



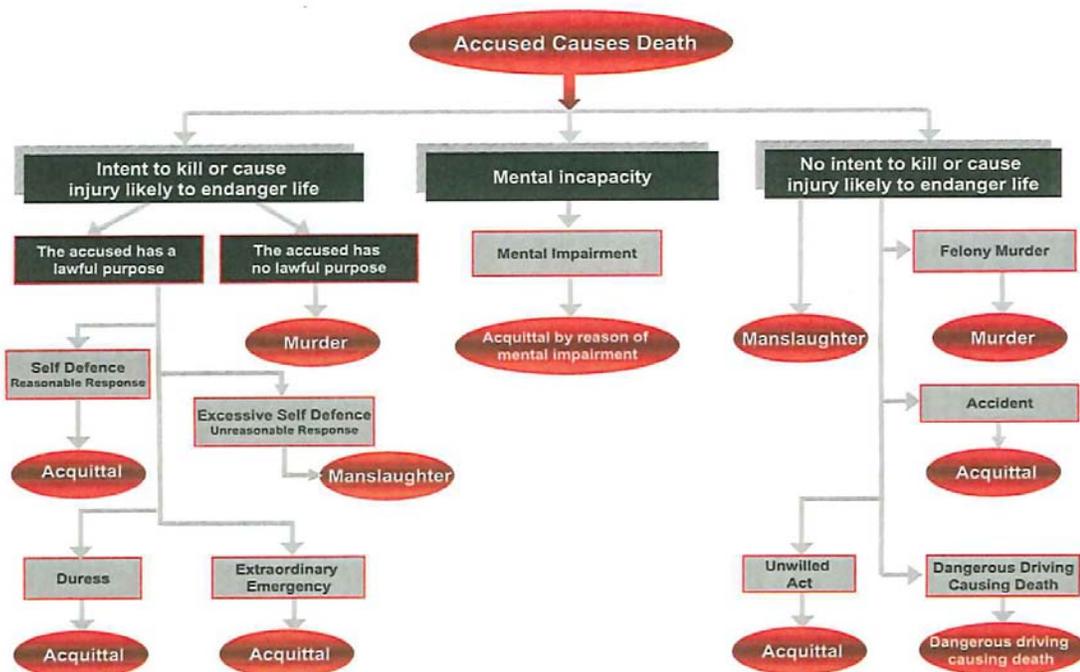
Media Briefing Notes

REVIEW OF THE LAW OF HOMICIDE

The Law Reform Commission of Western Australia will release its Final Report, *Review of the Law of Homicide*, on 2 November 2007. It will be available immediately upon release on the Commission's website: www.lrc.justice.wa.gov.au.

OVERVIEW OF RECOMMENDATIONS

The Commission has made 45 recommendations for reform spanning homicide offences, defences and sentencing. The recommendations are not stand-alone – they should be understood as a **package** which provides a coherent framework for reform of Western Australia's homicide laws. The diagram below is an overview of the Commission's recommended reforms to homicide defences and offences.



GUIDING PRINCIPLES FOR REFORM

Homicide arouses strong emotions and poses difficult legal, moral and social questions. The Commission has a keen awareness of these issues and has approached the task of reforming the law of homicide with the aim of ensuring that the laws of homicide in Western Australia are principled, clear, consistent and modern. In order to provide a framework for coherent and principled reform to the law of homicide in Western Australia, the Commission determined seven guiding principles for reform. These principles, and how they are reflected in some of the Commission's recommended reforms, are set out below. It is important that the Commission's recommendations are understood as a package of reforms resting on these principles.

Principle One: Intentional Killings

As a general rule, intentional killing should be distinguished from unintentional killing.

In most jurisdictions murder requires proof of an intention to kill or an intention to cause serious injury. In contrast, manslaughter does not require proof of any specific intention. Thus, murder and manslaughter are generally distinguished by the presence or absence of intention. In Western Australia wilful murder requires proof of an intention to kill and murder requires proof of an intention to cause grievous bodily harm. In simple terms, an intention to cause grievous bodily harm means an intention to cause a life-threatening injury or a permanent injury to health. The Commission has concluded that an intention to cause a permanent but non life-threatening injury should not be sufficient to establish the offence of murder. Because the difference between an intention to kill and an intention to cause an injury likely to endanger life is minimal the Commission has recommended that the distinction between wilful murder and murder should be abolished.

Thus, under the Commission's recommendation the mental element for murder is an intention to kill or an intention to cause an injury likely to endanger life. On this basis, it is the Commission's view that the difference between an intentional killing and an unintentional killing is significant. While it is not possible to say that every intentional killing is more serious than every unintentional killing, the culpability of a person who intends to kill (or cause a life-threatening injury) is invariably much higher than the culpability of a person who did not intend to kill (or cause a life-threatening injury).

