Stanley Yeo proposes a fourfold division. In this scheme, murder remains the most serious of offences. Manslaughter is reduced in scope and supplemented by two new offences involving lesser degrees of fault, making four offences of unlawful homicide.

SCHEMATIC OUTLINE OF HOMICIDE OFFENCES: FROM S YEO, <i>FAULT IN HOMICIDE</i> (1997)		
TYPE OF OFFENCE	FAULT ELEMENTS IN DESCENDING ORDER OF CULPABILITY	PENALTY
Murder	(a) Fatal act accompanied by intention to cause death; (b) Fatal act accompanied by intention to cause a bodily injury which is highly likely to cause death; (c) Fatal act accompanied by knowledge that the act is unjustifiable and virtually certain to cause death	Life imprisonment
Manslaughter	(a) fatal act accompanied by intention to cause bodily injury which will probably cause death; (b) fatal act accompanied by knowledge that the act will probably cause death	Maximum ten years imprisonment
Causing death by intentional act	Fatal act accompanied by an intention to cause bodily injury which might possibly cause death.	Maximum - nine years imprisonment.
Causing death by a rash or negligent act	(a) Fatal act accompanied by knowledge that the act might possibly cause death; or (b) Fatal act accompanied by a risk of probable death which would have been foreseen by a reasonable person.	Maximum eight years imprisonment.

15 S.Yeo, *Fault in Homicide*, (1997) Federation Press.

Professor Yeo's dissection and reconstitution of the unlawful homicide offences envisages a more detailed scheme of offences than the Committee's recommendations. Though the Committee shares with Professor Yeo the conviction that different degrees of fault should be reflected by distinguishing among serious and less serious homicides, it is not persuaded that his proposals for a fourfold division are practicable. Past experience with existing categories of homicide suggests that the distinctions between different grades of homicide should be based on criteria which are simpler and more robust than Professor Yeo's scheme.

#### Recommendation

The Committee recommends that four separate offences of unlawful homicide based on varying degrees of fault should not be introduced.

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## TERMINOLOGY

Having made the decision to retain two key offences the next issue to resolve is what they should be named.

All Australian jurisdictions currently use the terms ‘murder’ and ‘manslaughter’. Queensland, the Northern Territory and Western Australia use the term ‘unlawful homicide’ as a marginal or sectional heading and the term ‘unlawfully kills’ as a generic term to refer to both murder and manslaughter. Tasmania is the only jurisdiction which currently employs the term ‘homicide’ in its Code. In Tasmania homicide is in turn categorised as either culpable or non-culpable. Culpable homicide that is not murder is manslaughter. Non-culpable homicide is not an offence.

The concern of the Committee is to use terminology which is rational and readily understood by the community. The Committee’s earlier recommendation for retention of a distinction between murder and lesser unlawful homicides was based in part on the desirability of retaining a link between lay and legal perceptions of murder. The benefits of retaining ‘manslaughter’ as the name of the lesser alternative offence are less obvious.

Few people, perhaps, are likely to be offended by the curious connotations of the word. There is a significant possibility, however, that the name might obscure the differences in culpability between murder and the lesser fatal offences. A blander and less bloody word might be more conducive to an appreciation of the difference in moral condemnation of the offences. Such term might also redress a further consideration, namely, there is a stigma attached to the term manslaughter that militates against juries finding persons or corporations guilty of the offence even though, objectively the elements of the offence have been proved.

Historically this was a problem that beset motor vehicle manslaughter prosecutions and proved to be so universal that alternative offences of dangerous driving causing death had to be enacted to ensure a higher conviction rate for vehicular manslaughter.<sup>16</sup> In most instances, the elements of the offence are essentially the same as manslaughter; only the name of the offence and the lesser penalty distinguishes it from manslaughter. The High Court remarked in 1951 that the legislation was introduced for “practical rather than logical or juristic reasons,”<sup>17</sup> juries being unwilling to convict of manslaughter.

The Committee has similar concerns about the prosecution of corporations for manslaughter. In Chapter 2 of the Model Criminal Code the Committee has recommended that corporations should be able to be prosecuted for all general criminal offences, including manslaughter. In its Report on Homicide the Law Reform Commission of Victoria suggested that a major obstacle to

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16 Authorities supporting this view are cited in Brown, *Traffic Offences*, 2nd Ed., (1988) at 89.

17 *Callaghan v R* (1951) 87 CLR 115 at 120.

manslaughter prosecutions of corporations was attitudinal because neither the public or the relevant agencies are used to thinking in terms of prosecuting corporations for manslaughter as opposed to breach of workplace safety legislation.<sup>18</sup> Although the major difficulty in obtaining convictions for manslaughter against corporations is the problem with applying common law principles of criminal responsibility to creatures of statute, given that the primary meaning of the term manslaughter is the killing of a human being by another, it is not difficult to apprehend that a secondary difficulty for juries and prosecuting authorities is in understanding how the offence of manslaughter applies to corporations at all. This is particularly so if the conduct of the corporation constituting the offence is criminally negligent but not heinous.

One approach to take would be to acknowledge these difficulties and insert into the Model Criminal Code or other appropriate legislation special corporate homicide offences, much the same as was done to solve the difficulties in obtaining motor vehicle manslaughter convictions. That approach was rejected by the Victoria Law Reform Commission<sup>19</sup> and at least implicitly by the Committee in Chapter 2 of the Model Criminal Code. If corporations have committed criminal offences they should be subject to the general criminal law. The stigma that does attach to a conviction for manslaughter 'would clearly signal the high level of criminality of the conduct, raise the priority of safety issues, and provide a powerful incentive for greater levels of care'.<sup>20</sup> To create new offences implies that corporate crimes resulting in deaths are not as serious as other cases of murder or manslaughter. This is an approach which the Committee rejects.

An alternative solution is rename the offence of manslaughter so as to de-stigmatised the offence. The elements of and the penalties for the offence would remain the same but a jury would be less likely to consider its verdict in the light of preconceived notions of the types of offences that warrant a conviction for manslaughter.

If the traditional terms were discarded, alternatives would be first and second degree unlawful homicide, or murder and unlawful killing. The first option lacks any relationship to Australia's English common law heritage. As a result members of the community are unlikely to understand the true meanings of the terms. Further, it abandons the term 'murder' which, for the reasons mentioned above, is undesirable. The difficulty with the second option is that whilst the terms are descriptively correct, it is not clear whether they would be used and accepted by the community in preference to the traditional terminology.

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18 *Id.* at 10.

19 *Id.* at 11.

20 *Ibid.*

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### Recommendation

The Committee's tentative view is that although the term manslaughter is not without its problems the alternatives discussed above are not adequate replacements. The Committee is keen to receive suggestions for alternative terminology and comments on those proposed.

## **Part 5.1 - Fatal and non-fatal offences**

### Division 1 - Definitions

#### **5.1.4 Person against whom offence may be committed**

A person against whom an offence may be committed under this Part is a person who has been born and who has not already died.

#### **5.1.5 Birth**

- (1) For the purposes of this Part, a person's birth occurs at the time the person is fully removed from the mother's body and has an independent existence from the mother.
- (2) The following are relevant, but not determinative, as to whether a person has been born:
  - (a) the person is breathing;
  - (b) the person's organs are functioning of their own accord;
  - (c) the person has an independent circulation of blood.

#### **5.1.6 Death**

- (1) For the purposes of this Part, a person has died when there has occurred:
  - (a) irreversible cessation of all function of the person's brain (including the brain stem); or
  - (b) irreversible cessation of circulation of blood in the person's body.
- (2) In this section, irreversible means irreversible by natural or artificial means.

## THE PHYSICAL ELEMENTS OF UNLAWFUL HOMICIDE

The crimes of murder and manslaughter, and their various forms, only differ in the mental element required to establish the offence. The physical element for both is the same; namely, the defendant must cause the death of another human being. This essentially raises two aspects to the physical element of unlawful homicide: the concept of a human being and the concept of causation.

### HUMAN BEING

The question of defining 'what can be unlawfully killed?' is a complex one. This is not so much a question of trying to define what really is a 'human being', but developing a practical formula for the purposes of the unlawful killing offences. To provide the maximum protection the solution needs to provide certainty. There are two discrete issues: first, when does human life commence (birth), and second, when does it end (death).

#### Birth

The principal issue here is when does birth take place. All Australian States and mainland Territories except South Australia and Victoria have a statutory definition identifying the start of life.

The common law position was stated by Barry J in *Hutty*:

'A baby is fully and completely born when it is completely delivered from the body of its mother and it has a separate and independent existence in the sense that it does not derive its power of living from its mother. It is not material that the child may still be attached to its mother by the umbilical cord ...But it is required ... that the child should have an existence separate from and independent of its mother, and that occurs when the child is fully extruded from the mother's body and is living by virtue of the functioning of its own organs.'<sup>21</sup>

The Code States and the Northern Territory universally require the child to have 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.<sup>22</sup>

This definition is an improvement on the test in *Hutty* in as far as it makes it clear that the child does not have to breathe or have an independent circulation. The former criterion is important because it is well known that many children are born alive and yet do not breathe for some time after their birth.<sup>23</sup> The

21 [1953] VLR 338. See also *Poulton* (1832) 172 ER 997 and *Brain* (1834) 172 ER 1272.

22 Queensland *Criminal Code* s292; Western Australian *Criminal Code* s269; Tasmanian *Criminal Code* s153(4) and Northern Territory *Criminal Code* s156.

23 *Brain* (1834) 6 C&P 349 at 350.

Code

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second criterion is probably a biological misconception, since a foetus has independent circulation for some months before birth.<sup>24</sup> Given the number of premature but viable births that occur it is desirable to specify that a baby is a human being whether or not these two criteria are present.

Those criteria aside, the Code definition begs the question as to what is a living state. When the Queensland Code was drafted this was a more straightforward decision. Since then technology has radically increased the situations in which formerly non-viable foetuses can be kept alive until they have developed sufficiently to function independently. The courts have held that the definition did not only include what turned out to be a viable child - a child, albeit doomed to die, which proceeds from its mother in a living state is within the definition.<sup>25</sup>

The New South Wales and Australian Capital Territory definitions still require the child to breathe before it can be said to be born alive, but as with the Code jurisdictions there is no requirement for an independent circulation.<sup>26</sup>

However under the common law a child is regarded as having been born alive although it is not viable and will certainly die after a brief lapse of time. It need not matter if at the time the conduct occurred the child had not been born, survives to be born, but dies soon after as a result of the conduct.<sup>27</sup>

In the Committee's view the issue for the criminal law is a practical one: where can the line sensibly be drawn so as to provide a helpful and relevant test for juries? Religious/philosophical questions in relation to the beginning of life are very important but the Committee is unable to conclusively answer such questions for the community. Rather the Committee favours adopting a modern and practical test whilst ensuring that acts which fall short of having caused the death of a human being will be caught by some other offence such as child destruction or an offence against the mother. The Committee has no intention of demeaning the importance of the fundamental religious and philosophical questions by this approach. The Committee believes that the approach taken is principled but also a recognition of the need for the criminal law to provide a test that is acceptable to the majority of the community.

The current law in all jurisdictions is not so much concerned with when a foetus becomes a human being but rather when a baby can be murdered. Although the former question is often the one posed in legal textbooks,<sup>28</sup> the latter question is a practical legal issue the answer to which does not depend upon definitively answering the former philosophical question. The Committee does not propose changing the current law.

24 See Williams, *Textbook of Criminal Law*, 2nd ed. (1983) at 290.

25 *Martin* (No.2) (1996) 86 A Crim R 133 at 137; *R v Castles* [1969] QWN 36. .

26 *Crimes Act* (NSW) s20 and *Crimes Act* (ACT) s10.

27 *A/G's Reference* (No. 3 of 1994) [1996] QB 581; *Martin* (no. 2) (1996) 86 A Crim R 133; and *F* (1996) 89 A Crim R 250.

## **Part 5.1 - Fatal and non-fatal offences**

### Division 1 - Definitions

#### **5.1.4 Person against whom offence may be committed**

A person against whom an offence may be committed under this Part is a person who has been born and who has not already died.

#### **5.1.5 Birth**

- (1) For the purposes of this Part, a person's birth occurs at the time the person is fully removed from the mother's body and has an independent existence from the mother.
- (2) The following are relevant, but not determinative, as to whether a person has been born:
  - (a) the person is breathing;
  - (b) the person's organs are functioning of their own accord;
  - (c) the person has an independent circulation of blood.

#### **5.1.6 Death**

- (1) For the purposes of this Part, a person has died when there has occurred:
  - (a) irreversible cessation of all function of the person's brain (including the brain stem); or
  - (b) irreversible cessation of circulation of blood in the person's body.
- (2) In this section, irreversible means irreversible by natural or artificial means.

The Committee accepts that, smudged as the line may be, birth is the line at which the law recognises that a baby may be murdered. As we have said earlier that does not mean that the law does not recognise that it is impossible to offend by terminating a foetus' existence at an earlier point of time, but if a person does do so unlawfully they should not be guilty of the offence of murder.

Is it possible to clarify the current common law or Code tests of birth so as to make the line less problematical?

The common law test is attractive but it would appear to provide that a child which is born and kept alive on a life support machine of some sort is not capable of being murdered. Whilst this proposition may be more easily acceptable in relation to a child who has multiple organs malfunctioning, it is a difficult test to accept with respect to a child who perhaps has a minor malfunction of one organ that is capable of rectification or where the child would probably survive on its own but the cautiousness of the medical profession has replaced the functioning of an organ with a machine for a time until the child has become stronger or medication has taken effect.

There does not seem to be any test which would differentiate between these situations in any practical fashion. The Committee would be interested in hearing from anybody who has a practical solution to the problem.

#### Recommendations

1. Unlawful killing can occur where a person has been born but has not already died.
2. For these purposes a person has been born where he or she is fully removed from the mother's body and has an independent existence from the mother.
3. In determining 2, consideration should be given to whether:
  - the child has breathed;
  - the child's organs are functioning of their own accord; and
  - the child has an independent circulation of blood in its body.
4. However any of the above may still be absent - they are factors which should be relevant but not determinative.

28 See for example Fisse B, *Howard's Criminal Law*, 5th ed., at 27.

**5.1.4 Person against whom offence may be committed**

A person against whom an offence may be committed under this Part is a person who has been born and who has not already died.

**5.1.6 Death**

- (1) For the purposes of this Part, a person has died when there has occurred:
  - (a) irreversible cessation of all function of the person's brain (including the brain stem); or
  - (b) irreversible cessation of circulation of blood in the person's body.
- (2) In this section, irreversible means irreversible by natural or artificial means.

## Death

The second issue is when does the death of a human being occur. Though common sense and common usage leave no room for doubt in the vast majority of cases, recourse to a legal definition of the meaning of death is essential in some circumstances. Medical advances enable bare physical existence to be sustained by medical technology though the patient has suffered irreversible brain damage. Damage to the brain organism may be so severe as to compel the conclusion that the life of the person has ended, even though it may be possible, with the aid of medical technology, to maintain bodily functions for a time. The Australian Law Reform Commission provided a graphic illustration some years ago: "It is scientifically possible, after the guillotine has beheaded a man, to keep the heart and lungs going for days".<sup>29</sup> In such a case there would be few who would doubt that death occurred when the head was separated from the body or very shortly thereafter. Nevertheless, life support machines, medication and artificial feeding systems have not infrequently resulted in the medical profession and/or the family of the patient being placed in a dilemma as to whether the patient in such a situation is dead, whether it would be a criminal offence to cease the life preserving treatment and whether it would be legal to cause or hasten an inevitable death by positive action.

The last two issues will be dealt with later in this Discussion Paper under the heading of 'Euthanasia', but a consideration of them must commence by determining when the death of a human being occurs.

The common law did not define death but left it to the medical profession to determine when it had occurred in any particular situation.

It was not until the mid 1970's that the law and medicine agreed as to when death occurred. In 1977 the Australian Law Reform Commission reported that legislation should be passed defining death. Its recommendations have been adopted in most Australian jurisdictions which, in human tissue transplant legislation,<sup>30</sup> provide that a person dies when there occurs either:

- irreversible cessation of all functions of the brain; or
- irreversible cessation of circulation of blood in the body of the person.

The first basis requires brain stem death. Accordingly, the definition excludes persons in a persistent vegetative state, regardless of whether such persons have

<sup>29</sup> Australian Law Reform Commission, *Human Tissue Transplants*, Report 7, 1977, para. 117.

<sup>30</sup> *Human Tissue Act 1983* (NSW) s33; *Human Tissue Act 1982* (Vic) s41; *Transplant and Anatomy Act 1979* (Qld) s 45; *Death (Definition) Act 1983* (SA); *Human Tissue Act 1983* (Tas) s 27A; *Transplant and Anatomy Act 1978* (ACT) s45; *Human Tissue Transplant Act 1979* (NT) s23. With the exception of the Queensland statute, these statutory definitions are of general application. Western Australia does not define death. Section 24(2) of the *Human Tissue and Transplant Act 1982* (WA) does provide, however, for transplants after irreversible cessation of brain function.

Code

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any prospect of regaining consciousness. In addition, the second basis excludes from the definition persons who are kept alive by virtue of life support machines as it is sufficient for blood to be circulated by artificial as well as natural means.

The Committee has considered whether there is a strong argument for adopting a definition of death for the purposes of the criminal law that would hold that life is extinguished at an earlier point of time. The purpose of the definition would be to avoid the problems that have arisen in the difficult cases of *Airedale NHS Trust v Bland*<sup>31</sup> and *Auckland Area Health Board v AG*.<sup>32</sup> In the English case Mr. Bland had been in a persistent vegetative state for 3 years. Whilst his brain stem remained alive and functioning the cortex of his brain had lost its function and activity. He was able to breathe unaided and digest food but virtually every other indicator of life was absent. The space which the brain should have occupied was full of watery liquid. All medical experts agreed that his condition was irreversible. In the New Zealand case Mr. L was suffering from Guillain-Barre syndrome. The disease had destroyed the conductivity of the nerves between the brain and the body. His brain, although technically still alive, was not connected to any part of his body. The only part of his body that may still have been functioning was his visual faculties. Because of the denervation of his body he had to be kept alive by a life support system. Once this was turned off his death would be instantaneous.

In both cases the medical carers resorted to the courts for declarations that ceasing artificial feeding and medication in Mr. Bland's case and turning off the life support unit in Mr. L's case would not make them criminally liable.

In both cases the courts made the orders as sought. But the question is should the law adopt a more practical definition of death which would have obviated the need to resort to the courts? In practical terms, was either man a living human being capable of being murdered? Arguably not. This fact may be reflected in a definition of death for the purpose of fatal criminal offences. Such a definition could require irreversible cessation of more than 90% of brain function or irreversible cessation of blood circulation without regard being paid to whether it was possible to artificially maintain life. Alternatively the test of death could depend upon whether the person was incapable of independently maintaining blood circulation due to an irreversible condition.

Such a definition would have ramifications for the law of euthanasia. It would also result in a radical change in the criminal law. The Committee is of the opinion that it does not have the mandate to recommend such a change given that it would have ramifications that extend beyond the criminal law. In any event, the Committee is of the view that the problems of cases like Mr. Bland

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31 [1993] AC 789.

32 [1993] 1 NZLR 235.

**5.1.4 Person against whom offence may be committed**

A person against whom an offence may be committed under this Part is a person who has been born and who has not already died.

**5.1.6 Death**

- (1) For the purposes of this Part, a person has died when there has occurred:
  - (a) irreversible cessation of all function of the person's brain (including the brain stem); or
  - (b) irreversible cessation of circulation of blood in the person's body.
- (2) In this section, irreversible means irreversible by natural or artificial means.

and Mr. L can be solved without changing the definition of death,<sup>33</sup> but invites submissions on this issue.

The Committee is mindful to note that the definition of death has a broader relevance in the criminal law sphere. A defendant who renders a person reliant upon a life support machine may seek to avoid a homicide conviction if his or her victim dies after the life support is ceased. Although this argument is unlikely to succeed because the infliction of the original harm substantially contributes to the death,<sup>34</sup> a definition of death in terms of the human tissue transplant legislation would avoid any prospect of an unmerited acquittal on this basis. The following recommendation is expressed in similar terms and as such makes no change to the existing law while at the same time providing a necessary explicit statement about what is meant by 'death' for the purposes of these offences.

#### Recommendation

1. Note that it is recommended above unlawful killing should be able to occur where a person has been born but has not already died.
2. For the purposes of that recommendation, a person is dead where:
  - irreversible cessation of all functions of the person's brain has occurred; or
  - irreversible cessation of circulation of blood in the person's body has occurred.
3. 'Irreversible' means irreversible by natural or artificial means.

<sup>33</sup> See section headed "Euthanasia".

<sup>34</sup> See *R v Malcherek* [1981] 1 WLR 690; *R v Evans & Gardiner* (No 2) [1976] VR 523; *R v Kinash* [1982] Qd R 648. Also see, in relation to the first cited case, Leng R, "Death and the Criminal Law" (1982) 45 *Modern Law Review* 206.

Division 1 - Definitions

**5.1.3 Causing death or harm**

For the purposes of an offence under this Part, a person's conduct causes death or harm if it substantially contributes to the death or harm.

## PROBLEMS OF CAUSATION

The legal concept of causation is directly derived from the common sense notion of cause and effect. In the large majority of cases the question whether the defendant's act has caused the victim's death will not involve issues of any conceptual complexity. If the issue is contested, the contest is most likely to involve factual issues that can be settled by careful consideration of the evidence.

### Substantial Cause Test -v- Reasonable Foreseeability Test

The South Australian Full Court's decision in *Hallett*<sup>35</sup> states the test of causation in simple terms: the defendant's act must substantially contribute to the victim's death.<sup>36</sup> The complexity arises through the infinite circumstances in which the test may be applied. This diversity makes it futile to define causation more precisely. Nor need it be more fully defined; the law as expressed in *Hallett* is adequate.<sup>37</sup>

In applying the substantial cause test, it is essential to bear in mind that the law does not attempt to identify a single cause of death and then determine whether the defendant's act was that cause. The law recognises that a number of contributing causes all of varying degrees of significance may cause death.<sup>38</sup> Problems of causation are clarified when it is understood that the test of culpability is not whether the defendant's act is the cause of death, but rather whether it substantially contributed to the death. Thus, in cases where there are a number of competing causes of death the task is not to weigh one against the other so as to determine the principal cause of death. Rather, one need only focus on the defendant's act and ask whether it substantially contributed to the death.<sup>39</sup>

35 [1969] SASR 141 at 149.

36 The South Australian Full Court of the Supreme Court cited *R v. Smith* [1959] 2 QB 35 with approval for this proposition.

37 Section 153(2) of the Tasmanian *Criminal Code* establishes a narrower test of causation than the substantial cause test. This stems from the requirement in s153(2) that the act or omission be "directly and immediately" connected with death: see *R v. Inkson, Thomas and Sutton* (unreported, Tas SCt, Slicer J, A38/1995, 4 July 1995) and *Inkson v The Queen* (1996) 6 Tas R 1 for an illustration of the application of this more stringent test of causation where it was judicially recognised that the conclusion did not accord with the moral culpability attaching to the offenders. Exceptions to the "direct and immediate" cause test are stated in s154 of the Tasmanian *Criminal Code*.

38 *R v. McKinnon* [1980] 2 NZLR 31 at 36, cited with approval for this proposition in *Royall v. R* (1990-1991) 172 CLR 378 at 423, per Toohey and Gaudron JJ.

39 A good illustration of this approach is the English Court of Appeal's decision in *Pagett* (1983) 76 Cr App R 279. The defendant held his pregnant lover hostage as he fired at police. In returning the defendant's fire, the police killed the woman who was used by the defendant to screen his body. The Court confirmed that the defendant's act need not be the sole cause, or even the main cause, of the victim's death, it being enough that the act contributed significantly to that result: at 288. On this basis the jury found the defendant to be guilty of manslaughter, even though it was a bullet from a police officer's gun which was the immediate cause of the victim's death. This decision also serves to illustrate the potential width of causation in the context of homicide, however the Committee does see the case to rest on the outer limits of the concept.

Code

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In considering this issue, which is always the same despite the factual circumstances to which it is applied, the jury is best guided by the application of its collective common sense.<sup>40</sup>

In applying notions of common sense, one issue that arises is whether the concept of foreseeability should be considered in solving problems of causation. It is true that consequences that are caused by a person's act or omission are very often reasonably foreseeable. That is hardly surprising since the attribution of causal responsibility commonly depends upon the judgment that events followed their usual course to produce natural, expected or predictable consequences. But causation and foreseeability do not always run hand in hand. The consequences of our actions are very often unforeseeable, even to those who take reasonable care. Nor can we be said to cause every event that we can reasonably foresee as a sequel of our actions.

The argument that causation in the law of homicide requires reasonable foresight of consequences appears to have developed as a means of ensuring that culpability could not be attributed unless some minimal level of fault could be proved.<sup>41</sup> It was, in all likelihood, a response to the apparent unfairness of imposing constructive guilt for homicide and other offences against the person. However, grafting considerations of foreseeability onto causation has blurred the distinction between the physical and fault elements. Causation is a physical, not fault, element; it is not concerned with whether responsibility ought to be attributed to the defendant. Accordingly, the defendant's state of mind and knowledge in performing the act or making the omission is largely irrelevant to questions of causation. Whether the defendant reasonably foresaw the risk should not enter the calculation. It is highly relevant to the fault element, but must be limited to that sphere.

The common law in its present state is consistent with this approach in all but one type of case. In what are commonly referred to as fright or self-preservation cases, where the victim's death occurs in his or her effort to escape from the defendant, reasonable foreseeability is sometimes imported into the test of causation in requiring the victim's reaction to the situation created by the defendant to be reasonably foreseeable.<sup>42</sup> Nonetheless, the High Court in *Royall v The Queen*<sup>43</sup> recently acknowledged that even in the limited context of self-

40 *Campbell v. R* [1981] WAR 286 at 290 per Burt CJ (with whom Jones and Smith JJ concurred).

41 See, in particular, the course of development of the law in the Code states, where the defence of 'accident' in s23 of the Queensland and Western Australian *Criminal Codes* and s13 of the Tasmanian *Criminal Code* require recourse to reasonable foreseeability as a ground for assigning criminal responsibility. For a recent account see Blackwood J, "Humpty Dumpty Was Pushed Off the Wall/Humpty Dumpty Died From the Fall/An Accidental Death/Or Manslaughter in Tasmania?" (1996) 15 *University of Tasmania Law Review* 306. The judgment of Murray J in *Jemielta* (1995) 81 A Criminal R 409 is particularly instructive.

42 For example, see the English authority of *Roberts* (1971) 56 Cr App R 95.

43 (1990-1991) 172 CLR 378.

Code

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preservation cases, any reference to foreseeability in relation to the concept of causation should be avoided as it is likely to confuse the jury.<sup>44</sup> The confusion necessarily flows from the introduction of considerations of blameworthiness associated with foreseeability into establishing causal issues of fact. In this way, the dividing line between fault (blameworthiness) and physical (factual) elements is also blurred. The Committee agrees with the view expressed in *Royall* - no mention of foreseeability should be made in self-preservation cases.

The Code jurisdictions also specifically provide for self-preservation cases in the context of death caused by threats. The Western Australian and Queensland Code provisions are identical and the Northern Territory provision is substantially similar.<sup>45</sup> None of the provisions in these jurisdictions include a reference to foreseeability.<sup>46</sup> This is to be contrasted with paragraph 154(c) of the Tasmanian Criminal Code which specifically requires foreseeability to be considered by putting in issue both the defendant's and reasonable person's state of mind.<sup>47</sup>

The Committee favours the substantial cause test formulated in *Hallett's* case be applied uniformly in all cases where causation is in issue. The question should always be the same: did the defendant's act substantially contribute to the victim's death. This is so regardless of whether the victim's own negligence contributed to their death; or whether they had an unexpected vulnerability; or whether they received the wrong medical treatment; or whether their own fright

44 See in particular the judgments of Mason CJ at 389-390, Deane and Dawson JJ at 412 and Toohey and Gaudron JJ at 424-425. In *Royall*, the victim had fallen to her death from a bathroom window. The trial judge directed the jury to find that the defendant caused the deceased's death if they were satisfied that immediately before her fall, the deceased had a well-founded and reasonable apprehension of being subjected to life-threatening violence from the defendant if she remained in the bathroom, and that in order to escape that violence she jumped out of the window. The High Court upheld this direction and approved of its failure to refer to the notion of foreseeability, in particular, whether the deceased's action of jumping from the window was foreseeable to the defendant.

45 Western Australian *Criminal Code*, s272; Queensland *Criminal Code* s295; Northern Territory *Criminal Code*, s159. The Western Australian and Queensland sections state: "A person who, by threats or intimidation of any kind, or deceit, causes another person to do an act or make an omission which results in the death of that other person, is deemed to have killed him."

46 However, the reasonable foreseeability test does arise in a causation context in both Queensland and Western Australia by virtue of s23 of their respective Criminal Codes. Section 23 states that a person is not responsible "for an event which occurs by accident". The tendency has been to address issues of causation through s23, which has a very distinct link to reasonable foreseeability: see *Vallance v. R* (1961) 108 CLR 56, per Dixon CJ at 61 and Kitto J at 65; *Kapronovski v. R* (1975) 133 CLR 209 per Gibbs J at 231-232.

47 Section 154(c) of the Tasmanian *Criminal Code* states: "A person is deemed to have killed another in the following cases where his act or omission is not the immediate, or not the sole, cause of death:- ... (c) where by actual violence, or threats, or intimidation of any kind, or by deceit, he causes the other to do an act or make an omission likely to cause death, and which he knows, or ought to have known, the other would be likely to do, and which causes the death of the other ...".

Division 1 - Definitions

**5.1.3 Causing death or harm**

For the purposes of an offence under this Part, a person's conduct causes death or harm if it substantially contributes to the death or harm.

led to their death. All of these factors are relevant in the same way - as one of the factors to take into account in deciding whether the substantial cause test is made out. The concept of foreseeability should not be introduced in determining causation problems because it is largely irrelevant and, where relevant, serves to confuse. The Committee adopts the position in *Royall* and in doing so seeks to encourage juries to resolve causation issues by applying their common sense.

The Committee is further of the view that understanding of the substantial cause test is aided by expressing it in terms of a substantial contribution test. Colloquially, an act is described as having substantially caused a result if it is the principal causal factor. This colloquial understanding does not accurately reflect the legal test. It is more readily understood that a result may be substantially contributed to by more than one act or omission.

#### Recommendation

Legislation codifying causation should not depart from existing common law principles. A person causes death or other proscribed harm when their conduct substantially contributes to that death or harm.

#### Co-incident of Conduct and Fault

At common law, if the defendant is to be guilty of an unlawful homicide, the conduct that causes death must be accompanied by fault. In the case of murder, for example, the fatal act or omission must be done with intention to kill or other fault sufficient for murder.<sup>48</sup> Problems of causation surface when act and intent do not co-exist, as in these circumstances it cannot be said that the defendant performed an act causing death with the requisite intention.

The need for act and intent to coincide has created some difficulty in 'supposed corpses' cases. Here there are two acts in issue. The defendant commits the first act with the requisite fault element for murder but that act does not in fact kill the victim. Nevertheless, the defendant believes the victim to be dead (as he or she may be unconscious) and proceeds to dispose of the body in such a way which does result in the victim's death. The act of disposal, the second act, is not performed with the required fault element as the defendant believes the victim to already be dead.

In such cases, the defendant's argument is that he or she cannot be convicted of a fatal offence as act and intent do not exist contemporaneously. Although the first act was performed with the requisite fault element, it is not the act which killed the victim; the second act, while causing death, was not accompanied by the requisite fault element.

<sup>48</sup> See *Ryan v. R* (1967) 121 CLR 205 at 217-218; *Demirian* (1988) 33 A Crim R 441.

Code

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The courts have tended to overcome this problem of causation by artificially marrying the intent existing at the time of the first act with the second act constituting the immediate cause of death, thereby making act and intent contemporaneous. This is achieved by viewing the two acts as constituting one indivisible transaction or series of acts. The Privy Counsel's decision in *Thabo Meli v The Queen*,<sup>49</sup> followed in *R v Church*,<sup>50</sup> is the best known example of this situation.

