It's the Thought that Counts: Intention, Motive and Culpability for Murder

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Victoria Williams and Dr Tatum Hands are co-authors of the Law Reform Commission of Western Australia's Review of the Law of Homicide. Parts of this article are reproduced from the authors' work on this review.

Introduction
The Law Reform Commission of Western Australia ('the Commission') released its Review of the Law of Homicide final report on 2 November 2007. The report makes 45 recommendations which are intended to be treated as a package to provide a coherent framework for long-overdue reform of Western Australia's homicide laws. The comprehensive nature of the reference—spanning offences, defences and sentencing—allowed the Commission to approach its work with a view to system-wide reform with the aim of ensuring that the laws of homicide in this state are principled, consistent, clear and modern. To this end, the Commission determined the following seven guiding principles for reform:

1. Generally, intentional killing should be distinguished from unintentional killing.

2. The only lawful purpose for intentional killing is self-preservation or the protection of others.

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

4. There should be sufficient flexibility in sentencing to reflect the different circumstances of offences and the relative culpability of offenders.

5. The law of homicide should be as simple and clear as possible.

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

7. There should be no offences or defences that apply only to specific groups of people on the basis of gender or race.

This article focuses on principles 1–4; in particular, the way these principles impact upon the Commission's recommendations in relation to partial defences to homicide.

Guiding Principles for Reform
Homicide offences have traditionally been separated into two main categories: murder and manslaughter. Western Australia is the only Australian jurisdiction which separates murder into two different offences: wilful murder and murder. Wilful murder applies to an unlawful killing with an intention to kill and murder applies to an unlawful killing with an intention to cause grievous bodily harm. The Commission has closely examined the mental element for murder, in particular the concept of an intention to cause grievous bodily harm. The definition of grievous bodily harm under the Criminal Code (WA) covers two distinct types of harm: injuries that endanger or are likely to endanger life and injuries that cause or are likely to cause permanent injury to health. Because permanent injuries are not always life threatening, the Commission concluded that an intention to cause a permanent injury should not be sufficient to constitute the offence of murder. As a result, it was determined that the offence of murder (irrespective of whether murder continues to be split into two categories) should be defined as an unlawful killing with an intention to kill or an intention to cause a bodily injury of such a nature as to endanger, or be likely to endanger, life.

The Commission recommended that the distinction between wilful murder and murder should be abolished because any difference in culpability between an intention to kill and an intention to cause a life threatening injury is minimal.

The Commission's recommendations in relation to the mental element for murder and the repeal of the offence of wilful murder are consistent with the Commission's first guiding principle for reform—that intentional killings should be distinguished from unintentional killings. This principle supports the continued separation of homicide into murder (intentional killing) and manslaughter (unintentional killing). Considering the types of circumstances in which intentional killings take place, the Commission determined (consistent with contemporary community values in respect to violence) that the only lawful purpose for an intentional killing is self-preservation or the protection of others (guiding principle two). Intentionally killing another person for any other purpose should not be excused by the law unless the accused did not have the capacity to understand or control his or her behaviour. Hence, it was concluded that in addition to self-defence (and excessive self-defence), duress and emergency the only other excuses for an intentional killing should be mental impairment and immature age (guiding principle three).

That there should be a distinction between intentional killing and unintentional killing is relatively uncontroversial, but it must be recognised that the circumstances in which intentional killings take place vary significantly and not all intentional killings...
are equivalent in moral blameworthiness. For example, a person who takes the life of a terminally ill relative at their request (known as ‘mercy killing’) would not usually be seen as equal in culpability to a person who brutally murders another. Similarly, a sadistic child killer would generally be regarded as more culpable than a person who intentionally killed their rapist. For crimes other than murder, differences in culpability (and the offender’s motive for committing the offence) are generally recognised during sentencing. The mandatory penalty of life imprisonment provides very limited capacity to take into account differences in culpability for murder. Although there is some discretion when setting the minimum term, all offenders must be sentenced to life imprisonment with no guarantee of ever being released from prison. Thus, bearing in mind guiding principle four—that there should be sufficient flexibility in sentencing to reflect differences in culpability—the Commission recommended that mandatory life imprisonment be abolished and replaced with a presumptive life sentence.8