The present law in Western Australia does not treat all intentional killings as murder. An intentional but provoked killing is classified as manslaughter on the basis of the partial defence of provocation. Further, the intentional killing of a child under the age of 12 months by its biological mother may be categorised as infanticide and subject to a maximum penalty of 7 years' imprisonment. Although not currently available in Western Australia, other partial defences, such as diminished responsibility, also reduce an intentional killing to the status of an unintentional killing. Historically, the principal justification for partial defences was to avoid the mandatory death penalty (and subsequently the mandatory penalty of life imprisonment) for murder. Under the Commission's recommendations this justification no longer exists.

Relevant recommendations:

- Redefine the mental element for murder (recommendations 4 & 7).
- Abolish distinction between murder and wilful murder (recommendation 6).
- Repeal the offence of infanticide (recommendation 13).

- No partial defence of diminished responsibility (recommendation 39).
- Repeal the partial defence of provocation if mandatory life imprisonment is abolished. The partial defence of provocation currently reduces an intentional killing to the status of an unintentional killing (wilful murder or murder is reduced to manslaughter) if the killing takes place while the accused has lost self-control as a result of provocative conduct by the deceased. The Commission has identified a number of significant problems with provocation, including the lack of a clear and consistent rationale for the defence; gender-bias arising from the different circumstances in which men and women rely on the defence; and the fact that the defence partially condones violence. Importantly, the Commission has concluded that provocation inappropriately favours loss of self-control (usually caused by anger) over other circumstances in which intentional killings take place. Further, the partial defence of provocation does not always apply to those cases calling for leniency or sympathy and accordingly, with sufficient flexibility in sentencing, any reduced culpability that may be associated with provocation can be dealt with during the sentencing process. (recommendation 29).

Principle Two: Lawful Purpose

The only lawful purpose for intentional killing is self-preservation or the protection of others. The Commission has concluded that the only lawful purpose for an intentional killing is self-preservation or the protection of others. No other purpose should excuse or justify an intentional killing. This principle underpins the Commission's recommendations in relation to the defences of self-defence, duress and emergency; in each case the defence only applies if the purpose for killing was self-preservation or the protection of another.

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

Relevant recommendations:

- Reformulate and simplify the defence of self-defence so that the defence will apply in homicide cases if the accused reasonably believed that it was necessary to use force to defend himself, herself or another person; if the accused believed the killing was necessary for such purpose; and the response of the accused (the killing) was reasonable in the circumstances (recommendation 23).
- Provide for enhanced jury directions to explain the test for self-defence (recommendation 22).

- Allow for expert opinion evidence to be given on the subject of domestic violence so that juries can properly determine whether an accused's actions were reasonable in the circumstances for the purposes of self-defence (recommendations 41 & 42).
- Introduce a partial defence of excessive self-defence (recommendation 26).
- Redefine and extend the defence of duress so that the duress will only be available as a defence to murder if the intentional killing of the victim was a reasonable response to the relevant threat (recommendation 27).
- Redefine the defence of extraordinary emergency so that emergency will only be available as a defence to murder if the intentional killing of the victim was a reasonable response to the relevant emergency (recommendation 28).

Principle Three: Mental Incapacity

The only other excuses for intentional killing are mental impairment and immature age.

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

Relevant recommendations:

- Reformulate the provisions of the insanity defence (to be named 'mental impairment') to modernise and simplify the defence (recommendations 33 & 34).
- Enhance the dispositions available to a court on a finding of not guilty by reason of mental impairment for homicide and make the process of detaining mentally impaired offenders more transparent and open to appeal (recommendations 35 & 37).
- Provide that custody orders for all homicide offences are presumptive rather than compulsory and that in making a decision to detain in custody (whether in prison or in a hospital or a declared place within the community) the court must have regard to certain matters, including the circumstances of the offence, public interest and whether the accused's mental condition is treatable in the community (recommendation 35).
- Provide for a Supervised Release Order of up to 5 years for a mentally impaired accused which may have residential, treatment compliance and training conditions placed upon it. This will allow for those cases where the circumstances of the offence show reduced culpability, there is nothing to be gained by imposing a custody order and there is no subsisting mental illness (although one existed at the time of the offence) (recommendation 37).
- Protect the civil liberties of a mentally impaired offender by providing that a court must nominate a limiting term on a custody order that is capped at the term of imprisonment that the court would have imposed had the person been found guilty of the offence (recommendation 36).