In *Thabo Meli*, four defendants intended to kill their victim. They constructed a plan to achieve this purpose involving intoxicating the victim, killing him by a blow to the head (the first act) and disposing of his body by throwing him over a cliff (the second act) giving the appearance that his death was accidental. The defendants executed the plan but the blow to the head merely rendered the victim unconscious. This was not known to the defendants who thought that the blow had killed him. In fact, the victim died from exposure after he was thrown from the cliff. On appeal, the defendants argued that their conviction for murder must be quashed because the act causing death never contemporaneously existed with their intent to kill. The first act (blow to the victim's head) could not found the murder conviction as that act did not cause death. Similarly, the second act (throwing the victim from the cliff) was also deficient as at that time the defendants could not have intended to kill the victim as they thought he was already dead. The Privy Council held that it was "impossible to divide up what was really one transaction in [the manner suggested by the defendants]".<sup>51</sup> Therefore, the "act" was said to constitute the series of acts being both the blow to the head and throwing the victim off the cliff. This extended view of the act enabled the conviction to be upheld on the basis that the relevant intention was present when the defendants performed the act (being a series of acts) causing death. In *Church's* case there was no preconceived plan to kill the victim. In the course of an argument, the defendant struck the victim and, erroneously believing her to be dead, threw her in a nearby river where she drowned.

Although a desirable result was reached in *Thabo Meli*, the decision was based upon an artificially extended definition of the act, the idea being to define the act so broadly so that it existed at a time when the relevant intention was also present. The Committee believes it to be unnecessary to extend the view taken of the act to a series of acts in order to overcome the problem presented in these cases. The substantial contribution test identified above adequately meets the challenge without any need for modification. The key is to recognise that in applying the substantial contribution test there may be more than one act which substantially contributes to the death. The task is to identify the act which was accompanied with the relevant intention and determine whether *that (single)*

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49 [1954] 1 WLR 228.

50 [1966] 1 QB 59 (CCA).

51 [1954] 1 WLR 228 at 230.

Code

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*act* substantially contributed to the death. If so, there is co-occurrence of act and intent and hence no causation problem. The fact that the act performed with an intention to kill is not the immediate cause of death is not necessarily determinative. The only significance of any later acts committed in the series of acts is that they operate as potential breaks in the chain of causation. However in Australia, unlike *Thabo Meli*, the High Court has held the chain can be broken if a relevant subsequent act is also performed by the defendant.<sup>52</sup>

The Committee's approach has received judicial support. The New Zealand Court of Appeal's decision in *R v McKinnon*<sup>53</sup> is directly on point. In that case, as in *Thabo Meli*, there were two acts in question. The defendant, with the required fault element, struck the victim over the side of the head with a piece of fence paling which rendered him unconscious. The defendant proceeded to drag the victim to a telephone booth and place him inside. At some later stage and as a result of a second act committed by the defendant, the victim incurred an injury to his nose which caused it to bleed. The victim died as a result of inhaling blood. Thus, the immediate cause of the victim's death was the injury to his nose. In upholding a conviction for murder, the Court of Appeal did not seek to define the events constituting the two acts as a series of acts. This was thought to be unnecessary on a straight application of the substantial contribution test. The Court viewed the two acts independently. Further, it acknowledged that the immediate cause of the victim's death was the act which caused the victim's nose to bleed (the second act). The fact that no fault element sufficient for murder existed at the time that act was committed was not relevant. It was irrelevant because the Court acknowledged that '... there may be more than one cause of death in homicide cases ...'.<sup>54</sup> Although the second act constituted the immediate cause of death, this did not preclude the first, or any other, act also causing the victim's death. The issue was: did the first act of striking the victim's head substantially contribute to the death? If this test of causation was established the defendant was guilty of murder as the act substantially causing death was accompanied by the requisite mental element. Therefore, it was unnecessary for the Court to view the two acts as a series of acts in order to ground a murder conviction. The Court specifically made this point by stating that it preferred to decide the case on the principles enunciated in *R v Smith*<sup>55</sup> (the substantial contribution test), rather than on the basis of the *Thabo Meli* principle. The Court stated:

'... the principles stated by Lord Parker CJ in *R v Smith* are applicable in New Zealand and may be applied in a case where the act which is the immediate cause of death (here the nose injury

52 Royall (1990-1991) 172 CLR 378

53 [1980] 2 NZLR 31. Note also Cooper (1992) 78 CCC 3D 289 where the Canadian Supreme Court followed the McKinnon approach.

54 Ibid, at 36.

55 [1959] 2 QB 35 at 42-43.

Code

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and bleeding) is an act of the accused, or an act to which he is a party, and which is not so overwhelming as to make the original injury (here the blow to the head) merely part of the history.<sup>56</sup>

This approach can be applied to the facts of *Thabo Meli*. This was also recognised in *McKinnon*.

'In an article contributed to 1 Otago LR 278 at 287 the late Sir Francis Adams expressed the view that the decision in *Thabo Meli* could itself be supported by this type of approach to the problem of causation. He said:

"In *Thabo Meli's* case, the real cause of death was not the mere act of leaving the victim where he lay. But for the injuries previously, he could have walked away; and what really killed him was the fact that those injuries rendered him incapable of escaping from exposure to the cold."<sup>57</sup>

'Therefore, there was no need for the Privy Counsel in *Thabo Meli* to extend its view of the act to a series of acts as nothing turned on joining two separate acts into the one transaction. The proposition is perhaps best described in the following passage:

"Where measures are taken by an assailant to dispose of the supposed corpse of his victim, and death ensues, it will usually be the case that the initial acts of the accused contributed in a significant degree to the ultimate death of the victim. If not first beaten into unconsciousness the victim in *Meli* would not have died of exposure to the cold, and the victim in *Church* would probably not (or not so soon) have drowned. If the initial act was causally significant, there is no need to consider the subsequent act at all. Being a voluntary act of the accused himself, it can hardly be deemed a *novus actus interveniens*."<sup>58</sup> (emphasis added)

56 [1980] 2 NZLR 31 at 36.

57 [1980] 2 NZLR 31 at 36-37.

58 Turpin, "Manslaughter" [1965] *Criminal Law Journal* 170, at 173.

Division 1 - Definitions

**5.1.3 Causing death or harm**

For the purposes of an offence under this Part, a person's conduct causes death or harm if it substantially contributes to the death or harm.

### Recommendation

The Committee favours relying on an application of the general test of causation, the substantial contribution test, thereby promoting consistency and simplicity.

### Year-and-a-Day Rule

The year-and-a-day rule is essentially a rule of causation in that it arbitrarily limits the scope of causation to a year and a day.<sup>59</sup> At common law, no person could be convicted of an unlawful homicide if death occurred more than a year and a day from the date of the act or omission which eventually causes death.<sup>60</sup> Although there is some debate about the rule's origin,<sup>61</sup> its survival is most likely motivated by a perceived need to protect accused persons from liability in circumstances where the chain of causation becomes too faint to trace.<sup>62</sup> The need for such protection was greater in earlier times when medical science was less precise. This situation has changed. Not only is medical science able to more accurately identify the cause of death even after one year has elapsed, but it is becoming more common for death to result several years after the commission of the act. Life support machines are one reason for this change as is the increased prevalence of long-term though deadly diseases like Acquired Immune Deficiency Syndrome (AIDS) and mesothelioma. A person injected with HIV Aids infected blood, for example, is unlikely to die within a year and a day but this does not necessarily make the chain of causation any less certain. In the present environment the rule has become anachronistic.

Despite its diminished status, arguments have been raised which forge a new role for the rule. In England, the Criminal Law Revision Committee once recommended that the rule should be retained because no person should remain liable indefinitely for prosecution for murder, particularly when there are other serious offences with which the defendant can be immediately charged.<sup>63</sup> The Committee does not share this view.

59 *Dyson* [1908] 2 KB 454.

60 *Dyson* [1908] 2 KB 454; *R v Evans & Gardiner* (No. 2) [1976] VR 517.

61 The most comprehensive studies of the year-and-a-day rule trace its origin to the Middle Age's procedure for the appeal for felony of death which required such appeals to be instituted within a year and a day of the act which allegedly caused the death: see Yale, "A Year And A Day In Homicide" (1989) 48 *Cambridge Law Journal* 202; Law Commission of England, *Criminal Law: The Year and a Day Rule in Homicide*, Law Commission Consultation Paper No. 136, July 1994, at paras. 2.1-2.7; Law Commission of England, *Legislating the Criminal Code: The Year and a Day Rule in Homicide*, Law Commission Consultation Paper No. 230, February 1995, at paras. 2.3-2.4.

62 See, for example, Sir Edward Coke, *Institutes of the Laws of England*, 3 Inst. 53 (1641).

63 Criminal Law Revision Committee, Fourteenth Report, *Offences Against the Person*, 1980 Cmnd 7844 at para. 39, however the English Law Commission expressed the opposite view and the UK Parliament recently enacted the *Law Reform (Year and a Day) Rule Act 1996*.

Code

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First, it sees no reason why a person should escape liability for murder just because his or her victim did not die within a year and a day. The prosecution bears the onus of proving its case, including the issue of causation. If the delay between the defendant's act and the victim's death prevents the prosecution from establishing beyond a reasonable doubt a causal link, then the prosecution will not succeed.

Second, a person who kills another with the requisite mental state for murder should be charged with murder. To charge that person with a lesser offence fails to reflect the seriousness of his or her conduct. Murderers should not be convicted of attempted murder or any other non-fatal offence.

A related argument used to justify the year-and-a-day rule in its modern context concerns double jeopardy. The law of double jeopardy fails to protect a person who has been convicted of a non-fatal offence from subsequently being convicted for a fatal offence if the victim died after the first conviction. Again, the Committee is not persuaded by this argument. The same situation can arise even with the year-and-a-day rule.<sup>64</sup> Its abolition merely makes the situation more likely to occur. Nevertheless, when it does arise other mechanisms of the criminal justice system intervene to prevent any injustice. These mechanisms include the sentencing process, the rules relating to the framing of presentments and abuse of process, the special plea of *autrefois acquit* and Crown prosecution guidelines.<sup>65</sup>

#### Recommendation

The Committee has previously recommended to the Standing Committee of Attorneys General that the year-and-a-day rule ought to be abolished in the jurisdictions in which it still existed. All jurisdictions have implemented that recommendation.<sup>66</sup> The rule should not be revived.

<sup>64</sup> For an example, see *Thomas* [1950] 1 KB 26.

<sup>65</sup> See Victorian Law Reform Commission, *Homicide*, Report No. 40 at para. 278.

<sup>66</sup> *Crimes (Injuries) Amendment Act 1990* (NSW); *Crimes (Year and a Day Rule) Act 1991* (Vic); *Criminal Law Consolidation (Abolition of the Year and a Day Rule) Amendment Act 1991* (SA); *Penalties and Sentences Act 1992 (Old)*, s207 and Sch; *Criminal Law Amendment Act 1991* (WA); *Criminal Code Amendment (Year and a Day Rule Repeal) Act 1993* (Tas); *Crimes (Amendment) Act 1995* (ACT). The rule has also recently been abolished in the United Kingdom: *Law Reform (Year and a Day Rule) Act 1996* (UK).

Division 2 - Murder

**5.1.9 Murder**

A person:

- (a) whose conduct causes the death of another person; and
- (b) who intends to cause, or is reckless about causing, the death of that or any other person by that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for life.

## MURDER

It has already been stated that the fault element is the cornerstone of a principled approach to the law of homicide, the reason being that it is the best indication of moral culpability. It is crucial to remember that determining moral blameworthiness is the central objective of this approach. In the simplest case, where the defendant intends to kill, moral blameworthiness is clearly established and hence a murder conviction is appropriate. All jurisdictions, however, recognise that murder can be extended beyond this central case.

The central case of murder, an intention to kill, can be viewed as containing two variables:

- belief or awareness; and
- whether a circumstance exists or will exist, or a result will be brought about or will ordinarily occur.

The fault elements required for murder have been extended from requiring an intention to cause the death to also include recklessness about causing the death. Similarly, the awareness concept has been extended from requiring the defendant to be aware death will be brought about or will ordinarily occur, to include the defendant having awareness that grievous bodily harm will occur or will ordinarily occur. Further, constructive forms of murder such as felony-murder and escape-murder are not consistent with the central case of murder.

The key evaluative factor in deciding whether these extensions to murder are warranted is to consider whether they equate with the necessary degree of moral culpability sufficient to attract the murder label. That is clearly a mutable determination upon which reasonable minds can and do differ.

### THE CENTRAL CASE OF MURDER: INTENTION TO KILL

Intention is defined in section 5.2 of Chapter 2 of the Model Criminal Code as follows:

- ‘5.2 (1) A person has intention with respect to conduct if he or she means to engage in that conduct.
- (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
- (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.’

Code

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Killing with an intention to kill is the quintessential element of murder. It is clear beyond doubt that the existence of these conditions will, in the absence of a defence, properly give rise to a conviction for murder.<sup>67</sup> However, the adopted definition extends the meaning of intention beyond its usage in ordinary language.

The first part of the definition is an affirmation that intention bears the same meaning in law as it does in ordinary language. To *intend* to do something is, simply, to intend it. The second part clearly goes beyond ordinary language. Defendants in criminal cases are taken to intend the consequences of their conduct if they knew those consequences to be inevitable. For example, dentists know that their treatments usually result in discomfort and often in pain. It is a rare dentist, however, who intends to cause discomfort or pain to patients, yet they fall within the definition of intention adopted by the Model Criminal Code.

In the absence of a justification or excuse, such as self defence, it is murder to cause death by an act which was meant to kill.<sup>68</sup> So too in almost all circumstances in which death is caused by an act which the defendant knew involved a certainty of death. Thus, a person who places a time bomb on a cargo plane knowing that it will explode in flight and destroy the plane is guilty of murder should the crew be killed.<sup>69</sup> It makes no difference if the purpose was insurance fraud and the deaths were a matter of indifference to the offender. Callous indifference to the certainty of death is as bad as an intention to cause death in circumstances where death is a virtual certainty.

The case is different, however, when medical treatment of the terminally ill involves certain death. The administration of pain killing drugs may have the anticipated and inevitable side effect of accelerating the patient's death. Since death was anticipated and inevitable, the Code declares it to be an intentional termination of life. It should not be the case, however, that the medical professionals who provide the treatment are guilty of murder.

67 This accords with the law in all jurisdictions: *Crimes Act 1900* (NSW) s18(1)(a); Western Australian *Criminal Code* s278; Queensland *Criminal Code* s302(1); Tasmanian *Criminal Code* ss156(2)(a) and 157(1)(a); Northern Territory *Criminal Code* s162(1)(a); *Crimes Act 1900* (ACT) s12(1)(a). There is no statute in either Victoria or South Australia which defines "murder". The common law position applies in those jurisdictions.

68 This accords with the law in all jurisdictions: *Crimes Act 1900* (NSW) s18(1)(a); Western Australian *Criminal Code* s278; Queensland *Criminal Code* s302(1); Tasmanian *Criminal Code* ss156(2)(a) and 157(1)(a); Northern Territory *Criminal Code* s162(1)(a); *Crimes Act 1900* (ACT) s12(1)(a). There is no statute in either Victoria or South Australia which defines "murder". The common law position applies in those jurisdictions.

69 In such a case the offender *intends* the bomb to explode and *intends* to destroy the plane. The consequential death of the passengers is, arguably, not intended - though the offender knows it to be a certain consequence.

Code

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Existing law does not treat the realisation that consequences are certain as the equivalent of an intention to cause those consequences. Or, at all events, it does not do so consistently. In *Airedale NHS Trust v Bland*<sup>70</sup> Lord Goff declared that it was lawful for a doctor to administer painkilling drugs to a patient dying of cancer, 'despite the fact that he knows that an incidental effect of that application will be to abbreviate the patient's life'. It is generally accepted that Australian common law is the same, subject to any statutory provision governing the treatment of terminal illness.<sup>71</sup> What a doctor may not do without attracting criminal sanction, consistent with existing law, is to administer drugs in order to hasten death, or with the primary purpose of doing so.<sup>72</sup>

The distinction between consequences which are intended and consequences which are categorised as mere unintended side effects is known as the doctrine of double effect. The doctrine has a variety of applications in criminal law. Among the more important are those which have to do with medical treatments which carry a risk or certainty of death or other physical harms. Though judicial statements on the matter are far from unanimous,<sup>73</sup> there is significant support for rationalisation of existing medical practices in terms of the doctrine of double effect. To the extent to which existing law and practice rests on that foundation, it will be removed by the enactment of the provisions of Chapter 2 of the Model Criminal Code.

Similar problems are apparent when decisions are taken to terminate life sustaining treatment of patients who have no prospect of a sentient or bearable life. In these cases, the doctrine of double effect is stretched to, if not beyond, the limits of casuistry. The Code defines death as irreversible cessation of all brain function or of blood circulation (section 5.1.6). Given the definition of intention in the Code, it would be difficult to deny that termination of treatment of a completely dependent patient, whatever the medical justification, is an instance of intentionally causing death.

In most jurisdictions the double effect doctrine is the subject of continuing debate, reflecting fundamental moral divisions.<sup>74</sup> It is a debate which the Committee has no intention of entering. Our concern is only that the statutory

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70 [1993] AC 789.

71 See generally the section headed "Euthanasia" below.

72 Cox (1992) 12 BMLR 38 at 39 per Ognall J; *Re J* [1990] 3 All ER 930 at 938 per Lord Donaldson: "[T]he use of drugs to reduce pain will often be fully justified, notwithstanding that this will hasten the moment of death. What can never be justified is the use of drugs or surgical procedures with the primary purpose of doing so."

73 For instance, Lords Lowry and Brown-Wilkinson in *Airedale NHS Trust v Bland* [1993] AC 789 both rejected reliance on the doctrine of double effect, accepting that doctors do intend to the patient to die when that is the inevitable and known result of treatment.

74 Note s. 18(1) of the *Consent to Medical Treatment and Palliative Care Act 1995* (SA) which appears to preserve the double-effect doctrine.

Code

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definition of intention, as a fundamental element of criminal responsibility, should not have the unintended effect of altering existing law and practice relating to treatment of the terminally ill or others for whom normal and acceptable medical treatment may have the effect of hastening death.

#### Recommendation

In each jurisdiction, care should be taken to ensure that enactment of the Code provisions dealing with offences against the person does not have unintended effects on the law and practice relating to the medical treatment of patients who are terminally ill or suffering from conditions which deny the possibility of a bearable existence.

Subject to the above caution, classifying those who *intendi* to kill, in the sense in which the Model Criminal Code employs that term, is uncontroversial. The controversy arises in considering whether a conviction for murder should be extended to situations where there is only an intention to do grievous bodily harm, where there is recklessness rather than intention, and in situations where an intention to kill is constructed from the existence of certain circumstances.

#### INTENDING SERIOUS HARM

In most jurisdictions, a person who kills another human being will be guilty of murder even if he or she did not intend to kill, but merely inflict serious harm (otherwise known as grievous bodily harm).<sup>75</sup>

Subject to the above caution, a definition of intention which includes knowledge of consequences which are certain to happen, is uncontroversial in legislation dealing with offences against the person.

There is room for controversy, however, over the extension of the offence of murder to include cases in which there was an intention to cause injury rather than death, to cases of reckless conduct causing death and to cases of unexpected death resulting from the commission of a serious crime such as robbery or rape.

<sup>75</sup> See *Crimes Act 1900* (NSW) s18(1)(a); Western Australian *Criminal Code* s279(1) and (3); Queensland *Criminal Code* s302(1) and (3); Tasmanian *Criminal Code* ss 156(2)(a) and 157(1)(b) and (d); Northern Territory *Criminal Code* s162(1)(a). Victoria and South Australia are governed by the common law. The Australian Capital Territory is the notable exception. In that jurisdiction an intention to inflict grievous bodily harm resulting in death is not in itself sufficient to found a murder conviction: see s 12(1) *Crimes Act* (ACT).

Code

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The Griffith Code jurisdictions define grievous bodily harm (serious harm) to mean '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'.<sup>76</sup> The second limb of the definition substantially weakens the meaning of the term.

In common law jurisdictions which do not have a statutory definition of the term, the courts have not attempted to accurately define 'grievous bodily harm' or serious harm. Juries are merely instructed that the phrase means 'really serious injury'.<sup>77</sup> This affords the jury a considerable degree of autonomy. Consequently, this area of the law has been plagued with varying results which are difficult to reconcile.<sup>78</sup> In the Model Criminal Code, grievous bodily harm will be replaced with the term 'serious harm'.

Determining moral culpability is central to deciding whether this category of murder should be retained. The question should be asked: Is the person who kills while merely intending to do serious harm just as culpable as the person who intends to kill and does so? Are such persons moral equivalents?

Those who argue that such persons are moral equivalents emphasise the fact that the defendant has intentionally acted in such a way so as to endanger the life of another. They further point to the fine evidential line distinguishing persons who intend to kill from those merely intending to cause serious harm. It is not difficult to envisage situations where it is virtually impossible to draw this distinction. If forced to make this distinction, the jury in these cases may resort to guessing. Moreover, the fine distinction between the two would potentially enable defendants who intended to kill to avoid a murder conviction by arguing that they merely intended to cause serious harm.

Despite these arguments several bodies have recommended the abolition of the serious harm category of murder.<sup>79</sup> They argue that the doctrine is outdated. At the time of its development, it was far more common for persons who suffered serious harm to die. The practical distinction, therefore, between a person intending to kill and doing so and one who merely intended to do serious harm was in the past not very significant. Progress in medical science has

76 Western Australian *Criminal Code* s1; Queensland *Criminal Code* s1; Tasmanian *Criminal Code* s1. Also see *R v. Naismith* [1961] 2 All ER 735.

77 *Rhodes* (1984) 14 A Crim R 124; *Hunter and Dabblers* (1989) 44 A Crim R 93.

78 For example, compare *Rhodes* (1984) 14A Crim. R 124 with *Weeding* (1959) VR 298.

79 These include the Mitchell Committee (1977), the Victorian Law Reform Commission (1974, 1984), the English Law Commission (1966, 1989), the English Criminal Law Revision Committee (1980) two English Royal Commissions (one on Capital Punishment (1949-1953) and the other on Murder and Life Imprisonment (1989)), and the Law Reform Committee of Canada (1984).

Code

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caused the distinction to become more relevant.<sup>80</sup> Further, the notion of reckless killing has since been developed. This is said to be capable of subsuming the serious harm category of murder.<sup>81</sup> Critics also argue that the notion of serious harm is too vague, leading to inconsistent verdicts and unacceptably uncertain results.

The Committee is aware of the need for a principled approach to the law of homicide and has predominantly used the defendant's mental state in doing a particular act to achieve such consistency. The serious harm category of murder diminishes this intent-based approach by allowing something less than an intention to kill to constitute murder. The Committee's view is that murder should in some way be linked to death as the contemplated harm rather than merely serious harm.

The Committee is concerned that any offence of murder require the prosecution to prove intention or recklessness as to death. If the prosecution can only prove intention or recklessness as to causing serious harm, then manslaughter will be the appropriate offence.

#### Recommendation

The crime of murder should not extend to cases in which the accused intended serious harm, rather than death, unless the accused was reckless as to the risk of death.<sup>82</sup>

## RECKLESSNESS AS TO DEATH

### Meaning Of 'Recklessness'

'Recklessness' is a concept about risk. It relates to the degree of foresight of a particular result associated with a certain course of action and deciding to engage in that conduct despite the potential consequences.

In the context of murder, at common law the reckless killer is someone who foresees the *probable* risk of death or grievous bodily harm attached to certain conduct but decides to engage in that conduct despite that risk.

<sup>80</sup> Compare the comments of the Law Commission who states: "In practice, however, there is a very thin line between behaviour that risks serious injury and behaviour that risks death, because it is frequently a matter of chance, depending on such factors as the availability of medical treatment, whether serious injury leads to death.": Law Commission, *Legislating the Criminal Code: Unintentional manslaughter*, Law Comm No 237, 1995-96, at para. 4.19. The Commission also stated that "... much time could be spent in arguing about whether there was a foreseeable risk of causing death itself, and not merely serious injury": at para. 5.26.

<sup>81</sup> See Leader-Elliot, "Recklessness in Murder" (1981) 5 *Criminal Law Journal* 84. A person who foresees the risk of death or serious harm but decides to act (recklessly) in any event and thereby causes death is not very different from the person who intends to cause serious harm.

<sup>82</sup> See the section titled "Dangerous conduct causing death" below.

Code

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The Committee considered the definition of recklessness at section 5.4 of Chapter 2 of the Model Criminal Code:

- ‘5.4(1) A person is reckless with respect to a circumstance if:
- (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
  - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (2) A person is reckless with respect to a result if:
- (a) he or she is aware of a substantial risk that the result will occur; and
  - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (3) The question whether taking a risk is unjustifiable is one of fact.
- (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.’

This definition is similar to that of the common law. The High Court in *Crabbe*<sup>83</sup> held that the defendant must foresee death as a *probable* result, not merely as a possible one. The Committee has chosen to speak in terms of a ‘substantial risk’ so as to avoid speculation about mathematical chances.<sup>84</sup>

The Committee’s definition also requires the risk to be ‘unjustifiable’. Unlike intention, recklessness encompasses an evaluative element. Some risks are worth taking because they are socially justifiable. One example of such risks was referred to in *Crabbe*, namely, the doctor who performs an operation on a patient knowing that it is likely to cause death in circumstances where death will definitely result if the operation is not performed.<sup>85</sup> In these cases, the

83 (1985) 156 CLR 464 at 469-470.

84 The Committee does not, however, wish to derogate from the force of the High Court’s statements in *La Fontaine v. R.* (1976) 136 CLR 62 at 76-77 per Gibbs CJ. The jury should not be directed in terms of recklessness regarding murder as that is apt to confuse, particularly if the jury is also to consider the possibility of manslaughter by criminal negligence. For this reason, it is preferable for any directions to the jury to avoid the term “recklessness” by describing the precise state of mind required to establish reckless murder. See further Leader-Elliot, “Recklessness and Murder - The Facts of the Case” (1986) 10 *Criminal Law Journal* 359.

85 (1985) 156 CLR 464 at 470.

Code

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defendant is not the moral equivalent to the person who intends to kill and therefore does not attract liability for their actions because they do not act recklessly.<sup>86</sup>

In all jurisdictions except Western Australia, Queensland and the Northern Territory a person who recklessly kills another human being will be guilty of murder.<sup>87</sup> The position is not clear in the latter jurisdictions as the criminal codes in those jurisdictions merely refer to an intention to kill or do grievous bodily harm without any reference to recklessness. While there is case authority supporting the view that 'intention' should be interpreted to include recklessness,<sup>88</sup> there are also cases which state recklessness will not suffice where intention is required.<sup>89</sup>

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86 The Victorian Law Reform Commission has preferred to deal with the evaluative element of recklessness not by excluding justifiable risks from the definition of that term, but rather by providing for it through the defence of necessity: Law Reform Commission of Victoria, "*Homicide*", Report 40, para. 142. It argues that this approach avoids the need for the judge to direct the jury on justification where necessity is in issue and clearly separates justification from the question of foresight of death. The Committee takes the view that the issue of justification is not properly subsumed by the defence of necessity - they are two distinct concepts which may, but often do not, overlap. Hence, where necessity is a real issue in a case, a direction about both justification and necessity are properly to be given to the jury. Experience, nonetheless, shows that this will be a rare case. Further, it is not desirable to completely divorce the question of justification from the degree of foresight. These two notions are linked - the acceptable degree (foresight) of risk clearly interacts with the justifiability of running that risk. To that extent, their interaction should be acknowledged. Conversely, active destruction of the link should not be an objective. Thus, in keeping with its approach in Chapter 2, the Committee favours an approach whereby socially justified risk taking is excluded from the definition of recklessness rather than treating it as a partial defence. This approach avoids persons who take justifiable risks falling within the concept of murder but being excused. Such persons are rightly not incorporated within that concept at all.

87 See *Crimes Act 1900* (NSW) s18(1)(a); Western Australian *Criminal Code* ss278 and 279; Queensland *Criminal Code* s302; Tasmanian *Criminal Codes* s157(1)(b); Northern Territory *Criminal Code* s162(1)(a); *Crimes Act* (ACT) s18(1)(a). Victoria and South Australia are governed by the common law, which is to the same effect.

88 See *Vallance v. R* (1961) 108 CLR 56; *Knutsen* [1963] Qd R 157 at 165, 173 & 184. Further see Campbell, "Recklessness in Intentional Murder in the Australian Codes" (1986) 10 *Criminal Law Journal* 3.

89 See *Willmot* (No. 2) [1985] 2 Qd R 413, following the House of Lords' decision in *R v. Moloney* [1985] AC 905.

Division 2 - Murder

**5.1.9 Murder**

A person:

- (a) whose conduct causes the death of another person; and
- (b) who intends to cause, or is reckless about causing, the death of that or any other person by that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for life.

### Foreseeing Death

The Committee agrees with the High Court's decision in *Crabbe* that the reckless killer foreseeing the probability of causing death is 'just as blameworthy' as the intentional killer.<sup>90</sup> The contrary argument that such a person is merely 'willing, but does not try, to become [a killer]'<sup>91</sup> is not convincing because it is the very fact that they are willing to kill and do in fact kill which establishes them as the moral equivalent to murderers.

### Foreseeing Serious Harm

On the other hand, the Committee has already expressed the view that an intention to do serious harm *without being aware of the substantial risk of death* should only establish manslaughter, not murder. Logically, it follows that the Committee does not believe that the reckless killer in the same circumstances is just as culpable as the intentional killer. However, the reckless killer who is aware of a risk of causing serious harm but not death should be guilty of manslaughter.

#### Recommendation

It should be murder when a person causes death as a consequence of conduct which was accompanied by recklessness as to death. The crime of murder should not extend to individuals who are reckless as to the risk of physical harm short of death.

### CONSTRUCTIVE MURDER

The common law recognises two forms of constructive murder: felony-murder and escape-murder. Both involve an unintentional killing by an act of violence. In the case of felony-murder, such act is committed during the commission of a felony other than abortion or attempted abortion.<sup>92</sup> The meaning of the word 'felony' was at common law every species of crime for which the punishment could involve forfeiture of land, goods or death ('except petty larceny and mayhem'). Later felonies were categorised by statute as serious crimes and included murder, manslaughter, burglary, house-breaking, larceny, bigamy and rape). In the case of escape-murder, the act of violence is committed in an effort to resist, prevent or escape from lawful arrest and custody.

90 (1985) 156 CLR 464 at 469-470. The High Court also noted that "on one view, a person who does an act knowing its probable consequences may be regarded as having intended those consequences to occur", but did not conclusively determine that issue.

91 Duff, "Intentions Legal and Philosophical" (1989) 9 *Oxford Journal of Legal Studies* 76 at 93.

92 If the felony in issue is abortion or attempted abortion, a reasonable person in the defendant's position must consider the act of violence to be likely to cause death or serious harm to the victim: *Brown* [1949] VLR 177.

Code

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All jurisdictions have replaced the connection to traditional felonies with a narrower statutory version of the same concept. So it is not accurate to continue to describe it as the 'felony-murder' rule - 'constructive murder' is more appropriate. In the common law jurisdictions the scope of the offence is restricted by limiting the type of crimes which give rise to the operation of the offence. For instance, in New South Wales it only applies if the unintentional killing took place in the course of the commission of a crime punishable by imprisonment for a period of 25 years or life.<sup>93</sup> In Victoria the associated crime must be one where the necessary elements include violence and it is punishable by imprisonment for 10 years or more. In South Australia it must be a major indictable offence punishable by imprisonment for 10 years or more (other than abortion).<sup>94</sup> In each of those States the old 'felony-murder' rule is specifically abolished.

The Code states have also narrowed, albeit by different means, the operation of constructive murder. The limitation is not attached to the unlawful purpose, but rather the dangerous act. The Codes require the act to be 'of such a nature as to be likely to endanger human life'.<sup>95</sup> On the other hand, the Northern Territory *Criminal Code* uses both the unlawful purpose and the dangerous act to limit constructive murder.<sup>96</sup> There is no constructive murder provision in Australian Capital Territory legislation.<sup>97</sup>

Constructive murder has been the subject of criticism.<sup>98</sup> Such criticism stems from the fact that these offences involve the imputation of the fault element required for murder by reason of the coincidence of the death occurring in the context of other criminal conduct - hence the description 'constructive' murder. If these elements exist, a murder conviction follows as a matter of course even if there is no evidence of intention or recklessness.