Partial Defences
Because murder has traditionally attracted a mandatory penalty (death and subsequently life imprisonment), partial defences have developed to enable courts to take account of circumstances affecting an offender’s culpability. Partial defences are unique to homicide and reduce what would otherwise constitute murder to manslaughter. In other words, partial defences treat intentional killings as unintentional killings. This is inconsistent with the Commission’s first guiding principle for reform. The introduction of flexible sentencing also arguably renders partial defences redundant because circumstances which impact upon an offender’s level of culpability can be taken into account in the sentencing process.

Although recognising these fundamental problems, the Commission subjected each partial defence to rigorous examination to determine whether there is any justification for treating certain types of intentional killings as manslaughter. The Commission approached this task with the view that in order to justify the retention or introduction of a partial defence, the circumstances giving rise to the defence must always demonstrate reduced culpability. Just as complete defences only recognise circumstances where no criminal culpability should attach, partial defences should only recognise circumstances where there is some culpability, but not sufficient to attract a conviction for murder.

Provocation
In very general terms, the partial defence of provocation reduces murder to manslaughter if the killing took place while the accused had lost self-control as a result of the deceased’s provocative behaviour. The defence is traced back to 16th century England—a time when it was considered acceptable and justified for men to respond violently to affronts against their honour. But social values have changed and violence is now generally only considered acceptable if used for the purpose of defence. Provocation can no longer be justified on the basis that it is acceptable to respond in anger to wrongful behaviour with violence. Such an approach would potentially countenance revenge killings.

Over time the focus of the defence of provocation has shifted from the behaviour of the deceased to the accused’s subjective loss of self-control. But this is where the dilemma arises—if every loss of self-control is partially excused then the ambit of the defence would be exceptionally wide. The ‘ordinary person test’ is intended to limit the scope of the defence but, as the Commission explains in its report, it does not appear to have succeeded. There are a number of cases where provocation has been successfully raised but where it is extremely unlikely that an ‘ordinary person’ would have lost self-control and intentionally killed.9 In one such case, Dimond10, the accused was convicted of manslaughter after stabbing the deceased in the chest following an incident where the deceased and his friends had taken the accused’s baseball cap and t-shirt as a prank.

It is important to acknowledge that as a consequence of the historical inflexible sentencing regime for murder, provocation has provided a crucial alternative for some offenders who did not deserve the death penalty or life imprisonment. However, the defence has not necessarily captured all cases where leniency in sentencing is required.11 For example, the ‘hearsay provocation rule’ may exclude cases where the accused did not actually witness the provocative conduct even though the accused genuinely lost self-control.

The partial defence of provocation has been extensively criticised and was recently abolished in Victoria and Tasmania.12 The criticisms include that the defence operates in a gender-biased manner; that it condones violence; and that it is unnecessary in the absence of mandatory life imprisonment. Most importantly, the defence has been criticised because it excuses intentional killings on the basis of a loss of self-control while many other equally mitigating factors are only relevant at the sentencing stage. The Commission concluded that because the partial defence of provocation is inconsistent with the Commission’s first guiding principle for reform and because the circumstances giving rise to the defence do not always demonstrate reduced culpability there is little justification for its retention. However, the Commission also acknowledged that the existence of mandatory life imprisonment provides one of the strongest arguments in support of retention. There will be some cases where extremely serious provocative conduct on the part of the deceased coupled with the accused’s emotional state at the time of the killing demands leniency. As long as mandatory life imprisonment is retained it will be impossible to ensure that justice is done in such cases. With a degree of flexibility in sentencing the law can appropriately recognise reduced culpability in deserving cases—hence the Commission has recommended that the partial defence of provocation be repealed as long as mandatory life is replaced with a presumptive sentence of life imprisonment.13
Diminished Responsibility

Diminished responsibility is premised on the notion that if insanity can completely excuse an intentional killing, then a mental impairment falling short of insanity should reduce the culpability of the accused by providing a partial defence that reduces murder to manslaughter. The defence currently exists in four Australian jurisdictions. To make out the defence, at the time of the killing the accused must have been suffering from an 'abnormality of mind' which arose from a specified cause and which substantially (but not totally) impaired the accused's capacity to understand the nature of the act, to know that it was wrong, or to control the act.