Principle Four: Culpability and Sentencing

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

The Commission has approached this issue by asking not *who* should determine degrees of culpability, but in *what circumstances* is it appropriate to reduce an intentional killing to the same status as an unintentional killing? In the Commission's view, this should occur in very limited circumstances: where the purpose for the killing is self-preservation or the protection of others. The effect of this conclusion is that, in the absence of a lawful purpose, differences in culpability will be considered during sentencing. One of the central recommendations in the Commission's Report is the abolition of mandatory life imprisonment. In its place the Commission has recommended that the penalty for murder should be a presumptive sentence of life imprisonment. What this means is that in most cases of murder, life imprisonment will be imposed. However, if life imprisonment would be clearly unjust, the sentencing court will have discretion to impose a different penalty.

Relevant recommendations:

- That the penalty for murder be presumptive life imprisonment rather than mandatory life imprisonment. This allows all circumstances of the offence and the offender to be taken into account when setting a sentence, including circumstances of reduced culpability by reason of significant mental impairment falling short of 'insanity'; ; reduced culpability by reason of significant provocation; or reduced culpability associated with a mercy killing (recommendation 44).
- That strict security life be abolished but that the minimum non-parole period for a person sentenced to life imprisonment for murder be increased to 10 years and not more than 30 years (recommendations 43 & 44).
- That there be court-ordered assessment and treatment in an authorised hospital or prison for offenders found guilty of an offence but who suffer a mental impairment falling short of 'insanity' and who do not qualify for that defence. This will assist in ensuring that those offenders with a mental illness are properly treated separate from the prison mainstream and that the prison regime is not unduly disrupted by mentally impaired offenders (recommendation 38).
- That the sentencing of homicide offenders in Western Australia be monitored to provide data for the judiciary and government and to increase public understanding and awareness of sentencing (recommendation 45).

Principle Five: Simplifying the Law

The law of homicide should be as simple and clear as possible. In undertaking this reference the Commission has noted that many legislative provisions dealing with homicide are complex and sometimes difficult for juries to understand. The Commission has

endeavoured to ensure that its reforms provide a clear framework for the law of homicide. This is important for all those involved in the criminal justice system.

Recommendations that simplify the law include:

- Reforming self-defence and improving the directions given to juries on how to apply the test for self-defence (recommendations 22 & 23).
- Separating the defences of unwilling conduct and accident (recommendations 20 & 21).
- Reformulating the defence of insanity (recommendation 33).

Principle Six: Contemporary Conditions

Reforms to the law of homicide should adequately reflect contemporary circumstances. Many of the relevant legislative provisions under the Criminal Code have not been substantially changed since the beginning of the 20th century. The Commission has taken into account advances in medical and scientific knowledge, changes in community standards, and the social context in which homicide takes place when determining its recommendations for reform.

Advances in medical and scientific knowledge have impacted on a number of the Commission's recommendations. For example, the definition of when a child becomes a person capable of being killed requires reconsideration in light of medical advances. Improvements to medical treatment are relevant when assessing the definition of grievous bodily harm (as part of the mental element of murder). In the past, most serious injuries would have been life threatening but this is no longer the case.

Contemporary views about morality depart from historical views in some instances. For example, it was once considered acceptable or justifiable for men to defend their honour with violence. In today's society violence, especially as a result of anger, is not usually considered socially acceptable. This has implications for the defence of provocation. Current social values are also relevant when considering the offence of infanticide because it is more socially acceptable to have an illegitimate child, and the social and economic circumstances of single mothers have changed so that child-killing in the absence of significant mental impairment is less understandable today.

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

Relevant recommendations:

- Review the statutory definitions of death and of when a child becomes a person capable of being killed under the Criminal Code in light of medical advances and in consultation with the medical profession (recommendation 3).

- Redefine the mental element for murder to exclude an intention to cause a permanent but non life-threatening injury to health (recommendation 7).
- Reformulate the defence of self-defence and provide for jury directions to inform juries that threatened harm which was not immediate but was inevitable—such as in circumstances of domestic violence—can support a defence of self-defence (recommendations 22 & 23).
- Repeal the partial defence of provocation (recommendation 29).
- Repeal the offence of infanticide (recommendation 13).

Principle Seven: Removing Bias

There should be no offences or defences that apply only to specific groups of people on the basis of gender or race. The Commission is of the view that the law of homicide should be applied equally to all members of the community. What this means is that every offence and every defence must be applicable to anyone irrespective of gender or race.

Relevant conclusions/recommendations:

- That Aboriginal customary law should not provide a partial defence to murder.
- That the offence of infanticide, which provides for a substantially reduced penalty for killing a child under the age of 12 months, should be repealed. This offence only applies to biological mothers and discriminates against men who kill their children with similar motive and intention and a similar level of culpability (recommendation 13).
- That no special defence of 'battered women's syndrome' should be introduced, but that the defence of self-defence should be reformulated to ensure that it is able to apply equally to men and women (recommendations 22 & 23).
- That any reform to the law of homicide in Western Australia be expressed in gender-neutral terms (recommendation 40).

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