93 *Crimes Act 1900* (NSW) s18(1)(a).

94 *Crimes Act 1958* (Vic) s3A(1) & (2); *Criminal Law Consolidation Act 1935* (SA) s12A. Note however that while the South Australian legislation preserves the position in relation to abortion, the Victorian Act does not.

95 This phrase is used in both the Queensland (s302(2)) and Western Australian (s279(2)) Codes. In Tasmania, the unlawful act must be one "which the offender knew, or ought to have known, to be likely to cause death in the circumstances ...": Tasmanian *Criminal Code*, s157(1)(c). The Code states also contain other constructive murder type offences, although in practice they do not have any separate operation outside of the provision for murder by intending to do serious harm: see Queensland *Criminal Codes* s302(3); Western Australian *Criminal Codes* s279(3); Tasmanian *Criminal Code* s157(1)(d).

96 Northern Territory *Criminal Code* s162(1)(b) & (2).

97 See, however, similar provisions such as s22 of the *Crimes Act 1900* (ACT).

98 For example, see Lanham, "Felony Murder - Ancient and Modern" (1983) 7 *Crim Law Journal* 90 at 101 who describes this rule as "an instance of modern monstrosity". See further Stephen, *A History of the Criminal Law of England* (1883) at 57 and 75. Also see Willis, 'Felony Murder at Common Law in Australia' (1977) 1 *Criminal Law Journal* 231.

Code

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An example of the problem with constructive murder might be the case of an escaped prisoner. The prisoner fires a warning shot in the night well over the heads of pursuing prison officers but the bullet hits a guard who is out of sight and positioned on the roof of a building. The activity is clearly dangerous and against the public interest, however manslaughter, which in this discussion paper would have a maximum penalty of 25 years imprisonment, is a far more appropriate charge, not murder. Retaining a constructive murder offence will do nothing to provide protection for the public, police or prison warders because it should only be used where the conduct is unintentional. If it were intentional the charge should be murder.

The defendant is convicted of murder instead of manslaughter in these cases because he or she has committed another serious offence. This involves an element of double jeopardy given that punishment for the other offence may also be imposed. Imputed guilt is a dubious basis for criminal liability.

Constructive murder was abolished in England 40 years ago.<sup>99</sup> The Canadian Supreme Court has found the doctrine to be contrary to the Canadian Charter of Rights<sup>100</sup> and numerous law reform bodies have recommended its abolition.<sup>101</sup> Despite the objections, the doctrine has survived in most jurisdictions. Society has little sympathy for persons who kill in the course of the commission of a serious crime or while attempting to escape arrest and custody in circumstances of violence. Supporters of constructive murder point to its deterrent value in defending its existence. This, however, overlooks the important fact that such killings are not intended or foreseen and therefore not able to be deterred. At best the doctrine can deter the commission of the felony or the attempt to escape, but not the killing itself.

The lack of intention or other culpable state of mind for murder on behalf of the person committing the felony or seeking to escape underlies the inappropriateness of this doctrine. To equate accidental killings with murder is contrary to the Committee's fault-based approach to determining culpability. In as far as the law of fatal offences is concerned, persons who kill while committing a felony or attempting to escape should be treated in the same way as any other person. If they intended to kill or are reckless as to death they will be convicted of murder pursuant to the existing rules regarding intentional and reckless killing. In the absence of these circumstances - where the death is truly accidental - murder should not be an issue. In these cases, manslaughter by gross negligence may be an appropriate charge but in any event the defendant can be prosecuted for the offence he or she intended to commit.

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99 *Homicide Act 1957* (UK), section 1.

100 *Vaillancourt* (1987) 39 CCC (3d) 118.

101 These include The Victorian Law Reform Commission, *Homicide*, Report 40, 1992, the Criminal Law and Penal Methods Reform Committee of South Australia, Fourth Report, *The Substantive Criminal Law*, 1977, (Mitchell Committee) and the Canadian Law Reform Commission. However for a different view see Murray, *The Criminal Code: A General Review*, vol.1 at 173-175.

Code

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**Recommendation**

The Committee recommends that constructive murder be abolished.

**PENALTY**

Murder is a grave offence. It is one of the most harmful and culpable offences in the Model Criminal Code and as such should attract a maximum penalty of life imprisonment.

## **Part 5.1- Fatal and non-fatal offences**

### Division 2 - Murder

#### **5.1.9 Murder**

A person:

- (a) whose conduct causes the death of another person; and
- (b) who intends to cause, or is reckless about causing, the death of that or any other person by that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for life.

### Division 3 - Other unlawful homicides

#### **5.1.10 Manslaughter**

A person:

- (a) whose conduct causes the death of another person; and
- (b) who intends to cause, or is reckless about causing, serious harm to that or any other person by that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

#### **5.1.11 Dangerous conduct causing death**

A person:

- (a) whose conduct causes the death of another person; and
- (b) who is negligent about causing the death of that or any other person by that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

## OTHER UNLAWFUL HOMICIDES

Manslaughter and dangerous conduct causing death represent less serious forms of unlawful homicide.

### MANSLAUGHTER

Like murder, under the common law manslaughter consists of various categories. The broad distinction is between manslaughter which depends on a particular state of mind on the part of the defendant and that which results from the acceptance of a partial defence to a charge of murder.

When the partial defences apply, the mitigating circumstances will result in a manslaughter verdict even though death was accompanied by an intention to kill. On the other hand, unintentional manslaughter, as its name suggests, does not depend upon the existence of the fault element for murder. In these situations the defendant's culpability is not attached to his or her specific intentions, but rather to their failure to care for human life in accordance with social standards.

Under the common law serious harm manslaughter is where the defendant does not intend to kill but merely cause serious harm, before addressing the primary distinction between voluntary and unintentional manslaughter. It concludes with a discussion of the alternative verdict of manslaughter, or the merciful verdict of manslaughter as it is otherwise known.

Earlier in this Discussion Paper the Committee recommended the abolition of murder in circumstances where the defendant intends to inflict, or is reckless about inflicting, serious harm but in fact causes death without foreseeing the result.<sup>102</sup> Such conduct should nonetheless represent a serious breach of the criminal law. The Committee recommends manslaughter as the appropriate offence in these circumstances. As is the case for murder, the fault element for manslaughter is either intention or recklessness.<sup>103</sup> The similarity in structure between murder and manslaughter in this respect will aid jury understanding of the applicable law when a direction in terms of both murder and manslaughter is required.

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<sup>102</sup> See sections titled "Intending Serious Harm" and "Recklessness as to death".

<sup>103</sup> Australian common law does not expressly acknowledge the existence of a category of manslaughter based on recklessness. However, there are traces of reckless manslaughter emerging in some cases: see *Parmenter* [1956] VLR 312 at 314-315 per Sholl J; *Longley* [1962] VR 137 at 481 per Sholl J; *Holzer* [1968] VR 481 at 482 per Smith J. See generally Editorial, "Unintentional manslaughter" (1995) 19 *Criminal Law Journal* 309.

**5.1.10 Manslaughter**

A person:

- (a) whose conduct causes the death of another person; and
- (b) who intends to cause, or is reckless about causing, serious harm to that or any other person by that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

### Recommendation

The Committee recommends that a person who kills another in circumstances where he or she intends to cause, or is reckless about causing, serious harm to that person or any other person, but does not necessarily foresee a substantial risk of death, should be guilty of manslaughter.

### Penalty

Manslaughter is not as grave an offence as murder, for which the Committee suggested a maximum penalty of life imprisonment. To reflect this decrease in gravity, the Committee is of the view that manslaughter should be punishable by a maximum of 25 years imprisonment. This suggestion is higher than the existing penalty in most Australian states and the Australian Capital Territory, the same as that in New South Wales, but lower than the penalty in Queensland, South Australia and the Northern Territory where, as with murder, the maximum penalty is life imprisonment.

### PARTIAL EXCUSES AND MANSLAUGHTER

Under the current law in all States and Territories, murder can be reduced to manslaughter due to the existence of a partial excuse. It should be noted that in all cases affected by these partial excuses the defendant is potentially guilty of murder because both the physical and fault elements of the offence will be present. The partial excuses do not operate to negate intent or recklessness; rather they recognise and make a concession for human frailty. The issue which arises is to determine what circumstances will suffice to diminish the fault element for murder. The jurisdictions recognise different circumstances as sufficient to constitute a partial excuse. Four are discussed here: provocation, excessive self-defence, diminished responsibility and infanticide. There is also discussion on whether compliance with Aboriginal customary law should be a partial excuse.

### Provocation

Current law recognises that there are circumstances in which people can be provoked to the point where they may kill another human being. If there is a situation that the law will recognise as provocation, and the prosecution is unable to disprove the partial defence, murder is reduced to manslaughter, though the defendant intended to kill the victim.

The test of provocation was recently stated by the High Court in *Maschiantonio v The Queen*.<sup>104</sup>

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104 (1995) 69 ALJR 598.

Code

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‘The provocation must be such that it is capable of causing the ordinary person to lose self-control and to act in the way in which the accused did. The provocation must actually cause the accused to lose self-control and the accused must act whilst deprived of self-control before he has the opportunity to regain his composure.’<sup>105</sup>

Provocation exists where it is possible to answer the following three questions in the affirmative:

- Did the provocation cause the defendant to lose self-control?
- Did the defendant kill the victim while still out of control?
- Having assessed the gravity of the provocation to the particular defendant by reference to his or her personal characteristics, could an ordinary person be driven by provocation of that degree to act as the defendant did (that is, homicidally)?

There do exist, however, certain rules which limit the operation of the partial defence. Provocation will not be available where:

- The provocative act does not take place in the presence of the defendant.<sup>106</sup>
- The victim is not the source of the provocation.<sup>107</sup>
- The defendant induces the provocation.<sup>108</sup>
- The defendant is unusually hot-tempered or intoxicated.<sup>109</sup>
- The defendant is resisting lawful arrest or custody.<sup>110</sup>

Other rules have been created but have since been overturned.<sup>111</sup>

The provocation defence has long been a topical issue in the criminal law. Cries for its abolition have increased in number. Those who promote the continuation of the defence concede that changes to the defence are required.

<sup>105</sup> *Ibid*, at 602. See further *Dincer* [1983] VR 460 at 467.

<sup>106</sup> *Arden* [1975] VR 449; *Kenney* [1983] 2 VR 470; *Quarty* (1986) 22 A Crim R 252; *Gardner* (1989) 42 A Crim R 279.

<sup>107</sup> *Kenney* [1983] 2 VR 470; *Gardner* (1989) 42 A Crim R 279.

<sup>108</sup> *Edwards* [1973] AC 648; *Allwood* (1975) 18 A Crim R 120.

<sup>109</sup> *Enright* [1961] VR 663. However, the defence will still be available if nothing turns on the fact that the defendant is unusually hot-tempered or intoxicated, ie if the ordinary sober person would have reacted in the same way.

<sup>110</sup> *Webb* (1976) 16 SASR 309, 313.

<sup>111</sup> Examples of these rules include the rule that the provocative act must be unlawful (*R* (1981) 4 A Crim R 127) and the rule that mere words or gestures without more cannot amount to provocation (*Moffa* (1977) 138 CLR 601; *Webb* (1977) 16 SASR 309).

Code

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Many of the criticisms are levied at the doctrine's lack of a consistent theoretical foundation, which has led to practical difficulties. It is appropriate to consider the doctrine in its historical context to evaluate the strength of this and other claims.

### *Historical Foundations*

The doctrine's roots reach as far back as Anglo-Saxon and Norman times. It arose out of the sheer prevalence of drunken brawls and dangerous duels which often resulted in death due to the involvement of lethal weapons.<sup>112</sup> The doctrine began to take on a more recognisable form in the seventeenth century when murder was closely aligned with malice aforethought, which was said to be lacking in provoked killings.<sup>113</sup>

In the eighteenth century, the doctrine was increasingly applied in situations other than the traditional drunken pub brawl and duelling cases. As the scope of the doctrine expanded, the courts began to ascribe formal characteristics to provocation by devising certain rules regulating its operation. For instance, while the doctrine could now be raised by husbands who interrupted their wives engaging in adultery, a *suddenness* requirement developed requiring the defendant's act to be committed in the heat of passion before his temper had cooled.

The operation of the doctrine was modified during the nineteenth century when objective criteria such as *proportionality* were introduced. This strict view continued into the twentieth century and it wasn't until more recent years that a less rigid approach, accommodating contemporary moral standards, has been adopted. The suddenness requirement was relaxed by the High Court in *Parker*.<sup>114</sup> Similarly, the objective proportionality test has taken on a more subjective character by bestowing upon the ordinary person a wide array of the defendant's traits.<sup>115</sup> This trend reflected a broader doctrinal shift in twentieth century criminal law away from an *objective* focus upon what the defendant had done, towards a *subjective* analysis of the offender's personal pathology.<sup>116</sup>

### *Competing Rationales*

The doctrinal shifts between objective and subjective approaches points to an underlying difficulty which has long plagued the doctrine of provocation - its lack of a rationale which comprehensively explains its operation.

112 B Brown, "The Demise of Chance Medley and the Recognition of Provocation as a Defence to Murder in English Law" (1963) 7 *American Journal of Legal History* 310 at 312.

113 A Ashworth, "The Doctrine of Provocation" (1976) 35 *Cambridge Law Journal* 292.

114 (1963) 111 CLR 610.

115 These characteristics include ethnic, racial or cultural background, sex, age, mental condition, physical deformities, illegitimacy, potency and sexual performance.

116 M Goode, "The Abolition of Provocation" in S M H Yeo (ed), *Partial Excuses to Murder*, The Federation Press, 1990, 37 at 41.

Code

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There are two competing rationales: the first emphasises the victim's provocative conduct in focusing upon *why* the defendant acted as he or she did; the second takes the view that the defence excuses the defendant for that conduct. The two distinct rationales are apt to develop provocation in different directions.

Provocation as a partial excuse essentially amounts to a concession to human frailty as it recognises that in some circumstances society should not expect persons to act dispassionately. However, this does not wholly nor adequately describe the operation of this partial excuse; provocation displays characteristics of both rationales as is illustrated by the fact that the doctrine has both subjective and objective components. This has enveloped provocation in a mesh of complexity<sup>117</sup> which has culminated in an intense debate regarding the extent to which the test of provocation should display subjective and objective components and, in particular, whether the test should be completely subjective.

The objective criteria significantly restricted the scope of the defence. The proportionality requirement, which measures the defendant's actions against those of an ordinary person, has been the most controversial aspect of the doctrine. The House of Lord's decision in *Bedder v DPP*<sup>118</sup> represents the high-water mark of the objective test (the ordinary person was not to be attributed any of the defendant's characteristics). Although many critics acknowledged the need for community standards to be reflected in the test, they strongly objected to the balance that was struck by the House of Lord's decision.

The critics did not go unnoticed. Increasingly, the defendant's pathology was reflected in the ordinary person.<sup>119</sup>

Provocation's objectivity was seemingly lost, prompting Cox J in *Romano* to comment:

‘There is not much point in the law insisting upon an objective element in a provocation defence in this respect and then attributing to an ordinary man an ability to kill or to inflict serious physical harm with a lethal weapon in response to quite disproportionate provocation.’<sup>120</sup>

In the same case, King CJ sought to strike a balance between the subjective and objective elements of provocation.<sup>121</sup> This was achieved by identifying the objective test to compose two limbs: the *gravity* of the provocation, tested in a

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117 See G Coss, “‘God is a righteous judge, strong and patient: and God is provoked every day’: A Brief History of the Doctrine of Provocation in England” (1991) 13 *Sydney Law Review* 570 at 591.

118 [1954] 1 WLR 1119.

119 *DPP v Camplin* [1978] AC 705.

120 (1984) 36 SASR 283 at 294.

121 (1984) 36 SASR 283 at 291. King CJ derived this formulation from *DPP v Camplin* [1978] AC 705.

See further Ashworth “The Doctrine of Provocation” [1976] *Cambridge Law Journal* 292 at 300.

Code

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subjective fashion, and the power of *self-control*, an objective standard. This approach was affirmed by the High Court in *Stingel v The Queen*.<sup>122</sup>

In relation to the gravity limb the High Court held in *Stingel v The Queen*:

... the content and extent of the provocative conduct must be assessed from the viewpoint of the particular accused. Were it otherwise, it would be quite impossible to identify the gravity of the particular provocation. In that regard, none of the attributes or characteristics of a particular accused will be necessarily irrelevant to an assessment of the content and extent of the provocation involved in the relevant conduct. For example, any one or more of the accused's age, sex, race, physical features, personal attributes, personal relationships and past history may be relevant to an objective assessment of the gravity of a particular wrongful act or insult.<sup>123</sup>

The High Court contrasted the second limb (self-control) by stating:

Subject to a qualification in relation to age ... the extent of the power of self-control of that hypothetical ordinary person is unaffected by the personal characteristics or attributes of the particular accused.<sup>124</sup>

A majority of the High Court in *Masciantonio* accepted this distinction.<sup>125</sup> It has more recently been confirmed by a majority of the Privy Council.<sup>126</sup> This formulation attempts to redress earlier criticisms by more evenly balancing the subjective and objective components of the ordinary person test.

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122 (1990) 171 CLR 312.

123 *Id.*, at 326. Although the Court in this case was interpreting s160 of the Tasmanian *Criminal Code*, it was acknowledged that the common law position is the same.

124 *Ibid.*, at 327.

125 (1995) 69 ALJR 598. The majority stated: "The test involving the hypothetical ordinary person is an objective test which lays down the minimum standard of *self-control* required by the law. Since it is an objective test, the characteristics of an ordinary person are merely those of a person with ordinary powers of self-control. They are not the characteristics of the accused, although when it is appropriate to do so because of the accused's immaturity, the ordinary person may be taken to be of the accused's age. However, the *gravity* of the conduct said to constitute the provocation must be assessed by reference to relevant characteristics of the accused. Conduct which might not be insulting or hurtful to one person might be extremely so to another because of that person's age, sex, race, ethnicity, physical feature, personal attributes, personal relationships or past history. The provocation must be put in context and it is only by having regard to the attributes and characteristics of the accused that this can be done. But having assessed the gravity of the provocation in this way, it is then necessary to ask the question whether provocation of that degree of gravity could cause an ordinary person to lose self-control and act in manner which would encompass the accused's actions": at 602-603, per Brennan, Deane, Dawson and Gaudron JJ.

126 *Luc Thiet Thuan v R* [1996] 2 All ER 1033.

Code

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The test, nonetheless, is still problematic. Most notably, the ordinary person has developed a split personality in that his or her character suddenly changing depending on which part of the test is being addressed.<sup>127</sup> The jury's ability to understand this convoluted reasoning process, which requires them to distinguish between questions relating to the gravity of the provocation and questions relating to the capacity for self control, was questioned in *Camplin*<sup>128</sup> and *Romano*,<sup>129</sup> as was, assuming the test to be understood, its ability to apply it.<sup>130</sup> The New South Wales Law Reform Commission recognised this problem to be most acute in relation to ethnicity and Aboriginality, where the jury by and large has little or no knowledge of relevant cultural/racial practices, and in the context of domestic violence, where popular but false stereotypical assumptions (such as 'why didn't she leave?') persist.<sup>131</sup>

Other problems with the objective test are more theoretical in nature. At the most primary level, the objective test offends the basic criminal law principle which applies with greatest weight in relation to serious offences such as murder: that the defendant's culpability is to be assessed on the basis of his or her subjective mental state.

Further, even though the objective test seeks to set a community-wide standard to uphold the sanctity of human life, the test has been attacked as being inappropriate for today's diverse society.<sup>132</sup> Murphy J dissenting in *Moffa v The Queen* states:

The objective test is not suitable for even a superficially homogenous society, and the more heterogenous our society becomes, the more inappropriate the test is.<sup>133</sup>

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127 In his dissenting judgment in *Masciantonio*, McHugh J describes the two limbs as a "curious dichotomy" which entails an "inconsistency that could be abolished only by abolishing the 'ordinary person' test itself": (1995) 69 ALJR 598 at 606. Yeo argues that the dichotomy is "inconsistent with the opinion of behavioural scientists that the accused's personality must be taken as a whole and cannot be dissected into how he or she would view some provocative conduct on the one hand and the way he or she would respond emotionally to that conduct on the other.": S M H Yeo, "Power of Self-Control in Provocation and Automatism" (1992) 14 *Sydney Law Review* 3 at 7. See further S M H Yeo, "Ethnicity and the Objective Test in Provocation" (1987) 16 *Melbourne University Law Review* 67; Fisse, *Howard's Criminal Law* (5th ed, 1990) at 89.

128 [1978] AC 705 at 718.

129 (1984) 36 SASR 287 at 291.

130 *Voukelatos* [1990] VR 1 at 12 per Murphy J.

131 New South Wales Law Reform Commission, Discussion Paper: "Provocation, Diminished Responsibility and Infanticide", 1993 at 47-50.

132 See McHugh J, dissenting, in *Masciantonio v R* (1995) 69 ALJR 598 who states that "In a multicultural society such as Australia, the notion of an ordinary person is pure fiction.": at 606. His Honour cited Sir John Barry in *R v Jeffrey* [1967] VR 647 who at 478 describes the ordinary person as "a mythical person".

133 (1977) 138 CLR 601 at 627.

Code

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Murphy J was highly critical of the objective test recommending that 'it should be discarded [as] it has no place in a rational criminal jurisprudence'.<sup>134</sup>

The ordinary person test has been a continuing source of confusion and controversy. In part at least, this is a consequence of the misleading appearance of the test. One might expect the 'ordinary person' to be invoked as a standard of acceptable, if not desirable, social conduct. On reflection, however, it is obvious that the ordinary person of provocation lore is no social exemplar, though there are many instances in which courts and commentators have fallen into error on this point. The putative reactions of the ordinary person who loses self control are not acceptable. On the contrary, the hypothetical reactions of the ordinary person mark the boundary between murder and manslaughter, two of the most serious offences in the statute books. This fictitious being is far removed from the 'reasonable person', who is invoked to set standards of acceptable conduct in other areas of the law. By definition, the ordinary person of provocation law is one who can be driven to unlawful homicide.

The traditional defence of the objective test which focuses upon temperament thresholds, lacks substance. The defence asserts that without an objective standard, provocation would lead to anomalous results as it would discriminate in favour of ill-tempered persons who more readily lose their temper.<sup>135</sup> This argument overlooks the essence of provocation and is consequently easily discounted.<sup>136</sup> The 1993 New South Wales Law Reform Commission discussion paper illustrates the fallacy in its reasoning:

'This argument needs only to be stated to be rejected. If the good-tempered person does not lose self-control then he or she will not kill and there will be no occasion for a murder trial at all. If she or he does kill but still does not lose self-control then provocation is not applicable because the killing was done in cold blood. Finally if she or he kills and does lose self-control then there is no reason why provocation cannot be raised, the defendant will pass both the subjective (although it may be a little more difficult to prove) and the objective tests.'<sup>137</sup>

<sup>134</sup> *Ibid* at 626. The Irish Court of Appeal adopted Murphy J's reasoning in *The People v MacEion* (1978) 112 ILTR 53.

<sup>135</sup> See the High Court in *Stingel* (1990) 171 CLR 312, *Masciantonio* (1995) 183 CLR 58 and *Green* (1997) 148 ALR 659. Also Dickson CJ, the Chief Justice of Canada, endorsed this view in *R v Hill* (1986) 25 CCC (3d) 322 at 330 and I Leader-Elliott, 'Sex, Race and Provocation: In Defence of *Stingel*' (1996) 20 Crim.LJ 72 at 77-81.

<sup>136</sup> In fact, if it is a valid argument at all, it serves to debunk the provocation doctrine as a whole in as far as it describes its problematic/undesirable practical operation.

<sup>137</sup> New South Wales Law Reform Commission, Discussion Paper: "Provocation, Diminished Responsibility and Infanticide", 1993 at 44. Note that the Commission issued its final report on these matters in October, 1997 (Report 83) where it recommended that there should be a reformulated objective test.

Code

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Despite the failure of this traditional defence, the objective test sets a standard reflecting the minimum level of self-control demanded by society beyond which human frailty, in acting upon provocation, will not be excused. The rationale of the objective test was stated by Wilson J in *R v Hill* as follows:

‘The objective standard, therefore, may be said to exist in order to ensure that in the evaluation of the provocation defence there is no fluctuating standard of self-control against which accuseds are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard notwithstanding their distinct personality traits and varying capacities to achieve the standard.’<sup>138</sup>

Abolition of the ordinary person test would deprive the partial defence of any mechanism to avoid inequality and fluctuation in the level of culpability required for murder. Although others have recommended a fully subjective test,<sup>139</sup> neither the Codes nor statutory substitutions have implemented that recommendation.

The Committee will recommend that there be no partial defence of provocation. However the Committee would be grateful for your views about the recommendations in the October 1997 New South Wales Law Reform Commission report, ‘Partial Defences to Murder: Provocation and Infanticide’ which proposes a reformulated objective test.

138 [1986] 1 SCR 313 at 343. This rationale, and the objective test, was accepted by the High Court in *Stingel*: (1990) 171 CLR 312 at 324.

139 See for example the Victorian Law Reform Commissioner, *Provocation and Diminished Responsibility as Defences To Murder*, Report No 12, 1982 and the Criminal Law and Penal Methods Reform Committee of South Australia, Fourth Report, *The Substantive Criminal Law*, 1977.

Code

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**Summary of the recommendations of the New South Wales Law Reform Commission, Report 83, October 1997 on the reformulation of the partial defence of provocation.**

**Objective test**

Replace the 'ordinary person test' with a subjective test together with the application of community standards (pp.32-52). Removes mention of the ordinary person test and requires instead that the jury be satisfied that the accused should be excused for having so far lost self-control as to have formed an intention to kill or inflict grievous bodily harm or to have acted with reckless indifference to human life as to warrant the reduction of murder to manslaughter (p.79).

***Rationale:*** Avoids the complexities of the 'ordinary person test' while still allowing the jury to make a value judgment about whether or not the accused should be convicted of murder or manslaughter taking into account his or her personal characteristics.

**Subsidiary recommendations**

The accused is not precluded from raising the defence of provocation on the basis that the provocation occurred outside his or her presence (p.79).

***Rationale:*** The essence of this partial excuse is that the accused lost self-control. It should not matter whether this occurred as a result of reasonable belief following hearsay reports about something or witnessing the offending conduct personally (p.56).

The defence should be available where the victim did not commit the provocative conduct (p.79).

***Rationale:*** The essence of this partial excuse is that the accused lost self-control. Restrictions of this nature are artificial and not always appropriate, (p.60).

The defence of provocation should not be excluded on the basis that the provocative conduct was lawful (p.80).

***Rationale:*** Any exclusion of the defence on this basis would be too arbitrary. The Commission concluded that it is unlikely any undeserving cases involving lawful arrest will be able to succeed under the defence of provocation under the Commission's proposal that the jury consider whether the accused should be excused for losing self-control. A person should not be excluded on this basis if they are provoked because they believe they are innocent of the crime for which they are being arrested, (p.63).

Code

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The defence of provocation should not be available where provocation is self induced. The exclusion applies where the accused provokes another with a premeditated intention to kill or cause serious harm in response to any retaliation, (p.80).

***Rationale:*** The accused does not really act as a result of loss of self-control (p.65).

The defence should be available where a person loses self-control but acts with reckless indifference to human life, (p.81).

***Rationale:*** The Commission recommends that NSW legislation (s.23, Crimes Act) should continue to require the jury to consider whether the accused should be excused for having so far lost self-control as to have formed two of the three alternatives of the mental state required for murder: intent to kill or to inflict grievous bodily harm. It would be inconsistent and illogical to refer to those two mental states and not the third: to have acted with reckless indifference to human life.

## **Abolition**

The Committee believes the partial defence of provocation should be abolished. The arguments for and against this recommendation are as follows:

### *Arguments for the abolition of the provocation defence*

#### (a) Doctrinal Deficiencies: An Intention to Kill is Murder

The provocation defence engenders severe conceptual deficiencies. If the requirement that the relevant conduct must have caused the defendant to have lost self-control is accorded full literal force, the existence of any fault element is negated and it is illogical for provocation to only operate as a partial defence. Of course, this reasoning is illusory and there lies the root of the problem. Realistically, people who lose self-control are not perceived as being in the same category as people who act automatically or without intention. The person who acts in circumstances of extreme passion does act with conscious volition; such people do intend their actions and the results thereof.

The main argument for abolishing the defence stems from this very fact: people who rely on provocation intend to kill. Why does the fact that the killing occurred when the defendant was acting out of control make a difference? The answer given more often than not is that there is a significant difference between the provoked and unprovoked which ought to be reflected in the criminal law. Of course, one can accept this normative evaluation and still recommend the abolition of the provocation doctrine. The law can reflect this circumstance through the sentencing process.

Code

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(b) Provocation is Adequately Considered During Sentencing

At least in common law jurisdictions, in all other offences to which provocation applies it is merely relevant as part of the sentencing process.<sup>140</sup> Traditionally, the doctrine has enjoyed its elevated status in the context of fatal offences because of the rigid sentencing regime for such offences. However, while the death penalty and mandatory life imprisonment sentences have largely been removed from the statute books, provocation remains. To that extent the doctrine has become an anachronism.

(c) Hot-Blooded Killers are Often as Culpable as Their Cold-Blooded Counterparts

To state there is a difference between the provoked and unprovoked killer which ought to be reflected in the criminal law is to assert a normative proposition. An argument for the abolition of provocation stems from a rejection of this normative position, or at least a recognition that it does not universally apply. In many cases the hot blooded killer is no less culpable than their cold blooded counterparts. Why is a husband who kills his wife because he found her committing adultery morally less guilty than a murderer? Why is a conservative Turkish Muslim father partially excused when he stabs his daughter to death because she refuses to stop seeing her boyfriend?<sup>141</sup> Why do we partially excuse a man who kills another man who has made a homosexual advance on him?<sup>142</sup> Why is deadly violence mitigated in these cases?

(d) Provocation is Gender Biased and Unjust

The practical operation of the partial defence of provocation is often seen to result in injustice in that it favours those persons who have low, albeit not unusual, levels of self-control. A closer analysis of this aspect of provocation reveals that the discrimination is most prevalent against women. The need for the defendant to kill while still out of control incorporates a 'suddenness' requirement which is most reflective of male patterns of aggressive behaviour. This is hardly surprising given the historical foundations of the doctrine which reveal it to be a reaction to the prevalence of certain forms of male aggression (drunken pub brawls and duels). While provocation has served men well, perhaps too well, one has to question the appropriateness of a defence for women, bearing in mind it was never designed for them.

140 In some Code jurisdictions provocation can operate as a complete defence to some offences. In these cases the sentencing process will not even be invoked.

141 *R v Dincer* [1983] VR 460.

142 Considerable discussion of these issues has been prompted by the case of *R v Green* (1997) 148 ALR 659, where the nature of the provoking incident divided the Court. See Nathan Hodge, 'Transgressive Sexualities and the Homosexual Advance', *Alternative Law Journal* (February, 1998) at 30; Sally Kift, 'Provocation: (depending on your position) Green v R', *Proctor* (Jan-Feb, 1998) at 25; and Adrian Howe, 'More Folk Provoke Their Own Demise', *Sydney Law Review* (September, 1997) at 336.

Code

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Battered woman syndrome' is a psychological theory suggesting that the repeated battering of women results in their psychological helplessness.<sup>143</sup> The theory illustrates the unsatisfactory nature of provocation as presently formulated. The defendant, who in such cases often kills her partner after years of abuse, may adopt a method of killing that is undoubtedly premeditated, but is actuated by no less psychological stress and trauma than persons who kill in response to an immediate provocation. Any argument that it is murder for a battered woman driven to desperation to kill her partner but only manslaughter for a man to do the same after discovering her committing adultery is offensive to common sense.

Australian legislatures have not been insensitive to these issues. The statutory formulations of the provocation partial defence in New South Wales<sup>144</sup> and the Australian Capital Territory<sup>145</sup> do not incorporate a suddenness requirement. Australian courts have also been responsive. Recent developments in the law of provocation have attempted to redress the situation by abating the suddenness requirement. For example, what has traditionally been viewed as a cooling off period has, in the battered woman context, increasingly been seen as a period in which the woman's anger intensifies.<sup>146</sup> Further, cases also allow the particular provocative incident to be contextualised by reference to the history of the relationship between the victim and the defendant, one which invariably involves long-standing abuse.<sup>147</sup> There is also authority for the proposition that a specific triggering incident is not required - the past abuse endured during a long-term relationship can itself constitute the provocation.<sup>148</sup> However, these cases represent a fictitious attempt to distort the operation of an otherwise defunct doctrine. The doctrine was designed for male patterns of aggression and operates unjustly in modern society.