Critics of diminished responsibility encompass two broad concerns: definitional issues leading to lack of clarity and unnecessary broadening of the defence; and evidential issues concerning the respective roles of experts and juries in determining the culpability of the accused. The first of these confronts the imprecision of the term 'abnormality of mind'; it is neither medically nor legislatively defined, leaving the concept open to broad interpretation. Diminished responsibility has therefore been held to apply to offenders suffering from mental conditions ranging from sexual psychopathy and anti-social personality disorder to depression, anxiety and pre-menstrual tension. Because there is no objective measure of abnormality there is a danger that the more bizarre or heinous the crime, the more abnormal the offender is deemed to be. Psychiatrists have also questioned the relevance of the term, arguing that almost everyone who kills could be said to suffer an abnormality of mind.

While the question whether an offender suffered from an abnormality of mind at the time of the offence is one for the jury, expert medical evidence is vital to establish the cause of the abnormality. But the imprecision of the defined elements of the defence can invite disagreement among expert witnesses with some cases having as many as seven different diagnoses ranging from not relevantly impaired to insane. There have also been questions raised about the jury's reliance on the opinion of medical experts about the application of diminished responsibility to a particular case. In many cases it is clear that it is the expert, rather than the jury, who ultimately determines the level of culpability of the accused. This would appear to undermine the argument that diminished responsibility enhances community participation in the justice system.

On balance, the Commission has recommended that no partial defence of diminished responsibility be introduced in Western Australia. A prominent reason is that the defence clearly breaches the Commission's guiding principles for reform. A diminished responsibility killing is an intentional killing artificially rendered 'unintentional' by application of the partial defence. The Queensland case of Brown tragically demonstrates that reduced sentences via a manslaughter verdict are not the most appropriate way to deal with an offender who has killed because of an abnormality of mind. Brown stabbed his wife approximately 40 times following a domestic argument. He raised the defence of diminished responsibility on the grounds that he had substantially lost control of his actions. Medical evidence gave the relevant abnormality of mind as 'dependant personality disorder' which caused 'neurotic depression' and 'anger to a pathological degree'. The jury convicted him of manslaughter on the grounds of diminished responsibility and he was sentenced to eight years' imprisonment. He served five years in total and while in prison, met and married another woman. Only 10 months after his release from prison, and while still on parole, Brown killed his second wife.

Under the Commission's recommended regime in the absence of diminished responsibility such an offender would be convicted of murder. This would allow for a sentence appropriately reflecting the gravity of the intentional killing along with other factors including the offender's background and mental condition. If the offender represented a continuing danger to society on the basis of a psychiatric or medical condition, then life imprisonment would most likely be imposed. However, the Commission recognises that prison is not always the best place for offenders who suffer a mental impairment falling short of insanity and has recommended that courts should be able to specify treatment conditions on a sentence or, where circumstances demand it, make hospital custody orders in lieu of, or by way of, sentence.

Infanticide

Infanticide is an offence that may apply to a mother who kills her biological child, aged under 12 months, when suffering a disturbance of mind caused by the effects of childbirth or lactation. It was first introduced in England to ameliorate the death penalty in recognition of the social and economic factors that caused women to kill their (often

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illegitimate) children and that caused juries to consistently recommend mercy. In some Australian jurisdictions, infanticide operates as a partial defence to murder reducing the verdict to manslaughter. In Western Australia, infanticide is available as an offence and an alternative verdict to wilful murder or murder and carries a maximum penalty of seven years’ imprisonment.