Moreover, the relative inaccessibility of the provocation partial defence by women is more deep-rooted than these cosmetic changes to the operation of the doctrine. Relaxing the requirements of the provocation partial defence does not redress the injustice as any discrimination against women will probably stem from the very structure of the provocation partial defence.<sup>149</sup>

143 See Walker, Thyfault and Browne "Beyond the Jurors Ken" (1982) 7 *Vermont Law Review* 1 at 9; Walker *The Battered Woman Syndrome* (1984) chp. 10. The theory, however, is not without its critics: see for example Leader-Elliott "Battered But Not Beaten: Women Who Kill in Self-Defence" 15 (1993) *Sydney Law Review* 403 at 411-418.

144 *Crimes Act* (NSW), s23(2).

145 *Crimes Act* (ACT), s13(2).

146 *Parker* (1962-63) 111 CLR 524 & 665; *Hill* (1980) 3 A Crim R 397; *Van Den Hoek* (1985) 17 A Crim R 191.

147 *Queen v R* (1981) 21 SASR 321; *Mehemet Ali* (1957) 59 WALR 28.

148 *R v Chhay* (1994) A Crim R 1. See further S Tarrant, "The 'Specific Triggering Incident' in Provocation: Is the Law Gender Biased?" (1996) 26 *University of Western Australia Law Review* 190.

149 See Stella Tarrant, "Something is Pushing Them to the Side of Their Own Lives: A Feminist Critique of Law and Laws" 20 (1990) *Western Australian Law Review* 573.

Code

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Conceptualised as an excuse, provocation operates in circumstances where the law sees fit to partially excuse fatal acts on the basis of a *loss of control*. This is quite apart from situations where the law recognises such behaviour to be justified as a reaction to imminent *danger*. The consequence of this conceptualisation, which is reflected in the defence's structure, is that the woman's loss of control, not the danger confronting her, is placed in issue. However, women who kill in response to domestic violence do so through fear created by the danger which confronts them.<sup>150</sup> Defining the issue in terms of losing control - being 'provoked' - is to distance the inquiry from the reality. This results in a distortion of women's experiences.<sup>151</sup> The distortion occurs when women who seek to rely on the defence attempt to mould their situation to fit the requirements of the defence. The law's 'objectivity' does not achieve neutrality as the objective standard is measured against a distinctly male epistemology.

On this view, gender bias within the provocation partial defence is so entrenched that it can only be abolished by abolishing the defence itself. Extending the doctrine's operation by relaxing its requirements which are contrary to female patterns of behaviour does not circumvent the problem. Women's interest groups recommending the extension of provocation seek to redress an inequality between genders. That inequality will not prevail should the doctrine be abolished.

The contrary view, that provocation is not gender biased, is expressed by the Law Reform Commission of Victoria.<sup>152</sup> The Commission supports this view by reference to a lack of empirical evidence showing bias. Seventy-five cases in which provocation was raised were analysed. Only ten of the cases involved a female defendant. No female was convicted of murder although in some or all of these cases other defences were also raised, it not being known which defence, if any, succeeded.

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150 A Wallace, *Homicide: The Social Reality* (1986) NSW Bureau of Crime Statistics and Research, Research Study No. 5 at 97; W Bacon et al, *Women Homicide Offenders in New South Wales*, Report for the Feminist Legal Action Group (NSW) 1982, at 311 and 313.

151 See S Tarrant, *Op cit* at 594.

152 Law Reform Commission of Victoria, *Homicide*, Report 40 at paras. 164-168.

Code

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The Commission relied upon the data contained in the following tables:

**Provocation and outcomes: female defendant  
Charge = murder or manslaughter**

Outcome	Victim		
	Male (n=9)	Female (n=1)	Total (n=10)
Murder	0 (0%)	0	0
Manslaughter	5 (56%)	1 (100*%)	6 (60%)
Insanity	0 (0%)	-	-
Acquittal	3 (33%)	-	3 (30%)
Other	1 (11%)	-	1 (10%)
<b>Total</b>	<b>9 (100%)</b>	<b>1 (100%)</b>	<b>10 (100%)</b>

**Provocation: male defendant  
Charge - murder or manslaughter**

Outcome	Victim		
	Male (n=43)	Female (n=22)	Total (n=65)
Murder	5 (12%)	8 (36%)	13 (20%)
Manslaughter	29 (67%)	13 (59%)	42 (65%)
Insanity	2 (5*%)	-	2 (3%)
Acquittal	5 (12*%)	1 (5%)	6 (9%)
Other	2 (5%)	-	2 (3%)
<b>Total</b>	<b>43 (100%)</b>	<b>22 (100%)</b>	<b>65 (100%)</b>

*Notes: 1. Provocation is notE the only issue in many of these cases. Lack of intent, self defence, excessive defence, etc. may also be involved.*

*2. Tables include pleas of guilty and verdicts.*

*Source: Prosecutions Study. \* Note that corrections have been made to some of the percentage calculations.*

Code

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As some of the men who raised provocation were convicted of murder, the Commission concluded that ‘... women seem more ‘successful’ with the provocation defence than men.’<sup>153</sup> Nonetheless, the Commission did concede that the number of cases examined was ‘too small to make conclusive findings about gender bias.’<sup>154</sup> More recently the Judicial Commission in NSW examined the incidence of killing of sexual partners in that State between 1990 to 1993 and came up with a similar finding.<sup>155</sup>

(e) The Abolition of a Close Relative: Excessive Self-Defence

On one view, the High Court’s decision in *Zecevic*<sup>156</sup> to abolish excessive self-defence has weakened the case for the retention of provocation.<sup>157</sup> The decision has isolated provocation as the sole common law partial defence to murder. Moreover, the reasons for its abolition arguably apply with equal force to provocation.<sup>158</sup> The Court in *Zecevic* acknowledged the reduced moral culpability of persons who kill in circumstances of excessive self-defence but felt compelled to ignore this in light of its inability to satisfactorily reflect this moral distinction in the law.<sup>159</sup> Identical concerns exist for the partial defence of provocation. While supporters of the doctrine see it to recognise a distinction in moral culpability, the underlying tension between its subjective and objective nature have complicated the test and the jury’s ability to properly apply it.

(f) Provocation is Subject to Abuse

A further argument for the abolition of provocation is its potential abuse. This difficulty hints at a far greater problem with the defence - the extent to which it

153 Law Reform Commission of Victoria, *Homicide Prosecutions Study*, Appendix 6: Report 40, at para. 160.

154 Law Reform Commission of Victoria, *Homicide*, Report 40, at para. 165.

155 See summary New South Wales Law Reform Commission Report 83, *Partial Defences to Murder: Provocation and Infanticide* at 69 of conclusions of Donnelly, Cumines and Wilczynski (1995) Chapter 5. The report records that 47 sentenced male offenders who killed their sexual partner, 5 had successfully raised the provocation defence - 2 by hitting the accused, 3 leaving/threatening to leave the accused. Of 9 sentenced female offenders who killed their sexual partner, 8 were responding to physical violence or threats by the victim, 5 successfully relying on the defence of provocation. Another earlier study in NSW by P Eastal, *Killing the Beloved: Homicide between Adult Sexual Intimates* (Australian Institute of Criminology, 1993) at 179 concluded there was no clear pattern but “the most recurrent theme in the killings by both men and women was the antecedents of physical and emotional violence towards women.”

156 (1987) 162 CLR 645.

157 Contrast the view expressed by Mason CJ in *Zecevic* (1987) 162 CLR 645. He took the view that the partial defence of provocation becomes more important should excessive self-defence be abolished.

158 M Goode, “The Abolition of Provocation” in S M H Yeo (ed), *Partial Excuses to Murder*, The Federation Press, 1990, 37 at 51-51.

159 Note, however, the criticisms of *Zecevic* which endorse Deane J’s proposed formulation of a test for excessive self-defence: see B Fisse, *Howard’s Criminal Law*, 5th ed., Law Book Company, at 103.

Code

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is tested subjectively. Clearly, the ordinary person test militates against this subjectiveness. However, as the defence becomes more subjective by incorporating more of the defendant's characteristics, it is increasingly exposed to the possibility of abuse because it becomes more difficult to weed out those cases where the defendant was not actually provoked but merely lost his or her temper and decided to kill. This is brought into focus when provocation is raised in relation to homosexual advances.<sup>160</sup>

(g) Provocation is a Legal Anomaly

In those jurisdictions in which provocation does not reduce attempted murder to attempted manslaughter the doctrine operates in an anomalous fashion. This is because in those jurisdictions, a successful (provoked) killer might well receive a shorter sentence than one who failed in the attempt.

*Arguments Against the Abolition of the Provocation Defence*

(a) Quality of the Defendant's Fault Element is Diminished

Despite these serious problems, the abolition of the partial defence of provocation remains a controversial issue. The partial defence continues to enjoy strong support for a variety of reasons. The principal reason is the belief that hot and cold-blooded killers are not moral equivalents. Even though both intend fatal consequences, the quality of that intention is diminished in the case of hot-blooded killers by the fact that their free will has been impeded to the extent that they were provoked into acting as they did. Society wishes to make a concession for defendants who kill in circumstances in which many other persons would have behaved in the same way. The provocation defence represents such a concession.

(b) Culpability is a Jury Issue

Seen as an excuse, provocation is relevant to the defendant's culpability. Such issues are better left to the jury to determine rather than to the judge to pass judgment upon in the course of sentencing the offender. To remove considerations of culpability from the jury usurps their proper role.

(c) Hot-Blooded Killers Should not be Labelled Murderers

Murder, it is said, should be reserved for the most serious cases where no excuse exists. Persons who kill under provocation ought not be subject to the stigma which follows a murder conviction. Further, to brand such persons murderers diminishes the impact of that term and detracts from the object of distinguishing between murder and manslaughter.

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160 See Nathan Hodge, 'Transgressive Sexualities and the Homosexual Advance', *Alternative Law Journal* (February, 1998) at 30; Sally Kift, 'Provocation: (depending on your position) Green v R', *Proctor* (Jan-Feb, 1998) at 25; and Adrian Howe, 'More Folk Provoke Their Own Demise', *Sydney Law Review* (September, 1997) at 336.

Code

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These arguments share a common perspective in that they focus on the legal label. It is relatively uncontroversial to say: all else being equal, the provoked killer is less morally blameworthy than the unprovoked killer. But to adopt this perspective is, to a large extent, to avoid the very aspect which creates the moral dilemma. All else is not equal. Defining the debate in terms of labelling diverts the inquiry away from its broader context - the *value* of human life. The issue is: in what circumstances should society excuse a person who kills another human being having intended to do so? Should the fact that he or she killed while in a violent fit of rage and anger suffice to give rise to such excuse? If it does, what signals will the law be silently filtering throughout the community? Society accepts that violence exists but is it to be condoned? Values, not labels, are at the core of this debate. Labels are value driven; while the labels we create should accurately reflect our values, those labels should not dictate the contents of such values.

(d) Jury May be Reluctant to Convict Hot-Blooded Killers for Murder

Provocation acts as a half-way house allowing jurors to convict of manslaughter if they are not prepared to return a verdict of murder. Abolishing provocation removes this half way house position. There is a very real fear that without provocation juries may be reluctant to convict of murder. Consequently, persons who would otherwise have been found guilty of manslaughter may be acquitted. This clearly is not a desirable situation. However, this concern does not stem from a defence of the rationale of the provocation defence. Rather, it is motivated by an expectation that some defendants will unjustly escape punishment. Therefore, although it illustrates a potential operational limitation to the abolition of provocation, it does not contend that hot-blooded killers should not be guilty of murder. The argument should not be placed on any higher footing than this. Seen as a potential practical problem, various counteracting measures may be introduced. For instance, the problem may be redressed by a pertinent judicial direction to the jury.

(e) Inadequacy of the Sentencing Process

Making provocation an issue for the sentencing judge deprives defendants of the traditional safeguards built into the criminal process. Further, it does not simplify the issues which must be considered but merely shifts them sideways. Juries are more representative of the community than judges, particularly in terms of ethnicity and gender. Their input into making decisions concerning community standards is highly valued. Shifting the determination of provocation issues to the judge is to place it in the hands of a less desirable decision-maker. This perhaps is also true for a further reason: abolishing provocation will result in defendants being convicted for murder when, under the present law, they would otherwise be guilty of manslaughter. Judges sentencing these persons might be inclined to do so in line with general murder, not manslaughter, sentencing practices. Sentences may therefore be likely to rise.

Code

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## Conclusion

The provocation defence suffers from a number of conceptual problems which stem from its lack of a satisfactory doctrinal base. Most notably, the long-standing debate about the fate of the objective test has failed to realise a satisfactory outcome. Indeed, it has served to highlight that an entirely satisfactory result is not possible: a fully objective test operates harshly; a fully subjective test produces unacceptable results; a hybrid test incorporating both subjective and objective elements is internally incoherent and unacceptably complex.

Significantly, the problems are not merely conceptual. The balance of opinion sees provocation to operate in practice in a gender biased fashion. Although the courts have tinkered with the legal principles, formulations of the doctrine which reduce the suddenness requirement are artificial and contrary to its historical foundation. The theory underlying battered woman syndrome does not comfortably co-exist with that of provocation.

The real issue in deciding whether the partial defence of provocation should be retained is one of culpability - whether the defendant should be culpable for murder, or for the lesser crime of manslaughter. It cannot be escaped that this issue must in turn be decided by reference to society's values. The jury is generally used as the thermometer of community sentiment, however the many serious problems which have plagued the partial defence of provocation, at least during its most recent history, forces forward for consideration a more fundamental question: is the middle ground created by the partial defence of provocation worth the price paid for it? This cost/benefit analysis in turn leads to the consideration of the types of cases which commonly lie within this middle ground (the 'benefits'). What it reveals is a significant portion of such cases in which the defendant's culpability is no less than that of a 'murderer'. The desire to have a middle ground for *less culpable* (provoked) defendants does not seem to accord with the reality. This critical failure of the partial defence of provocation is not rectified by tightening its operation. (Indeed, as noted above, the recent (desirable) judicial trend is to extend its operation in order to cover battered woman syndrome cases.) The problems it poses arise directly as a consequence of its origins as a partial defence for violent behaviour. It is one thing to apply the doctrine in circumstances where the defendant's violence was in response to violence directed towards the defendant (as in the case of self-defence), but the partial defence is not so limited. With few technical exceptions,<sup>161</sup> the partial defence applies to all provoked violence, regardless of how it was provoked. In failing to assess the validity of the reasons for the defendant's violence, the partial defence overlooks much that is relevant to the question of the defendant's culpability. Thus, while provocation in its modern setting is designed to afford a middle ground to better reflect criminal culpability,

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161 See the list in the main text set out at the commencement of the section headed "Provocation".

Code

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it falls significantly short of that goal by reason of its limited focus which inescapably gears the partial defence towards male patterns of aggression and loss of self-control (its origin) at the expense of the sanctity of human life.

The Committee has from the outset defined the values by which it will be guided as subjective intention. The normative stance promoting the abolition of provocation is that a loss of self-control does not reduce culpability in circumstances where the killing is *intentional*. This reflects the Committee's emphasis on subjective intention. Because provoked killers intend to cause death, the fault element is not negated. The most that can be said for these persons is that they kill in circumstances which diminishes the quality of their fault element. This, however, is not true for many hot-blooded killers; some, perhaps even most, are morally just as culpable as their cold-blooded counterparts. In place of the partial defence of provocation, with all its doctrinal defects, the sentencing process offers a flexible means of accommodating differences in culpability between offenders. Some hot blooded killers are morally as culpable as the worst of murderers. Some are far less culpable. The differences can be reflected as they are at present, in the severity of the punishment. Provocation is only one among a variety of considerations which reduce the culpability of persons who kill intentionally. It is anomalous because it reduces murder to manslaughter. So, for example, those who kill from compassion, rather than anger, do not escape conviction for murder. The law of murder already encompasses a range of cases from the sympathetic to the heinous. The inclusion of cases of provoked killing within murder is consistent with current practice, which requires humane adjustment of the sentence to individual guilt.

In light of the plethora of serious defects and the realisation that any result which retains provocation for the jury's consideration inevitably reflects a compromise, the Committee recommends that the partial defence of provocation be abolished in the sense that its consideration should be confined solely to the sentencing process. Under this approach the hot blooded killer is labelled a murderer but his or her punishment is reduced to the extent to which the provocative incident has actually diminished the quality of his or her mental state.<sup>162</sup>

The Committee is encouraged in taking this view by the fact that similar recommendations have been made by other law reform bodies. See, for example, the Gibbs Report,<sup>163</sup> the New Zealand Criminal Law Reform Committee<sup>164</sup> and the New Zealand Crimes Consultative Committee.<sup>165</sup>

162 Cf the recommendations of the Canadian Criminal Law Reform Commission who would have made provocation completely irrelevant, even at the sentencing stage: *Recodifying Criminal Law* (Report 31, 1987).

163 Attorney General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters* (AGPS, 1990) at para 13.56.

164 *Report on Culpable Homicide* (1976).

165 *Crimes Bill 1989: Report of the Crimes Consultative Committee* (1991).

Code

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The Committee is particularly keen to receive submissions on whether the partial defence of provocation should be abolished.

#### Recommendation

The partial defence of provocation should be abolished. Those considerations which currently provide a basis for the partial defence should be considered for their relevance to the determination of an appropriate sentence after conviction.

#### The proposal to reformulate provocation

The Committee would be grateful if those commenting on this Discussion Paper could indicate whether they agree with the proposed New South Wales Law Reform Commission reformulation of the partial defence of provocation should Ministers decide the defence is to be included in the Model Criminal Code.

#### Excessive Self-Defence

Excessive self-defence is a modified version of self-defence.<sup>166</sup> However self-defence is a complete defence to all forms of murder and intentional manslaughter. Unlike self-defence, excessive self-defence is not a total but merely a partial defence to murder. As such, it represents a half-way house between a conviction for murder and an acquittal. The defendant who successfully raises excessive self-defence will only be guilty of manslaughter.

The test for *self-defence* contains two parts:

- Was deadly force necessary?
- Was deadly force a reasonable response to the danger which the defendant believed he or she faced?

The two parts are respectively known as the necessity and proportionality tests. Under existing Australian law necessity is usually tested objectively. However under section 10.4 of the Model Criminal Code, South Australian and Tasmanian provisions it is tested subjectively. However proportionality is an objective test in all jurisdictions containing a subjective element in as far as it is applied to the circumstances as the defendant perceives them to exist. Therefore, if a defendant is to be acquitted on the grounds of self-defence he or she must satisfy both tests.

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<sup>166</sup> The term "self-defence" is somewhat of a misnomer as it includes not only the defence of one's self, but also the defence of another and of property. The Committee's formulation of self-defence is at section 10.4 of Chapter 2 of the Model Criminal Code (see Appendix 2).

Code

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*Excessive self-defence* contains the same two tests of necessity and proportionality. It, however, tests proportionality subjectively so as to alleviate the potential hardship of a murder conviction in circumstances where the defendant believed (although unreasonably) that his or her response was proportionate to the threatened harm. Excessive self-defence can be raised as a defence if a positive answer can be given to both of the following questions:

- Did the defendant use excessive force (ie, more force than could reasonably be believed by the defendant to be necessary)?
- If so, did the defendant honestly believe that the force used was reasonably necessary?<sup>167</sup>

At common law, excessive self-defence has had a relatively short though controversial history. It was first introduced into Australian law by the High Court in 1958,<sup>168</sup> but was abolished when the Privy Council considered the issue in 1971.<sup>169</sup> The State courts applied the law as determined by the Privy Council until the issue came before the High Court of Australia again in 1978. In *Viro's* case,<sup>170</sup> the High Court overturned the Privy Council's decision, thereby re-establishing the doctrine of excessive self-defence. The High Court's reasoning, however, was lengthy and convoluted, making it difficult for State courts to instruct juries on the issue. The opportunity again arose for the High Court to reconsider the position in 1987 in *Zecevic's* case.<sup>171</sup> That case represents the High Court's formal concession to criticisms of the defence by State courts. By a five to two majority, the High Court abolished the excessive self-defence doctrine. This represents the current position in all common law jurisdictions, except South Australia.

Unlike the position at common law, the Code jurisdictions have consistently rejected the existence of a partial defence of excessive self-defence.<sup>172</sup> Burt CJ stated the position clearly in *Aleksovski v The Queen*<sup>173</sup> where he said that the Western Australian Criminal Code recognises no half-way house.<sup>174</sup> The decision in *Zecevic*, therefore, has aligned the position at common law with that persisting under the various Codes. The only exception is South Australia which has re-introduced a version of excessive self-defence.<sup>175</sup>

167 This two stage test is based on the decisions in *Howe* (1958) 100 CLR 448 and *Viro v. R* (1978) 141 CLR 88: see P. A. Fairall, "The Demise of Excessive Self-Defence Manslaughter in Australia: A Final Obituary?" (1988) 12 *Criminal Law Journal* 28 at 33, footnote 33.

168 *Howe* (1958) 100 CLR 448. The High Court in *Howe* adapted the reasoning of the Victorian Supreme Court a year before in *R v McKay* [1957] VR 560.

169 *Palmer v. R* [1971] AC 814, on appeal from the Jamaican Court of Appeal. See also *Shannon* (1980) 71 Cr App R 192.

170 *Viro v. R* (1978) 141 CLR 88 esp. at 146-147.

171 (1987) 162 CLR 645.

172 See *R v. Johnson* [1964] Qd R 1 per Philip J at 7, per Stanley J at 11; *Aleksovski v. R* [1979] WAR 1; *R v. McCullough* (1982) 6 A Crim R 274; *Masneq v. R* [1962] Tas SR 354.

173 *Ibid.*

174 *Id.*, at 5.

175 See section 15 of the *Criminal Law Consolidation Act 1935* (SA).

Code

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The majority in *Zecevic* were reluctant in their decision to abolish excessive self-defence. Mason CJ, one of the majority Justices, expressly made it known that but for the onerous burden placed on trial judges and juries in explaining and applying the doctrine, he would have retained the doctrine of excessive self-defence on the grounds that it 'best accords with acceptable standards of culpability'.<sup>176</sup> This and other similar reservations reiterated by the minority Justices, namely Deane and Gaudron JJ, place in issue the desirability of re-introducing excessive self-defence as a partial excuse to murder. Mason J, as he then was, in *Viro* succinctly encapsulates the argument for the re-introduction of excessive self-defence:

'The underlying rationale ... is to be found in a conviction that the moral culpability of a person who kills another in defending himself but who fails in a plea of self-defence only because the force which he believed to be necessary exceeded that which was reasonably necessary falls short of the culpability ordinarily associated with murder. The notion that a person commits murder in the circumstances should be rejected on the ground that the result is unjust. It is more consistent with the distinction which the criminal law makes between murder and manslaughter that an error of judgment on the part of the accused which alone deprives him of the absolute shield of self-defence results in the offence of manslaughter.'<sup>177</sup>

If the partial defence of excessive self-defence is to be re-introduced the immediate problem to be resolved is how is it to be tested. The complexity of previous formulations in cases such as *Howe* and *Viro*, where the test employs both objective and subjective components, is clearly unsatisfactory.<sup>178</sup> It was this complexity that led the High Court in *Zecevic* to abolish the partial defence.

If excessive self-defence is to be re-introduced, the Committee favours a test formulated completely in subjective terms. This approach was favoured by Deane J, one of the minority Justices in *Zecevic*.<sup>179</sup> Menzies J in *R v Howe* stated a test for excessive self-defence in simple terms:

'... it is manslaughter and not murder if the accused ... in honestly defending himself ... used greater force than was reasonably necessary for his self-protection and in doing so killed his assailant.'<sup>180</sup>

<sup>176</sup> (1987) 162 CLR 645 at 653.

<sup>177</sup> (1978) 141 CLR 88 at 139.

<sup>178</sup> See further the six propositions in applying the test advanced by Mason J in *Viro* (1978) 141 CLR 88 at 146-147.

<sup>179</sup> (1987) 162 CLR 645 at 681. Compare the approach of Gaudron J, the other minority Justice in *Zecevic*, who added an objective gloss to the necessity limb, requiring the defendant's belief as to the need for self-defence to be based on reasonable grounds.

<sup>180</sup> (1958) 100 CLR 448 at 477.

Code

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The simplicity of this test is attractive, but suffers from a lack of detail in as far as it fails to provide sufficient guidance to a jury. What is required is a test which sets out with some precision how the judge is to direct the jury on excessive self-defence. When this task is embarked upon, the result tends to be an unworkably complicated test more apt to confuse than assist.

An alternative approach was recommended by the Victorian Law Reform Commission. It did not recommend the re-introduction of excessive self-defence to operate as a partial defence to murder, reducing that offence to manslaughter. Rather, the Commission preferred creating a new offence of culpable homicide to apply in cases where excessive self-defence might otherwise have applied. Its recommendation was as follows:

‘A person who kills another in self-defence on the basis of a belief that was grossly unreasonable either in relation to the need for force or in relation to the degree of force that was necessary should be guilty of the offence of culpable homicide.’<sup>181</sup>

Other law reform bodies have also recommended the re-introduction of excessive self-defence. These include the House of Lords *Report of the Select Committee on Murder and Life Imprisonment* and the English Criminal Law Revision Committee. The Gibbs Committee, on the other hand, recommended against re-introducing the partial defence.

During 1997 South Australia changed from a purely subjective test of excessive self-defence to one incorporating an element of objectivity in testing the proportionality limb.<sup>182</sup> However, on balance, the Committee is not in favour of re-introducing excessive self-defence, particularly in the context of abolishing provocation. As a concept, excessive self-defence is inherently vague. This aspect has to date resulted in no satisfactory test being promulgated.

#### Recommendation

The Committee recommends that excessive self-defence should not be re-introduced.

### Diminished Responsibility

Diminished responsibility is a partial defence to murder, operating to reduce that offence to manslaughter. The rationale for its introduction and survival appears to be the desire for increased flexibility in dealing with defendants who display some kind of mental dysfunction, albeit not serious enough to establish

<sup>181</sup> Victorian Law Reform Commission, *Homicide*, Report No 40 (1991), Recommendation 27, at 98.

<sup>182</sup> See section 2 of the *Criminal Law Consolidation (Self-Defence) Amendment Act 1997 (SA)*, amending section 15 of the *Criminal Law Consolidation Act 1935 (SA)*.

Code

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the complete defence of insanity. As its name suggests, diminished responsibility partially excuses such persons on the basis that the fault element necessary to found a murder conviction, although present, is of diminished quality.

The common law doctrine of diminished responsibility originated in nineteenth century Scottish courts<sup>183</sup> but was not included in UK legislation until 1957.<sup>184</sup> New South Wales and the Australian Capital Territory have since introduced substantially identical provisions in domestic legislation.<sup>185</sup> Queensland and the Northern Territory are the only other Australian jurisdictions to legislate for diminished responsibility.<sup>186</sup> Although these Code jurisdictions formulate the defence differently, the distinction is predominantly one of form rather than substance.

Following a call for reform in 1993 by the then Chief Justice of New South Wales, the New South Wales Law Reform Commission issued a Discussion Paper and in May 1997 released a Report that recommended the retention of the partial defence of diminished responsibility. However the Commission recommended that the test for the defence be reformulated. The *Crimes Amendment (Diminished Responsibility) Act 1997* (NSW) reformulated the test in similar terms to the Commission's recommendations.<sup>187</sup>

### *Elements*

Despite the variance between statutory formulations, the Australian Capital Territory and Queensland/Northern Territory Acts are similar in effect. This stems from them all sharing the same three elements:

- The defendant must be suffering from an abnormality of mind.
- The abnormality must arise from a specified cause.
- The abnormality must have substantially impaired the defendant's mental responsibility for the acts or omissions causing death.<sup>188</sup>

The new New South Wales test differs from this in that the abnormality of mind must arise from an underlying condition - a pre-existing mental or physiological condition, other than a condition of a transitory kind (this is more specific and relevant to terminology used by health professionals).

183 *H.M. Advocate v Dingwall* (1867) 5 Irvine 446.

184 *Homicide Act 1957* (UK), section 2.

185 *Crimes Act* (NSW) 1900 s 23A, introduced in 1974; in the Australian Capital Territory, *Crimes Act* (NSW) 1900 s 14, enacted in 1990.

186 Queensland Code s 304A, inserted in 1961; Northern Territory *Criminal Code* s 37, which is essentially the same as the Queensland provision.

187 New South Wales Law Reform Commission, (Report no.82), '*Partial Defences to Murder: Diminished responsibility*.' (May,1997).

188 The Code jurisdictions do not use the concept of "mental responsibility". Rather, they require the substantial impediment of any of three named capacities. This is further discussed below.

Code

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(a) Abnormality of Mind

In the leading English case of *Byrne*<sup>189</sup> Lord Parker CJ defined abnormality of mind to mean:

‘... a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind’s activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise willpower to control physical acts in accordance with that rational judgment.’<sup>190</sup>

The cases show that this is a very broad definition. Two of the most controversial conditions which have been held to constitute an abnormality of mind are personality disorders and cases involving sexual psychopathy.

What amounts to an abnormality of mind is a legal, not medical, question. Although medical evidence will normally be adduced to prove this element, the jury are not bound to accept it. The jury must consider all the relevant facts and it is within their discretion to reject the medical findings if, on the balance of all the evidence, they think it is wrong. This affords the jury a significant degree of autonomy which in practise has worked against defendants. Defendants raising diminished responsibility not infrequently kill in a repulsive manner, making juries loath to return a verdict of manslaughter where the facts, in their minds, point strongly to murder. For this reason, many defendants who raise diminished responsibility elect to be tried before a judge alone.<sup>191</sup>

The New South Wales Law Reform Commission Report<sup>192</sup> concluded:

“The Commission agrees that the term ‘abnormality of mind’ is imprecise and that its meaning may be unclear to expert witnesses.”

The Commission proposed that it be replaced by a test that at the time of the killing, there must be substantial impairment of the accused’s capacity to understand events; or judge whether his or her actions were right or wrong; or control himself or herself. This formula was developed after consultation with forensic psychiatrists and psychologists and “should be easier to understand for both experts and juries, which in turn should make its application in individual cases more consistent and more straight forward.”<sup>193</sup> Parliament followed this approach but retained the term ‘abnormality of mind’ in preference to the more precise ‘abnormality of mental functioning.’<sup>194</sup>

189 [1960] 2 QB 396.

190 *Ibid* at 403.

191 See the comments of Gleeson CJ in *Chayna* (1993) 66 A Crim R 178 at 191.

192 New South Wales Law Reform Commission, (Report no.82), *Partial Defences to Murder: Diminished responsibility.* (May,1997), at 47.

193 *Ibid* at 53.

194 *Crimes Amendment (Diminished Responsibility) Act 1997*, s.23A(1).

Code

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(b) Causes of the Abnormality

The Australian Capital Territory and Queensland Acts (and until 1997 New South Wales) use the same phrase in prescribing the causes of abnormality.<sup>195</sup>

The abnormality of mind must:

- arise from a condition of arrested or retarded development of mind;
- arise from any inherent causes; or
- be induced by disease or injury.

Determining whether an abnormality of mind originates from one of these causes is a matter to be decided upon the medical evidence.<sup>196</sup> This has resulted in the creation of a wide range of conditions for meeting the criteria, despite the courts' efforts to restrict its scope by holding this to be an exclusive list of causes of abnormality.<sup>197</sup> The extension of diminished responsibility has been problematic. Abnormalities founded in inherent causes have attracted the most criticism. This stems from the fact that such inherent causes must be permanent in nature, even though the abnormality of mind itself need only be temporary.<sup>198</sup> Moreover, in some cases the inherent cause is indistinguishable from the abnormality.<sup>199</sup> Here the jury is asked to draw very fine distinctions due to the collapse of the first two elements into one.

The New South Wales Law Reform Commission concluded that the existing requirements concerning causes "appears quite arbitrary and may generate a high level of complexity and confusion in relation to the expert evidence which is led in diminished responsibility cases."<sup>200</sup> Their proposal, now contained in the 1997 Act, includes some improvements by providing more specifically that it must arise from an 'underlying condition': a pre-existing mental or physiological condition, other than a condition of a transitory kind.

(c) Substantially Impaired Mental Responsibility

The Australian Capital Territory legislation requires the defendant's abnormality of mind to substantially impair the defendant's mental responsibility for his or her acts or omissions which caused the death. Lord Parker CJ explored the concept of mental responsibility in *Byrne* recognising that it involves:

'... a consideration of the extent to which the accused's mind is answerable for his physical acts which must include a consideration

<sup>195</sup> The Northern Territory *Criminal Code* is silent in this respect.

<sup>196</sup> This is the only one of the three elements which requires medical evidence to establish its existence.

<sup>197</sup> *Purdy* [1982] 2 NSWLR 964 per Glass JA and Maxwell J.

<sup>198</sup> *McGarvie* (1986) 5 NSWLR 270.

<sup>199</sup> Personality disorders are cited as a common example of such cases.

<sup>200</sup> New South Wales Law Reform Commission, (Report no.82), '*Partial Defences to Murder: Diminished responsibility.*' (May,1997), at 49.

Code

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of the extent of his ability to exercise will-power to control his physical acts.’<sup>201</sup>

Despite this pointer to relevant considerations, no clear definition of mental responsibility has emerged from the cases. It remains a nebulous concept largely because it rests upon a moral, rather than legal or psychiatric, foundation.

The New South Wales Law Reform Commission concluded:

“the Commission agrees that it is not a precise expression. The term may be misleading in so far as it does not make it expressly clear that it is for the jury not the experts to answer.”<sup>202</sup>

They proposed that it be clarified that it was the jury’s role to determine whether the impairment was substantial. That recommendation is reflected at subsection 23A(2) of the 1997 Act. The Commission drew its inspiration on this point from the English Criminal Law Revision Committee.<sup>203</sup>

The Queensland and Northern Territory legislation seeks to avoid the ACT problem by omitting the phrase ‘mental responsibility’. Instead, they require any one of three of the defendant’s capacities to be substantially impaired, namely, the defendant’s capacity to:

- understand what he is doing;
- control his actions; or
- know that he ought not to do the act or make the omission.

### *Onus and Standard of Proof*

Unlike the other partial defences, but like the complete defence of insanity (‘mental impairment’), all State and Territory jurisdictions legislating for diminished responsibility place the onus of establishing the defence upon the defendant. (However note that under subsections 7.3(3)(4) of Chapter 2 of the Model Criminal Code (see Appendix 2) mental impairment may be raised and proved by either the prosecution or the defence.)

The applicable standard of proof is that operative in civil cases.<sup>204</sup> The defendant is required to establish each of the three elements of the defence on the balance of probabilities.

The reversal of the onus complicates the jury’s task, particularly when the defendant relies on more than one partial defence. Diminished responsibility is often run together with provocation. In these cases, the jury will not only

201 [1960] 2 QB 396 at 403.

202 New South Wales Law Reform Commission, (Report no.82), ‘*Partial Defences to Murder: Diminished responsibility.*’ (May,1997), at 50.

203 *Offences Against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) at par 93.

204 See *Byrne* [1960] 2 QB 396 at 404; *Dunbar* [1958] 1 QB 1 at 10ff.

Code

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need to appreciate that the onus of proof is on different parties for each defence, but also that the standard to which the defences must be proved differs. This legal framework must be absorbed even before jurors turn their minds to the most crucial aspect of the case - whether the substantive legal principles are established on the facts.

### *Practical Problems*

The New South Wales Law Reform Commission has made a valiant attempt to reformulate and rescue the partial defence of diminished responsibility on the basis that the public are much more likely to accept an appropriately lower penalty which takes into account by way of a sentence diminished responsibility where that conclusion has been reached by a jury rather than a judge.<sup>205</sup> This has its appeal in an era where sensational cases are dominated by trial by media because care is required to maintain public confidence in the judicial system. The Committee is far from sure, however that the Australian public does accept the reduction of murder to manslaughter, even though that decision must be reached by a jury. The Committee considers that the practical problems with the partial defence of diminished responsibility will not be remedied by further changes to the test. This is because the concept of this partial defence is fundamentally confused. The Committee notes that Victoria, Western Australia, South Australia and Tasmania are functioning perfectly well without the defence. Indeed there seems to be less concern about these issues in those States than New South Wales.

The Committee believes the defence has the following practical problems which warrant its abolition.

#### (a) Distinguishing Diminished Responsibility from Insanity

The importance of clearly defining the scope and operation of diminished responsibility is highlighted by the need to distinguish it from the closely related complete defence of insanity (mental impairment). Whereas diminished responsibility reduces liability for murder to manslaughter, insanity leads to acquittal, (though the acquitted person is often in most jurisdictions detained for an indeterminate period).

Diminished responsibility is inherently vague. All three elements of the defence are immersed in uncertainty. The surrounding uncertainty has resulted in a dichotomy of approaches in distinguishing diminished responsibility from insanity. The difference between the defences of insanity and diminished responsibility have been variously described as purely one of degree or one of degree and kind.<sup>206</sup> In Queensland and the Northern Territory, the distinction

<sup>205</sup> New South Wales Law Reform Commission, (Report no.82), *'Partial Defences to Murder: Diminished responsibility.'* (May,1997), at 30.

<sup>206</sup> See New South Wales Law Reform Commission, Discussion Paper 31 *Provocation, Diminished Responsibility and Infanticide*, 1993 para.4.52.

Code

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between diminished responsibility and insanity is purely one of degree. Queensland case law holds that diminished responsibility is only distinguishable from insanity in terms of the third element, (while insanity requires a complete deprivation of the defendant's pertinent capacities) diminished responsibility will be established if those capacities are merely substantially impaired.<sup>207</sup> In England and the Australian Capital Territory the first element of diminished responsibility is further used to distinguish it from insanity and thus the distinction is also one in kind. That is, the kinds of mental conditions founding diminished responsibility are different, and in fact broader, than those establishing insanity.<sup>208</sup> For instance, uncontrollable impulses and personality disorders are covered by diminished responsibility, but not insanity.<sup>209</sup>

(b) Problems of Proof Associated With the Use of Psychiatric Evidence

(i) *Conflicting Expert Testimony*

The defendant is charged with the onus of proving diminished responsibility. This almost invariably will require the use of psychiatric evidence. A major problem arises in cases where the experts' opinions conflict. An apt example illustrating the potential gravity of this problem is Chayna's case,<sup>210</sup> where seven psychiatrists were called and seven significantly different opinions expressed. These cases arguably bring the law into disrepute by creating the impression that psychiatrists can be obtained to express any desired view. Avoiding a murder charge may therefore be seen as a matter of merely shopping for the appropriate medical expert(s). Problems of this nature led Gleeson CJ in Chayna to recognise (under a separate heading in his judgment) the possible need for law reform by stating:

'... it appears to me that the place in the criminal law of [diminished responsibility] is a subject that is ripe for reconsideration.'<sup>211</sup>

(ii) *The Ultimate Issue Rule*

A further problem of proof is that expert opinion evidence in diminished responsibility cases often answers the 'ultimate issue' for the jury to decide, and thereby offends against the evidential rule by the same name. While section 80 of the uniform *Evidence Act 1995* (Cth/NSW/ACT) abolishes the 'ultimate issue' rule by providing that evidence of an opinion is not inadmissible only because it is about a fact in issue or an ultimate issue, most Australian jurisdictions still have antiquated laws of evidence. Questions directed to eliciting whether the defendant's conduct conforms to the legal standard are objectionable. Nevertheless, such questions are routinely put to medical experts

207 See *Rolph* [1962] Qd. R 262, especially Mansfield CJ at 271-272.

208 See for example *Byrne* [1960] 3 All ER 1; *Kopsch* (1925) 19 Cr. App. R 50.

209 See *Sodeman* (1936) 55 CLR 230; *AG (SA) v Brown* [1960] AC 432.

210 (1993) 66 A Crim R 178.

211 *Ibid*, at 191.

Code

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in these cases. There is even suggestion that the evidential rule does not apply in this context.<sup>212</sup> However, the fact remains that the rules need to be bent somewhat to facilitate the operation of the partial defence.

(c) Directions to Juries

Practical difficulties also arise in directing juries on diminished responsibility. The jury must recognise that diminished responsibility requires the defendant to show that he or she is not fully sane, yet not completely insane. In determining this issue jurors are generally required to understand, analyse and translate into legal significance complicated, and often contradictory, medical evidence. The early authorities avoided the problem of how to direct the jury on these complex matters by taking the view that jurors required no specific direction regarding diminished responsibility.<sup>213</sup> While this view no longer prevails,<sup>214</sup> the problem still remains and arguably will persist indefinitely due to the nebulous nature of the doctrine.

(d) Diminished Responsibility is Adequately Considered During Sentencing

Like provocation, diminished responsibility emerged as a response to mandatory life imprisonment sentences for murder. The need for the defence is questionable where sentencing flexibility exists. In such jurisdictions, trial judges are afforded a degree of sentencing discretion which allows them to take account of any mitigating circumstances which might affect the quality of the defendant's fault element. Cases which would otherwise amount to diminished responsibility would constitute one such mitigating circumstance, as is the case with all other offences.<sup>215</sup>

(e) Difficulty in Sentencing Offenders who Successfully Raise Diminished Responsibility

A further sentencing related argument against the introduction of diminished responsibility is the tragic experience in *Veen (No. 1)*<sup>216</sup> and *Veen (No. 2)*.<sup>217</sup> In both cases the same defendant successfully raised diminished responsibility as a result of alcohol combining with high stress levels. In the first case the evidence recognised that the defendant was likely to kill again if he was exposed to the same conditions. This, the prosecution contended, should offset any reduction in sentence by reason of diminished responsibility. The High Court held that

212 See *Tonkin and Montgomery* [1975] Qd. R 1.

213 *Spriggs* [1958] 1 QB 270; *Walden* [1959] 1 WLR 1008.

214 See *Terry* [1961] 2 QB 175; *Rolph* [1962] Qd. R 262, at 288 per Hanger J.

215 Of course, this route may achieve the same result in terms of incarceration periods but does so by travelling a substantially different path. Where diminished responsibility is not available the defendant is found guilty of murder; where the defence does exist the offence is manslaughter, thus allowing defendants to avoid the damning murder stigma by reserving that label for the worst cases.

216 (1979) 53 ALJR 305.

217 (1988) 62 ALJR 224.

Code

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proportionality in sentencing outweighed any consideration of public protection and accordingly dismissed the prosecution's arguments. Tragically, the defendant did kill again in the same circumstances when released from prison. Despite diminished responsibility being established, the High Court sentenced the defendant to life imprisonment holding that on this occasion his propensity to kill under specified conditions was no longer uncertain but well established.

The *Veen* cases illustrate the danger underlying the diminished responsibility doctrine.<sup>218</sup> Lenient penalties may not be desirable for all defendants suffering from abnormalities of the mind falling short of insanity. The paradoxical situation arises whereby a defendant successfully raising diminished responsibility is to receive a shorter sentence than a defendant who fails in that regard, even though the former may be significantly more dangerous than the latter.<sup>219</sup>

(f) Abuse

A further concern held by the Committee relates to the earlier recommendation to abolish provocation. If provocation is abolished and diminished responsibility remains, practical experience suggests provocation arguments which would otherwise have been raised will gain a voice in the form of diminished responsibility, resulting in the latter's abuse. This is so despite the different foundations upon which the two partial defences rest. The inevitable increased frequency of diminished responsibility cases will only serve to amplify all of the practical problems identified above.

### Conclusion

The practical difficulties associated with diminished responsibility frustrate its purpose. Public confidence in the defence, and more generally the law, is damaged by the perception that it operates to excuse persons because of the often deplorable manner in which they kill. These cases are viewed, certainly by juries at least, as murder. The extent to which the defendant's abnormal state of mind impacted upon the killing is adequately considered in sentencing. For these reasons, the Committee agrees with the Law Reform Commission of Victoria's view that the partial defence of diminished responsibility should not be introduced.<sup>220</sup>

218 See further R Fox "The Killings of Bobby Veen: The High Court in Proportion in Sentencing" (1988) 12 *Criminal Law Journal* 339.

219 See Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Report No. 34, October 1990, at 52, para. 145.

220 See Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Report No. 34, October 1990, at 53.

Code

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### Recommendation

The Committee recommends that there be no partial defence of diminished responsibility.

### The proposal to reformulate diminished responsibility

The Committee seeks the community's opinion on whether they agree with the proposed New South Wales Law Reform Commission reformulation of the diminished responsibility partial defence should Ministers decide the defence is to be included in the Model Criminal Code.

### Infanticide

New South Wales, Victoria, Western Australia and Tasmania have provisions concerning infanticide. The two Code states merely create an offence of infanticide,<sup>221</sup> whereas the common law states also allow defendants to raise it as a partial defence to murder.<sup>222</sup> There are no infanticide provisions in Queensland, South Australia or the Australian Capital Territory.

Conceptually, infanticide can be seen as a specific form of diminished responsibility.<sup>223</sup> This is because the statutory formulations of infanticide have linked it to an impeachment upon the defendant's mind. A historical survey, however, reveals a very different impetus for infanticide.<sup>224</sup> In ancient societies, killing newly born babies was an accepted and common means of controlling population growth. With the arrival of more sophisticated religions came an ethic which championed the sanctity of human life. However, despite the distinct shift in morality, the prevalence of infanticide was unaffected.<sup>225</sup> Even the introduction of legislation in 1623, which imposed the death penalty on a mother who disposed of the body of her illegitimate newborn child so as to conceal its death, failed to curb the incidence of infanticide. In fact, the statute was rarely used. Judges were loath to see mothers convicted for murder.<sup>226</sup>

221 Western Australian *Criminal Code* s 281A; Tasmanian *Criminal Code* s 165A

222 *Crimes Act* (NSW) 1900 s 22A; *Crimes Act* (Vic) 1958 s 6. Further note that infanticide also operates as both an offence and defence in the United Kingdom: *Infanticide Act (UK)* 1938-1967 s 1(1).

223 Indeed, the Queensland Criminal Code Review Committee concluded as recently as 1992 that the introduction of an offence of infanticide into the Queensland *Criminal Code* was unnecessary given the scope of the diminished responsibility defence: Criminal Code Review Committee *Final Report* (1992) at 195. The Butler Report expressed a similar view: *supra* at para. 19.27.

224 See generally New South Wales Law Reform Commission, Discussion Paper 31, *Provocation, Diminished Responsibility and Infanticide*, (1993) at para. 5.4-5.11; Bernadette McSherry "The Return of the Raging Hormones Theory: Premenstrual Syndrome, Postpartum Disorders and Criminal Responsibility" (1993) 15 *Sydney Law Review* 292 at 300-303.

225 See generally Osbourne "The Crime of Infanticide: Throwing Out the Baby with the Bathwater" (1987) 6 *Canadian Journal of Family Law* 47 at 49.

226 Seaborne Davies "Child Killing in English Law" [1937] *Modern Law Review* 203 at 219.

Code

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Their reasons were sociological in nature. In those times, infanticide was often an unshirkable option in light of the oppressive social and economic conditions unmarried mothers faced.<sup>227</sup> Despite these sociological concerns, when law reform took place the legislation sought to legitimise infanticide by ascribing it a medical rationalisation.<sup>228</sup> Infanticide was not murder because the death was a result of childbirth interfering with the balance of the mother's mind.<sup>229</sup> The adoption of the medical model was motivated by concerns to distance the judiciary from the law making process and provide infanticide with a legitimate basis. Ironically, it is that very basis which has exposed infanticide to often scathing attacks.

### *Elements*

The offence of infanticide is committed, or as appropriate, the defence arises when a mother causes the death of her child, being a child under the age of 12 months, when the balance of her mind is disturbed because:

- she is not fully recovered from the effect of giving birth to the child; or
- of the effect of lactation consequent upon the birth of the child.<sup>230</sup>

Three points arising from this definition are of note. First, the law here has adopted a medical model centred around the puerperium period following childbirth. Although in medicine this period is recognised to continue for about six weeks, in law it potentially persists for a full 12 months.<sup>231</sup> Second, as a consequence of the adoption of this medical model, the defendant must be the child's birth mother. Third, despite the need to establish a disturbance of the defendant's mind, that mental state need not be causally linked to the death. It will suffice, on the face of the legislation at least, to show that the act causing death contemporaneously existed with the relevant mental state.<sup>232</sup>

### *Problems with Infanticide*

#### (a) Ambiguities

Infanticide is ambiguous in two important respects. First only the Western Australian provision specifies the requisite mental element to be met. Section

<sup>227</sup> Osbourne, *op cit* at 49-50

<sup>228</sup> See O'Donovan "The Medicalisation of Infanticide" [1984] *Criminal Law Review* 259 at 261.

<sup>229</sup> *Infanticide Act* (UK) 1922.

<sup>230</sup> Section 165A of the Tasmanian *Criminal Code* does not include this second limb, which was first introduced in the English Act to justify the extension of the mother's emotional disturbance to a period of 12 months.

<sup>231</sup> In New Zealand the child need only be less than ten years of age: 178(1) of the *Crimes Act* (NZ) 1961.

<sup>232</sup> See Walker *Crime and Insanity in England*, Vol 1, Edinburgh University Press, 1968, at 134-135.

Code

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281A of the Western Australian Criminal Code provides that the fault element for infanticide is the same as that for wilful murder or murder.<sup>233</sup> In the other jurisdictions the position is unclear. It may be that the mental element for infanticide is no more onerous than that for unintentional manslaughter.

The second ground of uncertainty relates to the onus of proof when infanticide is used as a defence. As an offence, the prosecution shoulders the onus of proving the various elements. However, in both Victoria and New South Wales where infanticide can also operate as a defence, the legislation is silent on the matter. The parallels which align infanticide with diminished responsibility and, more broadly, insanity may indicate that the onus is placed upon the defendant when raised by the defendant. However, to do so would be contrary to deep rooted criminal law principles and the position which applies to most defences.<sup>234</sup> If infanticide is to be adopted, these ambiguities will need to be resolved.

#### (b) Uncertain Medical Foundation

Infanticide's medical foundation has attracted criticism. Recent medical advancement has seriously questioned the medical basis for concluding that the balance of a woman's mind may be disturbed as a consequence of childbirth or lactation.<sup>235</sup> Indeed, even if such an imbalance can arise, its persistence for a period of 12 months clearly falls beyond the support of the medical evidence.

Research suggests the real reason mothers commit infanticide is on the whole unrelated to any mental imbalance arising as a result of raging hormones. Motives for infanticide are more closely tied to social and environmental strains such as poverty, lifestyle changes, a sense of an inability to cope and lack of support.<sup>236</sup> Such findings serve to reinforce infanticide's historical roots and show the medical model to be out of place. Infanticide was motivated by sociological concerns, not medical theory.

233 See the discussion of wilful murder and murder under the section headed "Three Offences: First Degree Murder, Murder and Manslaughter" above.

234 The Victorian Law Reform Commission has recommended the onus of proof be placed upon the prosecution: Victorian Law Reform Commission *Mental Malfunction and Criminal Responsibility*, (Report 14, 1990) Recommendation 28.

235 See Ussher "Reproductive Rhetoric and the Blaming of the Body" in Nicolson and Ussher (eds), *The Psychology of Women's Health and Health Care*, (1992) at 44; Parlee "The Premenstrual Syndrome" (1973) 80 *Psychology Bulletin* 454; Holtzmann "Premenstrual Symptoms: No Legal Defence" (1986) 60 *St. John's Law Review* 712 at 713. Of course, the insanity defence is available to these mothers so that if their minds have been impaired to the legal standard then that defence will apply. McSherry suggests that while Postpartum psychosis does amount to legal insanity, postpartum depression and premenstrual syndrome do not: McSherry "The Return of the Raging Hormones Theory: Premenstrual Syndrome, Postpartum Disorders and Criminal Responsibility" (1993) 15 *Sydney Law Review* 292 at 306-308.

236 New South Wales Law Reform Commission, Report 83, *Partial Defences to Murder: Provocation and Infanticide*, (October 1997) at 115; The Butler Report; Criminal Law Review Committee *Offences Against the Person* (Report 14, 1980); O'Donovan, *ibid*, at 263; d'Orban "Women Who Kill Their Children" (1979) 134 *British Journal of Psychiatry* 560.

Code

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(c) Discriminatory

Infanticide is recognised to discriminate at several levels. First it specifically discriminates against fathers as it is a sex specific offence/defence that can only be committed by mothers. Fathers, and indeed other carers, in identical circumstances who kill their children are guilty of murder as the offence of infanticide is limited to mothers who kill their children. Despite such discrimination, it is unlikely that the community will support an extension of infanticide to men who kill their children.

Second, infanticide discriminates more generally against other persons who suffer from acute stress.

Finally, it singles out women on the basis of a notion that they are particularly vulnerable to mental impairment due to their biology.<sup>237</sup>

(d) Feminist Objections

Even though infanticide applies exclusively to mothers, operating to reduce murder to a lesser offence, there is concern that on a general level it may not serve women's interests. The objection is against linking women's biology to criminal responsibility.<sup>238</sup> Women have long fought for equality before the law. To single out lactating women and accord them special treatment on the grounds that they may experience temporary irrationality detracts from the broader agenda.

(e) Unnecessary

Finally, the objection which applies to both provocation and diminished responsibility is also applicable to infanticide. Infanticide is unnecessary in a jurisdiction with a discretionary murder sentence. However there is historical significance attaching to the label 'infanticide'. Separating that offence from murder was the vehicle through which lenient sentencing for infanticide was achieved. Under the Committee's recommendations, variable sentencing for murder will enable courts to take account of circumstances which call for a compassionate exercise of sentencing discretion. In cases where the child was killed by its mother as a consequence of her mental illness or disability, the broadly defined defence of 'mental impairment' in section 7.3 of the Model Criminal Code (Appendix 2) provides a basis for acquittal. It is worth remembering that infanticide is rarely used in practice, either as an offence or defence.

<sup>237</sup> New South Wales Law Reform Commission, Report 83, *Partial Defences to Murder: Provocation and Infanticide*, (October 1997) at 117.

<sup>238</sup> See Laster "Infanticide and Feminist criminology: 'Strong' or 'Weak' Women?" (1990) 2 *Criminology Australia* 14; McSherry "The Return of the Raging Hormones Theory: Premenstrual Syndrome, Postpartum Disorders and Criminal Responsibility" (1993) 15 *Sydney Law Review* 292; Scutt *Women and the Law*, Law Book Company, 1990 at 409ff.

Code

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## Conclusion

The justification for infanticide lies in policy, not, for example, in a diminished fault element resulting in reduced criminal liability. Consequently, the defence is contrary to fundamental criminal law principles. Moreover, the policy arguments against the defence have left the Committee in doubt as to its merits. The Committee therefore favours excluding infanticide as a partial defence or special offence under the Model Criminal Code. Ultimately, the rule of law should be upheld. If insanity (mental impairment) is applicable it can be claimed. The Committee notes that the New South Wales Law Reform Commissions report also recommended the removal of infanticide but stressed that it only did so on the basis that all accused can rely on their reformulated partial defence of diminished responsibility.<sup>239</sup> For the reasons given in the previous segment, the Committee does not support the retention of the partial defence of diminished responsibility.

### Recommendation

The Committee recommends that there be no partial defence or special offence of infanticide.

## Aboriginal customary law

Aboriginal customary laws are at present largely irrelevant in determining criminal liability for murder. If an Aborigine commits murder, that offence will not be reduced to manslaughter even though the defendant reasonably believed Aboriginal customary laws compelled him or her to kill the victim. In those circumstances, the common law and the law under the various Australian Codes requires Aborigines to obey white law in preference to their own laws.

The Australian Law Reform Commission (ALRC) has extensively considered whether Aboriginal customary laws should be recognised.<sup>240</sup> There are essentially two stages in the analysis: should Aboriginal customary laws be recognised, and if so, what form should that recognition take. In light of the ALRC Report in detail, it is not proposed to re-explore all of the pertinent issues. There are, however, some aspects which warrant further mention.

The ALRC found the reasons favouring recognition of Aboriginal customary laws to outweigh those against. In particular, the ALRC was persuaded by:

‘... the need to acknowledge the relevance and value of Aboriginal customary laws for many Aborigines, their desire for recognition

239 New South Wales Law Reform Commission, Report 83, *Partial Defences to Murder: Provocation and Infanticide*, (October 1997) at 107-113.

240 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No. 31.

Code

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of their laws in appropriate ways, their right to choose to live in accordance with their customs and traditions and the injustice inherent in non-recognition of Aboriginal customary laws.<sup>241</sup>

The ALRC recommendation was limited in its application to offences which do not involve serious violence to the person.<sup>242</sup> Although the ALRC was not prepared to accord recognition to Aboriginal customary laws which sanction serious violence against the person, it did recommend a partial defence, when conduct which would otherwise justify a conviction for murder was done in compliance with the requirements of customary law:

'A partial customary law defence should be created, similar to diminished responsibility, reducing murder to manslaughter. It should be provided that, where the accused is found to have done an act that caused the death of the victim in the well-founded belief that the customary laws of the Aboriginal community to which the accused belongs required that he do the act, the accused should be liable to be convicted for manslaughter rather than murder.'<sup>243</sup>

The Committee agrees that there are strong reasons for the general recognition of Aboriginal customary laws. Like the ALRC, however, it is not persuaded that recognition should extend to allowing customary law to excuse otherwise unlawful homicide. The ALRC proposal for a partial defence to murder was based on the premise that compliance with customary law was analogous to diminished responsibility. The Committee is not persuaded by the analogy. It is also not in favour of a partial defence of diminished responsibility. It is accepted that Aborigines are in a special position, even when compared to other cultural groups.<sup>244</sup> However, all crimes are committed against society as a whole and murder is one of the most heinous of crimes. Society at large has a great interest in preventing the commission of fatal offences. Individuals have a right to live in safety, free from the threat of culturally excused killings. Murder offends against democratic values that attach to human life which are so fundamental that they must take priority over the special position of Aborigines.

There are a number of subsidiary reasons which confirm this view. Such reasons are directed towards the uncertainty that prevails in the second aspect of the analysis - the form which recognition of an Aboriginal customary law defence

<sup>241</sup> *Ibid*, Summary Report, Chp 4, para. 37.

<sup>242</sup> Compare with section 9.5 of Chapter 2 of the Model Criminal Code which concerns claim of right. Section 9.5 permits recognition of a claim of right based on Aboriginal customary law in relation to offences which do not relate to the use of force against a person.

<sup>243</sup> *Ibid*, Vol. 1 at 323. The Victorian Law Reform Commission accepted this recommendation in its Report on Homicide: Report 40, at 99-100.

<sup>244</sup> See ALRC Report No. 31, *ibid*, Summary Report, para. 85.

Code

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to murder would take. Would the defence be available only when the fatal act is committed within a traditional Aboriginal community? If not, would a person with only some Aboriginal heritage be able to raise the defence? Does it apply to cross-cultural killings or must the victim also be of Aboriginal descent and, if so, must the victim further be subject to the same customary laws which required the killing? What if the victim was from the same tribe but was seeking to sever Aboriginal cultural ties? Would the defence be available to defendants who were intoxicated at the relevant time?

It is not clear that such a defence will in fact achieve the goals which motivate its introduction. The defence may reduce itself to no more than a means of partially condoning pay-back killings and legitimising the correction of wives. One view expressed by Aboriginal women is:

‘[Aboriginal women] are now subject to violence from their own men of a kind which would not have been countenanced in traditional society. As one woman remarked; There are now three kinds of violence in Aboriginal society - alcoholic violence, traditional violence, and bullshit traditional violence. Women are the victims of all three. By ‘bullshit traditional violence’ is meant the sort of assault on women which takes place today for illegitimate reasons, often by drunken men, which they then attempt to justify as a traditional right.’<sup>245</sup>

This raises a question regarding the proof of Aboriginal customary laws. In white society, as in traditional Aboriginal society, it was once considered to be ‘legitimate’ for men to use force to preserve male dominance - the community considered husbands had a right to chastise their wives.<sup>246</sup> However as society changed the common law made it clear there was no such right. On the other hand, the evolution of Aboriginal customary laws has been impeded since the arrival of Europeans in Australia. The recognition of Aboriginal customary laws in relation to murder might therefore have the undesirable effect of recognising Aboriginal culture as it existed in 1788 rather than Aboriginal culture today.

The Committee particularly seeks the views of Aboriginal people on these issues.

#### Recommendation

The Committee recommends that a partial defence to murder derived from Aboriginal customary laws should not be introduced.

<sup>245</sup> Bolger, *Aboriginal Woman and Violence: A Report for the Criminology Research Council and the Northern Territory Commissioner of Police*, at 58. See further Atkinson, “Violence Against Women: Reconstitution of Community Law - The Way Forward” (1990) 2 *Aboriginal Law Bulletin* 6.

<sup>246</sup> See Blackstone, *Commentaries on the Laws of England*, Vol I 15th ed. (London, Strahan, 1809) (rep 1982) at 444.

Division 3 - Other unlawful homicides

**5.1.10 Manslaughter**

A person:

- (a) whose conduct causes the death of another person; and
- (b) who intends to cause, or is reckless about causing, serious harm to that or any other person by that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

**5.1.11 Dangerous conduct causing death**

A person:

- (a) whose conduct causes the death of another person; and
- (b) who is negligent about causing the death of that or any other person by that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

## UNINTENTIONAL MANSLAUGHTER - THE PROPOSED DANGEROUS CONDUCT CAUSING DEATH OFFENCE - SECTION 5.1.11

Apart from the operation of the partial defences, which reduce murder to manslaughter, under the existing law the prosecution can establish guilt of manslaughter:

- When death results from a dangerous and unlawful act by the accused; or
- When death results from gross negligence.

In these circumstances an offender displays a level of indifference or disregard for the safety of others which current law counts as sufficient for a manslaughter verdict.<sup>247</sup>

### **Manslaughter by Dangerous and Unlawful Act**

The common law provides for manslaughter by unlawful and dangerous act. This constructs liability from the combination of two circumstances: the existence of a lesser crime coupled with a dangerous act causing death. Hence, this category of unintentional manslaughter is also known as 'constructive manslaughter' and is manslaughter's equivalent to 'constructive murder.' Constructive manslaughter, like constructive murder, is seen to operate harshly as it often applies in circumstances of accidental death. Australian Courts in particular have sought to limit the operation of the doctrine. For example, the

<sup>247</sup> Under the common law another category was manslaughter by intentional infliction of bodily harm. In *Holzer* [1968] VR 481 Smith J phrased the offence in these terms:

'... a person is guilty of manslaughter if he commits the offence of battery on the deceased and death results directly from the commission of that offence, and the beating or other application of force was done with the intention of inflicting on the deceased some physical injury not merely of a trivial or negligible character or, it would seem, with the intention of inflicting pain, without more injury or harm to the body than is involved in the infliction of pain which is not merely trivial or negligible.'

This category has attracted more scathing attacks than any other category of manslaughter because of its unrivalled extension of manslaughter's boundaries. Manslaughter by mere harm or battery sets the threshold for a conviction so low so as to encompass virtually any intentional blow which results in death, even if that death is completely unexpected.

In Australia, this category of manslaughter was recently held not to exist in *Wilson v The Queen* (1991-92) 174 CLR 313 at 333 a majority of the High Court there held that 'The notion of manslaughter by the intentional infliction of harm carries with it the consequence that a person may be convicted of manslaughter for an act which was neither intended nor likely to cause death. ... a person may be held guilty of manslaughter for a death that was quite unexpected.'

The Committee sees no reason to re-introduce manslaughter by intentional infliction of mere harm. It would effectively reduce a manslaughter conviction to a matter of chance. Virtually any intentional blow no matter how slight potentially exposes a person to a manslaughter conviction provided it is not trivial or negligible in character. A simple battery is effectively elevated to the status of manslaughter if death accidentally results. This is harsh, unjust and contrary to axiomatic criminal law principles.

Code

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cases require the act in question to be both unlawful to the extent that it constitutes a separate criminal offence<sup>248</sup> and, at the same time, dangerous.<sup>249</sup> An act performed negligently is not unlawful.<sup>250</sup> Moreover, the test of dangerousness is entirely objective. It requires 'the circumstances [to] be such that a reasonable man in the accused's position, performing the very act which the accused performed, [to] have realised that he was exposing another or others to an appreciable risk of really serious injury.'<sup>251</sup> The objective nature of this test likens it to a test of negligence so that conduct which is 'dangerous' is also likely to be negligent. While it will have no application when conduct, however negligent, does not amount, in itself, to a breach of the law, it still leaves manslaughter by dangerous and unlawful act very little scope to operate independently of manslaughter by gross negligence.