Although only introduced into the Criminal Code in 1986, there have been no known indictments for infanticide in Western Australia and it is very rarely charged elsewhere. The reason for this may be the prosecutorial burden of proving not only that the offender was mentally disturbed, but that the disturbance was linked to childbirth or lactation. In some cases, especially where a child is killed in close temporal proximity to birth, it is difficult to establish a cause of death or whether the child was in fact born alive. Further, in Western Australia there is the added difficulty of the necessity of proving the relevant intent for murder or wilful murder. This is not always easy in circumstances of mental disturbance. Thus, most infanticides are charged as murder (where intention is clear) or manslaughter (where intention is unknown).

The offence of infanticide not only breaches the first four guiding principles (because it treats an intentional killing as a relatively minor offence), but also breaches the principle against gender-biased laws. Infanticide can only ever apply to a biological mother, even where fathers, step-mothers or other guardians kill a child with the same motivation. This gender-bias is brought into sharp relief when it is understood that the mental impairment required for the offence of infanticide has never been sufficiently linked to any puerperal condition by medical authorities. More often, infanticidal killings are the result of a pre-existing mental illness or failure to cope condition. The Commission’s examination of infanticide revealed further aspects of the offence that were arbitrary. For example, the offence only applies to the last-born child: it would not apply to a mother who killed an older child while suffering a disturbance of mind due to recent childbirth or to a mother who killed two children together (even if both were aged under 12 months).

For these reasons, and others, the Commission has recommended that the offence of infanticide be repealed. The Commission believes that flexible sentencing for murder will appropriately address cases where a mother intentionally kills her young child, but where circumstances exist which would make a life sentence clearly unjust. Because there is no mandatory minimum, the same sentence of seven years or less, or even a community-based order, may be imposed on an infanticidal mother. Continued prosecutorial discretion to accept pleas to manslaughter or to concealment of birth (for neonaticides where evidential issues often preclude infanticide) will capture those cases that are seen by most to be deserving of sympathy and for which the offence was originally established. Where the offender kills in circumstances of a relevant mental impairment, she or he may argue the complete defence of insanity. The Commission’s recommended reforms to dispossession of insanity provide for immediate assisted release in the community on a supervised release order. These may be seen to be better than community-based orders because they give specific attention to continuing psychological care and treatment.

Excessive self-defence
Excessive self-defence is a partial defence recognising reduced culpability in cases where the killing is considered excessive or unreasonable but the accused was nevertheless genuinely acting in self-defence or in defence of another. The partial defence of excessive self-defence operates alongside the complete defence of self-defence. The Commission has recommended a simplified general test for self-defence with three requirements: that the accused believed on reasonable grounds that it was necessary to use defensive force; that the accused believed that the relevant act was necessary in order to effectively defend himself or herself or another person; and that the relevant act was a reasonable response in the circumstances. It is the third and final element that distinguishes self-defence and excessive self-defence – if the accused reasonably believes there is a threat and genuinely believes that it is necessary to use lethal force but the killing is objectively unreasonable, the accused will be unable to rely on self-defence. In the absence of a partial defence of excessive self-defence such an accused would be convicted of murder. The Commission concluded that the culpability involved in such a case is significantly less than most intentional killings. In fact, the only difference between the complete defence of self-defence and the partial defence of excessive self-defence is that the accused has made an error of judgement. The moral blameworthiness of the accused is more clearly akin to criminally negligent manslaughter than murder; hence, the Commission determined that the presence of a lawful purpose of self-preservation or the protection of another justifies treating these kinds of intentional killings as manslaughter. As a consequence the Commission recommended the introduction of excessive self-defence in Western Australia.