Despite these limitations, there is still considerable criticism concerning the scope and existence of manslaughter by unlawful and dangerous act. The offence has never completely risen above its origins, which developed in an environment where criminal liability did not hinge upon a guilty state of mind. It has been artificially moulded to fit present standards of culpability by constructing the fault element from the circumstances. This basis has not been well received. The Committee perceives the defendant in these cases to be morally culpable, but not for manslaughter.

The unpopularity of manslaughter by unlawful and dangerous act has not on the whole been reflected in the statute books. The common law jurisdictions have, like England, retained the offence in its common law form.<sup>252</sup> Tasmania and the Northern Territory have created an equivalent statutory offence,<sup>253</sup> although it has been omitted from the Queensland and Western Australian Codes. Misdemeanour-manslaughter, as it is known in the United States, has also been expressly rejected by the United States Model Penal Code (1962).<sup>254</sup>

248 *Pemble* (1971) 124 CLR 107; *Jennings* [1990] Crim LR 588.

249 *Holzer* [1968] VR 481; *Wills* [1983] 2 VR 201.

250 *Church* [1966] 1 QB 59; *Baughey v R* (1986) 65 ALR 609 at 627-628. Negligent acts are more relevantly considered in the context of manslaughter by gross negligence.

251 *Holzer* [1968] VR 481 at 482. Note that in *Wilson v R* (1991-92) 174 CLR 313 a majority of the High Court held that "It is better to speak of an unlawful and dangerous act carrying with it an appreciable risk of serious injury": at 333 per Mason CJ, Toohey, Gaudron and McHugh JJ. See further *Wills* [1983] 2 VR 201 at 212. The English and Canadian authorities are not as strict, requiring only a risk of some harm, albeit not serious harm: *R v Church* [1966] 1 QB 59; *DPP v Newbury* [1977] AC 500; *Watson* [1989] 2 All ER 865; *Lamb* [1967] 2 QB 981; *Adkins* (1987) 39 CCC (3d) 346. This also seems to be the position in New South Wales: *R v Coomer* (1989) 40 A Crim R 417. The minority of the High Court in *Wilson* preferred the English approach: *Wilson v R* (1991-92) 174 CLR 313 at 341 per Brennan, Deane and Dawson JJ.

252 In England the Law Commission has recently recommended the abolition of manslaughter by unlawful and dangerous act: Law Commission, *Legislating the Criminal Code: Unintentional manslaughter*, Law Comm No 237, 1995-96 at paras. 5.14-5.16.

253 Sections 156(2)(c) and 159(1) respectively. Similar statutory offences also exist in Canada (s205(5)(a) of the Canadian *Criminal Code* 1986) and New Zealand (ss160(2)(a) and 171 of the *Crimes Act* 1961).

254 Para. 210.3.

Code

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### Recommendation

The Committee recommends that manslaughter by dangerous and unlawful act should be abolished.

### Manslaughter by Gross Negligence

Common law and Code jurisdictions alike accept that a person who causes death by conduct which can be described as grossly negligent is guilty of manslaughter. Gross negligence requires the prosecution to prove that the conduct of the accused “involved such a great falling short of the standard of care which a reasonable man would have exercised and which involves such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.”<sup>255</sup>

The controversy surrounding manslaughter by gross negligence stems from its objective nature. Liability is tested by determining whether the reasonable person would have foreseen a high risk of death or serious harm associated with the relevant act or omission.<sup>256</sup> A person, therefore, can be guilty of manslaughter by gross negligence even though he or she did not even foresee the possibility of death or serious harm as a consequence of their actions or omissions.

This appears to be inconsistent with the principles which underlie the Committee’s approach in relation to the law of fatal offences - that moral blameworthiness is determined by reference to the defendant’s state of mind. It was however earlier stated that moral blameworthiness, not subjective intention, forms the core of this analysis. It is vital to recognise, especially in this context, that the defendant’s state of mind is no more than a means to an end; it is the best indicator available to jurors in determining the culpability of a defendant. Hence, the pages of our statute books and law reports (and, indeed, the recommendations in this Discussion Paper) reflect this by isolating the defendant’s state of mind as the critical factor. But that factor is critical only because of the implications it entails regarding criminal culpability. It is by no means the only factor which conveys such implications about criminal culpability.

255 [1977] VR 430. See also the Committee’s definition of ‘negligence’ is at section 5.5 of Chapter 2, *General Principles of Criminal Responsibility* at Appendix 2). In essence, this definition codifies the common law position as expressed in *Nydam*.

256 There is some authority for the view that the defendant must also have foreseen a high risk of death or injury: *Taktak* (1988) 34 A Crim R 334 at 355. This subjective test, however, blurs the line between manslaughter by gross negligence and reckless murder. The Committee, in considering gross negligence, takes the view that this element of the offence is tested objectively, without any resort to the defendant’s actual state of mind.

Code

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H L A Hart provides an extensive discussion of the issues in *Punishment and Responsibility: Essays in the Philosophy of Law*. The argument he constructs has a distinct logical appeal:

“...There is nothing to compel us to say ‘he could not have helped it’ in *all* cases where a man omits to think about or examine the situation in which he acts and harm results which he has not foreseen ... After all, a hundred times a day persons are blamed outside the law courts for not being more careful, for being inattentive and not stopping to think; in particular cases, their history or mental or physical examination may show that they could not have done what they omitted to do. In such cases they are not responsible; but if anyone is ever responsible for *anything*, there is no general reason why men should not be responsible for such omissions to think, or to consider the situation and its dangers before acting.”<sup>257</sup>

The English Law Commission confronted this issue and concluded that ‘... it may be justifiable to impose criminal liability for the *unforeseen* consequences of a person’s acts, at any rate where the harm risked is great and the actor’s failure to advert to this risk is *culpable*.’<sup>258</sup>

The standard of care required by the criminal law can be breached in two ways:

- by failing to take necessary precautions in the course of potentially dangerous activity; or
- by failing to perceive the need to take action in order to avert danger to others.

In short, the standard can be breached by either an act or omission.

In relation to omissions the criminal law is slow to impose positive duties upon people to act. One reason is because such action often requires the rescuer to place their own safety in jeopardy. Before doing so the law generally requires some kind of special pre-existing relationship to exist between the defendant and victim. The common law has imposed a duty to save life where the defendant:

257 H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 1968, ch. 6, esp. 150-153. To the same effect is Ashworth, *Principles of Criminal Law*, (1995) 2nd ed., at 84-85. Further legal philosophy on point includes L J Austin, “A Plea for Excuses” in *Proceedings in the Aristotelian Society*, New Series, vol 57 (1956-57) 1; R A Duff, *Intention, Agency and Criminal Liability* (1990); T Honoré, “Responsibility and Luck” (1988) 104 *Law Quarterly Review* 530; Bernard Williams, *Moral Luck* (1981); Andrew Ashworth, “Taking the Consequences” in Shute, Gardner and Horder, *Action and Value in the Criminal Law* (1993).

258 Law Commission, *Legislating the Criminal Code: Unintentional manslaughter*, Law Comm No. 237, 1995-96 at para. 4.17 ff. The Law Commission specified two criteria required for culpable inadvertence. First the risk must be obviously foreseeable (para. 4.18), and secondly the defendant must have the capacity to advert to the risk (para. 4.20).

Code

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- is closely related to the victim;<sup>259</sup>
- has voluntarily undertaken to care for the life of the victim,<sup>260</sup>  
or
- incurs that duty through his or her employment of the  
victim.<sup>261</sup>
- places the life of the victim in danger by the defendant's  
conduct or activities.<sup>262</sup>

Similar duties exist in the Code jurisdictions. These duties broadly relate to the provision of the necessities of life and the need to take special precautions in relation to dangerous things or acts.<sup>263</sup>

There are a number of coincidental reasons which make it attractive to retain some form of unlawful homicide by gross negligence as an offence. It signals to society acceptable standards of behaviour and, at the same time, importantly acts to re-enforce the value of human life. It also significantly overlaps with manslaughter by dangerous and unlawful act, thus discouraging people from dangerous unlawful conduct. Therefore abolition of the offence of manslaughter by dangerous and unlawful act is made less consequential in the result if unlawful homicide by gross negligence continues to be an offence.

The Committee is of the view that the circumstances of gross negligence resulting in death are, in combination, sufficiently weighty to establish criminal culpability. Accordingly, the Committee favours retaining homicide by gross negligence in the proposed dangerous conduct causing death offence (section 5.1.11). There the offence refers to 'negligence', however the definition of negligence at section 5.5 of Chapter 2 of the Model Criminal Code is similar to the meaning given to 'gross negligence' under the common law (see Appendix 2).

In doing so, the Committee recognises the need to apply the objective negligence test in a subjective environment by requiring the reasonable person to step into the shoes of the defendant at the relevant time. To an extent this feature redresses the strict manner in which this category of manslaughter can operate. The reasonable person is to be attributed with any relevant knowledge which the defendant possesses at the relevant time. Hence, more onerous obligations may be placed upon persons possessing special skills (such as doctors assisting

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259 See for example *Russell* [1933] VLR 59 and *Chau Ming Cheong* [1983] HKLR 187 where duties were imposed upon parents to save the lives of their children.

260 *Stone and Dobinson* [1977] 1 QB 354; *Instan* [1893] 1 QB 450.

261 *Lowe* (1850) 175 ER 489.

262 *Miller* [1983] 2 AC 161; discussed by B Fisse, *Howard's Criminal Law* (1990) pp 122-123.

263 See Western Australian *Criminal Code* ss262-167; Queensland *Criminal Code* ss285, 289 and 290; Tasmanian *Criminal Code* ss144-151; Northern Territory *Criminal Code* ss149-152.

**5.1.11 Dangerous conduct causing death**

A person:

- (a) whose conduct causes the death of another person; and
- (b) who is negligent about causing the death of that or any other person by that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

at a road accident)<sup>264</sup> or special knowledge (such as knowledge that the victim, who was startled by the defendant and consequently died of a heart attack, had a weak heart).<sup>265</sup>

#### Recommendation

The Committee recommends that manslaughter by gross negligence should be replaced and encompassed in the 'dangerous conduct causing death' offence which should cover a person whose conduct causes the death of another person and is negligent about causing the death of that or any other person.

#### **Dangerous conduct causing death - why have a separate offence from manslaughter?**

The Committee could have incorporated negligence into the offence of manslaughter. However it favours reserving the manslaughter offence to where death results from conduct which was known to involve a risk of serious harm. This is because:

- Cases of dangerous conduct causing death will usually involve less serious wrongdoing than where there is proof of reckless disregard for the safety of others. In current law, which lumps both together in manslaughter, the jury usually has no opportunity to indicate the basis for its verdict. Consistent with the approach taken elsewhere in the Code, the Committee is of the view that where meaningful distinctions can be made in the degree of fault attaching to conduct, it is a matter appropriate for jury determination rather than relegation to the sentencing stage of the trial.
- Though the Committee recommends the retention of an offence called 'manslaughter', it recognises that juries have been unwilling in the past to convict defendants of manslaughter on proof of negligence. The reluctance is said to have been particularly apparent when charges of manslaughter were brought against motorists who cause death by dangerous driving or against negligent employers. A distinct offence of dangerous conduct causing death better expresses the degree of condemnation juries are likely to be prepared to impose for criminally negligent conduct on the roads and in the workplace.

<sup>264</sup> For example, see *Boghey*(1986) 161 CLR 10. See further Law Commission, *Legislating the Criminal Code: Unintentional manslaughter*, Law Comm No. 237, 1995-96 at para. 5.28.

<sup>265</sup> This example was used by the Law Commission: *id.*

### 5.1.7 Omissions

An omission to perform an act can be a physical element of an offence against this Part if it is a person's omission to perform any of the following duties:

- (a) The duty to provide the necessities of life to another person if the person has assumed responsibility for the welfare of that other person and that other person is unable to provide himself or herself with those necessities.
- (b) The duty to avoid or prevent danger to the life, safety or health of any child if the person has assumed responsibility for the welfare of the child (whether or not the child is related to the person).
- (c) The duty to avoid or prevent danger to the life, safety or health of another person if the danger arises from an act of the person, from anything in the person's possession or control or from any undertaking of the person.

**Note.** Chapter 2 provides that in the Code "conduct" includes an omission to perform an act. That Chapter also provides that an omission can only be a physical element of an offence if the law creating the offence makes it so or if the law creating the offence provides that the offence can be committed by an omission to perform an act that by law there is a duty to perform.

*Dangerous conduct causing death and intoxication*

Cases of dangerous conduct causing death will frequently involve negligence resulting from drug or alcohol induced intoxication. Unlawful homicides resulting from negligent driving are particularly likely to involve defendants who were intoxicated. When, as is almost always the case, intoxication was self-induced, the defendant is judged by the standard of a reasonable person who was not under the influence of drugs or alcohol. In these cases, the evidence of intoxication lends strong if not overwhelming support, to the allegation of negligence. It is possible, however, for intoxication to result from an excusable accident or mistake. So, for example, a doctor's error in prescribing a drug which resulted in an overdose could temporarily deprive the patient of the capacity to perceive risks or take precautions. Death caused by conduct which appeared at first to have been negligent, might be excusable in these circumstances.

Section 8.3 of the Model Criminal Code makes provision for negligent liability involving intoxication and the exceptional cases where liability is avoided because the state of intoxication is not self-induced:

- (1) If negligence is a fault element for a particular physical element of an offence, in determining whether that fault element existed in relation to a person who is intoxicated, regard must be had to the standard of a reasonable person who is not intoxicated.
- (2) However, if intoxication is not self-induced, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.<sup>266</sup>

*Omissions*

In general terms, the law is that a person will not commit a criminal offence by failing to do something, or omitting to do something, unless a statute makes it an offence specifically - such as failing to file a tax return or failing to report a car accident - or unless the law imposes a duty to act in the situation at hand. The Committee considered the question of statutory duties to act when it was formulating the chapter on General Principles, but decided that the list of duties would need to be specific to each chapter of the Code - duties of honesty would be different to duties to prevent death - and that the codified duties which it had considered were peculiarly applicable to offences against the person. This is, therefore, the place where those duties to act are applicable.

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<sup>266</sup> Note, however, that the Committee originally recommended that *R v O'Connor* (1980) 146 CLR 64 be followed: Chapter Two, *General Principles of Criminal Responsibility*, Final Report December 1992, at p52. This was not accepted by the Standing Committee of Attorneys-General, thereby resulting in section 8.3 of the Model Criminal Code being introduced to reflect the Standing Committee's preference.

Code

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The formulation arrived at by the Committee is self-explanatory. It is based on s 2(3)(c) of the Canadian Draft Code and the proposed ss 53-54 of the Queensland Code contained in *Final Report of the Criminal Code Review Committee to the Attorney-General*, June, 1992.

The Committee emphasises that a failure to perform any of these duties will not of itself constitute a criminal offence. These duties specify the circumstances under which a failure to act will count as conduct capable of constituting a criminal offence. If, for example, a father was charged with intentionally causing serious injury where he failed to take any action to prevent another beating his child, the failure to perform the duty specified in 23.2 (b) would suffice to show the “causing” element of the crime, but, for conviction, the prosecution would also need to prove that the failure to act was, for this charge, intentional and that serious injury resulted.

Liability for homicide committed by an omission to perform one of the duties specified in section 5.1.7 varies according to the fault element accompanying the omission. Though most cases of unlawful homicide will amount to no more than dangerous conduct causing death, a verdict of manslaughter (section 5.2.10) is possible in cases involving recklessness or intention to cause serious harm. Conviction for murder is also possible, though cases will be rare. In this respect the Model Criminal Code runs parallel with the common law which always recognised that parents who deliberately starve their children to death, and other instances where the omission is intended or calculated to cause death, amount to murder.<sup>267</sup>

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<sup>267</sup> *Gibbons & Proctor* (1918) 13 Cr App R 134. For a similar case under the Queensland *Criminal Code* see *Macdonald* [1904] QSR 1.

Division 3 - Other unlawful homicides

**5.1.10 Manslaughter**

A person:

- (a) whose conduct causes the death of another person; and
- (b) who intends to cause, or is reckless about causing, serious harm to that or any other person by that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

**5.1.11 Dangerous conduct causing death**

A person:

- (a) whose conduct causes the death of another person; and
- (b) who is negligent about causing the death of that or any other person by that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

## THE PROPOSED 'MANSLAUGHTER' OFFENCE - SECTION 5.1.10

The manslaughter offence is restricted to the person whose conduct causes the death of another person where that person intends to cause, or is reckless about causing, serious harm to that person or any other person.

As mentioned above, the focus is on what is generally the most culpable component of the existing offence.

## THE PENALTIES

The Committee is of the view that the proposed manslaughter and dangerous conduct causing death offences should attract the same penalty, namely, a maximum period of imprisonment of 25 years. In some circumstances a penalty similar to what would be appropriate for manslaughter will be justified where the offence is dangerous conduct causing death. It is therefore necessary to have the same maximum penalty. However, as is mentioned above, the description of the crime as well as the maximum penalty can be important in the mind of the jury and the community.

## VEHICULAR HOMICIDE

All jurisdictions, with the exception of the Northern Territory, have created special offences of vehicular homicide.<sup>268</sup> The offences were introduced to counter the perceived unwillingness of juries to convict defendants of manslaughter.<sup>269</sup> Broadly speaking, they fall into one of two categories. In some jurisdictions, the problem was perceived as primarily cosmetic; the reluctance of juries to convict motorists of manslaughter was supposed to arise from the emotive connotations of the name of the offence. In Victoria the offence of culpable driving causing death, introduced in 1967<sup>270</sup> was no more than manslaughter under another, less condemnatory name, with a lesser penalty. Culpable driving causing death required proof of negligence of the same degree as manslaughter before a conviction could be returned. In 1967 the maximum

268 In the Northern Territory, instances of dangerous driving are often dealt with by the offence created by s154 of the Northern Territory *Criminal Code* headed "Dangerous Acts or Omissions". Causing death or serious harm are not elements of this offence but act as aggravating circumstances, as does being under the influence of an intoxicating substance. Victoria, South Australia and the Australian Capital Territory are the only jurisdictions to have these offences: *Crimes Act 1958* (Vic) s318; *Criminal Law Consolidation Act 1935* (SA) s19A; *Crimes Act 1900* (ACT) s29 (gross negligent driving only). *Crimes Act 1900* (NSW) s52A; *Criminal Law Consolidation Act 1935* (SA) s19A; *Road Traffic Act 1974* (WA) s59; Queensland *Criminal Code* s328A; Tasmanian *Criminal Code* s167A; Northern Territory *Criminal Code* s154.

269 Law Reform Commission of Victoria, *Death Caused by Dangerous Driving*, Discussion Paper No. 21, July 1991 at para. 21. Also see para. 23. Observations of the reluctance of juries to convict motorists of manslaughter stem from numerous judicial observations to that effect: see for example *Callaghan v R* (1952) 87 CLR 115 at 120; *AG (NSW) v Bindoff* (1953) 53 SR(NSW) 489 at 490; *Giorgianni v R* (1985) 2 MVR 97 at 109; *R v Seymour* [1983] 2 All ER 1058 at 1061..

270 *Crimes Act 1958* (Vic), s318.

Code

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penalty for culpable driving was set at 7 years imprisonment. It was increased to 10 years in 1991, 15 years in 1992 and 20 years in 1997. Other jurisdictions have taken the further step of extending liability for a special vehicular offence to cases in which the fault of the driver falls well short of manslaughter by negligence. In New South Wales, for example, the offence of dangerous driving causing death effectively imposes a form of strict liability on drivers who kill.<sup>271</sup> A defendant is guilty of the offence unless there is a reasonable excuse for the dangerous manner in which the car was driven. Proof of gross departure from ordinary standards of care is not necessary for conviction.

The Victorian expedient, which merely changes the name of the offence when death results from negligence involving a motor vehicle, has been subjected to sustained criticism. The Victorian Law Reform Commission was scathing:

‘... the overlaps [between murder/manslaughter and culpable driving causing death] come close to duplication - yet the penalties are remarkably different. The main problem is in relation to the offence of causing death by culpable driving. The conduct constituting that offence is distinguished from reckless murder and unintentional manslaughter neither by particular consequences nor a particular level of culpability. ... The question is whether there is any justification for retaining the offence of causing death by culpable driving. Why should it make any difference that a death occurs in the context of the use of a motor vehicle rather than in the context of the use of firearms or drugs? What justifies the disparity in penalties?’<sup>272</sup>

Allridge makes the same point in these terms:

‘... it is not a principle of English jurisprudence that offences ought to be named palliatively so as to increase the conviction rate, nor is it just that one who kills with a car should be exposed to a lower maximum penalty than one who, no more culpably, kills otherwise.’<sup>273</sup>

The Committee endorses these criticisms. If the special offence requires proof of the same degree of fault as manslaughter, the distinction between manslaughter and the vehicular homicide offence lacks any principled justification. The Committee’s recommendations for two distinct offences - manslaughter and dangerous conduct causing death - removes the original, cosmetic rationale for a special vehicular homicide offence. If the case is one of negligent driving, the

271 *Crimes Act 1900*, s52A. See *Jiminez* (1992) 173 CLR 572; discussed Leader-Elliott, “Cases in the High Court: *Jiminez*” (1993) 17 Crim LJ 61.

272 *Ibid* at para. 22. The Victorian Law Reform Commission report was prepared before the more recent amendments to the offence, which raised the penalty to parity with manslaughter.

273 Allridge, “Manslaughter and Causing Death by Driving Recklessly” 44 (1980) *Justice of The Peace* 569 at 571.

Code

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jury can be expected to convict the offender of dangerous conduct causing death. Manslaughter need only be charged in those comparatively rare cases in which the vehicle was used as a weapon.

Introduction of an offence of dangerous conduct causing death removes any need for a counterpart to the Victorian offence of culpable driving causing death. It avoids as well the appearance of unprincipled expediency of which the Victorian Law Reform Commission was so critical. The offence of dangerous conduct causing death is quite general in its application, extending to deaths caused by criminal negligence no matter how arising. The penalty is the same as the penalty for manslaughter.

There is a second possible ground for retaining special vehicular homicide offences, beyond the purely cosmetic rationale of the original Victorian legislation. In its 1991 Discussion Paper, the Law Reform Commission of Victoria cited the alarming statistic that 40% of all unnatural deaths occurring in Victoria in the 1989-1990 financial year resulted from traffic accidents. Despite the death toll and despite rigorous rules and standards which regulate driving, there remains a pervasive and unwarranted social tolerance for careless or dangerous driving practices. A vehicular homicide offence which required proof of something less than criminal negligence might be advocated for its salutary educative effect on drivers.

Should the Code include a special offence which requires a lesser degree of fault than manslaughter? Since the fault required for conviction would be something less than criminal negligence, a substantial reduction of the 25 year penalty for dangerous conduct causing death would be necessary. The problem encountered in past attempts to devise such offences is the shifting and uncertain nature of the fault requirements.<sup>274</sup> In general terms, there appear to be only two possibilities:

- a special standard for motorists who kill; or
- strict liability

*A special negligence standard for motorists who kill*

The Victorian Law Reform Commission recommended this path in 1991; 'A person commits the offence of dangerous driving causing death if he or she causes the death of another person by driving a motor vehicle in a manner that falls substantially below the level of care that a competent and careful driver would take in the circumstances.'<sup>275</sup>

The Commission employed the use of a scale to illustrate the relative severity of conduct amounting to dangerous driving. Its model direction to juries is as follows:

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274 For a discussion of attempts to strike such a standard preceding the High Court decision in *Jiminez* (1992) 173 CLR 572, see Leader-Elliott, "Case and Comment: *Kroon*", (1992) 16 Crim LJ 124.

275 *Ibid* at para. 33.

Code

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‘Clearly, it is not always easy to distinguish between driving which is so bad as to constitute manslaughter, that which is bad enough to make the accused guilty of the lesser offence of dangerous driving causing death, and that which is merely careless. However, it will help you to make up your mind to think of a scale. At the bottom of this scale are cases of momentary carelessness - the kind of driving errors which most of us may make from time to time, when we are not concentrating as carefully as we should. At the top of the scale is driving which we would agree is totally unacceptable. Driving of the kind required to prove manslaughter belongs near the top end of this scale - it is a gross departure from what we would expect of a careful and competent driver. Dangerous driving is driving which falls more towards the middle of the scale. It is driving which we would all agree is unacceptable and deserves to be punished, but is not so bad as to warrant that person being convicted for manslaughter. On the other hand, it involves considerably more than just a momentary, perhaps excusable, mistake or error of judgment.’<sup>276</sup>

### *Strict liability*

In New South Wales, as a consequence of the High Court decision in *Jiminez*,<sup>277</sup> s52A of the *Crimes Act* imposes what is, in effect, a form of strict liability on motorists who cause death; it being sufficient to show that the defendant drove in a dangerous manner regardless of the reasonableness of his or her conduct. In New South Wales and in other jurisdictions which take a similar approach,<sup>278</sup> there is, however, no liability for involuntary conduct and the defendant can rely on the defence of reasonable mistake of fact and other commonly recognised defences to crimes of strict liability.<sup>279</sup> It is not necessary, however for the prosecution to establish negligence of any degree in order to obtain a conviction.<sup>280</sup>

<sup>276</sup> *Ibid* at para. 34. This jury direction reflects the decision in *Buttsworth* [1983] 1 NSWLR 658 at 684-687.

<sup>277</sup> *Ibid*.

<sup>278</sup> See *Road Traffic Act* 1974 (WA) s59(1); Queensland *Criminal Code* s328A; Tasmanian *Criminal Code* s167A.

<sup>279</sup> Other defences include intervening conduct or event, duress and sudden or extraordinary emergency - see Part 2.3 of Chapter 2 of the Model Criminal Code (Appendix 2).

<sup>280</sup> The decision in *Jiminez* (1992) 173 CLR 572, was prefigured on this point by the decision of the New South Wales Court of Criminal Appeal in *Warner* (1991) 58 A Crim R 54, a case involving the parallel offence of culpable navigation: s52B *Crimes Act* 1900 (NSW).

Code

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## Conclusion

The first of these alternatives, which requires a standard of care to be struck somewhere between mere carelessness and criminal negligence is open to criticism for its incoherent failure to articulate the proposed standard.<sup>281</sup> The difficulty of articulating a concept of quasi-criminal negligence is apparent from a consideration of the section 5.5 Model Criminal Code definition of negligence as conduct which involves a departure from reasonable standards of care of such magnitude that the “conduct merits criminal punishment”. The Code formulation of the negligence standard is drawn directly from the leading common law authority of *Nydam*.<sup>282</sup> Acceptance of this criterion obviously leaves no room for liability based on some lesser degree of criminal negligence.

The alternative, strict liability, does not encounter the same objection of incoherence. A special offence imposing strict liability requires proof of nothing more than that the manner of driving, or the circumstances in which the vehicle was driven, were objectively dangerous. The prosecution is not required to prove fault in the form of intention, recklessness or negligence of any degree.<sup>283</sup> Certain defences are available to the defendant such as honest and reasonable mistake of fact.<sup>284</sup> Hence:

‘the avenues to exculpation are far more limited and closely defined. An unreasonable mistake need not involve the gross departure from acceptable standards which negligence usually requires ... Moreover, the defendant bears an evidential burden: reasonable mistake will be withheld from the jury in the absence of evidence supporting the defence.’<sup>285</sup>

281 In *Buttsworth* [1983] NSWLR 659, which must be taken to have been overruled by *Jiminez* (1992) 173 CLR 572, the Court of Criminal Appeal proposed three ascending levels of negligence for driving offences. Driving in a manner dangerous and causing death by driving in a manner dangerous (s52A *Crimes Act* 1900) were said to require something more than the bare carelessness or negligence which suffices for driving without due care and something less than the gross or reckless negligence required for manslaughter. Neither in *Buttsworth* nor in the earlier decision in *Hain* (1966) 85 WN (Pt 1) (NSW) 7, was the nature of the intermediate level clearly explained though it appears that the negligence required for dangerous driving is “nowhere near” the seriousness of gross negligence (*Buttsworth* [1983] NSWLR 659, 684-686). The difficulty of formulating any coherent account of such a half way house was the subject of energetic discussion by the Victorian Court of Criminal Appeal in *Shields* [1981] VR 717, 718-719.

282 [1977] VR 430.

283 That is, strict liability offences do not require a fault element, it being sufficient to establish the existence of the relevant physical element: see the definition of strict liability at section 6.1 Chapter 2 of the Model Criminal Code (see Appendix 2). See also page 24 of *General Principles of Criminal Responsibility*, Final Report December 1992. Hence, it is irrelevant whether the defendant was merely momentarily inadvertent or even doing his or her incompetent best: see *Jiminez* (1992) 173 CLR 572; *McBride v R* (1966) 115 CLR 44; *R v Coventry* (1938) 59 CLR 633 at 638; *A M Smith v R* [1976] WAR 97; *R v Thompson* (1975) 11 SASR 217; *R v Little* (1976) 14 SASR 556; *R v Evans* [1963] 1 QB 412; *R v Ball & Loughlin* (1966) 50 CR App R 266.

284 Other defences include intervening conduct or event, duress and sudden or extraordinary emergency - see Part 2.3 of Chapter 2 of the Model Criminal Code (Appendix 2).

285 I D Leader-Elliott, “Case and Comment: *Jiminez*” (1993) 17 *Criminal Law Journal* 61 at 65.

Code

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Clearly, the strict liability approach significantly lowers culpability required to establish the specific motor vehicle offence. Unless the defendant is able to successfully raise a defence, he or she will be guilty of the offence even if he or she acted with all due care and diligence.

In principle, a special offence that dispenses with any need for proof of fault and imposes a severe penalty is difficult to justify. Instances of dangerous driving which result in death frequently present an appearance of sheer misfortune for all concerned. The symbolism involved in convicting a relatively blameless defendant for an offence of unlawful homicide carrying very low penalties is a cause for concern. There is a risk, moreover, that the prosecutorial advantages which derive from the ease of proving the offence might encourage neglect of the option to prosecute for more serious degrees of homicide in cases involving serious wrongdoing. Though the object of the legislation is to extend criminal liability for dangerous driving, the effect might be to perpetuate the all too prevalent view that criminal negligence is in some way less deserving of punishment when a vehicular homicide is involved.

For these reasons, the Committee is of the view that the Model Criminal Code, which is primarily concerned with serious offences which require proof of fault, should not include a special vehicular homicide offence. Code liability for motorists who cause death by the blameworthy manner of their driving should be limited to the possibilities of conviction for murder, manslaughter or dangerous conduct causing death.

If injury short of death is caused, the motorist is liable for offences requiring proof of corresponding degrees of fault. Of these the most important, in practical terms, is the proposed offence of causing serious harm by negligence (s.5.1.11). That offence will provide the matching counterpart to the offence of dangerous conduct causing death. As has already been mentioned, the recommendation for two distinct offences of manslaughter and dangerous conduct causing death removes the original rationale for a special vehicular homicide offence. If the case is one of negligent driving, the jury can be expected to convict the defendant of dangerous conduct causing death., while manslaughter can be reserved for the comparatively rare cases in which the vehicle was used as a weapon.

Introduction of an offence of dangerous conduct causing death removes any need for a counterpart to the Victorian offence of culpable driving causing death. It avoids as well the appearance of unprincipled expediency of which the Victorian Law Reform Commission was so critical. The offence of dangerous conduct causing death is quite general in its application, extending to deaths caused by criminal negligence no matter how arising. The penalty is the same as the penalty for manslaughter.

Code

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### Recommendation

The Committee recommends that the Model Criminal Code should not make provision for a special vehicular homicide offence

### Intoxication and dangerous driving

A significant proportion of deaths resulting from criminal negligence on the roads are a consequence of driving under the influence of alcohol or other recreational drugs. Section 8.3 of the Model Criminal Code (Appendix 2), which deals with the effect of evidence of intoxication when negligence must be proved, applies to the offence of dangerous conduct causing death:

- (1) If negligence is a fault element for a particular physical element of an offence, in determining whether that fault element existed in relation to a person who is intoxicated, regard must be had to the standard of a reasonable person who is not intoxicated.
- (2) However, if intoxication is not self-induced, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.<sup>286</sup>

### ATTEMPTS AND UNLAWFUL HOMICIDE

In Chapter 2 of the Model Criminal Code, consistent with the common law and the statute law,<sup>287</sup> the Committee recommended that a person should not be guilty of attempting to commit an offence unless he or she has, inter alia, intention or knowledge as a fault element in relation to the physical element of the offence attempted. The central physical element of the offences of manslaughter and dangerous conduct causing death is the death of the victim. Since these offences do not require proof of an intention to cause death, there can be no liability for an attempt. If harm short of death is caused and accompanied by intention, recklessness or negligence, the offender can be convicted of an appropriate non-fatal offence against the person. If no harm is caused, the offender may yet be guilty of attempting a non-fatal offence - reckless

<sup>286</sup> Note, however, that the Committee originally recommended that *R v O'Connor* (1980) 146 CLR 64 be followed: Chapter Two, *General Principles of Criminal Responsibility*, Final Report December 1992, at p52. This was not accepted by the Standing Committee of Attorneys-General, thereby resulting in section 8.3 of the Model Criminal Code being introduced to reflect the Standing Committee's preference.

<sup>287</sup> See *Bell* [1972] Tas SR 127 at 130-131, per Neasey J; *McGhee v R* (1995) 69 ALJR 650, see Brennan J at 651.

Code

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endangering or other crimes involving the creation of an unacceptable risk of harm to others.<sup>288</sup>

### MERCIFUL VERDICT OF MANSLAUGHTER

At common law and under the criminal codes of Queensland, Western Australia, Tasmania and Northern Territory, the jury may return a verdict of manslaughter on a charge of murder.<sup>289</sup> The alternative verdict reflects the general rule that an accused who is charged with an offence may be convicted, on the same charge, of a lesser included offence. When the evidence against the accused suggests the possibility that the case might be one of manslaughter, rather than murder, the trial judge is bound to direct the jury to consider the alternative. Failure to do so is a ground for quashing a murder conviction.<sup>290</sup>

Since the outcome of trials for murder usually involve a contest over the issue of intention or recklessness with respect to death or serious injury, a direction on the alternative verdict of manslaughter is usually necessary. A jury which is not satisfied that an attack was accompanied by fault sufficient for murder may convict of manslaughter on the ground that the accused intended some lesser degree of harm or, perhaps, was criminally negligent with respect to the risk of death or serious injury. There are comparatively rare occasions, however, when the case against an accused is one of murder or nothing. The trial judge is under no duty to instruct the jury that they may return a manslaughter verdict in such a case.<sup>291</sup> Such a verdict would, indeed, be improper: the jury is not entitled to compromise on manslaughter.<sup>292</sup>

Though there is no right to return a compromise verdict in a case where the evidence points to murder or nothing, it has long been accepted that the jury

288 See also *McGhee v R* (1995) 69 ALJR 650 the High Court considered whether it was appropriate for the principles in relation to provocation to operate in relation to the offence of attempted murder (and therefore allowing a complete acquittal), which was the argument put by the counsel for the accused, or reduction of the offence to attempted manslaughter, preferred in the dissent of Deane J, at 658. The majority concluded provocation under the Tasmanian *Criminal Code* was only relevant to murder, not attempted murder. They also concluded there could be no offence of attempted manslaughter because the rules in the *Criminal Code* on attempt required proof of intention to commit the crime. The relevant elements in the circumstances being intention to kill; per Brennan J at 654-655; Dawson J at 659; Toohey and Gaudron JJ at 662. As mentioned above, the Model Criminal Code, is consistent with the Tasmanian *Criminal Code* in relation to the fault element of attempt. It follows there can be no offence of attempted manslaughter.

289 Western Australian *Criminal Codes* s595; Queensland *Criminal Codes* s576; Tasmanian *Criminal Code* s333; Northern Territory *Criminal Code* s.316

290 *Van den Hoek v R* (1986) 161 CLR 158 at 161, 162 (duty to direct on evidence of provocation, whether or not the accused chose to rely on the partial defence); *Pemble v R* (1971) 124 CLR 107 (duty to direct on alternative verdict when evidence suggests fault sufficient for manslaughter rather than murder.)

291 *Beavan v R* (1954) 92 CLR 660 at 662, 663.

292 *Packett v R* (1937) 58 CLR 190 at 213. See also, *Gammage v R* (1969) 122 CLR 444.

Code

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has the power to do so. Courts and texts occasionally refer to this power as the “merciful verdict of manslaughter” though the expression earned the disapproval of Barwick CJ in the High Court.<sup>293</sup> Reference to the merciful verdict implies acceptance of the view that it is appropriate for juries to exercise compassion and return a conviction for the lesser offence though there is no warrant for it.<sup>294</sup> There appears to be no counterpart to the merciful verdict in offences other than murder. In the earlier part of this century, when the law of murder was more harshly defined than now and courts were required to impose the death sentence, the justification for an exercise of compassion and consequential compromise was more obviously apparent. The Model Criminal Code rightly provides for sentencing discretion up to the maximum sentence.

In current law, the fact that the jury has the power to return a manslaughter verdict which is not justified on the evidence is said to have two consequences:

- Though the trial judge is under no duty to instruct the jury of their power to return a verdict of manslaughter, an instruction that they have no power to do so is a ground for quashing a conviction for murder;
- If the jury convicts of manslaughter, the conviction will be upheld, though the evidence points to murder or nothing.<sup>295</sup>

The first of these consequential rules, though supported by case and textual authority,<sup>296</sup> is singularly lacking in rational support. It is true that there is nothing a trial judge can do to prevent a determined jury from returning a perverse verdict. In that sense, it is an error to inform the jury that they lack the power to do so. It does not follow, however, that an accused has any grounds for complaint if a trial judge does succeed in convincing the jury that a perverse verdict is beyond their powers. The second consequential rule rests on an evident fiction. In *Beavan*<sup>297</sup> the High Court said that a verdict of manslaughter will not be set aside, though the evidence points to murder or nothing:

“The verdict must be taken to mean that the jury were satisfied of all the elements of the crime of murder except the existence of the requisite intention or other form of malice aforethought but that they were not prepared to find that this element existed. It is within a jury’s province to refuse to make this or any other finding

293 *Gammage v R* (1969) 122 CLR 444 at 451.

294 See generally Kalven and Zeisel’s analysis of “jury nullification”, meaning the tendency of juries to nullify capital crimes by refusing to convict or convicting of a lesser offence due to the excessive number of crimes punishable by death: Kalven and Zeisel, *The American Jury*, The University of Chicago Press at 310-311.

295 *Beavan v R* (1954) 92 CLR 660 at 662-663; discussed B Fisse, *Howard’s Criminal Law* (1990) 80-82. For an instance of application of the rule in the context of felony murder, see *Ryan & Walker* [1966] VR 553.

296 B Fisse, *ibid*, 82.

297 *Beavan v R* (1954) 92 CLR 660 at 662-663

Code

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involving guilt and it is by that refusal that the verdict of manslaughter is warranted.”

There are many possible reasons why a jury may reach a verdict which is not warranted on the evidence. A perverse or improper verdict of manslaughter may represent a compromise between jurors who take opposing viewpoints on the question whether the physical elements of the offence have been proved. Such a verdict may be the product of compassion or of simple confusion. However the consequences are serious. It can result in a retrial or the withdrawal of proceedings. If there is no evidence which could justify conviction for manslaughter rather than murder, the preferable course is to accept that the verdict represents a miscarriage of justice. At all events, that is an appropriate conclusion in the context of a reformed code of fatal offences, which eliminates constructive murder and provides for variable sentencing in accordance with desert and proportionality. In a reformed code, it would be inappropriate to allow a conviction for unlawful homicide to be based on a verdict which was improper or perverse.

This conclusion gains further persuasive force from the fact that recognition of the “merciful verdict” would run directly counter to the Committee’s proposals to eliminate the partial defences. The recommendations to eliminate the pleas of provocation, diminished responsibility and infanticide are based on the premise that these are matters which go to the severity of the punishment for murder, not to the definition of the offence. Recognition of the continued existence of the merciful verdict would almost certainly have the effect of subverting the Committee’s proposals to deal with issues which require a discriminating exercise of compassion at the sentencing stage of the trial.

**Recommendation**

The Model Criminal Code should not confer or recognise any right or entitlement based on the jury power to return a “merciful verdict” of manslaughter.

**OFFENCES RELATED TO SUICIDE**

Division 4 - Offences relating to suicide

**5.1.12 Assisting suicide**

- (1) A person who assists another person to commit suicide is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

- (2) For the person to be guilty of the offence:
  - (a) the person must have intended that his or her conduct would assist the other person to commit suicide; and
  - (b) the other person commits or attempts to commit suicide and was assisted to do so by that conduct.
- (3) It is not an offence to attempt to commit an offence against this section.

**5.1.13 Encouraging suicide**

- (1) A person who encourages another person to commit suicide is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

- (2) For the person to be guilty of the offence:
  - (a) the person must have intended that his or her conduct would encourage the other person to commit suicide; and
  - (b) the other person commits or attempts to commit suicide and was encouraged to do so by that conduct.
- (3) It is not an offence to attempt to commit an offence against this section.

## SUICIDE AND ATTEMPTED SUICIDE

It is not an offence to commit suicide. It is also with one exception not an offence to attempt suicide in Australia.<sup>298</sup> This would seem appropriate. We would agree with Mr Fisse who states:

“The preponderance of responsible opinion at the present day ... as evidenced by police practice in many jurisdictions, by pronouncements by the major churches, and by legislative developments in Australia, is that although suicide and attempted suicide may be regarded by some as sins, even grave ones, there is no case for treating them as offences against the criminal law.”<sup>299</sup>

## ASSISTING AND ENCOURAGING SUICIDE

There is still a need for offences prohibiting what legislation variously describes as procuring, counselling, inciting, instigating, aiding or abetting suicide.<sup>300</sup> The Committee agrees that both inciting and aiding suicide should amount to an offence.

### Recommendation

The Committee recommends that the Model Criminal Code should contain offences of assisting suicide and encouraging suicide. The provisions of section 11.1 of Chapter 2 of the Model Criminal Code (Appendix 2), should have no application to either offence.

### Penalty

In all jurisdictions except New South Wales no differentiation is made between the sentence for assisting and encouraging suicide. In New South Wales a person aiding or abetting suicide is liable to 10 years imprisonment,<sup>301</sup> whereas one who incites or counsels suicide is punishable by a maximum of 5 years imprisonment.<sup>302</sup>

**The Committee has taken the view that the offence of assisting suicide ought to attract a greater maximum penalty than encouraging suicide. The Committee**

<sup>298</sup> The exception is the Northern Territory, where the offence of attempted suicide has survived: Northern Territory *Criminal Code* s169.

<sup>299</sup> Fisse B, *Howard's Criminal Law*, 5th ed, Law Book Company, 1990 at 132. See further Barry, "Suicide and the Law" (1965) 5 *Melbourne University Law Review* 1 at 14-15.

<sup>300</sup> *Crimes Act 1900* (NSW) s31C(1) and (2); *Crimes Act 1958* (Vic) s6B(2); *Criminal Law Consolidation Act 1935* (SA) s13A(5); Western Australian *Criminal Code* s288; Queensland *Criminal Code* s311; Tasmanian *Criminal Code* s163; Northern Territory *Criminal Code* s168; *Crimes Act 1900* (ACT) s17(1) and (2).

<sup>301</sup> *Crimes Act 1900* (NSW) s31C(1).

<sup>302</sup> *Crimes Act 1900* (NSW) s31C (2). The Australian Capital Territory legislation also contains separate provisions for aiding and abetting (s17(1)) and inciting or counselling (s17(2)) suicide, although both are punishable by 10 years imprisonment.

Code

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suggests 7 and 5 years respectively.

## SUICIDE PACTS

### **Where the Defendant Unsuccessfully Attempts to Kill Himself or Herself**

Cases of encouraging or assisting suicide not infrequently involve defendants who survive a suicide pact. In most if not all cases in which people make a pact to take their own lives, and seek to carry it out, each of them will have encouraged or assisted the other. It is arguable that the survivor should not be guilty of an offence of encouraging or assisting suicide. In former times such a person would have been guilty of the crime of attempted suicide. It may be suggested that the reasons of humanity which induced legislatures to abolish the offence of attempted suicide will also justify lenience when liability for encouraging or assisting suicide is in issue. Two jurisdictions reduce inciting suicide in these circumstances to an indictable offence known as being a party to a suicide pact.<sup>303</sup> In all other jurisdictions the offence remains one of inciting suicide.

Despite the arguments in favour of reduced criminal culpability, the Committee's view is that the existence of a suicide pact does not justify a lesser offence. The aspect of the defendant's conduct which attracts criminal sanction, and which is sought to be deterred, relates to being involved in *another's* self-killing.

### **Where the Defendant Kills Another Member of the Pact**

Consistent with the above approach, the existence of a suicide pact should similarly be inconsequential where the pact was for each member to kill another member of the pact instead of himself or herself. It is a misnomer to describe such an arrangement as a 'suicide' pact when it is in fact more akin to a consensual murder pact. The survivor of such pact who successfully kills another or other members of the pact intends to kill and therefore satisfies the central case of murder. The Committee is again loath to depart from its underlying maxim by which it believes a principled approach is achieved. The circumstances in which the death occurred can be reflected in the sentencing process. This position is consistent with the position in the Code states where it is expressly enacted that the victim's consent to the causing of their own death is immaterial to the killer's criminal responsibility.<sup>304</sup> To be contrasted is the position in Victoria and South Australia where murder in these circumstances is reduced to manslaughter.<sup>305</sup>

<sup>303</sup> *Crimes Act 1958* (Vic) s6B(2); *Criminal Law Consolidation Act 1935* (SA) s13A(6)(b).

<sup>304</sup> *Western Australian Criminal Codes* s261; *Queensland Criminal Codes* s284; *Tasmanian Criminal Code* s 53(a).

<sup>305</sup> *Crimes Act 1958* (Vic) s6B(1); *Criminal Law Consolidation Act 1935* (SA) s13A(2). In New South Wales culpability is reduced even further, the offence being not manslaughter but merely aiding or inciting suicide: *Crimes Act 1900* (NSW) s 31B(1).

Code

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**Recommendation:**

Participation in a suicide pact should not be a ground for a defence or partial defence when the survivor of such a pact is charged with an unlawful homicide or with assisting or encouraging suicide.

**EUTHANASIA**

Euthanasia means a gentle and easy death or the bringing about of such a death. As a descriptive term, euthanasia refers to a variety of practices ranging from withdrawal of life support measures from the dying to active termination of the lives of individuals in order to put an end to their suffering.

Persons of full competence are entitled to refuse medical treatment even though the refusal will certainly result in death. Medical practitioners and others who may have the care of such a person are under no liability for an omission to provide treatment in these circumstances. It is unlawful, however, to take active steps to terminate life, even with the informed consent of the patient. A person who causes death in this way is guilty of murder. Liability can also be incurred for offences of assisting or encouraging suicide by individuals who connive in any act by the patient which was intended to terminate life.

Whilst active termination of life to end suffering is clearly unlawful, the permissible limits of conduct intended to palliate suffering are very far from clear. The English common law position which is derived from recent decisions is as follows:

1. An adult patient of sound mind may refuse, however unreasonably, to consent to treatment or care by which his or her life would or might be prolonged. He or she may thus bring about their own death.
2. Doctors, nurses or carers responsible for the care of a person who refuses treatment, food or care have no right to override the wishes of an adult competent person, even if they consider that it would be in his or her best interest to do so.
3. An adult person of sound mind may, if properly informed, require that life support be terminated or life saving medication or other treatment cease.
4. The same principles apply where the person's refusal to give his or her consent has been expressed at an earlier date, before he or she became unconscious or otherwise incapable of communicating it.

Code

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5. In such cases there is no question of the person having committed suicide or of anybody having assisted him or her to do so.<sup>306</sup>
6. A doctor is not under an absolute obligation to prolong the life of a person who is completely dependent on life support systems and without the capacity to decide whether they want life to continue.
7. Discontinuance of life support treatment in such a situation does not amount to a criminal act because if the continuance of an intrusive life support system is not in the patient's best interests the doctor is no longer under a duty to maintain life but is simply allowing his or her patient to die of a natural cause.
8. When a patient is in a persistent vegetative state, guidance should be sought from a court before making any decision to withdraw life support measures.<sup>307</sup>
9. The taking of positive steps to end a person's life such as administering a drug is unlawful.

It is not clear that point 7 correctly reflects the common law in Australia. In *Secretary, Department of Health and Community Services v JWB Anor* ('*Marion's case*')<sup>308</sup> a majority of the High Court held that parents of a mentally retarded 14 year old girl were not permitted by law to consent to a sterilisation procedure being performed on the girl because of her fundamental right to personal inviolability as well as because of the practical exigencies accompanying the decision. The only issue in that case was sterilisation and the majority found that due to the invasiveness of the procedure a court's consent was required before the operation could be carried out. Arguably, the same considerations apply to the termination of the life of an incompetent terminally ill patient.

The Committee is of the view that the Model Criminal Code should not include provisions which would permit active euthanasia or assistance to be given to patients even if they are capable of making an informed and settled decision that they want to die. Any such change would be radical, controversial and beyond the Committee's brief to propose a uniform code which reflects a consensus on matters of legal principle.

The example of the passage of the Northern Territorial *Rights of the Terminally Ill Act 1995* and its removal from force as a result of the passage of the Commonwealth *Euthanasia Laws Act 1997* shows just how controversial the

<sup>306</sup> For authority for all these propositions see *Airedale NHS Trust v Bland* [1993] 2 WLR 316 at 866.

<sup>307</sup> In the United Kingdom this is said in *Blands* case to be a matter of practice. In Australia, *Marion's case* requires it as a matter of law.

<sup>308</sup> (1992) 106 ALR 385 ('*Marion's case*').

Code

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issue is in the Australian community. If governments wish to make such changes to the current law they will be easily accommodated in the Model Criminal Code by providing that a person is not criminally liable for a death that occurs pursuant to the provisions of another piece of legislation, specifically, legislation providing for active euthanasia.

Similar considerations preclude any attempt by the Committee to recommend legislation which sets permissible limits to palliative care of the terminally ill. The principles which should inform such legislation are far removed from the Committee's terms of reference.

If exceptions are to be made to the general prohibitions against taking life, or assisting or encouraging suicide, those exceptions should be the subject of specialised legislation.

It is necessary to reiterate the warning given earlier in this Discussion Paper. The law in some Australian jurisdictions may draw a distinction between conduct which is undertaken with the purpose of causing death and conduct which is not undertaken with that purpose, though it is known that death will result. The Model Criminal Code definition of intention in Chapter 2 obliterates that distinction, counting any consequence which is known to be certain as an intended consequence. Reconsideration of palliative care legislation may be necessary in some jurisdictions to avoid an unwanted extension of criminal liability for homicide.

## CHILD DESTRUCTION

All jurisdictions except South Australia and New South Wales have an offence of child destruction.<sup>309</sup> The offence is directed to those cases where the child is born dead because of acts done which would have amounted to homicide had the child died after birth. The offence is distinguishable from abortion in that it is limited to the destruction of a viable foetus; that is "a child capable of being born alive".<sup>310</sup> Nonetheless, child destruction remains closely tied to abortion and, in the Committee's view, cannot escape the controversy that the abortion debate attracts. In its Final Report on *Non Fatal Offences Against the Person*, the Committee will state in relation to abortion that:

'The Committee has, in the end, decided that it is not in a position to make a Final Report to Ministers on the subject containing a recommended legislative position. As the Committee thought,

<sup>309</sup> For example the *Consent to Medical Treatment and Palliative Care Act 1995* (SA).

<sup>309</sup> *Crimes Act 1958* (Vic) s10; *Western Australian Criminal Code* s290; *Queensland Criminal Code* s313; *Tasmanian Criminal Code* s165; *Northern Territory Criminal Code* s170; *Crimes Act* (ACT) s40. The Australian Capital Territory also has an offence of inflicting grievous bodily harm on a child at or before childbirth: *Crimes Act 1900* (ACT) s41. Compare section 21 of the *Crimes Act 1900* (NSW).

<sup>310</sup> See for example s82A(7) of the *Criminal Law Consolidation Act 1935* (SA).

Code

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consultation proved that the issue is ultimately one for political decision. This part of the Final Report is designed to place on record background information which may form a basis on which Ministers may wish to make a decision.’

Given the close inter-relationship between abortion and child destruction, the Committee has further decided that it necessarily must take the same approach in relation to child destruction. While no recommendations will be made, the following comments are offered as useful background information upon which Ministers may wish to make a political decision.

### **Viable Foetus**

As stated above, child destruction is an offence committed against a viable foetus. In New South Wales and South Australia, the offence is unknown. Laws against abortion cover all cases of unlawful termination of foetal life, whether or not the foetus is capable of being born alive. In Western Australia, Tasmania, the Australian Capital Territory and Northern Territory, the offence is limited to acts which cause the death of a viable foetus during birth.<sup>311</sup> The original reason for the offence was to ensure that offenders who terminated the life of the foetus could not escape liability by arguing that the conduct amounted neither to procuring a miscarriage nor to an unlawful homicide against a living person. In Victoria and Tasmania, the offence has a far less restricted operation. Child destruction extends to any act during pregnancy which causes the death of a child which is capable of being born alive.

The Victorian legislation contains an evidentiary provision which provides that evidence of pregnancy for 28 weeks or more constitutes *prima facie* proof that the child was capable of being born alive.<sup>312</sup>

As a consequence of recent amendments to the Queensland *Criminal Code*, the offence of “killing an unborn child” has been extended to cover cases in which

311 See for example *Crimes Act 1900* (NSW) s21; Western Australian *Criminal Code* s290; Queensland *Criminal Code* s313; Northern Territory *Criminal Code* s170; *Crimes Act 1900* (ACT) s40.

312 *Crimes Act 1958* (Vic) s10(2). For a discussion about whether the foetus must not only be “capable of being born alive” but also capable of surviving see Wright, “Late Abortions and the Crime of Child Destruction: (2) A Rejoinder” [1985] *Criminal Law Review* 140; Tunkel, “Late Abortions and the Crime of Child Destruction: (1) A Reply” [1985] *Criminal Law Review* 133; Norrie, “Abortions in Great Britain: One Act, Two Laws” [1985] *Criminal Law Review* 475. Note, however, the decision in *C v S* [1987] 1 All ER 1230 which suggests that the foetus must also be capable of surviving if born alive. In that case a foetus which would not be capable of breathing, either naturally or with the aid of a ventilator, was held not to be a child “capable of being born alive” even though the foetus displayed signs of life as a foetus which had developed for 18 to 21 weeks.

Code

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an assault on a pregnant woman seriously injures or kills her foetus.<sup>313</sup> Unlike the original offence of killing an unborn child, the new offence is not limited to a foetus which is capable of being born alive nor to conduct which occurs during birth. Liability can be incurred for an act which causes injury, disease or death at any time during the pregnancy. The amending legislation has no effect on the law relating to conduct which does not involve an assault on a pregnant woman. If there was no assault, liability can only be incurred for conduct which occurred during the birth of a child capable of being born alive.

In his review of the Western Australian *Criminal Code*, Murray J endorsed the 'child capable of being born alive' test, but preferred a 24 week evidentiary provision in view of progress in medical science.<sup>314</sup> The English Court of Appeal heard considerable expert opinion in *C v S*<sup>315</sup> to the effect that prior to 24 weeks, a foetus cannot be delivered by operation and live as it is not capable of breathing because the lungs are in an inadequately developed state, as are certain other organs.

### **Exception: Preserving the Mother's Life**

Murray J was also of the view that 'the only circumstance which will relieve an individual of criminal responsibility for an act or omission which has the effect of killing a foetus of more than twenty-four weeks duration would be the need to preserve the mother's life.'<sup>316</sup>

What is encompassed by the phrase 'preserve the mother's life' requires careful consideration. This was highlighted in *R v Bourne's* case,<sup>317</sup> which held that the phrase as used in section 58 of the *Offences Against the Person Act 1861* (UK) is not limited to the case of saving the mother from violent death, but rather extended to situations where the continuance of the pregnancy would make her a physical or mental wreck. The Court came to this view after noting the need for the phrase to be interpreted in a 'reasonable sense'.

### **Fault Element**

The final issue which arises is what fault elements should suffice to establish child destruction. Currently, intention and recklessness are the only fault elements which establish child destruction. A question which arises is whether

<sup>313</sup> *Criminal Law Amendment Act 1996* (Qld) s47(2); amending s313 *Criminal Code* Qld.<sup>314</sup> Michael Murray QC, now Murray J of the Western Australian Supreme Court, *The Criminal Code: A General Review*, vol. 1 at 185. The accompanying evidentiary provision provides that a 24 or more week gestation period constitutes *prima facie* proof that the foetus was viable. For further support for the view that 24 weeks is the appropriate period see the Lane Committee's Report, *Working of the Abortion Act* (UK), Cmnd 5579, 1974. Further, see the Law Reform Commission of Canada's Working Paper 58 titled *Crimes Against the Foetus* (1989) which suggested a 22 week gestation period.

<sup>315</sup> [1987] 1 All ER 1230.

<sup>316</sup> Murray, *The Criminal Code: A General Review*, vol. 1 at 186.

<sup>317</sup> [1939] 1 KB 687.

Code

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the present law should be extended by allowing gross negligence to also suffice as a fault element for child destruction.

In the context of fatal offences the fault element required reflects the seriousness of the offence in issue. Thus, for example, gross negligence is sufficient for manslaughter but not murder. As child destruction is no more serious an offence than manslaughter, it is arguable that gross negligence, one of the fault elements for manslaughter, should also suffice to establish child destruction.

If gross negligence is introduced as a fault element sufficient to establish child destruction, consideration should be given to whether that fault element ought to apply to prospective mothers. Such a law is arguably too invasive, hence extending beyond the limits of the criminal law. Further, in many cases pregnant women may be unaware or even incapable of knowing what activities will endanger their foetus. Those who are aware of a substantial risk associated with a particular activity, and that risk is unjustified, will be guilty of child destruction if they take that risk and, as a result, the foetus dies. Under section 5.4 of the Model Criminal Code the fault element of recklessness will be satisfied.

#### CHILD CONCEALMENT

All jurisdictions have an offence which is committed when a person seeks to conceal the birth of a child where the child has died before, at or after its birth.<sup>318</sup> In most cases the mother will be the defendant, although the offence can be committed by others either together with, or independently of, the mother. Concealment of birth is an alternative verdict in trial for the murder of a recently born child in all jurisdictions.<sup>319</sup> In its modern form, the primary purpose of the offence is to enable conviction of a lesser offence in circumstances where murder, manslaughter or infanticide are suspected but impossible of proof.

The offence requires proof that the accused disposed of the body of a dead child with the intention of concealing the fact of its birth from public knowledge. It makes no difference to liability whether the child was born alive or dead.

The offence does not extend to cover cases of concealment of the body of a child born or aborted during early stages of pregnancy, before the point of viability. In New South Wales, Tasmania and the Australian Capital Territory child concealment is limited to the concealment of a child which has reached

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318 *Crimes Act 1958* (Vic) s67; *Crimes Act 1900* (NSW) s85; *Criminal Law Consolidation Act 1935* (SA) s83; Western Australian *Criminal Code* s291; Queensland *Criminal Code* s314; Tasmanian *Criminal Code* s166; Northern Territory *Criminal Code* s171; *Crimes Act 1900* (ACT) s45.

319 *Crimes Act 1900* (NSW) s22; *Criminal Law Consolidation Act 1935* (SA) s83(2); Western Australian *Criminal Code* s595; Queensland *Criminal Code* s577; Tasmanian *Criminal Code* s334; Northern Territory *Criminal Code* s317; *Crimes Act 1900* (ACT) s47.

Code

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such a stage of maturity as would in the ordinary course of nature render it possible that such a child would live.<sup>320</sup>

Murray J recommended the introduction of this limitation into the Western Australian provision on the basis that it would make the offence more accurately reflect its history and purpose, being to cover cases where where a charge of homicide or child destruction might well have been sustained, but for the loss of evidence consequent on the act of concealment.<sup>321</sup> Murray J preferred the Tasmanian approach which places the onus upon the Crown to establish the foetus had reached the stage of maturity at which a child can ordinarily be expected to survive after it is born.<sup>322</sup> The New South Wales and Australian Capital Territory provisions make it a matter of defence and therefore place the burden upon the defendant.

There have been arguments promoting the abolition of child concealment. It has been said that '[t]he offence seems to be of only minor importance and ... it could be safely repealed, leaving the conduct presently covered by it to be dealt with by the general law on improper disposal of dead bodies.'<sup>323</sup> By a narrow majority, the Committee has decided to abolish child concealment in those jurisdictions where it exists. The Committee seeks the community's views in this respect.

If child concealment is retained it should only apply to a child which was born after reaching the point of viability. Following the recommendations of the Murray Review of the Western Australian Criminal Code, the prosecution should be required to prove this element of the offence.

#### Recommendation

The Committee recommends child concealment be abolished.

<sup>320</sup> *Crimes Act 1900* (NSW) s85; *Tasmanian Criminal Code* s166(2); *Crimes Act 1900* (ACT) s45(2). In New South Wales and the Australian Capital Territory the requisite state of maturity is set at 28 weeks of pregnancy.

<sup>321</sup> Murray, *The Criminal Code: A General Review*, vol 1 at 189.

<sup>322</sup> *Id.*

<sup>323</sup> English P "Homicide other than Murder" [1977] *Criminal Law Review* 79 at 89.

<sup>324</sup> 'The Law Commission, Consultation Paper No. 122 - Legislating the Criminal Code offences against the person and general principles' at p.88:

## Division 12 - Defences

**5.1.42 Law enforcement officers**

A person is not criminally responsible for an offence against this Part if the person is, at the time of the offence, a public official (within the meaning of Part 3.6) acting in the course of his or her duty as a police officer, prison officer or other law enforcement officer and the conduct of the person is reasonable in the circumstances for the purpose of performing that duty.

Note: It is also proposed to add a defence of lawful authority to Chapter 2 of the Code, along the following lines:

*Lawful authority*

A person is not criminally responsible for an offence if the person's conduct constituting the offence is justified or excused by any Act or other law.

From the Law Commission - Consultation Paper 122.

- 28.(1) The use of force by a person for any of the purposes specified in subsection (2) below, if only such as is reasonable in the circumstances as he believes them to be, does not constitute an offence.
- (2) Those purposes are -
- (a) preventing or terminating crime, or effecting or assisting in the lawful arrest of an offender or suspected offender or of a person unlawfully at large;
  - (b) preventing or terminating a breach of the peace;
  - (c) protecting himself or another from unlawful force or unlawful injury;
  - (d) preventing or terminating the unlawful detention of himself or another;
  - (e) protecting property (whether belonging to himself or another) from unlawful appropriation, destruction, damage or infringement; or
  - (f) preventing or terminating a trespass to his person or property or, with the authority of another, of preventing or terminating a trespass to the person or property of that other.
- (3) For the purposes of this section a person uses force in relation to another person or property not only where he applies force to, but also where he causes an impact on, the body of that person or that property; and a person shall be treated as -
- (a) using force in relation to another person if -
    - (i) he threatens him with its use; or
    - (ii) he detains him without actually using it; and

Continues next page.

## DEFENCES

### Law Enforcement Defence

There is a standard defence for law enforcement officers at section 5.1.42 of Chapter 5 (refer to Appendix 3). As with the existing law, it is recognised that in some circumstances it will be reasonable for such officers to kill persons for the purposes of their duties.

The defence remains as first drafted for the purposes of the discussion paper 'Non-fatal offences against the person'. It has been subject to some comment in the context of that discussion paper and will be reconsidered in the final report on that topic. However the Committee would be grateful for comments on provisions recommended by the UK Law Commission which suggests a completely different approach.<sup>324</sup> The Law Commission provisions are set out on the opposite page to this commentary.

Chapter 2 of the Model Criminal Code also contains a defence of lawful authority that applies to all offences, including fatal offences. This defence operates, for example, in times of conflict, hence excusing members of the Australian Defence Force who kill at war.

### General Defences - Chapter 2 of the Model Criminal Code

Chapter 2 of the Model Criminal Code (see Appendix 2) contains a number of general defences which are of particular importance where they apply to fatal offences against the person. They are duress (section 10.2), sudden and extraordinary emergency (section 10.3) and self-defence (section 10.4). For more detail, see the commentary to the Final Report on Chapter 2 of the Model Criminal Code (December, 1992).