The Commission has devoted a chapter of its report to an examination of homicide in the context of domestic violence. The reforms to self-defence will, among other things, better accommodate victims of domestic violence who kill their abuser after serious and long-standing violence. However, the Commission recognised that the complete defence of self-defence will not be applicable in every case – deliberately killing another person is the most extreme defensive response and will in some circumstances be viewed as objectively unreasonable. The partial defence of excessive self-defence may apply in such cases to ensure that victims of domestic violence who genuinely kill in self-defence are not treated as murderers. Further, because self-defence and excessive self-defence are conceptually consistent, victims of domestic violence who kill will not be forced to distort the facts of their case to fit within the defence of provocation. The Commission does not believe that provocation is the appropriate...
defence for victims of domestic violence who kill in response to genuine fear.

Conclusion
The Commission's examination of partial defences shows them to be a generally arbitrary and inflexible tool for recognising differences in culpability for murder. In contrast, the sentencing process is accustomed to balancing competing factors to determine the appropriate penalty in any given case. As long as mandatory life imprisonment is abolished, differences in moral culpability can and should be taken into account during sentencing. In reaching its conclusions, the Commission did not ignore the argument that partial defences enable community involvement in the criminal justice system because issues of culpability are determined by a jury rather than a judge. However, the Commission found this argument unconvincing. The jury's role in the criminal justice system is to determine criminal responsibility; there is nothing in the Commission's package of reforms that changes this important role. Further, the jury participation argument would mean that a partial defence would be required for every conceivable circumstance potentially reducing culpability; it would be the jury's decision to assess every case of intentional killing to determine whether the accused should be convicted of murder or manslaughter. Rather than deciding who should determine issues of culpability the Commission decided that the correct question is, 'in what circumstances is it appropriate to reduce an intentional killing to the same status as an unintentional killing?'. The answer is excessive self-defence: it is the only partial defence where the accused's purpose for killing always demonstrates less moral blameworthiness.

References
1. At common law murder is generally defined as an intention to kill or an intention to cause grievous bodily harm.
2. Criminal Code (WA) ss 278 & 279(1). Sections 279(2)-(5) provide additional categories of murder. The Commission recommended the repeal of ss 279(3)-(5) because these provisions are unnecessary: see Law Reform Commission of Western Australia (LRCWA), Review of the Law of Homicide, Project No. 97 (2007) Recommendation 5.
4. LRCWA, 43–50 (Recommendations 4 & 7).
5. LRCWA, 75–84 (Recommendation 6). For the remainder of this article the authors refer to murder rather than wilful murder and murder.
6. For a discussion of the Commission's seven guiding principles for reform see LRCWA, 6–9.
7. However, the Commission recognises that this principle is not absolute; felony-murder and excessive self-defence are exceptions to the principle.
9. LRCWA, 208–210; 219–20. In particular, provocation has been criticised extensively because it has been relied on in cases where a man has killed his intimate partner as a result of the breakdown of the relationship, infidelity or jealousy. But as the Commission and others have highlighted, the overwhelming majority of men do not respond to life's disappointments and stresses with lethal violence.
11. LRCWA, 220–21.
12. The partial defence of provocation is currently being reviewed in Queensland.
13. LRCWA, recommendation 29.
14. New South Wales, Queensland, the Northern Territory and the Australian Capital Territory.
15. LRCWA, 251–52.
16. See, for example, Byrne ([1960] 2 QB 396 where the defendant, who suffered from sexual psychopathy, strangled a young girl and 'committed horrifying mutilations upon her dead body'.
17. LRCWA, 251.
18. See, for example, Chayna ([1992] 66 A Crim R 178; discussed in ibid 254.
20. LRCWA, recommendation 39.
22. Ibid 7–8.
23. Unless the offender successfully raised the defence of mental impairment (insanity), in which case he would be acquitted and subject to various dispositions under the Commission's recommended amendments to the Criminal Law (Mentally Impaired Accused) Act 1996 (WA). See LRCWA, 240–46.
24. LRCWA, 247–48, recommendation 38.
25. DPP and Supreme Court records reveal that there has only been one conviction for infanticide in Western Australia: on plea to an alternative to wilful murder prior to trial.
27. LRCWA, recommendation 37.
28. LRCWA, recommendation 23.
29. LRCWA, recommendation 26.
30. LRCWA, Chapter 6.
31. LRCWA, 179.