### 5.1.43 Evidential burden of proof

A defendant who wishes to deny criminal responsibility by relying on a provision of this Division bears an evidential burden in relation to that matter.

From the Law Commission - Consultation Paper 122, continued-

- (b) using force in relation to property if he threatens a person with its use in relation to property.
- (4) For the purposes of this section, an act is "unlawful" although a person charged with an offence in respect of it would be acquitted on the ground only that -
  - (a) he was under ten years of age; or
  - (b) he lacked the fault required for the offence or believed that an exempting circumstance existed; or
  - (c) he acted in pursuance of a reasonable suspicion; or
  - (d) he acted under duress, whether by threats or of circumstances; or
  - (e) he was insane, so as not to be responsible, according to law, for the act.
- (5) Notwithstanding subsection (1) above, a person who believes circumstances to exist which would justify or excuse the use of force under that subsection has no defence if -
  - (a) he knows or believes that the force is used against a constable or a person assisting a constable; and
  - (b) the constable is acting in the execution of his duty, unless he believes the force to be immediately necessary to prevent injury to himself or another.
- (6) This section applies in relation to acts immediately preparatory to the use of force as it applies in relation to acts in which force is used.
- (7) Subsection (1) above does not apply where a person causes unlawful conduct or an unlawful state of affairs with a view to using force to resist or terminate it; but subsection (1) above may apply although the occasion for the use of force arises only because he does anything he may lawfully do, knowing that such an occasion may arise.
- (8) The fact that a person had an opportunity to retreat before using force shall be taken into account, in conjunction with other relevant evidence, in determining whether the use of force was reasonable.
- (9) A threat of force may be reasonable although the use of the force would not be.
- (10) So much of subsection (1) above relates to the use of force for the purpose specified in subsection (2)(e) above does not apply in relation to offences under the Criminal Damage Act 1971.

**EVIDENTIAL BURDEN OF PROOF**

Section 5.1.43 (see Appendix 3) is consistent with the policy underlying section 13.3(2) of the Model Criminal Code (see Chapter 2 of the Model Criminal Code reproduced in Appendix 2). As with the general defences, the defendant bears the evidential burden and is therefore required to adduce or point to evidence that suggests a reasonable possibility that the matter exists or does not exist.



	WA	Qld	Tas	NT	NSW	Vic	SA	ACT	MCCOC suggested penalties
Murder	<ul style="list-style-type: none"> <li>• wilful murder: "strict security life"</li> <li>• murder: "life"</li> </ul> s282 Criminal Code	"life" s305 Criminal Code	"the term of his natural life" s158 Criminal Code Act 1924	"life" s164 Criminal Code Act	"penal servitude for life" means "term of his natural life" s19A Crimes Act 1900	"life" ss3 & 109 Crimes Act 1958	"life" s11 Criminal Law Consolidation Act 1935	"life" s12 Crimes Act 1900	Imprisonment for life
Man-slaughter	20 years hard labour s287 Criminal Code	"life" s310 Criminal Code	21 years ss159, 389 Criminal Code Act 1924	"life" s167 Criminal Code Act	25 years s24 Crimes Act 1900	15 years ss5 & 109 Crimes Act 1958	"life" s13 Criminal Law Consolidation Act 1935	20 years s15 Crimes Act 1900	25 years
Motor Vehicle Man-slaughter	<ul style="list-style-type: none"> <li>• indictable: \$10,000 or 4 years; 20 years if driving without owner's consent</li> <li>• summary: \$4,000 or 18 months s59(3) Road Traffic Act</li> </ul>	<ul style="list-style-type: none"> <li>• 7 years</li> <li>• 10 years if intoxicated</li> <li>• 14 years if blood alcohol level exceeds 150mg per 100ml of blood.</li> </ul> s328A(4) Criminal Code	21 years ss167A, 389 Criminal Code Act 1924	<ul style="list-style-type: none"> <li>• 10 years s154(3) Criminal Code Act</li> <li>• 14 years if offender intoxicated s154(4) Criminal Code Act</li> </ul>	<ul style="list-style-type: none"> <li>• 14 years if 'aggravated' (intoxicated), speeding by more than 45km/h over the speed limit, being pursued by police s52A Crimes Act 1900</li> </ul>	15 years ss318 & 109 Crimes Act 1958	<ul style="list-style-type: none"> <li>• 10 years for first offence</li> <li>• 15 years for second offence s19A Criminal Law Consolidation Act 1935</li> </ul>	7 years s29(2) Crimes Act 1900	Covered by Dangerous Conduct Causing Death 25 years
Assisting Suicide	"hard labour life" s288 Criminal Code	"life" s311 Criminal Code	21 years ss163, 389 Criminal Code Act 1924	"life" s168 Criminal Code Act	10 years s31C Crimes Act 1900	N/A	14 years if person dies, 8 years if they live s14 Criminal Law Consolidation Act 1935	10 years s17 Crimes Act 1900	<ul style="list-style-type: none"> <li>• Assisting suicide: 7 years</li> <li>• Encouraging suicide: 5 years</li> </ul>
Child destruction	"hard labour life" s290 Criminal Code	"life" s313 Criminal Code	21 years ss165, 389 Criminal Code Act 1924	"life" s170 Criminal Code Act	10 years ss82, 83 Crimes Act 1900	10 years ss10 & 109 Crimes Act 1958	"life" s81 Criminal Law Consolidation Act 1935 (attempting abortion)	15 years s40 Crimes Act 1900	No recommendation



**MODEL CRIMINAL CODE**

**SCHEDULE**

**THE CRIMINAL CODE OF [(NAME OF STATE/TERRITORY)]**

**CHAPTER 1 - CODIFICATION**

*Division 1*

**Codification**

- 1.1 The only offences against laws of [Name of State/Territory] are those offences created by, or under the authority of, this Code or any other Act of [Name of State/Territory].

**CHAPTER 2 - GENERAL PRINCIPLES OF CRIMINAL RESPONSIBILITY**

**PART 2.1 - PURPOSE AND APPLICATION**

*Division 2*

**Purpose**

- 2.1 The purpose of this Chapter is to codify the general principles of criminal responsibility under laws of [Name of State/Territory]. It contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created.

**Application**

- 2.2(1) This Chapter applies to all offences against this Code.
- (2) On and after the day occurring 5 years after the day on which the Criminal Code Act 1994 of [Name of State/Territory] receives the Royal Assent, this Chapter applies to all other offences.
- (3) Section 11.6 applies to all offences.

PART 2.2 - THE ELEMENTS OF AN OFFENCE

*Division 3 - General*

**Elements**

- 3.1(1) An offence consists of physical elements and fault elements.
- (2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.
- (3) The law that creates the offence may provide different fault elements for different physical elements.

**Establishing guilt in respect of offences**

- 3.2 In order for a person to be found guilty of committing an offence the following must be proved:
  - (a) the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt;
  - (b) in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element.

Note: See Part 2.6 on proof of criminal responsibility.

*Division 4 - Physical elements*

**Physical elements**

- 4.1(1) A physical element of an offence may be:
  - (a) conduct; or
  - (b) a circumstance in which conduct occurs; or
  - (c) a result of conduct.
- (2) In this Code:  
“conduct” means an act, an omission to perform an act or a state of affairs.

**Voluntariness**

- 4.2(1) Conduct can only be a physical element if it is voluntary.
- (2) Conduct is only voluntary if it is a product of the will of the person whose conduct it is.

- (3) The following are examples of conduct that is not voluntary:
  - (a) a spasm, convulsion or other unwilled bodily movement;
  - (b) an act performed during sleep or unconsciousness;
  - (c) an act performed during impaired consciousness depriving the person of the will to act.
- (4) An omission to perform an act is only voluntary if the act omitted is one which the person is capable of performing.
- (5) If the conduct constituting an offence consists only of a state of affairs, the state of affairs is only voluntary if it is one over which the person is capable of exercising control.
- (6) Evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary.
- (7) Intoxication is self-induced unless it came about:
  - (a) involuntarily; or
  - (b) as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force.

### **Omissions**

- 4.3 An omission to perform an act can only be a physical element if:
- (a) the law creating the offence makes it so; or
  - (b) the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that by law there is a duty to perform.

### *Division 5 - Fault elements*

### **Fault elements**

- 5.1(1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.
- (2) Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.

Note: Under subsection 5.4 (4), recklessness can be established by proving intention, knowledge or recklessness.

## Appendix 2

### **Intention**

- 5.2(1) A person has intention with respect to conduct if he or she means to engage in that conduct.
- (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
- (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

### **Knowledge**

- 5.3 A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

### **Recklessness**

- 5.4(1) A person is reckless with respect to a circumstance if:
  - (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
  - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (2) A person is reckless with respect to a result if:
  - (a) he or she is aware of a substantial risk that the result will occur; and
  - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (3) The question whether taking a risk is unjustifiable is one of fact.
- (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

### **Negligence**

- 5.5 A person is negligent with respect to a physical element of an offence if his or her conduct involves:
  - (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and

- (b) such a high risk that the physical element exists or will exist; that the conduct merits criminal punishment for the offence.

### **Offences that do not specify fault elements**

- 5.6(1) If the law creating the offence does not specify a fault element for a physical element of an offence that consists only of conduct, intention is the fault element for that physical element.
- (2) If the law creating the offence does not specify a fault element for a physical element of an offence that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

### *Division 6 - Cases where fault elements are not required*

#### **Strict liability**

- 6.1(1) If a law that creates an offence provides that the offence is an offence of strict liability:
  - (a) there are no fault elements for any of the physical elements of the offence; and
  - (b) the defence of mistake of fact under section 9.2 is available.
- (2) If a law that creates an offence provides that strict liability applies to a particular physical element of the offence:
  - (a) there are no fault elements for that physical element; and
  - (b) the defence of mistake of fact under section 9.2 is available in relation to that physical element.
- (3) The existence of strict liability does not make any other defence unavailable.

#### **Absolute liability**

- 6.2(1) If a law that creates an offence provides that the offence is an offence of absolute liability:
  - (a) there are no fault elements for any of the physical elements of the offence; and

- (b) the defence of mistake of fact under section 9.2 is unavailable.
- (2) If a law that creates an offence provides that absolute liability applies to a particular physical element of the offence:
  - (a) there are no fault elements for that physical element; and
  - (b) the defence of mistake of fact under section 9.2 is unavailable in relation to that physical element.
- (3) The existence of absolute liability does not make any other defence unavailable.

## PART 2.3 - CIRCUMSTANCES IN WHICH THERE IS NO CRIMINAL RESPONSIBILITY

Note: This Part sets out defences that are generally available. Defences that apply to a more limited class of offences are dealt with elsewhere in this Code and in other laws.

### *Division 7 - Circumstances involving lack of capacity*

#### **Children under 10**

- 7.1 A child under 10 years old is not criminally responsible for an offence.

#### **Children over 10 but under 14**

- 7.2(1) A child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.
- (2) The question whether a child knows that his or her conduct is wrong is one of fact. The burden of proving this is on the prosecution.

#### **Mental impairment**

- 7.3(1) A person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that:
  - (a) the person did not know the nature and quality of the conduct; or
  - (b) the person did not know that the conduct was wrong (that is, the person could not reason with a moderate

degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or

- (c) the person was unable to control the conduct.
- (2) The question whether the person was suffering from a mental impairment is one of fact.
- (3) A person is presumed not to have been suffering from such a mental impairment. The presumption is only displaced if it is proved on the balance of probabilities (by the prosecution or the defence) that the person was suffering from such a mental impairment.
- (4) The prosecution can only rely on this section if the court gives leave.
- (5) The tribunal of fact must return a special verdict that a person is not guilty of an offence because of mental impairment if and only if it is satisfied that the person is not criminally responsible for the offence only because of a mental impairment.
- (6) A person cannot rely on a mental impairment to deny voluntariness or the existence of a fault element but may rely on this section to deny criminal responsibility.
- (7) If the tribunal of fact is satisfied that a person carried out conduct as a result of a delusion caused by a mental impairment, the delusion cannot otherwise be relied on as a defence.
- (8) In this section: “mental impairment” includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.
- (9) The reference in subsection (8) to mental illness is a reference to an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli. However, such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur.

*Division 8 - Intoxication*

**Definition - self-induced intoxication**

- 8.1 For the purposes of this Division, intoxication is self-induced unless it came about:
- (a) involuntarily; or
  - (b) as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force.

**Intoxication (offences involving basic intent)**

- 8.2(1) Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed.
- (2) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

Note: A fault element of intention with respect to a circumstance is not a fault element of basic intent.

- (3) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental.
- (4) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed.
- (5) A person may be regarded as having considered whether or not facts existed if:
  - (a) he or she had considered, on a previous occasion, whether those facts existed in circumstances surrounding that occasion; and
  - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

**Intoxication (negligence as fault element)**

- 8.3(1) If negligence is a fault element for a particular physical element of an offence, in determining whether that fault element existed in relation to a person who is intoxicated, regard must be had to the standard of a reasonable person who is not intoxicated.

- (2) However, if intoxication is not self-induced, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.

**Intoxication (relevance to defences)**

- 8.4(1) If any part of a defence is based on actual knowledge or belief, evidence of intoxication may be considered in determining whether that knowledge or belief existed.
- (2) If any part of a defence is based on reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.
- (3) If a person's intoxication is not self-induced, in determining whether any part of a defence based on reasonable belief exists, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.
- (4) If, in relation to an offence:
  - (a) each physical element has a fault element of basic intent; and
  - (b) any part of a defence is based on actual knowledge or belief; evidence of self-induced intoxication cannot be considered in determining whether that knowledge or belief existed.
- (5) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

Note: A fault element of intention with respect to a circumstance is not a fault element of basic intent.

**Involuntary intoxication**

- 8.5 A person is not criminally responsible for an offence if the person's conduct constituting the offence was as a result of intoxication that was not self-induced.

*Division 9 - Circumstances involving mistake or ignorance***Mistake or ignorance of fact (fault elements other than negligence)**

- 9.1(1) A person is not criminally responsible for an offence that has a physical element for which there is a fault element other than negligence if:

- (a) at the time of the conduct constituting the physical element, the person is under a mistaken belief about, or is ignorant of, facts; and
  - (b) the existence of that mistaken belief or ignorance negates any fault element applying to that physical element.
- (2) In determining whether a person was under a mistaken belief about, or was ignorant of, facts, the tribunal of fact may consider whether the mistaken belief or ignorance was reasonable in the circumstances.

**Mistake of fact (strict liability)**

- 9.2(1) A person is not criminally responsible for an offence that has a physical element for which there is no fault element if:
- (a) at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts; and
  - (b) had those facts existed, the conduct would not have constituted an offence.
- (2) A person may be regarded as having considered whether or not facts existed if:
- (a) he or she had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and
  - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

Note: Section 6.2 prevents this section applying in situations of absolute liability.

**Mistake or ignorance of statute law**

- 9.3(1) A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence, he or she is mistaken about, or ignorant of, the existence or content of an Act that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.
- (2) Subsection (1) does not apply, and the person is not criminally responsible for the offence in those circumstances, if:

- (a) the Act is expressly or impliedly to the contrary effect; or
- (b) the ignorance or mistake negates a fault element that applies to a physical element of the offence.

### **Mistake or ignorance of subordinate legislation**

9.4(1) A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence he or she is mistaken about, or ignorant of, the existence or content of the subordinate legislation that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.

(2) Subsection (1) does not apply, and the person is not criminally responsible for the offence in those circumstances, if:

- (a) the subordinate legislation is expressly or impliedly to the contrary effect; or
- (b) the ignorance or mistake negates a fault element that applies to a physical element of the offence; or
- (c) at the time of the conduct, copies of the subordinate legislation have not been made available to the public or to persons likely to be affected by it, and the person could not be aware of its content even if he or she exercised due diligence.

(3) In this section:

“available” includes available by sale;

“subordinate legislation” means an instrument of a legislative character made directly or indirectly under an Act, or in force directly or indirectly under an Act.

### **Claim of right**

9.5(1) A person is not criminally responsible for an offence that has a physical element relating to property if:

- (a) at the time of the conduct constituting the offence, the person is under a mistaken belief about a proprietary or possessory right; and
- (b) the existence of that right would negate a fault element for any physical element of the offence.

- (2) A person is not criminally responsible for any other offence arising necessarily out of the exercise of the proprietary or possessory right that he or she mistakenly believes to exist.
- (3) This section does not negate criminal responsibility for an offence relating to the use of force against a person.

*Division 10 - Circumstances involving external factors*

**Intervening conduct or event**

- 10.1 A person is not criminally responsible for an offence that has a physical element to which absolute liability or strict liability applies if:
- (a) the physical element is brought about by another person over whom the person has no control or by a non-human act or event over which the person has no control; and
  - (b) the person could not reasonably be expected to guard against the bringing about of that physical element.

**Duress**

- 10.2(1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence under duress.
- (2) A person carries out conduct under duress if and only if he or she reasonably believes that:
- (a) a threat has been made that will be carried out unless an offence is committed; and
  - (b) there is no reasonable way that the threat can be rendered ineffective; and
  - (c) the conduct is a reasonable response to the threat.
- (3) This section does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.

**Sudden or extraordinary emergency**

- 10.3(1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency.

- (2) This section applies if and only if the person carrying out the conduct reasonably believes that:
  - (a) circumstances of sudden or extraordinary emergency exist; and
  - (b) committing the offence is the only reasonable way to deal with the emergency; and
  - (c) the conduct is a reasonable response to the emergency.

### **Self-defence**

10.4(1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.

- (2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:
  - (a) to defend himself or herself or another person; or
  - (b) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or
  - (c) to protect property from unlawful appropriation, destruction, damage or interference; or
  - (d) to prevent criminal trespass to any land or premises; or
  - (e) to remove from any land or premises a person who is committing criminal trespass;and the conduct is a reasonable response in the circumstances as he or she perceives them.
- (3) This section does not apply if the person uses force that involves the intentional infliction of death or really serious injury:
  - (a) to protect property; or
  - (b) to prevent criminal trespass; or
  - (c) to remove a person who is committing criminal trespass.
- (4) This section does not apply if:
  - (a) the person is responding to lawful conduct; and
  - (b) he or she knew that the conduct was lawful.

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

PART 2.4 - EXTENSIONS OF CRIMINAL RESPONSIBILITY

*Division 11*

**Attempt**

- 11.1(1) A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.
- (2) For the person to be guilty, the person's conduct must be more than merely preparatory to the commission of the offence. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.
- (3) For the offence of attempting to commit an offence, intention and knowledge are fault elements in relation to each physical element of the offence attempted.

Note: Under section 3.2, only one of the fault elements of intention or knowledge would need to be established in respect of each physical element of the offence attempted.

- (4) A person may be found guilty even if:
- (a) committing the offence attempted is impossible; or
- (b) the person actually committed the offence attempted.
- (5) A person who is found guilty of attempting to commit an offence cannot be subsequently charged with the completed offence.
- (6) Any defences, procedures, limitations or qualifying-provisions that apply to an offence apply also to the offence of attempting to commit that offence.
- (7) It is not an offence to attempt to commit an offence against section 11.2 (complicity and common purpose) or section 11.5 (conspiracy).

**Complicity and common purpose**

- 11.2(1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.
- (2) For the person to be guilty:
- (a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and

- (b) the offence must have been committed by the other person.
- (3) For the person to be guilty, the person must have intended that:
  - (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
  - (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.
- (4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
  - (a) terminated his or her involvement; and
  - (b) took all reasonable steps to prevent the commission of the offence.
- (5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.

### **Innocent agency**

11.3 A person who:

- (a) has, in relation to each physical element of an offence, a fault element applicable to that physical element; and
  - (b) procures conduct of another person that (whether or not together with the conduct of the procurer) would have constituted an offence on the part of the procurer if the procurer had engaged in it;
- is taken to have committed that offence and is punishable accordingly.

### **Incitement**

- 11.4(1) A person who urges the commission of an offence is guilty of the offence of incitement.
- (2) For the person to be guilty, the person must intend that the offence incited be committed.

- (3) A person may be found guilty even if committing the offence incited is impossible.
- (4) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of incitement in respect of that offence.
- (5) It is not an offence to incite the commission of an offence against section 11.1 (attempt), this section or section 11.5 (conspiracy).

**Maximum penalty:**

- (a) if the offence incited is punishable by life imprisonment - imprisonment for 10 years; or
- (b) if the offence incited is punishable by imprisonment for 14 years or more, but is not punishable by life imprisonment - imprisonment for 7 years; or
- (c) if the offence incited is punishable by imprisonment for 10 years or more, but is not punishable by imprisonment for 14 years or more - imprisonment for 5 years; or
- (d) if the offence is otherwise punishable by imprisonment - imprisonment for 3 years or for the maximum term of imprisonment for the offence incited, whichever is the lesser; or
- (e) if the offence incited is not punishable by imprisonment - the number of penalty units equal to the maximum number of penalty units applicable to the offence incited.

Note: Under section 4D of the Crimes Act 1914, these penalties are only maximum penalties. Subsection 4B (2) of that Act allows a court to impose an appropriate fine instead of, or in addition to, a term of imprisonment. If a body corporate is convicted of the offence, subsection 4B (3) of that Act allows a court to impose a fine of an amount not greater than 5 times the maximum fine that the court could impose on an individual convicted of the same offence. Penalty units are defined in section 4AA of that Act.

[Drafting note: The note will have to be adapted to suit the relevant jurisdiction.]

### **Conspiracy**

- 11.5(1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the

offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

Note: Penalty units are defined in section 4AA of the Crimes Act 1914.

[Drafting note: The note will have to be adapted to suit the relevant jurisdiction.]

- (2) For the person to be guilty:
  - (a) the person must have entered into an agreement with one or more other persons; and
  - (b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and
  - (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.
- (3) A person may be found guilty of conspiracy to commit an offence even if:
  - (a) committing the offence is impossible; or
  - (b) the only other party to the agreement is a body corporate; or
  - (c) each other party to the agreement is at least one of the following:
    - (i) a person who is not criminally responsible;
    - (ii) a person for whose benefit or protection the offence exists; or
  - (d) subject to paragraph (4)(a), all other parties to the agreement have been acquitted of the conspiracy.
- (4) A person cannot be found guilty of conspiracy to commit an offence if:
  - (a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal; or
  - (b) he or she is a person for whose benefit or protection the offence exists.

- (5) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person:
  - (a) withdrew from the agreement; and
  - (b) took all reasonable steps to prevent the commission of the offence.
- (6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.
- (7) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
- (8) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given.

#### **References in Acts to offences**

- 11.6(1) A reference in an Act to an offence against an Act (including this Code) includes a reference to an offence against section 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) of this Code that relates to such an offence.
- (2) A reference in an Act (including this Code) to a particular offence includes a reference to an offence against section 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) of this Code that relates to that particular offence.
- (3) Subsection (1) or (2) does not apply if an Act is expressly or impliedly to the contrary effect.

Note: Sections 11.2 (complicity and common purpose) and 11.3 (innocent agency) of this Code operate as extensions of principal offences and are therefore not referred to in this section.

## **PART 2.5 - CORPORATE CRIMINAL RESPONSIBILITY**

### *Division 12*

#### **General principles**

- 12.1(1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as

are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.

- (2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

Note: Section 4B of the Crimes Act 1914 enables a fine to be imposed for offences that only specify imprisonment as a penalty.

[Drafting note: The note will have to be adapted to suit the relevant jurisdiction.]

### **Physical elements**

- 12.2 If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

### **Fault elements other than negligence**

- 12.3(1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.
  - (2) The means by which such an authorisation or permission may be established include:
    - (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
    - (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
    - (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
    - (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

- (3) Paragraph (2) (b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.
- (4) Factors relevant to the application of paragraph (2) (c) or (d) include:
  - (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
  - (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.
- (5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.
- (6) In this section:

“board of directors” means the body (by whatever name called) exercising the executive authority of the body corporate;

“corporate culture” means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place;

“high managerial agent” means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate’s policy.

### **Negligence**

- 12.4(1) The test of negligence for a body corporate is that set out in section 5.5.
- (2) If:
  - (a) negligence is a fault element in relation to a physical element of an offence; and

- (b) no individual employee, agent or officer of the body corporate has that fault element;  
that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).
- (3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
  - (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
  - (b) failure to provide adequate systems or conveying relevant information to relevant persons in the body corporate.

**Mistake of fact (strict liability)**

- 12.5(1) A body corporate can only rely on section 9.2 (mistake of fact (strict liability)) in respect of conduct that would, apart from this section, constitute an offence on its part if:
- (a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and
  - (b) the body corporate proves that it exercised due diligence to prevent the conduct.
- (2) A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
- (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
  - (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

**Intervening conduct or event**

- 12.6 A body corporate cannot rely on section 10.1 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate.

PART 2.6 - PROOF OF CRIMINAL RESPONSIBILITY

*Division 13*

**Legal burden of proof prosecution**

- 13.1(1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

Note: See section 3.2 on what elements are relevant to a person's guilt.

- (2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.
- (3) In this Code:  
“legal burden”, in relation to a matter, means the burden of proving the existence of the matter.

**Standard of proof prosecution**

- 13.2(1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.
- (2) Subsection (1) does not apply if the law creating the offence specifies a different standard of proof.

**Evidential burden of proof - defence**

- 13.3(1) Subject to section 13.4, a burden of proof that a law imposes on a defendant is an evidential burden only.
- (2) A defendant who wishes to deny criminal responsibility by relying on a provision of Part 2.3 (other than section 7.3) bears an evidential burden in relation to that matter.
- (3) A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.

- (4) The defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court.
- (5) The question whether an evidential burden has been discharged is one of law.
- (6) In this Code:  
“evidential burden”, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

**Legal burden of proof - defence**

- 13.4 A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly:
- (a) specifies that the burden of proof in relation to the matter in question is a legal burden; or
  - (b) requires the defendant to prove the matter; or
  - (c) creates a presumption that the matter exists unless the contrary is proved.

**Standard of proof - defence**

- 13.5 A legal burden of proof on the defendant must be discharged on the balance of probabilities.

**Use of averments**

- 13.6 A law that allows the prosecution to make an averment is taken not to allow the prosecution:
- (a) to aver any fault element of an offence; or
  - (b) to make an averment in prosecuting for an offence that is directly punishable by imprisonment.



**CHAPTER 5 OF THE MODEL CRIMINAL CODE:  
PROVISIONS RELEVANT TO FATAL OFFENCES AGAINST THE  
PERSON**

**Chapter 5 - Offences against the person**

Part 5.1 - Fatal and non-fatal offences

*Division 1 - Definitions*

**5.1.1 Harm**

- (1) In this Part, harm means physical harm or harm to a person's mental health, whether temporary or permanent.
- (2) Physical harm includes unconsciousness, pain, disfigurement, infection with a disease and any physical contact with a person that a person might reasonably object to in the circumstances (whether or not the person was aware of it at the time).
- (3) Harm to a person's mental health includes significant psychological harm, but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger.
- (4) Harm does not include being subjected to any force or impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community.

**5.1.2 Serious harm**

In this Part, serious harm means any harm (including the cumulative effect of more than one harm):

- (a) that endangers, or is likely to endanger, a person's life;  
or
- (b) that is or is likely to be significant and longstanding.

**5.1.3 Causing death or harm**

For the purposes of an offence under this Part, a person's conduct causes death or harm if it substantially contributes to the death or harm.

**5.1.4 Person against whom offence may be committed**

A person against whom an offence may be committed under this Part is a person who has been born and who has not already died.

**5.1.5 Birth**

- (1) For the purposes of this Part, a person's birth occurs at the time the person is fully removed from the mother's body and has an independent existence from the mother.
- (2) The following are relevant, but not determinative, as to whether a person has been born:
  - (a) the person is breathing;
  - (b) the person's organs are functioning of their own accord;
  - (c) the person has an independent circulation of blood.

**5.1.6 Death**

- (1) For the purposes of this Part, a person has died when there has occurred:
  - (a) irreversible cessation of all function of the person's brain (including the brain stem); or
  - (b) irreversible cessation of circulation of blood in the person's body.
- (2) In this section, irreversible means irreversible by natural or artificial means.

**5.1.7 Omissions**

An omission to perform an act can be a physical element of an offence against this Part if it is a person's omission to perform any of the following duties:

- (a) The duty to provide the necessities of life to another person if the person has assumed responsibility for the welfare of that other person and that other person is unable to provide himself or herself with those necessities.
- (b) The duty to avoid or prevent danger to the life, safety or health of any child if the person has assumed responsibility for the welfare of the child (whether or not the child is related to the person).

- (c) The duty to avoid or prevent danger to the life, safety or health of another person if the danger arises from an act of the person, from anything in the person's possession or control or from any undertaking of the person.

Note. Chapter 2 provides that in the Code "conduct" includes an omission to perform an act. That Chapter also provides that an omission can only be a physical element of an offence if the law creating the offence makes it so or if the law creating the offence provides that the offence can be committed by an omission to perform an act that by law there is a duty to perform.

### 5.1.8 Other definitions

In this Part:

aggravated offence means an offence against this Part that is an aggravated offence by the operation of Division 11.

child means a person under the age of 18 years.

consent has the same meaning it has in Part 5.2.

parent of a person, includes a guardian of the person or any other person who is responsible at law for the person's maintenance.

Note. Part 5.2 defines "consent" as follows:

- (1) In this Part, consent means free and voluntary agreement.
- (2) Examples of circumstances in which a person does not consent to an act include the following:
  - (3) the person submits to the act because of force or the fear of force to the person or to someone else;
  - (4) the person submits to the act because the person is unlawfully detained;
  - (5) the person is asleep or unconscious, or is so affected by alcohol or another drug as to be incapable of consenting;
  - (6) the person is incapable of understanding the essential nature of the act;
  - (7) the person is mistaken about the essential nature of the act (for example, the person mistakenly believes that the act is for medical or hygienic purposes.

*Division 2 - Murder*

**5.1.9 Murder**

A person:

- (a) whose conduct causes the death of another person; and
- (b) who intends to cause, or is reckless as to causing, the death of that or any other person by that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for life.

*Division 3 - Other unlawful homicides*

**5.1.10 Manslaughter**

A person:

- (a) whose conduct causes the death of another person; and
- (b) who intends to cause, or is reckless as to causing, serious harm to that or any other person by that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

**5.1.11 Dangerous conduct causing death**

A person:

- (a) whose conduct causes the death of another person; and
- (b) who is negligent as to causing the death of that or any other person by that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

*Division 4 - Offences relating to suicide*

**5.1.12 Assisting suicide**

- (1) A person who assists another person to commit suicide is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

- (2) For the person to be guilty of the offence:

- (a) the person must have intended that his or her conduct would assist the other person to commit suicide; and
  - (b) the other person commits or attempts to commit suicide and was assisted to do so by that conduct.
- (3) It is not an offence to attempt to commit an offence against this section.

#### **5.1.13 Encouraging suicide**

- (1) A person who encourages another person to commit suicide is guilty of an offence.  
Maximum penalty: Imprisonment for 5 years.
- (2) For the person to be guilty of the offence:
- (a) the person must have intended that his or her conduct would encourage the other person to commit suicide; and
  - (b) the other person commits or attempts to commit suicide and was encouraged to do so by that conduct.
- (3) It is not an offence to attempt to commit an offence against this section.

*There will be a number of non-fatal offences which will be included in this chapter between sections 5.1.12 and 5.1.42. The non-fatal offences are the subject of a separate Discussion Paper issued in August 1996 and will soon be the subject of a Final Report which is to be issued later this year.*

### *Division 12 - Defences*

#### **5.1.42 Law enforcement officers**

A person is not criminally responsible for an offence against this Part if the person is, at the time of the offence, a public official (within the meaning of Part 3.6) acting in the course of his or her duty as a police officer, prison officer or other law enforcement officer and the conduct of the person is reasonable in the circumstances for the purpose of performing that duty.

#### **5.1.43 Evidential burden of proof**

A defendant who wishes to deny criminal responsibility by relying on a provision of this Division bears an evidential burden in relation to that matter.

## Appendix 3

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*Note: It is also proposed to add a defence of lawful authority to Chapter 2 of the Code, along the following lines:*

***Lawful authority***

*A person is not criminally responsible for an offence if the person's conduct constituting the offence is justified or excused by any Act or other law.*